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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,

Defendant.

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Judge: Hon. Virginia A. Phillips
Hearing Date: July 26, 2021
Time: 2:00 p.m.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

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 treat her as an independent contractor. 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 full and heavy weight of California's pervasive employment regulations fall upon the visitor's relationship with her client.

Perhaps the cosmetics and kitchen-wares industries could afford these regulations, though the direct-sales lobby convinced the legislature to spare them from that worry. But 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. This Court should immediately halt the damage being done to Californians' fundamental right to conduct and participate in the democratic process.

STATEMENT OF FACTS

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. Labor Code § 3700; and sick leave, Cal. Labor Code § 246. Employers also face additional payroll expenses in hiring employees, and may also be more readily susceptible to tort claims arising from their employees'

conduct, generating 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. Labor 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. 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," "[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. Labor 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 anticipated legal challenges to its new worker-classification scheme, and chose a remedy in the event that any part of the scheme was 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. Labor 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. Labor 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, the Labor Code Private Attorneys General Act of 2004 enables employees to sue alleged employers to recover civil penalties for Labor Code violations. Cal. Labor 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. Labor 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. Greiss Decl., ¶ 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. *Id.* ¶¶ 2, 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. *Id.* ¶ 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. *Id.* ¶ 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. *Id.* ¶ 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. Starr Decl., ¶¶ 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. *Id.* ¶ 3.

MOF and Starr Coalition have historically hired signature gatherers as independent contractors. *Id.* ¶¶ 4, 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. *Id.* ¶ 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. MOF and Starr Coalition do not tell their signature gatherers when or where to gather signatures. *Id.* ¶ 5.

Plaintiffs' doorknockers and signature gatherers are expected to use their improvisational, conversational and persuasive skills to "sell" candidates and ballot measures. Greiss Decl., ¶ 5; Starr Decl., ¶ 5. Pay for Plaintiffs' door knockers and signature gatherers is negotiable. Greiss Decl., ¶ 3; Starr Decl., ¶ 6. 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. Greiss Decl., ¶ 4; Starr Decl., ¶ 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. Greiss Decl., ¶ 8; Starr Decl., ¶ 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. Greiss Decl., ¶ 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. Starr Decl., ¶ 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. 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.* ¶ 10.

Starr Coalition intends to hire MTM to gather signatures for the Oxnard Property Tax Relief Act and its other measures. *Id.* ¶ 11. MTM intends to accept that work, just as it intends to provide other campaigns with doorknocking and signature-gathering services in California. Greiss Decl., ¶ 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. Starr Decl., ¶ 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. Greiss Decl., ¶ 11; Starr Decl., ¶ 12.

Absent paid signature gatherers, Starr Coalition must rely on volunteers, including the volunteer efforts of its otherwise-employed principals to gather signatures. 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. Starr Decl., ¶ 13.

SUMMARY OF ARGUMENT

California's disparate treatment of commercial and political solicitation provides a textbook example of unlawful content-based speech discrimination. The traditional act of going door-to-door and engaging residents in an effort to persuade them is pure First Amendment protected speech, regardless of its content. So is circulating political petitions. 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 June 23, 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 an independent contractor under California law. But if she does so "to solicit political support," and is paid by the visit or signature on a ballot petition, that same law labels her an employee—a class of inflexible and often unaffordable worker.

Likewise, delivering newspapers to the home gets one classified as an independent contractor. Delivering ballot petitions or other campaign materials to the home, including reprints of a newspaper endorsement, triggers employee status.

As the state cannot carry its burden in justifying this content-based discrimination, 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.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits; (2) they are suffering irreparable harm

owing to the state's unconstitutional discrimination; (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). The Ninth Circuit "follows a 'sliding scale' approach, in which a stronger showing of one element may offset a weaker showing of another." *Doe v. Trump*, 984 F.3d 848, 870 (9th Cir. 2020) (internal quotation marks omitted).

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.

The regulatory scheme, on its face, implicates Plaintiffs' political speech. Their workers are subject to the ABC test for all purposes under Cal. Labor 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 classified as

independent contractors per *Borello*. 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. Unempl. Ins. Code § 650(a); Cal. Labor Code § 2783(e), and rather than circulate petitions, they deliver *news*papers, Cal. Labor Code § 2783(h)(1).

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 just about 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, the state's investigators would presumably examine the worker's message to see if Section 2783's exceptions applied. Delivering 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).

California's discrimination against political speech in worker classification cannot remotely satisfy strict scrutiny. Whatever the state's 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 Advertising 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 acknowledge that this Court has rejected a content-based First Amendment challenge to California's worker classification regime in two different contexts. *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. 19-cv-10645-PSG, 2020 WL 1444909 (C.D. Cal. Mar. 20, 2020) ("*ASJA*"). The ASJA claimed that two of the scheme's features created unlawful content-based discrimination: a since-repealed provision that barred freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists working as independent contractors, but not other creators, from selling more than 35 "content submissions;" and the exclusion of videography from an exemption otherwise available to photographers. But that decision is readily distinguishable.

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 the 35-submission limit 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." *Id.* at *7 (citation omitted). "There is no indication that [the 35-submission limit] reflects preference for the substance or content of what certain speakers have to say, or aversion to what other speakers have to say. The justification for these distinctions is proper categorization of an

employment relationship, unrelated to the content of speech." *Id.* at *8 (citations omitted).

Here, quite unlike *ASJA*, the distinctions are based solely on the 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. Unempl. Ins. Code § 650(a). The sole point of distinction between these allegedly different occupational classifications is the content of their speech. Arguably newspaper carriers usually 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. "[T]he legislature's speaker preference reflects a content preference." *ASJA*, 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.[1]

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 speech based on

[1] *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.

its content, and the court consequently never addressed a *Reed* claim. The *Crossley* plaintiffs did include 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* 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." 479 F. Supp. 3d at 916. The scheme is replete with exclusions for various professions. *See, e.g.*, Cal. Labor 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. But *Crossley*'s larger point is apt. The fact that AB 5 impacts expressive speech does not, without more, make for a First Amendment claim. And in any event, 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. The state's arguments had "shown that there is some 'reasonable basis' for these classifications." *Id.*

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.

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 their other proposed ballot measures. Every day that passes injures their ability to qualify their measures for the ballot, and gain their passage.

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 other hand, Plaintiffs are suffering the loss of fundamental First Amendment rights.

"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, the Ninth Circuit has "consistently recognized the significant public interest in upholding First Amendment principles." *Doe*, 772 F.3d at 583 (internal quotation marks omitted).

CONCLUSION

The Court should grant Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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