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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD, INC.; STARR COALITION FOR MOVING OXNARD FORWARD, Plaintiffs-Appellants, v. ROB BONTA, in his official capacity as Attorney General of California, Defendant-Appellee.	No. 21-55855 D.C. No. 2:21-cv-05115-VAP-JPR OPINION (Filed Oct. 11, 2022)

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Argued and Submitted February 7, 2022
San Francisco, California

Before: Andrew D. Hurwitz and Lawrence VanDyke, Circuit Judges, and Joan N. Ericksen,* District Judge.

Opinion by Judge Ericksen;
Dissent by Judge VanDyke

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* The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

COUNSEL

Alan Gura (argued), Institute for Free Speech, Washington, D.C., for Plaintiffs-Appellants.

Jose A. Zelidon-Zepeda (argued), Deputy Attorney General; Heather Hoesterey, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the Attorney General, San Francisco, California; for Defendant-Appellee.

ERICKSEN, District Judge.

For certain purposes, California classifies "a person providing labor or services for remuneration" as an employee unless the hiring entity satisfies the "ABC test" adopted in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018). Cal. Lab. Code § 2775(b)(1). Section 2775 and *Dynamex* do not apply to several occupations. *E.g.*, *id.* § 2783. For workers in the exempt occupations, the multifactor test of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989), governs in determining whether the worker is an employee or an independent contractor.

Mobilize the Message, LLC, Moving Oxnard Forward, Inc., and Starr Coalition for Moving Oxnard Forward (collectively "Plaintiffs") claim that this California law violates the First Amendment. They sued the California Attorney General and moved for a preliminary injunction to restrain him from classifying

their doorknockers and signature gatherers according to the ABC test. The district court denied the motion. Plaintiffs appealed. We have jurisdiction under 28 U.S.C. § 1292(a)(1) and affirm.

I

A

"Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction." *Dynamex*, 416 P.3d at 14 (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 121 (1944)).

"[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions." *Id.* "[T]he question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor." *Id.* Before *Borello*, "California decisions generally invoked this common law 'control of details' standard beyond the tort context, even when deciding whether workers

should be considered employees or independent contractors for purposes of the variety of 20th century social welfare legislation that had been enacted for the protection of employees." *Id.* "In addition to relying upon the control of details test, . . . the pre-*Borello* decisions listed a number of 'secondary' factors that could properly be considered in determining whether a worker was an employee or an independent contractor." *Id.* at 15.

Borello addressed the distinction between employees and independent contractors for purposes of California's Workers' Compensation Act. The California Supreme Court stated that "the concept of 'employment' embodied in the Act is not inherently limited by common law principles"; that "the Act's definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute"; and that, "under the Act, the 'control-of-work-details' test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation." 769 P.2d at 405–06. After summarizing the purposes of the Act, the court acknowledged that "[t]he Act intends comprehensive coverage of injuries in employment"; that the Act "accomplishes this goal by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee' "; and that the Act's exclusion of "independent contractors" "recognizes those situations where the

Act's goals are best served by imposing the risk of 'no-fault' work injuries directly on the provider, rather than the recipient, of a compensated service." *Id.* at 406.

Borello did not adopt "detailed new standards for examination of the issue." *Id.* Rather, it explained:

> [T]he Restatement guidelines heretofore approved in our state remain a useful reference. The standards set forth for contractor's licensees in section 2750.5 are also a helpful means of identifying the employee/contractor distinction. The relevant considerations may often overlap those pertinent under the common law. Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.

Id. at 406–07 (citations omitted). The court also noted a "six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation." *Id.* at 407. Recognizing "many points of individual similarity between these guidelines and [its] own traditional Restatement tests," the court concluded that "all [of the factors] are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." *Id.*

Borello came "to be viewed as the seminal decision" in California on whether a worker is an employee or an independent contractor. *Dynamex*, 416 P.3d at 15. California courts have applied it "in distinguishing

employees from independent contractors in many contexts, including in cases arising under California's wage orders." *Id.* at 27.

In *Dynamex*, the California Supreme Court addressed "what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees." *Id.* at 5. Under the applicable wage order, "to employ" meant "(a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." *Id.* at 6 (quoting *Martinez v. Combs*, 231 P.3d 259, 278 (Cal. 2010)). Acknowledging "the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors," *id.* at 35, the *Dynamex* court "conclude[d] it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test":

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Id. (footnote omitted).

"Although *Dynamex* was initially limited to wage orders, with *Borello* applying outside that context, the California legislature codified the ABC test and expanded its applicability through the enactment of" Assembly Bill No. 5 in 2019.[1] *Am. Soc'y of Journalists*

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[1] The ABC test is codified at California Labor Code § 2775(b)(1):

> For purposes of [the Labor Code] and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of

& Authors, Inc. v. Bonta, 15 F.4th 954, 958 (9th Cir. 2021) (footnote omitted) (citations omitted), *cert. denied*, 142 S. Ct. 2870 (2022). "The legislature gave several reasons for taking this step. It found that misclassification caused workers to 'lose significant workplace protections,' deprived the state of needed revenue, and ultimately contributed to the 'erosion of the middle class and the rise in income inequality.' With [Assembly Bill No. 5], the legislature declared, it was protecting 'potentially several million workers.'" *Id.* (citations omitted). Assembly Bill No. 5 "did not apply *Dynamex* across the board, however, but specified that the *Borello* standard would continue governing many occupations and industries." *Id.* at 958–59. A direct sales sales-person,[2] a newspaper distributor, and

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the same nature as that involved in the work performed.

[2] "A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met," is governed by *Borello.* Cal. Lab. Code. § 2783(e). Section 650 provides that "'[e]mployment' does not include services performed as . . . a . . . direct sales salesperson . . . by an individual" if "[t]he individual . . . is engaged in the trade or business of primarily inperson demonstration and sales presentation of consumer products, including services or other intangibles, in the home or sales to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment," "[s]ubstantially all of the remuneration (whether or not paid in cash) for the services performed by that individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual," and "[t]he services performed by the individual are performed pursuant to a written contract between that individual

a newspaper carrier[3] are among the occupations governed by *Borello*.

B

Mobilize the Message provides political campaigns with doorknockers and signature gatherers, which it

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and the person for whom the services are performed and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes."

[3] "A newspaper distributor working under contract with a newspaper publisher, . . . or a newspaper carrier" is governed by *Borello*. Cal. Lab. Code § 2783(h)(1). The definitions of "newspaper" and "carrier" were amended after the parties filed their briefs. 2021 Cal. Stat. 5542. A "newspaper" is:

> [A] newspaper of general circulation, as defined in Section 6000 or 6008 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper's own publication, whether that publication be designated a "shoppers' guide," as a zoned edition, or otherwise. "Newspaper" may also be a publication that is published in print and that may be posted in a digital format, and distributed periodically at daily, weekly, or other short intervals, for the dissemination of news of a general or local character and of a general or local interest.

Id. § 2783(h)(2)(A). A "newspaper carrier" is:

> [A] person who effects physical delivery of the newspaper to the customer or reader, who is not working as an app-based driver, as defined in Chapter 10.5 (commencing with Section 7448) of Division 3 of the Business and Professions Code, during the time when the newspaper carrier is performing the newspaper delivery services.

Id. § 2783(h)(2)(D).

purports to hire as independent contractors. It formerly provided services in California, but left the state upon the enactment of Assembly Bill No. 5, and has since declined prospective "contracts in California because it cannot afford the administrative expenses of hiring its independent contractors as employees." Mobilize the Message would like to provide services to Starr Coalition and others in California, but refrains from doing so "solely because hiring doorknockers and signature gatherers as employees, per the ABC test, is infeasible."

Moving Oxnard Forward is a nonprofit corporation dedicated to making the government of Oxnard, California, more efficient and transparent. The purpose of Moving Oxnard Forward and Starr Coalition, its political action committee, "is to effect political change by enacting ballot measures." They depend on signature gatherers to qualify their measures for the ballot. Moving Oxnard Forward and Starr Coalition have in the past hired signature gatherers as independent contractors. Starr Coalition now, however, "refrains from hiring signature gatherers solely because doing so as an employer, per the ABC test, is infeasible." Starr Coalition would like to contract with Mobilize the Message to gather signatures or to hire its own signature gatherers as independent contractors.

Plaintiffs sued the California Attorney General under 42 U.S.C. § 1983, claiming that California law violates their right of free speech under the First Amendment by classifying their doorknockers and signature gatherers as employees or independent contractors

according to the ABC test and classifying direct sales salespersons, newspaper distributors, and newspaper carriers according to *Borello*. They alleged that direct sales salespersons, newspaper distributors, and newspaper carriers who work on the same terms that Plaintiffs would offer doorknockers and signature gatherers would be classified as employees under the ABC test but for the exemptions in California Labor Code § 2783(e) and (h)(1).

Plaintiffs moved for a preliminary injunction to restrain the California Attorney General from classifying their doorknockers and signature gatherers according to the ABC test. The district court denied the motion, finding that Plaintiffs failed to show a likelihood of success on the merits. The district court rejected their contention that Assembly Bill No. 5 imposes content-based restrictions on speech, concluding instead that it is "a generally applicable law that regulates classifications of employment relationships by industry as opposed to speech." The district court also noted that Plaintiffs failed "to show the need for emergency injunctive relief to prevent immediate and irreparable harm." They appealed.

II

A

"We review the denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo." *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 835 (9th Cir. 2020) (quoting *Fyock v. City of Sunnyvale*,

779 F.3d 991, 995 (9th Cir. 2015)). "An abuse of discretion occurs when the district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 838 (9th Cir. 2019) (quoting *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because we find that likelihood of success on the merits is determinative, we confine our analysis to that factor. *See Hall*, 984 F.3d at 835.

B

Plaintiffs assert that California discriminates against their speech based on its content by classifying their doorknockers and signature gatherers as employees or independent contractors under the ABC test while classifying direct sales salespersons, newspaper distributors, and newspaper carriers under *Borello*. The state responds that Assembly Bill No. 5 and "its exemptions do not . . . impose content-based restrictions on speech." The district court agreed and so do we.

"The First Amendment, applied to states through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech or the press. Governments cannot,

therefore, 'restrict expression because of its message, its ideas, its subject matter, or its content.'" *Am. Soc'y of Journalists*, 15 F.4th at 960 (citation omitted) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. "A regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (alteration in original) (quoting *Reed*, 576 U.S. at 163).

However, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Therefore, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* "Consistent with this view, the Supreme Court has rejected First Amendment challenges to the Fair Labor Standards Act and its exceptions, the National Labor Relations Act, the Sherman Act, and taxes." *Am. Soc'y of Journalists*, 15 F.4th at 961 (citations omitted).

In *American Society of Journalists*, we stated that California Labor Code § 2778, which applies *Borello* instead of section 2775 and *Dynamex* to certain contracts

for "professional services," "fits within this line of cases because it regulates economic activity rather than speech":

> It does not, on its face, limit what someone can or cannot communicate. Nor does it restrict when, where, or how someone can speak. It instead governs worker classification by specifying whether *Dynamex*'s ABC test or *Borello*'s multi-factor analysis applies to given occupations under given circumstances. In other words, the statute is aimed at the employment relationship—a traditional sphere of state regulation. Such rules understandably vary based on the nature of the work performed or the industry in which the work is performed, and section 2778 is no different in this regard. But whether employees or independent contractors, workers remain able to write, sculpt, paint, design, or market whatever they wish.

15 F.4th at 961–62 (footnote omitted) (citation omitted). We acknowledged that use of the ABC test might increase the likelihood of a worker being classified as an employee and that classification of workers as employees "may indeed impose greater costs on hiring entities, which in turn could mean fewer overall job opportunities for workers, among them certain 'speaking' professionals." *Id.* at 962. But we stated that "such an indirect impact on speech does not necessarily rise to the level of a First Amendment violation." *Id.*

We recognized that "economic regulations can still implicate the First Amendment when they are not 'generally applicable' but instead target certain types

of speech and thereby raise the specter of government discrimination." *Id.* But we concluded that "[s]ection 2778 poses none of these problems":

> It does not target the press or a few speakers, because it applies across California's economy. That is, it establishes a default rule applying *Dynamex*'s ABC test to the classification of all work arrangements *unless* an arrangement falls within an exemption, in which case *Borello* applies. Freelancers and related professionals enjoy one exemption and may understandably want it broadened. But many occupations have no exemption at all; the ABC test governs their classification regardless of the circumstances. So if a freelance writer falls out of his exemption's scope—by, say, being restricted from working for more than one entity—he is not uniquely burdened. Rather, he is then treated the same as the many other workers governed by the ABC test.

Id. at 962–63.

We also concluded that section 2778 does not "impose content-based burdens on speech" because "its applicability does not turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged." *Id.* at 963. We recognized that "some regulated occupations 'speak' as part of their professions," but we discerned no "legislative content preference" in "section 2778's text, structure, or purpose":

> Notably, the practice of most exempted professions—such as home inspectors, foresters, and fisherman—does not equate to "speech." Other regulated services, which could constitute "speech," do not serve as stand-ins for particular subject matters. These include freelance writers, graphic designers, and photo editors. Creative marketers will, of course, communicate about marketing, just as lawyers will about law. But the inclusion of provisions specific to such "speaking" professionals does not, in our view, transform a broad-ranging, comprehensive employment law like section 2778 into a content-based speech regulation. If it did, it is difficult to see how any occupation-specific regulation of speakers would avoid strict scrutiny. We decline ASJA's invitation to apply the First Amendment in this manner.

Id. at 963–64 (footnote omitted) (citations omitted). We indicated that examination of the content of a worker's message to determine whether the ABC test or *Borello* applies does not necessarily mean the law "impermissibly singles out speech based on its subject matter." *Id.* at 963 n.8. We also noted that "[a] legislature could conceivably define services or occupations so granularly that a court could isolate the speech's communicative intent as a defining distinction." *Id.* at 964 n.9. Ultimately, we held that "[s]ection 2778's use of different worker-classification tests for different occupations under different circumstances does not implicate the First Amendment." *Id.* at 966.

"For purposes of [the Labor Code] and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity" satisfies the ABC test. Cal. Lab. Code § 2775(b)(1). Several occupations, including direct sales salesperson, newspaper distributor, and newspaper carrier, are exempt from section 2775 and *Dynamex* and instead governed by *Borello*. *Id.* § 2783(e), (h)(1). This statutory scheme does not restrict what, when, where, or how a worker may communicate. California's classification of a worker as an employee or an independent contractor is "aimed at the employment relationship—a traditional sphere of state regulation." *Am. Soc'y of Journalists*, 15 F.4th at 961. It is a regulation of economic activity, not speech.[4]

We accept, for present purposes, Plaintiffs' assertion that application of the ABC test to their doorknockers and signature gatherers increases the likelihood that

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[4] Plaintiffs' reliance on various cases was expressly foreseen and rejected in *American Society of Journalists*:

> In *Reed*, the Court invalidated an ordinance restricting residents' display of signs—"a canonical First Amendment medium—on the basis of the language they contained." *Sorrell* dealt with content-based prohibitions on disseminating information, an established form of speech. And *Pacific Coast Horseshoeing* [*School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020),] concerned a law that "squarely" implicated the First Amendment by "regulat[ing] what kind of educational programs different institutions can offer to different students."

15 F.4th at 962 n.7 (alteration in original) (citations omitted).

they will be classified as employees. We also accept that classification of their doorknockers and signature gatherers as employees might impose greater costs on them than if these individuals had been classified as independent contractors, and that as a result they might not retain as many doorknockers and signature gatherers. Such an indirect impact on speech, however, does not violate the First Amendment. *Id.* at 962. Economic regulations can, of course, "implicate the First Amendment when they are not 'generally applicable' but instead target certain types of speech and thereby raise the specter of government discrimination." *Id.* Section 2783 does not target certain types of speech. Unless an occupational exemption exists, the ABC test "applies across California's economy." *Id.* at 962-63. Thus, Plaintiffs are not unfairly burdened by application of the ABC test to their doorknockers and signature gatherers.

We also reject Plaintiffs' assertion that section 2783's exemptions for direct sales salespersons, newspaper distributors, and newspaper carriers constitute content-based discrimination.[5] Citing a dictionary definition of "canvass,"[6] they maintained that their doorknockers, their signature gatherers, and the exempted direct sales salespersons, newspapers distributors, and

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[5] Plaintiffs do not assert an Equal Protection claim nor do they claim that no rational basis exists for the exemptions.

[6] *Canvass*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/canvass (last visited Aug. 19, 2021) ("to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments").

newspaper carriers are engaged in the identical occupation of canvassing and that California favors the commercial speech of the direct sales salespersons and certain newspapers over the political speech of their doorknockers and signature gatherers. We are not persuaded that a dictionary definition of "canvass" sets the outer limit of California's ability to classify workers who go to people's homes. We perceive a mighty gap between the pernicious granularity rebuked in *American Society of Journalists*, 15 F.4th at 964 n.9, and the broad brush of Merriam-Webster.

More importantly, section 2783's exemptions for direct sales salespersons, newspapers distributors, and newspaper carriers do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations. Although determination of whether an individual is, for example, a direct sales salesperson might require *some* attention to the individual's speech, the Supreme Court has rejected "the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern." *City of Austin*, 142 S. Ct. at 1474.

III

Because Plaintiffs have not established "a colorable claim that [their] First Amendment rights have been infringed, or are threatened with infringement," *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022) (citation omitted), they have not demonstrated a likelihood of

success on the merits. The district court did not abuse its discretion in denying a preliminary injunction.

AFFIRMED.

VANDYKE, Circuit Judge, dissenting:

The majority spends much of its decision explaining the complexities and history of California's attempt to govern "the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." I don't disagree that's been a vexing problem for California, but it's also not particularly relevant in this case. This case comes down to a single constitutional question: whether AB 5's employment classification before us turns predominately on the content of the workers' speech. If it doesn't, then this is a permissible labor regulation as the majority concludes. But if it does, then the law is a content-based regulation that must pass strict scrutiny. And if the latter is true, because this law could not meet strict scrutiny's demanding burden, Plaintiffs are likely to prevail on their claim and should have been granted a preliminary injunction.[1]

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[1] The majority limits its analysis to Plaintiffs' likelihood of success on the merits, so I also focus on that criterion, concluding that Plaintiffs are likely to succeed on "the most important factor." *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). And where, as here, a plaintiff has shown a likelihood of a First Amendment violation, the remaining preliminary injunction factors

In just a few paragraphs of analysis, the majority rejects Plaintiffs' argument that AB 5's exemption of certain occupations but not others constitutes content-based discrimination. Under this view, California can treat doorknockers and signature gatherers differently than direct salespeople and newspaper carriers because they are different industries and occupations. But dig beneath the surface of these "occupations" and it becomes clear that these occupational labels turn predominantly, if not entirely, on the content of the workers' speech. And "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This is no less true when that content-based distinction is embedded within a labor law. Because the governmental burdens challenged here turn primarily on what is said, not labor distinctions unrelated to speech, I must respectfully dissent from the majority's refusal to protect that speech.

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inevitably weigh in the plaintiff's favor also. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief. . . ." (internal quotation marks omitted)); *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757-58 (9th Cir. 2019) ("[T]he fact that Plaintiffs have raised serious First Amendment questions compels a finding that . . . the balance of hardships tips sharply in Plaintiffs' favor. Finally, we have 'consistently recognized the significant public interest in upholding First Amendment principles.' Indeed, 'it is always in the public interest to prevent the violation of a party's constitutional rights.' " (cleaned up) (citations omitted)).

I.

The First Amendment ensures that any content-based law is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted). This covers not only the laws that obviously define "regulated speech by particular subject matter," but also the "more subtle" laws that define "regulated speech by its function or purpose." *Id.*

The majority finds no issue with AB 5 because the exemptions focus on economic activity, not protected expression. This is a false dichotomy. As Plaintiffs correctly note, the occupational classifications challenged here are directly defined by the messages those workers communicate. That is how a direct salesperson and a political canvasser, both of whom go door-to-door pitching something to the public, can result in different labor classifications. Put another way, the difference between these otherwise quite similar jobs is the content of the message being shared with the public.

Notwithstanding this dynamic, the majority asserts ipse dixit that the exemptions "do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations." This position subverts First Amendment protections to the mere semantics of legislation—content-based speech restrictions are impermissible, but labor classifications

based on the content of the industry's speech are allowed, and the legislature's choice of label determines which bucket a classification falls into. The Supreme Court has warned against this, explaining that "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022). That is what is happening here with AB 5's labor classifications.

II.

To justify its conclusion, the majority relies heavily on *American Society of Journalists and Authors, Inc. v. Bonta* ("*ASJA*"), 15 F.4th 954 (9th Cir. 2021). But *ASJA* was clear to disavow this type of classification. In *ASJA*, media associations sued California over a different section of AB 5 that "burdened journalism . . . by forcing freelancers to become employees, thereby reducing their work opportunities and inhibiting their 'freedom to freelance.'" *Id.* at 959. Our court rejected the claim in part because "the specific conditions complained of apply not only to journalists, but to all freelance writers, photographers, and others in the state—including narrators and cartographers for journals, books, or 'educational, academic, or instructional work[s] in any format or media.'" *Id.* at 963 (citing Cal. Lab. Code § 2778(b)(2)(I)–(K)) (alteration in original). AB 5 therefore did not uniquely impose any First Amendment burdens on journalists *because of what*

they said; it evenly applied to a broad group of speakers and non-speakers regardless of industry. This is true even though the effect of the law might result in "fewer overall job opportunities for workers, among them certain 'speaking' professionals." *Id.* at 962. In short, *ASJA* rejected that the speaking professions should somehow get an exemption from broadly applicable, content-neutral labor regulations—just because they earned their bread by speaking. *ASJA* did not purport to undermine our longstanding constitutional skepticism of regulatory classifications that are genuinely content-based.

Indeed, in rejecting the media associations' claim, *ASJA* was clear to demarcate what would be permissible labor classifications and what would be susceptible to First Amendment challenge. It explained that "economic regulations can still implicate the First Amendment when they are not 'generally applicable' but instead target certain types of speech and thereby raise the specter of government discrimination." *Id.* And crucial for our purposes, *ASJA* explained that this concern would be implicated if a legislature defined "services or occupations so granularly that a court could isolate the speech's communicative intent *as a defining distinction.*" *Id.* at 964 n.9 (emphasis added). That is precisely what we have before us in this case. California and the majority rely on industry and occupational labels that, when scrutinized, "isolate the speech's communicative intent as"—not just "*a* defining distinction"—but as *the* "defining distinction." *Id.*

III.

None of the majority's other bases for rejecting Plaintiffs' speech claims are persuasive. The majority is quick to dismiss the dictionary definition of "canvass," but it in fact buoys an important point. To "canvass," according to Merriam-Webster, means "to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments." *Canvass*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/canvass (last visited Aug. 24, 2022). The fact that canvassing covers both exempt and non-exempt workers also demonstrates how artificial these labels are as anything other than a speech distinction.

If the majority dislikes dictionaries, our own caselaw makes the same point. In *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998), our court invalidated a county ordinance banning canvassing that "propose[d] one or more commercial transactions." *Id.* at 1145. The county argued that it was only the commercial canvassers who were causing problems, and therefore wanted to regulate just this industry (as opposed to non-commercial canvassers), but our court was clear: "By distinguishing between commercial and noncommercial forms of expression, the Clark County Ordinance is content-based." *Id.* Other courts have also refused to parse commercial from non-commercial canvassers. *See*, *e.g.*, *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 983 (10th Cir. 2020) ("When an ordinance makes these sorts of facial distinctions, e.g., between those soliciting for religious purposes and

those soliciting for commercial gain, not only the Supreme Court, but our court, has expressly held that it 'contemplates a distinction based on content.'" (citation omitted)).

It seems clear that direct salespeople and newspaper distributors "canvass" in the same way doorknockers and signature gatherers do, and yet they are treated differently under AB 5 because one is selling a vacuum cleaner, while the other is selling a political idea. This labor classification turns squarely on the "speech's communicative intent" and should be subject to strict scrutiny.

The majority's reliance on the breadth of AB 5 is no more persuasive. The majority concludes that any First Amendment concerns are "indirect," because AB 5 "does not target certain types of speech," but rather "applies across California's economy." This misunderstands the relevant First Amendment inquiry. Plaintiffs are not required to engage in some balancing test where the constitutional parts of AB 5 are weighed against the unconstitutional parts of AB 5. Even if most aspects of a given law regulate broadly without regard to speech, that cannot possibly protect the parts of that law that *do* distinguish on speech. If this were true, the government could circumvent the First Amendment simply by hiding content-based distinctions within a sweeping regulation. Rather, the proper inquiry is whether the exact exemptions challenged here predominately turn on the content of the workers' speech.

The majority also justifies the exemptions by focusing on the direct salespersons' and newspaper distributors' occupations. The majority claims that the distinction between these occupations and industries makes it permissible to regulate them differently. The problem with shifting the focus away from speech and towards the speaker is that the Supreme Court has recently rejected this same type of argument. In *Barr v. American Association of Political Consultants, Inc.* ("*AAPC*"), 140 S. Ct. 2335 (2020), the Supreme Court addressed a First Amendment challenge to a law that banned robocalls except those "made to collect debts owed to or guaranteed by the Federal Government." *Id.* at 2343. The government defended this exemption by arguing that the law does not address speech, but rather "draws distinctions based on speakers (authorized debt collectors)." *Id.* at 2346. The Supreme Court rejected this argument for multiple reasons, including because "'the fact that a distinction is speaker based' does not 'automatically render the distinction content neutral.'" *Id.* at 2347 (quoting *Reed*, 576 U.S. at 170). The Court has elsewhere warned that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Similarly, the defense of the provisions challenged by Plaintiffs attempts to shift the focus away from the content of the speech and towards the industry of the worker, but such surface-level labels are insufficient to avoid First Amendment scrutiny.

The government in *AAPC* also argued that "the legality of a robocall under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech." 140 S. Ct. at 2347. In other words, the government tried to classify the exemption as activity, not speech. The Supreme Court likewise rejected this argument, noting that the "law here focuses on whether the caller is *speaking* about a particular topic." *Id.* That same rationale vindicates Plaintiffs' claims here, as AB 5 inevitably focuses on what each worker *says*, even if it uses an occupational label in doing so.

IV.

State governments no doubt have broad power to regulate labor markets within their borders, but that power runs into fundamental rights protected by the Constitution when those regulations turn on the speech of the worker. Regardless of whether such content-based distinctions hide under the veneer of a labor classification, the First Amendment's protections remain the same. Plaintiffs face cost-prohibitive expenses under AB 5 because of the content of the speech in which they engage. I would reverse the denial of a preliminary injunction, and therefore respectfully dissent.

Merriam-Webster

canvass verb

transitive verb

1 : to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments

// *canvassed* voters

// *canvassed* the neighborhood to solicit magazine subscriptions

2 a : to examine in detail

***specifically* : to examine (votes) officially for authenticity**

b : DISCUSS, DEBATE

// *canvassed* all the items on the agenda

3 *obsolete* : to toss in a canvas sheet in sport or punishment

intransitive verb

: to seek orders or votes: SOLICIT

// was *canvassing* for a seat in Congress

APPENDIX B

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 DENYING Motion for Preliminary Injunction (Dkt. 9)** (Filed Aug. 9, 2021)

Before the Court is Plaintiffs' Mobilize the Message, LLC, Moving Oxnard Forward, Inc., and Starr Coalition for Moving Oxnard Forward ("Plaintiffs") Motion for Preliminary Injunction. (Dkt. 9). After considering all the papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced at the hearing conducted on August 2, 2021, the Court DENIES the Motion.

I. BACKGROUND

A. Assembly Bill 5

This case challenges Assembly Bill 5 ("AB 5"), codified at Cal. Labor Code § 2775(b)(1), a California law pertaining to the classification of employees and independent contractors.

In 2018, the California Supreme Court in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 916

(2018), held that courts should apply a three-part test, the "ABC Test", to determine whether a worker is properly classified as an employee for certain purposes. Prior to 2018, California's test for classifying workers as either employees or independent contractors was set forth, for all purposes, in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). The ABC Test classifies workers as employees unless an employer establishes:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
>
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Cal. Labor Code § 2775(b)(1). On September 18, 2019, the California Legislature codified the ABC test adopted in *Dynamex* by enacting AB 5. *See* A.B. 5, Ch. 296, 2019-2020 Reg. Sess. (Cal. 2019) ("AB 5"); Cal. Labor Code § 2775(b)(1).

Under AB 5, the ABC test is the standard used for ascertaining whether a worker is an employee. The law nevertheless creates certain exceptions for categories of workers that remain subject to the multi-factor

"*Borello*" standard. As relevant here, workers that fall within such exceptions include "[a] direct sales salesperson as described in Section 650 of the Unemployment Insurance Code so long as the conditions for exclusion from employment under that section are met." Cal. Labor Code § 2783(e). Per that provision, "'[e]mployment' does not include services performed as a . . . direct sales salesperson . . . by an individual" if "[t]he individual . . . is engaged in the trade or business of primarily in person demonstration and sales presentation of consumer products, including services or other intangibles, in the home . . . or otherwise than from a retail or wholesale establishment. . . ." Cal. Unemp. Ins. Code § 650. Newspaper distributors and carriers are also exempted from the ABC test and are instead subject to *Borello*. Cal. Labor Code § 2783(h)(1).

B. Plaintiffs and the Alleged Burden of AB 5

Plaintiff Mobilize the Message, LLC ("MTM") hires "doorknockers" to canvass neighborhoods and personally engage voters in the residence on behalf of its client campaigns. MTM also hires signature gatherers to persuade voters, at their residence and in public places, to sign petitions that would qualify measures for the ballot.

Plaintiff Moving Oxnard Forward, Inc., ("MOF"), a California nonprofit corporation dedicated to improving the city of Oxnard, maintains a political action committee, Plaintiff Starr Coalition for Moving

Oxnard Forward ("Starr Coalition"), that creates, qualifies, and works to enact ballot measures in Oxnard's municipal elections.

Prior to AB 5's enactment, MTM provided its services in California. MTM abandoned the California market upon AB 5's enactment because, *inter alia*, it could not afford the administrative expenses of hiring its independent contractors as employees.

MOF and Starr Coalition claim that they intend to participate in Oxnard's 2022 municipal elections which require signature gathering for the ballots to begin now. Plaintiffs nevertheless refrain from hiring their doorknockers and signature gatherers as employees because they claim it is unfeasible for them to do so under the current regulatory scheme.

C. Procedural Background

On June 23, 2021, Plaintiffs filed this lawsuit against Defendant Rob Bonta, in his official capacity as Attorney General of California ("Defendant"), arguing that AB 5 discriminates against speech based on its content. (*See* Dkt. 1, at 13). Specifically, Plaintiffs contend that California favors commercial speech over political speech because AB 5 exempts certain workers, such as newspaper deliverers and cosmetics salespersons, from being classified as employees whereas signature gatherers and doorknockers for political campaigns are considered employees under the current framework. (*See id.*) According to Plaintiffs, "My classifying doorknockers per the ABC test, while

classifying direct salespersons, newspaper distributors, and newspaper carriers per *Borello*, Defendant, under color of law deprives Plaintiffs . . . of their right of free speech guaranteed by the First and Fourteenth Amendment." (Dkt. 1).

On June 24, 2021, Plaintiffs filed the instant Motion asking the Court to enjoin Defendant from applying the ABC Test to classify Plaintiffs' doorknockers and signature gatherers as employees. Defendant filed an Opposition to the Motion on July 12, 2021. (Dkt. 20). Plaintiffs filed a Reply on July 19, 2021. (Dkt. 21).

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy . . . ; it is never awarded as of right." *Munaf v. Green*, 553 U.S. 674, 689-90 (2007) (citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). In this Circuit, a plaintiff may obtain a preliminary injunction upon a lesser showing of the merits if the balance of hardships tips "sharply" in his favor, and he has satisfied the other two *Winter* requirements. *See Affiance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

III. DISCUSSION

As discussed below, Plaintiffs fail to satisfy the requirements set forth in *Winter* for injunctive relief.

1. Likelihood of Success on the Merits

The Court finds that Plaintiffs have failed to establish a likelihood of success on the merits. "Likelihood of success on the merits is 'the most important factor' in determining whether interim, injunctive relief is warranted." *Environmental Protection Information Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). "Because it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three *Winter* elements." *Al-Nasser v. Serdy*, No. 2:20CV03582 ODW (Ex), 2020 WL 3129206, at *2 (C.D. Cal. June 12, 2020) *(citing Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)).

Plaintiffs allege two claims against Defendant, arguing that the application of the ABC Test violates the First Amendment as applied to their doorknockers and signature gatherers. Plaintiffs have not satisfied their burden of showing they are likely to succeed on either claim.

A. First Amendment

If a law "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct.

2218, 2231 (2015); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). By contrast, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner*, 512 U.S. at 642. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct . . . [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011)). The question is whether there is conduct with a "significant expressive element that drew the legal remedy in the first place" or the statute has the "inevitable effect of singling out those engaged in expressive activity." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986). "[G]enerally applicable economic regulations [affecting] rather than targeting news publications" pass constitutional muster. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 896 (9th Cir. 2018) (generally applicable wage law targeting employer use of employee wages regulated conduct and was not subject to First Amendment scrutiny).

Plaintiffs contend that AB 5 imposes content-based restrictions and thus is subject to strict scrutiny. The Court disagrees.

Here, the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny. As other courts in this circuit have held, "AB 5 applies a particular test to determine if a worker is considered an 'employee' as opposed to an 'independent contractor,' to the Labor Code . . . [i]t is thus directed at economic activity generally [and] does not directly regulate or prohibit speech." *See Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV1910645 PSG (KSx), 2020 WL 1444909, at *7 (C.D. Cal. Mar. 20, 2020), appeal dismissed, No. 20-55408, 2020 WL 6075667 (9th Cir. Aug. 20, 2020).

Plaintiffs nevertheless argue at length that AB 5 makes distinctions between speakers' messages, such as between newspaper deliverers and campaign signature gatherers, and therefore expresses a content preference. *See* Dkt. 9-1, at 11-12 ("The regulatory scheme, on its face, implicates Plaintiffs' political speech. Their workers are subject to the ABC test for all purposes . . . [y]et other workers, who knock on the same doors and walk the same streets to speak to the same people and deliver them papers, are classified as independent contractors per *Borello*. The distinctions? Rather than talk politics, these workers perform 'in person demonstration[s] and sales presentation[s].' "). Indeed, Plaintiffs contend that state investigators would need to examine the "worker's message to see if [an] exception applied." These arguments are unpersuasive.

"There is no indication that AB 5 reflects preference for the substance or content of what certain speakers have to say, or aversion to what other

speakers have to say." *Am. Soc'y of Journalists & Authors, Inc.*, 2020 WL 1444909, at *8. Rather, as Defendant points out, the distinctions between cosmetics salespersons and campaign signature gatherers or doorknockers under AB 5 are based on the worker's occupation. The distinctions based on the types of products sold or services rendered are directly related to the occupation or industry of a worker as opposed to the statements the worker uses to sell such goods or perform such services. Courts in this circuit have held the same and have reasoned that "[t]he justification for these distinctions is proper categorization of an employment relationship, unrelated to the content of speech." (*Id.*; *see* also *Crossley v. California*, 479 F. Supp. 3d 901, 916 (S.D. Cal. Aug. 17, 2019)). The Court sees no reason to reach a different result here. (*Id.*)

Plaintiffs' attempt to distinguish these cases is unpersuasive. Notably, Plaintiffs argue *Crossley* is inapposite because that court "plainly erred in describing AB 5 as 'a generally applicable law that regulates the classification of employment relationships across the spectrum and does not single out any profession or group of professions.'" (Dkt. 9-1, at 17). The Court disagrees. Plaintiffs' conclusory statement is unsupported as they have failed to point to any facts suggesting that AB 5 favors commercial speech over political speech due to its exemptions.

The Court agrees with the courts in this circuit that have found AB 5 to be a generally applicable law that regulates classifications of employment

relationships by industry as opposed to speech. Plaintiffs' argument that the content of what a worker says will determine whether an AB 5 exemption applies in this context lacks merit. The more sensible interpretation is that the distinctions hinge on the worker's industry regardless of speech. While some of AB 5's exemptions arguably may have been arbitrarily designed or are the result of political motives, "[a]ccommodating one interest group is not equivalent to intentionally harming another." *Gallinger v. Becerra*, 898 F.3d 1012, 1021 (9th Cir. 2018). Accordingly, Plaintiffs have failed to show that strict scrutiny applies.

Plaintiffs do not argue whether AB 5 could pass the lesser rational based review. (*See* Dkt. 9-1, at 18 ("Plaintiffs would disagree that AB 5 could pass even rational basis review, but that is not the test here.")). Given that Plaintiffs have only argued the strict scrutiny portion of the analysis that the Court rejects, Plaintiffs have failed to satisfy their heavy burden of showing they are likely to succeed on their First Amendment Claims.

2. Irreparable Harm

Although it need not address this factor, the Court notes that Plaintiffs also fail to show the need for emergency injunctive relief to prevent immediate and irreparable harm. *Al-Nasser v. Serdy*, No. 220CV03582 ODW (Ex), 2020 WL 3129206, at *2 (C.D. Cal. June 12, 2020) (*citing Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)) ("Because it is a threshold inquiry,

when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three *Winter* elements."). "An essential prerequisite to the granting of a preliminary injunction is a showing of irreparable injury to the moving party in its absence." *Dollar Rent A Car of Washington, Inc. v. Travelers Indem.* Co., 774 F.2d 1371, 1375 (9th Cir. 1985).

As Defendant notes, AB 5 was signed into law in September 2019. Nevertheless, Plaintiffs waited until June 2021, nearly two years later, to bring their claims regarding AB 5's exemptions. Plaintiffs admit that they halted all operations in California after AB 5's implementation and have thus been impacted by the regulation long before this year. Although Plaintiffs now claim there is urgency given the upcoming 2022 elections, Plaintiffs have failed to explain their delay in seeking their requested relief for a declaration that AB 5 should not apply to their workers.

Although a delay in filing for injunctive relief is not determinative, it "implies a lack of urgency and irreparable harm." *See Vital Pharms., Inc. v. PhD Mktg., Inc.*, No. 220CV06745 RSWL (JCx), 2020 WL 6545995, at *8 (C.D. Cal. Nov. 6, 2020) (citing to *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (citations omitted); *see also Dahl v. Swift Distrib., Inc.*, No. CV 10-00551 SJO (RZx), 2010 WL 1458957, at *3 (C.D. Cal. Apr. 1, 2010) (noting that an "unexplained delay . . . undercuts a claim that an injunction is necessary to prevent immediate and irreparable injury")). Here, Plaintiffs' two-year delay in filing this Motion weighs

against irreparable harm. *See id.* (citing to *AK Metals, LLC v. Norman Indus. Materials, Inc.*, No. 12cv2595-IEG (WVG), 2013 WL 417323, at *10 (S.D. Cal. Jan. 31, 2013) ("Plaintiff's [two-month] delay in filing the motion . . . weighs against the immediacy of the harm.")).

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs have not satisfied their heavy burden of establishing they are entitled to the extraordinary remedy of a preliminary injunction. Accordingly, the Court DENIES Plaintiffs' Motion.

IT IS SO ORDERED.

Dated: 8/9/21

/s/ Virginia A. Phillips
Virginia A. Phillips
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOBILIZE THE MESSAGE, LLC; et al., Plaintiffs-Appellants, v. ROB BONTA, in his official capacity as Attorney General of California, Defendant-Appellee.	No. 21-55855 D.C. No. 2:21-cv-05115-VAP-JPR Central District of California, Los Angeles ORDER (Filed Jan. 17, 2023)

Before: HURWITZ and VANDYKE, Circuit Judges, and ERICKSEN,* District Judge.

Judge VanDyke voted to grant the petition for rehearing en banc. Judges Gurwitz and Ericksen recommended denying it.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

The petition for rehearing en banc, Dkt. 31, is **DENIED**.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOBILIZE THE MESSAGE LLC; et al., Plaintiffs-Appellants, v. ROB BONTA, in his official capacity as Attorney General of California, Defendant-Appellee.	No. 21-55855 D.C. No. 2:21-cv-05115-VAP-JPR Central District of California, Los Angeles ORDER (Filed Jan. 20, 2023)

Before: HURWITZ and VANDYKE, Circuit Judges, and ERICKSEN,* District Judge.

Appellants' motion to stay the mandate, Dkt. 45, is granted. The mandate is stayed for ninety (90) days from the date this order is filed. If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.

* The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

APPENDIX E

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)** (Filed Sep. 17, 2021)

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.

Plaintiffs filed this lawsuit against Defendant Rob Bonta, in his official capacity as Attorney General of California ("Defendant"), alleging that a California law

pertaining to the classification of employees and independent contractors, Assembly Bill 5 ("AB 5"), violates the First Amendment right of free speech. AB 5 codifies the so-called "ABC Test" articulated in *Dynamex Operations W v. Superior Court*, 4 Cal. 5th 903, 916 (2018). The test consists of a three-pronged inquiry that determines whether a worker is classified as an employee or an independent contractor for certain purposes. Plaintiffs argue that AB 5 favors commercial speech over political speech because it exempts certain commercial workers from being classified as employees, while classifying signature gatherers and doorknockers for political campaigns as employees.

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

II. LEGAL STANDARD

When a party files an interlocutory appeal from the denial of a motion for a preliminary injunction, a stay is "not a matter of right. . . ." *Nken v. Holder,* 556 U.S. 418, 433 (2009). The decision to grant a stay "is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* "The moving party has the burden of persuading the court that the circumstances of the case justify a stay." *Cesca Therapeutics Inc. v. SynGen Inc.,* No. 2:14-CV2085-TLN (KJNx), 2017 WL 1174062, at *2 (E.D. Cal. Mar. 30, 2017).

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

questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

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

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

III. DISCUSSION

A. Ninth Circuit Dicta

As a threshold matter, Defendant argues that it would contravene Ninth Circuit instruction for this

Court to stay proceedings pending appeal of a preliminary injunction order. (Opp'n, at 8). Defendant cites to language from Ninth Circuit cases suggesting that granting a stay under these circumstances is strongly disfavored. *See* Opp'n at 8, citing *Cal. v. Azar,* 911 F.3d 558, 583 (9th Cir. 2018) ("We have repeatedly admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction."); *Melendres v. Arpaio,* 695 F.3d 990, 1002-03 (9th Cir. 2012); *Sports Form, Inc. v. United Press Intern., Inc.,* 686 F.2d 750, 753 (9th Cir. 1982) ("[I]n many cases, appeal of district courts' preliminary injunctions will result in unnecessary delay to the parties and inefficient use of judicial resources."). Plaintiff responds that Defendant's argument over-generalizes the Ninth Circuit's position, and even if these warnings are informative, the Court must engage with the *Landis* factors before summarily denying the motion. *See* Reply, at 4.

A review of decisions in this district demonstrates that courts do not interpret the Ninth Circuit's warnings as prohibitively as Defendant suggests. There are numerous examples of courts granting a motion to stay proceedings pending the appeal of an order granting or denying a preliminary injunction. *See, e.g., STM Inv. S.a.r.l. v. 3P Equity Partners, LLC,* No. 19- 1764-CBM (ASx), 2019 WL 9518077, at *3 (C.D. Cal. June 24, 2019) (granting an application to stay proceedings pending the Ninth Circuit's resolution of plaintiff's appeal of the preliminary injunction); *Commodity Futures Trading Comm'n v. Bame,* No. CV-08-05593-RGK

(PLAx), 2009 WL 10676150, at *3 (C.D. Cal. Mar. 6, 2009) (same). Moreover, while the Court may take the Ninth Circuit's admonition against granting a stay as cautionary, there is no "blanket rule" prohibiting consideration of the motion. *See Fraihat v. U.S. Immigr. & Customs Enf't,* No. EDCV 19-1546-JGB (SHKx), 2020 WL 6540441, at *3 (C.D. Cal. Oct. 30, 2020) (noting that the court would consider the Ninth Circuit's warnings against delaying trial preparation to await an interim ruling, but Defendants were "correct that there is no such blanket rule" in the Ninth Circuit).

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

B. *Landis* Factors

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

1. Possibility of Damage

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

The Court agrees that no harm would result from a stay of these proceedings. Defendant has no need for an immediate resolution of the case, especially because he is not enjoined from continuing to enforce AB 5 while the appeal is pending. Moreover, Defendant himself has not asserted that he would suffer damage if a stay were granted. The lack of potential damage to Defendant stands in stark contrast to the potential consequences to parties in other cases where a stay was denied. *See Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (finding a "fair possibility" of damage in granting a stay that would have forced a company to enter into arbitration in a foreign country). The Court therefore agrees with Plaintiffs that the lack of possible damage weighs heavily in favor of granting a stay. *See, e.g., Physicians Healthsource Inc. v. Masimo Corp.,* No. SACV 14-00001-JVS (ANx), 2014 WL 12577142, at *2 (C.D. Cal. May 22, 2014) (determining that there would be little possibility of damage from granting a stay).

2. Hardship or Inequity from Denial of a Stay

Next, Plaintiffs argue they would be injured by the denial of this Motion because it would frustrate their

potential to obtain relief in time for the 2022 election. (Motion, at 6). They contend that the Ninth Circuit could grant their pending appeal in time to allow them to engage in activities for the 2022 election, but if this Court denies the stay and ultimately dismisses the case, the pending appeal would become moot. (*Id.*). Plaintiffs would then have to appeal again from "square one," which would push the timeline for appellate review beyond the 2022 election. (*Id.*). Plaintiffs also allege that intervening mootness harms both parties "in terms of duplication of effort on appeal." (*Id.* at 7).

Defendant responds that any prejudice Plaintiffs might suffer is attributable to their own delay in filing suit. *See* Opp'n. Defendant points out that AB 5 was enacted in September 2019, and yet "Plaintiffs did not file suit until two months ago." (Opp'n, at 1). Defendant also argues that any concern about inefficient litigation stems from Plaintiffs' own decision to seek interlocutory review. (*Id.* at 3-4).

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

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

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

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

3. Judicial Efficiency

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

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

As to the potential preclusive effect of other proceedings, this Court previously held that "staying [an] action based on a possibility of a preclusive decision elsewhere is not enough to demonstrate that those other proceedings "bear upon the case." *Tesoro Ref. & Mktg. LLC v. City of Long Beach,* No. 2:16-CV-06963-VAP (FFMx), 2019 WL 4422666, at *2 (C.D. Cal. May 31, 2019); *Leyva,* 593 F.2d at 863-64. Moreover, *Landis* itself dictates that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis,* 299 U.S. at 255; *see*

also Fed. Trade Comm'n v. Cardiff, 2020 WL 5417125, at *3 (declining to stay an action pending an upcoming U.S. Supreme Court decision that would not directly affect the present case).

Here, Plaintiffs have not met the high burden of proving that the pendency of *ASJA* merits a stay in this action. Plaintiffs acknowledge that "there is no guarantee that the Ninth Circuit's forthcoming decision in ASJA would control or even be instructive in this case," but surmise that "the odds of that occurring are meaningful." (Motion, at 1). The Court does not find that the mere potential of an instructive decision warrants a stay.

On the other hand, the Court agrees with Plaintiffs that awaiting the resolution of the Ninth Circuit's review of the interlocutory appeal advances the orderly cause of justice. The order that is before the Court of Appeals implicates issues that are at the heart of this case. In the August 9, 2021 Order, the Court concluded that Plaintiffs had not shown they were likely to succeed on the merits. (Dkt. 24). The Court also determined that the challenged exemptions in AB 5 were neither content-based nor required heightened scrutiny. (*Id.* at 7). These issues bear on the heart of Plaintiffs' First Amendment claims, and the Ninth Circuit's review of those issues would almost certainly affect the outcome of any proceedings in this Court.

The Court agrees with Plaintiffs' observation that "this is not a case where the 'disposition of th[e] appeal will affect the rights of the parties only until the

district court renders judgment on the merits of the case.'" (Reply at 33, citing *Sports Form, Inc. v. United Press International, Inc.,* 686 F.2d 750, 753 (9th Cir. 1982). It would be wise for the Court to preserve its judicial resources in light of the pending appellate review of issues central to this case.

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

IV. CONCLUSION

The Court therefore GRANTS the Motion to Stay pending the outcome of Plaintiffs' interlocutory appeal.

IT IS SO ORDERED.

Dated: 9/17/21 /s/ Virginia A. Phillips
Virginia A. Phillips
United States District Judge

APPENDIX F

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Gov't Code § 6000 – "Newspaper of General Circulation"

A "newspaper of general circulation" is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement.

Cal. Gov't Code § 6008 – Alternative criteria for qualification as newspaper of general circulation

(a) Notwithstanding any provision of law to the contrary, a newspaper is a "newspaper of general circulation" if it meets all of the following criteria:

(1) It is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers and has been established and published at regular intervals of not less than weekly in the city, district, or public notice district for which it is seeking adjudication for at least three years preceding the date of adjudication.

(2) It has a substantial distribution to paid subscribers in the city, district, or public notice district in which it is seeking adjudication.

(3) It has maintained a minimum coverage of local or telegraphic news and intelligence of a general character of not less than 25 percent of its total inches during each year of the three-year period.

(4) It has only one principal office of publication and that office is in the city, district, or public notice district for which it is seeking adjudication.

(b) For the purposes of Section 6020, a newspaper meeting the criteria of this section which desires to have its standing as a newspaper of general circulation ascertained and established, may, by its publisher, manager, editor, or attorney, file a verified petition in

the superior court of the county in which it is established and published.

(c) As used in this section:

(1) "Established" means in existence under a specified name during the whole of the three-year period, except that a modification of name in accordance with Section 6024, where the modification of name does not substantially change the identity of the newspaper, shall not affect the status of the newspaper for the purposes of this definition.

(2) "Published" means issued from the place where the newspaper is sold to or circulated among the people and its subscribers during the whole of the three-year period.

(3) "Public notice district" means a public notice district described in Chapter 1.1 (commencing with Section 6080).

Cal. Lab. Code § 2775 – Employee versus independent contractor; Applicable law

(a) As used in this article:

(1) "Dynamex" means Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903.

(2) "Borello" means the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.

(b)

(1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

Cal. Lab. Code § 2783 – Exceptions for other specific occupations

Section 2775 and the holding in Dynamex do not apply to the following occupations as defined in the paragraphs below, and instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by Borello:

* * *

(e) A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.

* * *

(h)

(1) A newspaper distributor working under contract with a newspaper publisher, as defined in paragraph (2), or a newspaper carrier.

(2) For purposes of this subdivision:

(A) "Newspaper" means a newspaper of general circulation, as defined in Section 6000 or 6008 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper's own publication, whether that publication be designated a "shoppers' guide," as a zoned edition, or otherwise. "Newspaper" may also be a publication that is published in print and that may be posted in a digital format, and distributed periodically at daily, weekly, or other short intervals, for the dissemination of news of a general or local character and of a general or local interest.

(B) "Publisher" means the natural or corporate person that manages the newspaper's business operations, including circulation.

(C) "Newspaper distributor" means a person or entity that contracts with a publisher to distribute newspapers to the community.

(D) "Newspaper carrier" means a person who effects physical delivery of the newspaper to the customer or reader, who is not working as an app-based driver, as defined in Chapter 10.5 (commencing with Section 7448) of Division 3 of the Business and Professions Code, during the time when the newspaper carrier is performing the newspaper delivery services.

(3)

(A) On or before March 1, 2022, March 1, 2023, and March 1, 2024, every newspaper publisher or distributor that hires or directly contracts with newspaper

carriers shall submit to the Labor and Workforce Development Agency, in a manner prescribed by the agency and in conformity with existing law, the following information related to their workforce for the current year:

(i) The number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes in the previous year.

(ii) The average wage rate paid to carriers classified as independent contractors and as employees.

(iii) The number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law.

(B) For the March 1, 2022, reporting date only, every newspaper publisher and distributor shall also report the number of carrier wage claims filed with the Labor Commissioner or in a court of law for the preceding three years.

(C) Information that is submitted shall only be disclosed in accordance with subdivision (k) of Section 6254 of the Government Code, relating to trade secrets or other proprietary business information.

(4) This subdivision shall become inoperative on January 1, 2025, unless extended by the Legislature.

* * *

Cal. Lab. Code § 2787 – Severability of Article

The provisions of this Article are severable. If any provision of this Article or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Cal. Unemp. Ins. Code § 650 – Services performed by specified real estate or other brokers or salespersons

"Employment" does not include services performed as a real estate, mineral, oil and gas, or cemetery broker or as a real estate, cemetery or direct sales salesperson, or a yacht broker or salesman, by an individual if all of the following conditions are met:

(a) The individual is licensed under the provisions of Chapter 19 (commencing with Section 9600) of Division 3 of, or Part 1 (commencing with Section 10000) of Division 4 of, the Business and Professions Code, Article 2 (commencing with Section 700) of Chapter 5 of Division 3 of the Harbors and Navigation Code, or is engaged in the trade or business of primarily in person demonstration and sales presentation of consumer products, including services or other intangibles, in the home or sales to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment.

(b) Substantially all of the remuneration (whether or not paid in cash) for the services performed by that

individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual.

(c) The services performed by the individual are performed pursuant to a written contract between that individual and the person for whom the services are performed and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes.

APPENDIX G

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD INC.; and STARR COALITION FOR MOVING OXNARD FORWARD, Plaintiffs, v. ROB BONTA in his official capacity as Attorney General of California and in his individual capacity, Defendant.	Case No. 2:21-cv-05115 VAP (JPRx) **DECLARATION OF JUSTIN GREISS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Judge: Hon. Virginia A. Phillips Hearing Date: July 26, 2021 Time: 2:00 p.m.

DECLARATION OF JUSTIN GREISS

I, Justin Greiss, am competent to state and declare as follows based on my personal knowledge:

1. I am the Chief Operating Officer of Mobilize the Message, LLC, ("MTM"), a Florida limited liability company. MTM provides political campaigns with door knocking and signature gathering services. Doorknockers canvass neighborhoods, personally engaging voters in the home on behalf of MTM's client campaigns in an effort to persuade them to vote for and gather feedback on candidates and ballot measure campaigns. MTM's signature gatherers persuade voters, at home and in public places, to sign petitions qualifying measures for the ballot.

2. MTM hires doorknockers and signature gatherers on an independent contractor basis. Under the typical arrangement, MTM's doorknockers and signature gatherers supply their own appropriate clothing, cell phones, computers, and transportation to the work areas. When the work requires driving, doorknockers and signature gatherers supply their own vehicles, though MTM provides gas cards to offset the transportation costs.

3. MTM provides workers optional housing in the campaign areas, and in the case of doorknockers, identifies the homes to be contacted, but it does not pay time-based wages. Rather, MTM pays doorknockers only for reaching particular door milestones. Signature gathering campaigns may target particular areas to satisfy legal requirements, but gatherers may gather

signatures from anywhere within such boundaries, and are paid per valid signature obtained. Pay for all MTM workers is negotiable.

4. Signature gatherers' pay also fluctuates with market conditions. When many competing petitions circulate, signature gatherers can and do demand more money for their services. It is also easier to gather signatures earlier in the qualification process. Consequently, a gatherer's price per signature may rise as time winds down and the signature gathering campaign approaches its goal.

5. MTM provides some training and a generalized script or talking points, but door knockers and signature gatherers are expected to use their improvisational, conversational and persuasive skills to "sell" MTM's client campaigns.

6. MTM does not prescribe fixed hours, breaks, or schedules, apart from requesting that door knockers perform their work during the times of day when people are most likely to be home.

7. MTM's door knockers and signature gatherers understand and agree that they provide MTM their services as independent contractors.

8. Considering MTM's lack of control over its door knockers and signature gatherers, and the degree of independent judgment that these individuals must exercise in generating the performance milestones for which MTM pays them, MTM's doorknockers and signature gatherers have always been essentially

independent direct sales salespeople—notwithstanding that their advocacy is political rather than commercial.

9. Prior to AB 5's enactment, MTM provided its services in California. However, MTM abandoned the California market upon AB 5's enactment. MTM passed on doorknocking and signature gathering contracts in California because it cannot afford the administrative expenses of hiring its independent contractors as employees, and it does not wish to encourage inefficient work by disconnecting performance milestones from pay.

10. MTM intends to provide the Starr Coalition for Moving Oxnard Forward ("SCMOF") with signaturing gathering services to qualify the Oxnard Property Tax Relief Act and other measures for the city's 2022 election ballot. MTM also intends to provide other campaigns with doorknocking and signature gathering services in California.

11. But MTM currently refrains from providing its services in California, including to SCMOF, solely because hiring doorknockers and signature gatherers as employees, per the ABC test, is infeasible. I am concerned that our workers would be classified as employees under the ABC test, and reasonably fear criminal and civil penalties for "misclassifying" workers as independent contractors. MTM can also ill afford the costs of defending itself from misclassification claims.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 2021.

/s/ Justin Greiss
Justin Greiss

APPENDIX H

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD INC.; and STARR COALITION FOR MOVING OXNARD FORWARD, Plaintiffs, v. ROB BONTA in his official capacity as Attorney General of California and in his individual capacity, Defendant.	Case No. 2:21-cv-05115 VAP (JPRx) **DECLARATION OF AARON STARR IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Judge: Hon. Virginia A. Phillips Hearing Date: July 26, 2021 Time: 2:00 p.m.

DECLARATION OF AARON STARR

I, Aaron Starr, am competent to state and declare as follows based on my personal knowledge:

1. I am the founder and President of Plaintiff Moving Oxnard Forward, Inc., ("MOF"), a California nonprofit corporation dedicated to making Oxnard, California's government more efficient and transparent. MOF seeks to ensure that Oxnard residents receive value for the taxes and fees they pay, to see to it that Oxnard's government provides quality services at a low cost, and to improve Oxnard's business climate and lower the cost of operating a business in Oxnard. MOF attempts to focus Oxnard's City Hall on providing basic goods and services such as roads, infrastructure, and public safety, while reducing bureaucracy.

2. Plaintiff Starr Coalition for Moving Oxnard Forward ("SCMOF") is MOF's political action committee. Once MOF decides that its community action requires going to the ballot box, SCMOF handles all aspects of the initiative campaigns, including creating, qualifying and enacting ballot measures in Oxnard's municipal elections. SCMOF's measures regularly appear on the ballot, and at times prevail.

3. As MOF and SCMOF's purpose is to effect political change by enacting ballot measures, they depend utterly on signature gatherers who persuade voters, at home and in public places, to sign petitions qualifying measures for the ballot.

4. MOF and SCMOF have historically hired signature gatherers as independent contractors. MOF and SCMOF paid these gatherers by the signature, but exercised no control over when, where, or how these gatherers worked.

5. Typically, MOF and SCMOF's signature gatherers would set their own schedule, and walk around highly-trafficked public spaces or go door-to-door to speak to voters and persuade them to sign petitions to qualify MOF and SCMOF's ballot measures. MOF and SCMOF do not tell their signature gatherers when or where to gather signatures. They were expected to use their improvisational, conversational and persuasive skills to "sell" MOF and SCMOF's ballot measures.

6. MOF and SCMOF's signature gatherers' pay was negotiable, and fluctuated with market conditions. When many competing petitions circulate, signature gatherers can and do demand more money for their services. It is also easier to gather signatures earlier in the qualification process. Consequently, a gatherer's price per signature may rise as time winds down and the signature gathering campaign approaches its goal.

7. MOF and SCMOF's signature gatherers understood and agreed that they provided MOF and SCMOF their services as independent contractors.

8. Considering MOF and SCMOF's lack of control over their signature gatherers, and the degree of independent judgment that these individuals exercised in generating the performance milestones for which MOF and SCMOF paid them, MOF and

SCMOF's signature gatherers have always been essentially independent direct sales salespeople—notwithstanding that their advocacy is political rather than commercial.

9. MOF and SCMOF intend to participate in Oxnard's 2022 municipal elections. SCMOF has already prepared ballot language for one measure that it would seek to qualify for that election, the "Oxnard Property Tax Relief Act." Pursuant to Cal. Const. art. XIII C, § 3, the measure would require that Oxnard's pension obligations be funded by the city's general and other available funds, as is the case with most of California's cities, rather than through a special property tax. SCMOF is also drafting additional ballot measures to be qualified for the same election.

10. The time to start gathering signatures for the 2022 election is now. Any additional delays in beginning the signature-gathering campaign jeopardizes SCMOF's odds of gathering sufficient signatures in time to qualify for the ballot, especially as additional or competing signature-gathering petitions are launched. Moreover, delaying the completion of our signature gathering campaigns delays our ability to effectively proceed to the next phase of advocating for the qualified measures' adoption by voters.

11. SCMOF intends to hire MTM to gather signatures for the Oxnard Property Tax Relief Act and its other measures. Failing that, SCMOF intends to hire its own signature gatherers as independent contractors, as it has done in years past before the advent of

AB 5. Given MOF and SCMOF's limited resources, SCMOF cannot afford the burden of hiring signature gatherers as employees.

12. SCMOF currently refrains from hiring signature gatherers solely because doing so as an employer, per the ABC test, is infeasible. I am concerned that SCMOF's signature gatherers would be classified as employees under the ABC test, and reasonably fear criminal and civil penalties for "misclassifying" signature gatherers as independent contractors. SCMOF can also ill afford the costs of defending itself from misclassification claims.

13. Absent paid signature gatherers, SCMOF must rely on volunteers, including my volunteer efforts and those of SCMOF's other, otherwise-employed principals to gather signatures. In our experience, SCMOF cannot gather enough signatures to qualify a measure for the ballot using only volunteer labor. Lack of access to paid signature gatherers, caused solely by the ABC test, is thus preventing MOF and SCMOF from speaking to the voters and qualifying their ballot measures.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 2021.

/s/ Aaron Starr
Aaron Starr