No. 21-55855

In the United States Court of Appeals for the Ninth Circuit

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD, INC.; AND STARR COALITION FOR MOVING OXNARD FORWARD,

Plaintiffs-Appellants,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central District of California, The Hon. Virginia A. Phillips (Dist. Ct. No. 2:21-cv-05115-VAP-JPR)

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants certify:

Mobilize the Message, LLC, is a Florida limited liability company that has no parent company, and no publicly held company owns more than 10 percent of its stock.

Moving Oxnard Forward, Inc., is a California non-profit corporation that has no parent company, and no publicly held company owns more than 10 percent of its stock.

Starr Coalition for Moving Oxnard Forward is a California political committee whose parent company is appellant **Moving Oxnard Forward, Inc.** No publicly held company owns more than 10 percent of its stock.

/s/ Alan Gura
Alan Gura
Counsel for Appellants

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INTRODUCTION

Absent immediate injunctive relief, California will effectively preclude Plaintiffs-Appellants ("Plaintiffs") from campaigning in the 2022 elections. The state will frustrate their efforts to knock on doors to communicate with voters about candidates and ballot measures, and it will prevent Plaintiffs from gathering enough petition signatures to qualify their initiatives for this coming year's ballot.

This case might not have been filed, at least not in its present form, if California's restrictions of Plaintiffs' speech applied to all speakers equally as a function of arguably misguided but content-neutral economic regulations. But California does not treat all speech equally.

When there's a knock at the door, and the sales pitch begins, California law enforcement officials constructively perk up their ears. If the salesperson tries to sell cosmetics or demonstrate a set of kitchen knives, officials apply more-lenient rules to classify her employment status. But if the purpose of her visit is political—if she urges the resident to vote for a candidate or sign a ballot measure petition—the heavy weight of California's pervasive employment regulations fall upon the visitor's relationship with her client.

Political campaigns often cannot bear this burden. More to the point, they should not be made to do so. The state's discrimination against people based on the content of their speech is indefensible under the First Amendment. The state cannot explain how this application of its scheme might satisfy strict scrutiny. And it cannot escape the fact that it impermissibly privileges commercial over political speech.

Given the urgency of the situation—Plaintiffs Moving Oxnard Forward and Starr Coalition for Moving Oxnard Forward are fast running out of time to qualify their measures for next year's ballot—this Court should immediately restore Californians' fundamental right to conduct and participate in the democratic process to a level of parity with their right to discuss consumer products.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as the dispute arises under the United States Constitution.

(b) Plaintiffs appeal from the district court's order denying their motion for a preliminary injunction. ER-3—13. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).

(c) The order appealed from was entered on August 10, 2021. Plaintiffs filed their notice of appeal from that order on August 10, 2021. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether Cal. Lab. Code § 2775, et seq., discriminates against speech on the basis of content, in violation of the First Amendment, by classifying canvassers who speak about "consumer products" more favorably than canvassers who speak about politics, and by classifying workers who deliver particular newspapers more favorably than workers who deliver ballot petitions and other campaign material;

2. Whether a discriminatory law irreparably harms Plaintiffs by burdening their political campaign speech;

3. Whether the equities and public interest favor enjoining a law that discriminates against political campaign speech; and

4. Whether Plaintiffs are entitled to a preliminary injunction against application of Cal. Lab. Code § 2775, et seq., to their hiring of campaign workers.

STATEMENT OF ADDENDUM

Pertinent constitutional provisions and statutes are included in an addendum below.

STATEMENT OF THE CASE

The Regulatory Regime

Employers have greater control over employees than they do over independent contractors, but that control comes at great cost, including unemployment insurance taxes and associated administrative costs, Cal. Unemp. Ins. Code §§ 976, 13020, 13021; workers' compensation insurance, Cal. Lab. Code § 3700; and sick leave, Cal. Lab. Code § 246. Employers also face additional payroll expenses when hiring employees, and may also be more readily susceptible to tort claims arising from their employees' conduct, thus incurring additional insurance costs. From a worker's perspective, formal employment may include certain benefits, but often carries a significant cost in loss of freedom and flexibility over one's working hours and conditions.

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). *Borello* employed a multi-factor balancing test under which no one factor was dispositive. But "[w]hether a common law employer-employee relationship exists [under *Borello*] turns foremost on the degree of a hirer's right to control how the end result is achieved." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 528 (2014) (citing *Borello*, 48 Cal. 3d at 350).

In 2018, California's Supreme Court adopted a different "ABC test" to determine workers' classification for purposes of the California Industrial Welfare Commission's wage orders. The ABC test presumes that workers are employees unless the hiring entity 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; *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.

Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903, 957 (2018) (citations omitted) (paragraph breaks added).

In *Dynamex*'s wake, California's legislature enacted Assembly Bill 5 ("AB 5"), which codified *Dynamex*'s application of the ABC test to wage orders, and extended the ABC test's application to the entirety of California's Labor and Unemployment Insurance Codes. That general imposition of the ABC test is now codified at Cal. Lab. Code § 2775(b)(1).

But AB 5 contained myriad exemptions for livelihoods that are again, notwithstanding *Dynamex*, governed by *Borello* for all purposes. Assembly Bills 170 and 2257 enacted additional *Borello* exemptions at the behest of various lobbies. And in the November 2020 election, California's voters enacted Proposition 22, codified at Cal. Bus. & Prof. Code § 7451, which classifies drivers for app-based companies—AB 5's original prime targets—as independent contractors. Accordingly, since 2018, the question of whether a particular California worker is classified under the ABC test, under *Borello*, or under some definitive legislative command, is determined by the ever-shifting political vicissitudes of the moment within the legislature and among the voters.

Among the occupations that "shall be governed by *Borello*" regardless of Section 2775 or *Dynamex* is that of "[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. Lab. 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," "[s]ubstantially all" of the seller's remuneration "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 the seller and hiring entity agree in writing to treat the seller as an independent contractor. Cal. Unemp. Ins. Code § 650. The Direct Selling Association "work[ed]" with AB 5's sponsor to enact the exemption, and understands it provides "that direct sellers are clearly and specifically independent contractors." *Direct Selling Association Applauds Direct Seller Exemption in California AB 5*, Sep. 26, 2019, https://bit.ly/3xOArGF.

Newspaper distributors and carriers are also exempted from the ABC test and instead subject to *Borello*, Cal. Lab. Code § 2783(h)(1), as "[c]lassifying independent contractors as employees would impose at least $80 million in new costs on the newspaper industry." Bill Swindell, *Legislature passes one-year exemption for newspaper carriers from AB 5*, The Press Democrat, Sep. 1, 2020, https://bit.ly/3gVc0Aq.

California's legislature chose a remedy in the event that any part of the scheme were struck down. "If a court of law rules that the [ABC test] cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under [the Labor Code, the Unemployment Insurance Code, or an Industrial Welfare Commission order]," *Borello* applies. Cal. Lab. Code § 2775(b)(3).

"Misclassifying" an employee as an independent contractor carries significant criminal and civil penalties. Civil penalties for misclassifying employees begin at $5,000 per violation. Cal. Lab. Code § 226.8(b). Even the unintentional failure to withhold unemployment insurance tax is a misdemeanor punishable by $1,000 and imprisonment up to a year. Cal. Unemp. Ins. Code § 2118. And misclassifying a worker can trigger a

variety of other penalties, *e.g.,* for not reporting a new or rehired employee, *id.* § 1088.5(e); not reporting a new independent contractor, *id.* § 1088.8(e); or not electronically reporting wages paid to employees, *id.* § 1114(b); *see, generally,* Cal. Empl. Dev. Dep't, *Penalty Reference Chart*, https://www.edd.ca.gov/pdf_pub_ctr/de231ep.pdf.

Moreover, employees may sue alleged employers to recover civil penalties for Labor Code violations. Cal. Lab. Code §§ 2699(a) and (g)(1). Prevailing employees may recover attorney fees and costs. *Id.* § 2699(g)(1). And putative employers are also subject to claims "for injunctive relief to prevent the continued misclassification of employees as independent contractors" brought by the state's attorney general, district attorneys, or various city or city and county attorneys, "upon their own complaint or upon the complaint of a board, officer, person, corporation, or association." Cal. Lab. Code § 2786.

Plaintiffs' Use of Doorknockers and Signature Gatherers

Plaintiff Mobilize the Message, LLC ("MTM") hires doorknockers to canvass neighborhoods and personally engage voters in the home on behalf of its client campaigns. Their purpose is to seek support for and gather feedback on political candidates and ballot measures. ER-23, ¶ 1.

MTM also hires signature gatherers to persuade voters, at home and in public places, to sign petitions qualifying measures for the ballot. *Id.*

MTM hires doorknockers and signature gatherers on an independent contractor basis. ER-23, ¶ 2; ER-24, ¶ 7. MTM's doorknockers and signature gatherers typically supply their own appropriate clothing, tools, and transportation, though MTM provides gas cards to offset transportation costs. ER-23, ¶ 2. MTM also 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 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. ER-23, ¶ 3. MTM does not prescribe fixed hours, breaks, or schedules, but requests that door knockers perform their work during the times of day when people are most likely to be home. ER-24, ¶ 6.

Plaintiff Moving Oxnard Forward, Inc., ("MOF"), a California nonprofit corporation dedicated to improving Oxnard, California's government, maintains a political action committee, plaintiff Starr

Coalition for Moving Oxnard Forward ("Starr Coalition"), that creates, qualifies, and through its efforts enacts ballot measures in Oxnard's municipal elections. Starr Coalition's measures regularly appear on the ballot, and at times prevail. ER-18, ¶¶ 1-2. As MOF and Starr Coalition'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. ER-18, ¶ 3.

MOF and Starr Coalition have historically hired signature gatherers as independent contractors. ER-18, ¶ 4; ER-19, ¶ 7. Like MTM, MOF and Starr Coalition paid these gatherers by the signature, but exercised no control over when, where, or how these gatherers worked. ER-18, ¶ 4. Typically, MOF and Starr Coalition'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 Starr Coalition's ballot measures. ER-18—19, ¶ 5. MOF and Starr Coalition do not tell their signature gatherers when or where to gather signatures. ER-19, ¶ 5.

Plaintiffs' doorknockers and signature gatherers are expected to use their improvisational, conversational and persuasive skills to "sell" candidates and ballot measures. ER-19, ¶ 5; ER-24, ¶ 5. Pay for Plaintiffs' door knockers and signature gatherers is negotiable. ER-19, ¶ 6; ER-23, ¶ 3. 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. ER-23—24, ¶ 4; ER-19, ¶ 6.

Considering plaintiffs' lack of control over their doorknockers and signature gatherers, and the degree of independent judgment that these individuals exercised in generating the performance milestones for which plaintiffs paid them, plaintiffs' doorknockers and signature gatherers have always been essentially independent direct sales salespeople—notwithstanding that their advocacy is political rather than commercial. ER-19, ¶ 8; ER-24, ¶ 8.

The Regulatory Scheme's Impact on Plaintiffs' Political Speech

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. ER-24, ¶ 9.

MOF and Starr Coalition intend to participate in Oxnard's 2022 municipal elections. Starr Coalition has already prepared ballot language for one measure that it would seek to qualify for that election, the "Oxnard Property Tax Relief Act," and is also drafting additional ballot measures to be qualified for the same election. ER-19—20, ¶ 9. The time to start gathering signatures for the 2022 election is now. Any additional delays in beginning the signature-gathering campaign jeopardizes Starr Coalition's odds of gathering sufficient signatures in time to qualify for the ballot, especially as additional or competing signature-gathering petitions are launched. ER-20, ¶ 10. Moreover, delaying the completion of its signature-gathering campaigns delays

Starr Coalition's ability to effectively proceed to the next phase of advocating for the qualified measures' adoption by voters. *Id.*

Starr Coalition intends to hire MTM to gather signatures for the Oxnard Property Tax Relief Act and its other measures. ER-20, ¶ 11. MTM intends to accept that work, just as it intends to provide other campaigns with doorknocking and signature-gathering services in California. ER-24—25, ¶ 10. Absent the ability to use MTM, Starr Coalition intends to hire its own signature gatherers as independent contractors, as it has done in years past before the advent of AB 5. But given MOF and Starr Coalition's limited resources, Starr Coalition cannot afford the burden of hiring signature gatherers as employees. ER-20, ¶ 11.

Plaintiffs currently refrain from hiring doorknockers and signature gatherers solely because doing so as employers, per the ABC test, is unfeasible. Plaintiffs are concerned that their doorknockers and signature gatherers would be classified as employees under the ABC test, and they reasonably fear criminal and civil penalties for "misclassifying" these workers as independent contractors. Plaintiffs

can also ill afford the costs of defending themselves from misclassification claims. ER-25, ¶ 11; ER-20, ¶ 12.

Absent paid signature gatherers, Starr Coalition must rely on volunteers, including the volunteer efforts of its otherwise-employed principals to gather signatures. ER-20, ¶ 13. But Starr Coalition 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 Starr Coalition from speaking to the voters and qualifying their ballot measures. ER-20—21, ¶ 13.

Procedural History

On June 23, 2021, Plaintiffs brought this lawsuit in the United States District Court for the Central District of California against Defendant California Attorney General Rob Bonta, in his official capacity, pursuant to 42 U.S.C. § 1983. ER-29—45. The complaint seeks injunctive and declaratory relief against application of AB 5 to Plaintiffs' hiring of door knockers and signature gatherers, as the scheme violates their First Amendment right of free speech by discriminating against their speech on the basis of its content. ER-44—

45. The following day, upon the case's judicial assignment, Plaintiffs moved for a preliminary injunction. ER-26—28, ER-50. The district court heard argument on Plaintiffs' motion on August 2, 2021. ER-3.

On August 10, 2021, the district court entered an order denying Plaintiffs' motion. ER-3—13. It asserted that "the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny . . . '[AB 5] is . . . directed at economic activity generally [and] does not directly regulate or prohibit speech.'" ER-9 (quoting *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV1910645 PSG (KSx), 2020 U.S. Dist. LEXIS 52867, at *20-*21, 2020 WL 1444909, at *7 (C.D. Cal. Mar. 20, 2020) ("*ASJA*"), *appeal dismissed*, No. 20-55408, 2020 U.S. App. LEXIS 26605, 2020 WL 6075667 (9th Cir. Aug. 20, 2020), *subsequent appeal*, Ninth Cir. No. 20-55734 (argued June 11, 2021)).[1] Per the district court,

> The distinctions based on the types of products sold or services rendered [by canvassers] 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.

ER-9.

[1] *See* Statement of Related Case, *infra*.

The district court also asserted that Plaintiffs were not irreparably harmed by AB 5's ongoing enforcement, because they allegedly "waited until June 2021, nearly two years [after AB 5's enactment], to bring their claims regarding AB 5's exemptions." ER 12. The court also asserted that "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." *Id.*[2] And it asserted that Plaintiffs "failed to explain their delay." *Id.*[3] The alleged "two-year delay . . . weighs against irreparable harm." ER-13 (internal quotation marks omitted).

Plaintiffs immediately noticed their appeal upon the August 10, 2021 entry of the district court's order. ER-46—48. On August 16, 2021, Defendant moved to dismiss the case, and Plaintiffs moved to stay further district court proceedings pending this appeal's outcome. ER-52. Both motions are set to be heard on September 20, 2021. *Id.*

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[2] Only MTM halted its operations owing to AB 5. ER-25, ¶ 11. The Oxnard plaintiffs still operate in California. ER-19—20, ¶ 9. And they were not, and never admitted to being, impacted "long before this year."

[3] *Contra* ER-15—16 (Plaintiffs' reply to delay claim, denying existence of any delay, noting questions about ripeness of raising 2022 election claims in 2019, and arguing that the pendency of a related challenge to AB 5's application to campaign workers would have counseled waiting).

SUMMARY OF THE ARGUMENT

California's disparate treatment of commercial and political solicitation provides a textbook example of unlawful content-based speech discrimination.

The First Amendment protects the traditional act of going door-to-door and engaging residents in efforts to persuade them. It likewise protects the circulation of written material. The dictionary tells us that to "canvass" is "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.COM DICTIONARY, Merriam-Webster, https://www.merriam-webster.com/dictionary/canvass (last visited Aug. 19, 2021). When a worker does so "to solicit orders," and is paid by the demonstration or by the signature on a sales contract, she's subjected to a legal regime that has long been understood to classify her as an independent contractor. But if she does so "to solicit political support," and is paid by the visit or signature on a ballot petition, she's subjected to a legal regime that consigns her to "employee" status—a class of inflexible and often unaffordable worker.

"That is about as content-based as it gets. Because the law favors speech made for [selling consumer products] over political and other speech, the law is a content-based restriction on speech." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality).

Likewise, delivering legislatively favored newspapers or their related publications, such as shoppers' guides, gets one classified under *Borello,* which is well-understood to classify such workers as independent contractors. But delivering ballot petitions or other campaign materials, including reprints of newspaper endorsements, triggers employee status per the ABC test.

As the state cannot carry its burden in justifying this content-based discrimination—it never even attempted to do so below—and considering the ongoing irreparable harm to Plaintiffs in the conduct of their political campaigns, the balance of the equities, and the strong public interest in defending fundamental rights, the Court should not delay in enjoining the state's unlawful discriminatory practice.

STANDARD OF REVIEW

"We review the denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo." *Hall v. United*

States Dep't of Agric., 984 F.3d 825, 835 (9th Cir. 2020) (internal quotation marks omitted).

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits; (2) they are likely to continue suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction serves the public interest. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2009). "When the government is a party, these last two factors merge." *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 975 (9th Cir. 2021) (internal citations omitted).

Under this Court's "sliding scale" approach, "a stronger showing of one element may offset a weaker showing of another." *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020) (internal quotation marks omitted). Plaintiffs may obtain a preliminary injunction if their appeal at least presents a "substantial case on the merits" or "serious legal questions," *Leiva-Perez v. Holder*, 640 F.3d 962, 965-68 (9th Cir. 2011), provided "that the balance of hardships tips sharply in [their] favor," *id.* at 970.

I. PLAINTIFFS ARE LIKELY TO ESTABLISH THAT CALIFORNIA'S CONTENT-BASED DISCRIMINATION AGAINST POLITICAL CANVASSING VIOLATES THE FIRST AMENDMENT.

When seeking a preliminary injunction "in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (internal quotation marks omitted). The government cannot justify its blatant discrimination against political canvassing.

A. The challenged regulations implicate Plaintiffs' First Amendment right to campaign for political causes and candidates.

"The first step of First Amendment analysis is to determine whether the regulation implicates protected expression." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017). Canvassing—not least including Plaintiffs' efforts to engage and persuade voters on political matters—is plainly among the highest forms of protected expression.

"For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the

occupants or to invite them to political, religious, or other kinds of public meetings." *Martin v. Struthers*, 319 U.S. 141 (1943). And "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160 (2002) (footnote omitted). "[T]he cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas." *Id.* at 162.

"Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes." *Martin*, 319 U.S. at 146. And the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted).

The First Amendment's special concern for political campaign speech extends to the circulation of petitions. "The circulation of an initiative petition of necessity involves both the expression of a desire for political

change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). "Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22 (footnote omitted).

The regulatory scheme, on its face, implicates Plaintiffs' political speech. Their workers are subject to the ABC test for all purposes under Cal. Lab. Code § 2775(b)(1), and are thus classified as employees. Yet other workers, who knock on the same doors and walk the same streets to speak to the same people and deliver them papers, are subject to *Borello*, which has long been understood to classify them as independent contractors. The distinctions? Rather than talk politics, these workers perform "in person demonstration[s] and sales presentation[s] of consumer products, including services or other intangibles," Cal. Unemp. Ins. Code § 650(a); Cal. Lab. Code § 2783(e), and rather than circulate petitions, they deliver a *news*paper, Cal. Lab. Code § 2783(h)(1). And not just any newspaper—"a newspaper of general circulation, as defined in Section 6000 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 . . . ." Cal. Lab. Code § 2783(h)(2)(A). That can include a "shoppers' guide." *Id.* It does not include a candidate, party, or civic group's voter guide.

B. The challenged regulations violate the First Amendment by discriminating against Plaintiffs' speech on the basis of its political content and purpose.

"[A]bove 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). "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 v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citations omitted).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. "A law may also be content based if it requires authorities to examine the contents of the message to see if a violation has occurred." *Tschida v. Motl*, 924 F.3d 1297, 1303 (9th Cir. 2019) (citation omitted); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221,

230 (1987) ("official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment[]").

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*, 576 U.S. at 163 (internal quotation marks omitted). It does not matter whether a law does so by "defining regulated speech by particular subject matter," or by "defining regulated speech by its function or purpose." *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-64.

Moreover, laws that are facially neutral are nonetheless considered content-based if they "cannot be justified without reference to the content of the regulated speech, or . . . were adopted by the government because of disagreement with [the speech's] message." *Id.* at 164 (internal quotation marks omitted). If a law is "justified by a concern that stems from the direct communicative impact of speech," *Tschida*, 924 F.3d at 1303 (internal quotation marks and brackets omitted), it is content-based.

Given Section 2783's exemptions, the application of Section 2775's ABC test to Plaintiffs' doorknockers and signature gatherers fits every definition of content-based speech discrimination. Section 2775's application to a doorknocker depends on whether that worker, upon visiting a home, demonstrated or tried to sell consumer products. Upon receiving a misclassification complaint about a canvasser, state investigators would presumably examine the worker's message to see if Section 2783's exceptions applied. Delivering some (but not all) newspapers door-to-door is one thing; delivering ballot petitions or other campaign literature, quite another.

Indeed, the structure of California's worker classification system, a broad rule with numerous exceptions for different speakers, itself signals content-based discrimination. When a scheme "*favors* particular kinds of speech and particular speakers through an extensive set of exemptions . . . . [t]hat means [it] necessarily *disfavors* all other speech and speakers." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1072 (9th Cir. 2020) (citations omitted).

The Supreme Court has consistently rejected the district court's notion that the government might classify speech on a particular

subject or having a particular function or purpose as a discrete economic activity, and thereby, without more, claim that it discriminates only on the basis of economic activity. Otherwise, the government could discriminate against any speaker by the mere artifice of assigning her a different "economic" label. "[A] law's practical effects [on speech] are not merely 'incidental' when it imposes restrictions 'based on the content of speech and the identity of the speaker.'" *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)).

"[T]he courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech." *Barr*, 140 S. Ct. at 2347. In *Sorrell*, the Court struck down a Vermont law that prohibited the sale of information to those who would use it to sell pharmaceuticals—to speak for a particular purpose. The state argued that "its law is a mere commercial regulation," *Sorrell*, 564 U.S. at 566, but the Court disagreed. "It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the

First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 567. But Vermont's law "imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker." *Id.* (citation omitted). "Vermont's law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id.* So, too, is California's law here.

Directly on-point stands the Supreme Court's decision last term in *Barr*, striking down the federal robocall ban's content-based features. Plaintiffs pointed out that by exempting calls made to collect government debt, the robocall ban discriminated against their speech based on its content. The government argued the district court's position here—and lost:

> [T]he Government argues 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. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic.

Barr, 140 S. Ct. at 2347.

In *Barr*, the favored callers were speaking about government debt. Here, the favored canvassers are speaking about "consumer products." Cal. Unemp. Ins. Code § 650(a). But it will not do to simply call the legislature's favorites "direct sales salespersons" and privilege their home visits, any more than it sufficed in *Barr* to label some callers "government debt collectors," and thereby privilege their calls. Likewise, California cannot privilege those delivering "newspaper of general circulation" as defined by Cal. Gov't Code § 6000 by calling them "newspaper carriers," over people who carry other newspapers or publications. At least not without satisfying strict scrutiny.

California's discrimination against political speech in worker classification cannot remotely satisfy strict scrutiny. Indeed, the state never argued that it does. Whatever its interest in addressing "misclassification," the state has no conceivable interest—let alone a compelling one—in treating political canvassers less favorably than commercial ones. A canvasser's purpose in approaching a door, and the subject of her pitch, bears no relationship to the alleged need to "protect" her (by rendering her services unaffordable). Indeed, as the legislature acknowledges, some campaign workers warrant *less*

"protection." *See* Cal. Unemp. Ins. Code § 636 (political campaigns exempted from paying unemployment insurance for temporary workers).

The Court cannot guess at the state's interest in regulating speech, and the state cannot offer post-hoc reasoning, in response to litigation, on that subject. The legislature was required to explain itself on this point. *Desert Outdoor Advert. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) ("ordinance lacks any statement of purpose concerning [city's] interests" first asserted in litigation). Of course, the explanation for the disparate treatment is plain: lobbying by impacted industries, in the best tradition of First Amendment political advocacy—alas in service of an unconstitutional result.

Indeed, the legislature's haphazard exemptions of favored industries "leads to the odd result that purely commercial speech, which receives more limited First Amendment protection than noncommercial speech, is allowed and encouraged, while artistic and political speech is not. This bias in favor of commercial speech is, on its own, cause for the rule's invalidation." *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009) (en banc) (citations omitted). The state "may not conclude

that the communication of commercial information concerning goods and services connected . . . is of greater value than the communication of noncommercial messages." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion) (footnote omitted); *see also Desert Outdoor*, 103 F.3d at 820 (ordinance "unconstitutionally imposes greater restrictions upon noncommercial structures and signs than it does upon commercial structures and signs").

Plaintiffs note that theirs is not the only First Amendment challenge to an aspect of AB 5. In *ASJA*, plaintiffs claim that two of the scheme's other features unlawfully discriminate against speech on the basis of content: a provision that restricts freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists, but not other creators, in working as independent contractors; and the exclusion of videography from an exemption otherwise available to photographers. The *ASJA* plaintiffs have the better argument in their case, but even if they would not succeed, the court below here erred in relying on its earlier decision dismissing *ASJA*.

First, *ASJA* did not involve discrimination favoring commercial over political speech as exists here. All the speech at issue in *ASJA* was treated without regard to its commercial or political nature.

Second, the *ASJA* court found that an earlier version of AB 5 limiting the plaintiffs to 35 submission a year did "not reference any idea, subject matter, viewpoint or substance of any speech; the distinction is based on [whether] the individual providing the service in the contract is a member of a certain occupational classification." *ASJA*, 2020 U.S. Dist. LEXIS 52867, at *22, 2020 WL 1444909, at *7. Whatever the merit of this assertion,[4] it is readily distinguishable here, where the challenged distinctions are based solely on the "subject matter" and "content" of the canvassers' speech. A worker going door-to-door to persuade residents, paid not by the hour but in direct relation to sales or other output, including the performance of the visit itself, is classified as an independent contractor only if her speech involved "in person demonstration and sales presentation of consumer products." Cal. Unemp. Ins. Code § 650(a). Arguably newspaper carriers usually

[4] At a minimum, it overlooks the fact that the contested provision discriminates on the basis of a speaker's function.

have less interaction with people than do petition circulators or canvassers who leave campaign literature, but then any distributor of written material is disfavored when not delivering, specifically, newspapers falling within Gov't Code 6000's definition or their related publications. "[T]he legislature's speaker preference reflects a content preference." *ASJA*, 2020 U.S. Dist. LEXIS 52867, at *23, 2020 WL 1444909 at *7 (quoting *Reed*, 576 U.S. at 157) (other citations and emphasis omitted).

Finally, *ASJA* found that the videography exclusion pertained to a specific medium, and thus, a separate occupation. *Id.* at *8. But the mediums and methods of expression here are the same: canvassing, and the distribution of printed material.[5]

Plaintiffs would also be remiss if they did not mention *Crossley v. California*, 479 F. Supp. 3d 901 (S.D. Cal. 2019), which rejected a different AB 5 challenge brought by signature-gatherers. *Crossley* could have been on-point, but alas, the plaintiffs in that case never argued that AB 5 violates the First Amendment by discriminating against

[5] *ASJA* also rejected a theory that the submission limit and videography exception targeted the press, but Plaintiffs do not claim that the discrimination here singles them out for exercising a press function.

speech based on its content, and the court consequently never addressed a *Reed* claim. The *Crossley* plaintiffs did tuck a First Amendment theory among their 13 different claims, but it complained only generally that AB 5 burdened their speech.

Addressing that generalized grievance, *Crossley* erred in claiming that AB "does not single out any profession or group of professions." *Id.* at 916. The scheme is replete with exclusions for various professions. *See, e.g.*, Cal. Lab. Code §§ 2778 ("professional services" exception), 2780 ("specified occupations" exception), 2783 ("other specific occupations" exception). And contrary to *Crossley*'s view, AB 5 indeed "regulate[s] conduct that is inherently expressive," *Crossley*, 479 F. Supp. 3d at 916, by exempting some forms of speech. *See Pacific Coast*, 961 F.3d at 1072. *Crossley*'s larger point is apt: the fact that AB 5 impacts expressive speech does not, without more, make for a First Amendment claim. But Plaintiffs here do not make *Crossley*'s First Amendment claim.

To the extent the *Crossley* plaintiffs complained of disparate treatment owing to their speech's content, they did so only under an equal protection theory that did "not implicate a fundamental right,"

Crossley, 479 F. Supp. 3d at 912, leading the court to apply only rational basis review. And "under the highly deferential rational basis review standard, the Court decline[d] to judge the 'wisdom, fairness, or logic' of the California state legislature's choices," even though they "may arguably have been arbitrarily designed or the result of political motives." *Id.* at 914.

Plaintiffs would disagree that AB 5 could pass even rational basis review, but that is not the test here. *Strict* scrutiny governs this case. It requires some *compelling* interest to justify the discrimination, hopefully reflected in the legislature's statement of purpose—but none exists. And the state cannot carry its narrow tailoring burden with supposition or rationalizing. Where First Amendment rights are at stake, "there must be *evidence*; lawyers' talk is insufficient." *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir 2009). The state's elevation of commercial over political speech interests can hardly be justified by explaining, as the state did in *Crossley*, that direct sales of consumer products and newspaper deliveries are commercial endeavors.

Plaintiffs are likely to succeed on the merits. At a minimum, they have established a "substantial case for relief on the merits." *Leiva-Perez*, 640 F.3d at 968.

II. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM.

"Irreparable harm is relatively easy to establish in a First Amendment case. A party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury by demonstrating the existence of a colorable First Amendment claim." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019) (internal quotation marks and other punctuation marks omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for preliminary injunction purposes. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted); *CTIA*, 928 F.3d at 851. "When, as here, a party seeks to engage in political speech in an impending election, a delay of even a day or two may be intolerable." *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012) (internal quotation marks omitted).

Mobilize the Message has already abandoned the California market owing to the state's discriminatory worker classification regime. Its client campaigns, including those for Moving Oxnard Forward and the Starr Coalition, are being denied its services. The Oxnard plaintiffs are not gathering signatures for the Oxnard Property Tax Relief Act and will not be able to gather signatures for their other proposed ballot measures. Every day that passes injures their ability to qualify their measures for the ballot, and gain their passage.

This Court's precedent and that of the Supreme Court regarding irreparable harm in the First Amendment context, and discussion of AB 5's continuing impact on Plaintiffs' campaign speech, are absent from the district court's order. Instead, the district court burdened Plaintiffs with demonstrating why they did not file suit immediately upon the offending law's enactment, ignored their explanations, and then offered their alleged "delay" as the *sole* reason for precluding the existence of irreparable harm.

This approach is unmoored from controlling precedent. And not only with respect to the nature of First Amendment rights. "Usually, delay is but a single factor to consider in evaluating irreparable injury; indeed,

courts are loath to withhold relief *solely on that ground*." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (adding emphasis) (internal quotation marks omitted). "[A]lthough a failure to seek speedy relief can imply the lack of a need for such relief, such tardiness is not particularly probative in the context of ongoing, worsening injuries." *Id.* (internal quotation marks omitted). Moreover, "our cases do not require a strong showing of irreparable harm for constitutional injuries." *Id.*

Indeed, the three unpublished district court opinions upon which the district court relied on for its exclusive focus on the alleged "delay" are inapposite. None are constitutional cases, let alone cases involving harm to First Amendment rights. All are trademark matters. And in none was the plaintiffs' delay the sole basis for finding a lack of irreparable harm. In one matter, the plaintiff did "not make a showing that the harm it will suffer as a result of Defendant's allegedly infringing conduct is actual and imminent. Rather, Plaintiff only speculate[d]" about consumer confusion. *AK Metals, LLC v. Norman Indus. Materials*, No. 12cv2595, 2013 U.S. Dist. LEXIS 13793, at *26, 2013 WL 417323 (S.D. Cal. Jan. 31, 2013) (citation omitted). In another, plaintiffs "only provided instances of confusion—not actual, irreparable

harm." *Vital Pharms., Inc. v. PHD Mktg.*, No. 2:20-cv-067452020, U.S. Dist. LEXIS 208394, at *22, 2020 WL 6545995 (C.D. Cal. Nov. 6, 2020). The third case found that "Plaintiff's eighteen day delay in filing the TRO Application is not dispositive . . . the result would not have been different had the TRO Application been filed in a timely manner." *Dahl v. Swift Distrib., Inc.*, No. CV 10-00551, 2010 U.S. Dist. LEXIS 35938, at *11, 2010 WL 1458957 (C.D. Cal. Apr. 1, 2010).

Of course, Plaintiffs here did not delay seeking relief. As they explained in responding to the allegation first raised by the state's opposition, the existence of this *Reed* claim is not readily obvious to everyone (the district court, for one, does not believe it exists). It takes time to learn that one has a valid claim, identify counsel willing and able to bring it, and then proceed. Any claim over Plaintiffs' potential 2022 election activities would have been unripe in 2019. And *Crossley*'s pendency would have counseled waiting before filing a potentially unnecessary lawsuit. In any event, the harm here to First Amendment rights is obvious, ongoing, and "intolerable." *Sanders*, 698 F.3d at 748. Rejecting irreparable harm, on *these* facts, solely on grounds of alleged delay, is untenable.

III. THE PUBLIC INTEREST IN SECURING FIRST AMENDMENT RIGHTS, AND THE BALANCE OF THE EQUITIES, FAVOR GRANTING RELIEF.

"A court must balance the interests of all parties and weigh the damage to each in determining the balance of the equities." *CTIA*, 928 F.3d at 852 (internal quotation marks omitted). Misclassification might cost the state money, but if the state can handle direct sales salespersons and newspaper carriers being classified as independent contractors, it should tolerate the same classification of those who perform the same services with a political angle. On the ledger's other side, Plaintiffs are suffering the loss of fundamental First Amendment rights owing to their speech's noncommercial content.

"The public interest and the balance of the equities favor preventing the violation of a party's constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (internal quotation marks and brackets omitted). In particular, this Court has "consistently recognized the significant public interest in upholding First Amendment principles." *Doe*, 772 F.3d at 583 (internal quotation marks omitted). Indeed, it is "obvious" that "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (citations omitted). "[I]t may be assumed that the

Constitution is the ultimate expression of the public interest." *Id.* (internal quotation marks omitted).

CONCLUSION

The order below should be reversed, and the case remanded with instructions to grant Plaintiffs' motion for a preliminary injunction.

Dated: August 20, 2021

Respectfully submitted,

By: /s/ Alan Gura

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STATEMENT OF RELATED CASE

This case is related to *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, Ninth Cir. No. 20-55734. Both cases challenge aspects of California's AB 5, Cal. Lab. Code § 2775, et seq., as violating the First Amendment right of free speech by discriminating against speech based on its content.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

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Cal. Bus. & Prof. Code § 7451 – Driver independence

Notwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met:

(a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.

(b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.

(c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.

(d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

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. 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 § 2778 – Exception for contract for "professional services"

(a) Section 2775 and the holding in Dynamex do not apply to a contract for "professional services" as defined below, and instead the determination of whether the individual is an employee or independent contractor shall be governed by Borello if the hiring entity demonstrates that all of the following factors are satisfied:

(1) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this paragraph prohibits an individual from choosing to perform services at the location of the hiring entity.

(2) If work is performed more than six months after the effective date of this section and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has the required business license or business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their profession.

(3) The individual has the ability to set or negotiate their own rates for the services performed.

(4) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

(5) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds

themselves out to other potential customers as available to perform the same type of work.

(6) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

(b) For purposes of this section:

(1) An "individual" includes an individual providing services as a sole proprietor or other business entity.

(2) "Professional services" means services that meet any of the following:

(A) Marketing, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the individual or work that is an essential part of or necessarily incident to any of the contracted work.

(B) Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(C) Travel agent services provided by either of the following:

(i) A person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code.

(ii) An individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.

(D) Graphic design.

(E) Grant writer.

(F)

(i) Fine artist.

(ii) For the purposes of this subparagraph, "fine artist" means an individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media.

(G) Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.

(H) Payment processing agent through an independent sales organization.

(I) Services provided by any of the following:

(i) By a still photographer, photojournalist, videographer, or photo editor who works under a written contract that specifies the rate of pay and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity. This subclause is not applicable to a still photographer, photojournalist, videographer, or photo editor who works on motion pictures, which is inclusive of, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos. Nothing in this section restricts a still photographer, photojournalist, photo editor, or videographer from distributing, licensing, or selling their work product to another business, except as prohibited under copyright laws or workplace collective bargaining agreements.

(ii) To a digital content aggregator by a still photographer, photojournalist, videographer, or photo editor.

(iii) For the purposes of this subparagraph the following definitions apply:

(I) "Photo editor" means an individual who performs services ancillary to the creation of digital content, such as retouching, editing, and keywording.

(II) "Digital content aggregator" means a licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer, or photo editor for the purposes of distributing that copyright by way of sublicense or assignment, to the intermediary's third party end users.

(J) Services provided by a freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist who works under a written contract that specifies the rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.

(K) Services provided by an individual as a content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media, who works under a written contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity, the individual does not primarily perform the work at the hiring entity's business location notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.

(L) Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:

(i) Sets their own rates, processes their own payments, and is paid directly by clients.

(ii) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.

(iii) Has their own book of business and schedules their own appointments.

(iv) Maintains their own business license for the services offered to clients.

(v) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.

(vi) This subparagraph shall become inoperative, with respect to licensed manicurists, on January 1, 2022.

(M) A specialized performer hired by a performing arts company or organization to teach a master class for no more than one week. "Master class" means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.

(N) Services provided by an appraiser, as defined in Part 3 (commencing with Section 11300) of Division 4 of the Business and Professions Code.

(O) Registered professional foresters licensed pursuant to Article 3 (commencing with Section 750) of Chapter 2.5 of Division 1 of the Public Resources Code.

(b) Section 2775 and the holding in Dynamex do not apply to the following, which are subject to the Business and Professions Code:

(1) A real estate licensee licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code. If that section is not applicable, then this determination shall be governed as follows:

(A) For purposes of unemployment insurance by Section 650 of the Unemployment Insurance Code.

(B) For purposes of workers' compensation by Section 3200 et seq.

(C) For all other purposes in the Labor Code by Borello. The statutorily imposed duties of a responsible broker under Section 10015.1 of the Business and Professions Code are not factors to be considered under the Borello test.

(2) A home inspector, as defined in Section 7195 of the Business and Professions Code, and subject to the provisions of Chapter 9.3 (commencing with Section 7195) of Division 3 of that code.

(3) A repossession agency licensed pursuant to Section 7500.2 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7500.2 of the Business and Professions Code, if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

Cal. Lab. Code § 2780 - Exception for specified occupations related to creating, marketing, promoting, or distributing sound recordings or musical compositions

(a)

(1) Section 2775 and the holding in Dynamex do not apply to the following occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, and instead the holding in Borello shall apply to all of the following:

(A) Recording artists, subject to the below.

(B) Songwriters, lyricists, composers, and proofers.

(C) Managers of recording artists.

(D) Record producers and directors.

(E) Musical engineers and mixers engaged in the creation of sound recordings.

(F) Musicians engaged in the creation of sound recordings, subject to the below.

(G) Vocalists, subject to the below.

(H) Photographers working on recording photo shoots, album covers, and other press and publicity purposes.

(I) Independent radio promoters.

(J) Any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions.

(2) This subdivision shall not apply to any of the following:

(A) Film and television unit production crews, as such term is commonly used in the film and television industries, working on live or recorded performances for audiovisual works, including still photographers and cinematographers.

(B) Publicists who are not independent music publicists.

(3) Notwithstanding Section 2775, paragraphs (1) and (2), and the holding in Dynamex, the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employers shall govern the determination of employment status in all events.

(4) The following shall apply to recording artists, musicians, and vocalists:

(A) Recording artists, musicians, and vocalists shall not be precluded from organizing under applicable provisions of labor law, or otherwise exercising rights granted to employees under the National Labor Relations Act (29 U.S.C. Sec. 151 et seq.).

(B)

(i) Musicians and vocalists who are not royalty-based participants in the work created during any specific engagement shall be treated as employees solely for purposes of receiving minimum and overtime wages for hours worked during the engagement, as well as any damages and penalties due to the failure to receive minimum or overtime wages. Any such wages, damages, and penalties owed under this subparagraph shall be determined according to the applicable provisions of this code, wage orders of the Industrial Welfare Commission, or applicable local laws.

(ii) "Royalty-based participant" means an individual who has either negotiated for the collection or direct administration of royalties derived from the exploitation of a sound recording or musical composition, or is entitled to control, administer or collect royalties related to the exploitation of a sound recording or musical composition as a co-author or joint owner thereof.

(C) In all events, and notwithstanding subparagraph (B), the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employers shall govern the determination of employment status.

(b)

(1) Section 2775 and the holding in Dynamex do not apply to a musician or musical group for the purpose of a single-engagement live performance event, and instead the determination of employee or independent contractor status shall be governed by Borello, unless one of the following conditions is met:

(A) The musical group is performing as a symphony orchestra, the musical group is performing at a theme park or amusement park, or a musician is performing in a musical theater production.

(B) The musical group is an event headliner for a performance taking place in a venue location with more than 1,500 attendees.

(C) The musical group is performing at a festival that sells more than 18,000 tickets per day.

(2) This subdivision is inclusive of rehearsals related to the single-engagement live performance event.

(3) As used in this subdivision:

(A) "Event headliner" means the musical group that appears most prominently in an event program, advertisement, or on a marquee.

(B) "Festival" means a single day or multiday event in a single venue location that occurs once a year, featuring performances by various musical groups.

(C) "Musical group" means a solo artist, band, or a group of musicians who perform under a distinct name.

(D) "Musical theater production" means a form of theatrical performance that combines songs, spoken dialogue, acting, and dance.

(E) "Musician" means an individual performing instrumental, electronic, or vocal music in a live setting.

(F) "Single-engagement live performance event" means a stand-alone musical performance in a single venue location, or a series of performances in the same venue location no more than once a week. This does not include performances that are part of a tour or series of live performances at various locations.

(G) "Venue location" means an indoor or outdoor location used primarily as a space to hold a concert or musical performance. "Venue location" includes, but is not limited to, a restaurant, bar, or brewery that regularly offers live musical entertainment.

(c) Section 2775 and the holding in Dynamex do not apply to the following, and instead, the determination of employee or independent contractor status shall be governed by Borello:

(1) An individual performance artist performing material that is their original work and creative in character and the result of which depends

primarily on the individual's invention, imagination, or talent, given all of the following conditions are satisfied:

(A) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both as a matter of contract and in fact. This includes, and is not limited to, the right for the performer to exercise artistic control over all elements of the performance.

(B) The individual retains the rights to their intellectual property that was created in connection with the performance.

(C) Consistent with the nature of the work, the individual sets their terms of work and has the ability to set or negotiate their rates.

(D) The individual is free to accept or reject each individual performance engagement without being penalized in any form by the hiring entity.

(2) "Individual performance artist" shall include, but is not limited to, an individual performing comedy, improvisation, stage magic, illusion, mime, spoken word, storytelling, or puppetry.

(3) This subdivision does not apply to an individual participating in a theatrical production, or a musician or musical group as defined in subdivision (b).

(4) In all events, notwithstanding paragraph (1), the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employer shall govern the determination of employment status.

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:

(a) A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code or a person who provides underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries.

(b) A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code. Nothing in this subdivision shall circumvent, undermine, or restrict the rights under federal law to organize and collectively bargain.

(c) An individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, landscape architect, engineer, private investigator, or accountant.

(d) A securities broker-dealer or investment adviser or their agents and representatives that are either of the following:

(1) Registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority.

(2) Licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.

(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.

(f) A manufactured housing salesperson, subject to all obligations under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, including all regulations promulgated by the Department of Housing and Community Development relating to manufactured home salespersons and all other obligations of manufactured housing salespersons to members of the public.

(g) A commercial fisher working on an American vessel.

(1) For the purposes of this subdivision:

(A) "American vessel" has the same meaning as defined in Section 125.5 of the Unemployment Insurance Code.

(B) "Commercial fisher" means a person who has a valid, unrevoked commercial fishing license issued pursuant to Article 3 (commencing with Section 7850) of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code.

(C) "Working on an American vessel" means the taking or the attempt to take fish, shellfish, or other fishery resources of the state by any means, and includes each individual aboard an American vessel operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, including maintaining the vessel or equipment used aboard the vessel. However, "working on an American vessel" does not apply to anyone aboard a licensed commercial fishing vessel as a visitor or guest who does not directly or indirectly participate in the taking.

(2) For the purposes of this subdivision, a commercial fisher working on an American vessel is eligible for unemployment insurance benefits if they meet the definition of "employment" in Section 609 of the

Unemployment Insurance Code and are otherwise eligible for those benefits pursuant to the provisions of the Unemployment Insurance Code.

(3)

(A) On or before March 1, 2021, and each March 1 thereafter, the Employment Development Department shall issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. This report shall include, but not be limited to, all of the following:

(i) Reporting the number of commercial fishers who apply for unemployment insurance benefits.

(ii) The number of commercial fishers who have their claims disputed.

(iii) The number of commercial fishers who have their claims denied.

(iv) The number of commercial fishers who receive unemployment insurance benefits.

(B) The report required by this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

(4) This subdivision shall become inoperative on January 1, 2023, unless extended by the Legislature.

(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 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.

(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) “Carrier” means a person who effects physical delivery of the newspaper to the customer or reader.

(3) This subdivision shall become inoperative on January 1, 2022, unless extended by the Legislature.

(i) An individual who is engaged by an international exchange visitor program that has obtained and maintains full official designation by the United States Department of State under Part 62 (commencing with Section 62.1) of Title 22 of the Code of Federal Regulations for the purpose of conducting, instead of participating in, international and cultural exchange visitor programs and is in full compliance with Part 62 (commencing with Section 62.1) of Title 22 of the Code of Federal Regulations.

(j) A competition judge with a specialized skill set or expertise providing services that require the exercise of discretion and independent judgment to an organization for the purposes of determining the outcome or enforcing the rules of a competition. This includes, but is not limited to, an amateur umpire or referee.

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.