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)

REPLY BRIEF

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INTRODUCTION

The State of California wants this Court to know that AB 5 is a generally applicable labor law. In describing AB 5, the state's brief repeats the words "generally applicable" no fewer than sixteen times—on average, nearly every other page. Some permutation of "generally applicable state labor law" consumes 60 of the brief's 7,896 words, nearly 1% of the entire word count.

But repeating something over and over again doesn't make it true. Perhaps more importantly, nor does repetition make a true thing relevant in a given context.

It simply does not matter whether AB 5 is a "generally applicable labor law" (though Plaintiffs have their doubts), as a facial matter or in the context of other disputes. "An as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a *particular person* under *particular circumstances* deprived *that person* of a constitutional right." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (citation omitted) (emphasis added). And the fact remains that in the context of *this* as-applied challenge—not in the context of a challenge based on different distinctions among truckers or freelance

journalists or others—*here*, as between people who canvass about one topic rather than another, and as between people who deliver one sort of publication rather than another, AB 5 directly and explicitly discriminates against speech based on its content.

Just two days ago, this Court rejected a First Amendment content-based discrimination challenge to a different set of AB 5's distinctions. *Am. Soc'y of Journalists & Authors v. Bonta*, No. 20-55734, 2021 U.S. App. LEXIS 30020 (9th Cir. Oct. 6, 2021) ("*ASJA*"). But in explaining what that case purportedly lacked in terms of content-based discrimination, this Court practically described this case. Far from creating a special AB 5 immunity from all future as-applied First Amendment challenges, *ASJA* indicated where the lines in such cases are drawn. The regulatory scheme is vast; not all challenges to its application could prevail. This one should.

The state would correctly claim that *ASJA* provides a roadmap for the decision of this case. But the destination is reversal.

SUMMARY OF ARGUMENT

Having driven home the point that AB 5 is "generally applicable," the state rests on the only-sometimes correct notion that the scheme distinguishes among occupational classifications, not speech. Perhaps in most cases, perhaps in this Court's other AB 5 cases, but not here.

In this particular as-applied challenge, the relevant occupational classifications are defined solely by the content of a worker's speech. If a worker speaks differently, about different things, the state classifies her differently. Under AB 5, a worker who speaks about "consumer products," Cal. Unempl. Ins. Code § 650, is classified one way; a worker who speaks about politics, another. A worker who delivers a newspaper of the sort defined in Cal. Gov't Code § 6000 is classified one way; a worker who delivers other papers, is classified another.

The state cannot escape the First Amendment consequences of treating speech differently based on its content by the artifice of claiming that it only discriminates between the different *labels* it has assigned to different speech. The labels are irrelevant. The content-based speech discrimination exists, and it burdens the state with proving that its discrimination satisfies strict scrutiny.

Yet the state relies exclusively on its semantic, label-chasing arguments. Nowhere has it even attempted to argue that classifying canvassers based on the subject of their sales pitch, or that classifying newspaper carriers based on the type of paper they carry, could survive strict scrutiny. Nor does the state attempt to defend its indefensible preference of commercial over political speech—an automatic invalidator per *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009) (en banc). If strict scrutiny applies to the state's discrimination against workers based on their speech's content —and it does—the state effectively concedes that Plaintiffs will succeed on the merits.

A colorable First Amendment violation would establish irreparable harm. Plaintiffs have much more than that. Precedent forecloses the notion that harm caused by unlawfully burdening election speech is somehow acceptable if the plaintiffs did not challenge the offending law three years before the election. That the state's discriminatory conduct irreparably harms Plaintiffs by burdening their election speech is obvious. Nor are the other preliminary injunction factors in doubt.

The district court's order should be reversed, and the case remanded for entry of a preliminary injunction.

ARGUMENT

I. THE CHALLENGED STATUTORY TEXT SPELLS OUT CONTENT-BASED SPEECH DISCRIMINATION.

The state has figured out how to overcome the problem posed by AB 5's content-based speech distinctions: pretend they don't exist. "AB 5's plain terms confirm that there is no content-based restriction," Appellee's Br. 17, only if one ignores the content-based restrictions, or papers over them with euphemistic descriptions.

In contrast to its incessant repetition that AB 5 is "generally applicable," the state fails to quote even once the defining content-based terms of the challenged exemptions, preferring instead to cloak these classifications with vague generalities. For example, the state will not directly acknowledge that Cal. Lab. Code § 2783 exempts canvassers who engage in the "demonstration and sales presentation of consumer products, including services or other intangibles." Cal. Unempl. Code § 650(a). The state only offers that the exemption is triggered "when certain conditions are met." Appellee's Br. 8.

What are the "certain conditions" that Plaintiffs' workers lack?

They meet all of Section 650's conditions—except for the subject of their speech. They knock on doors to speak with people, they are not

paid by the hour but by the milestone, they agree to be independent contractors—but they do not discuss, specifically, "consumer products." And when Plaintiffs' workers "effect physical delivery" of reading material "to the . . . reader," Cal. Lab. Code § 2783(h)(2)(D), the only unmet condition is that the materials be "newspaper[s] of general circulation" under Gov't Code § 6000, or some extensions of such papers, such as a "shopper's guide[s]." Cal. Lab. Code § 2783(h)(2)(A). If only they delivered the type of publication favored in the statutory text, these workers would enjoy an exemption from AB 5's onerous rules.

The statutory text, including the parts the state glosses over, defeats the claim that "[n]one of the challenged exclusions hinge on the *content* of any message." Appellee's Br. 22 (citation omitted). They do. And if the legislature were to amend the relevant statutes, substituting "political campaigns" for "consumer products" and "voter guide" for "newspaper of general circulation" and its related publications, Plaintiffs wouldn't be here—but the direct sales and newspaper industries doubtless *would be*, and they would raise the same content-based speech discrimination arguments.

ASJA anticipated the problem with the state's claim that "on its face, section 2783 does not apply based on the message conveyed, but instead on the *occupation* in which the worker is employed, i.e., sale of consumer products or distribution of newspapers." Appellee's Br. 22. To be sure, some occupational distinctions are just that: occupational distinctions. But this Court warned that "[a] legislature could conceivably define services or occupations so granularly that a court could isolate the speech's communicative intent as a defining distinction." *ASJA*, 2021 U.S. App. LEXIS 30020, at *17 n.9.

That is the case here, where focusing on the broader descriptive labels the state assigns to people who speak differently amounts to an exercise in semantics, not law. The state's argument can be reduced to the following syllogism:

1. Canvassers who speak about "consumer products" are "direct sales salespersons," but canvassers who work on the same terms yet instead speak about politics are not so labeled; those who deliver particular newspapers or related publications are "newspaper carriers," and those deliver other printed material, are not;

2. AB 5 thus classifies different "*occupations*" differently, not speech according to its content, Q.E.D.

But for *ASJA*, the state's logic would allow it to engage in unlimited content-based speech discrimination simply by assigning different labels to people according to their speech's content. It could classify Axl Rose as a "rock star" and treat him differently on that account than it would treat "opera singer" Plácido Domingo, although both are vocalists who sell recorded music and perform concerts. The state might argue that different rules *should* apply to these performers, that "rock" and "opera" are in some sense different industries targeting (mostly) different audiences. But as *ASJA*'s granularity note confirms, such a scheme would sound in content-based speech discrimination, and the state would thus carry a heavy strict scrutiny burden to justify it. For example, when a law "focuses on whether the caller is speaking about a particular topic," it does not turn "on whether the caller is engaged in a particular economic activity." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2347 (2020) (plurality).

ASJA thus reflects the understanding that "'the fact that a distinction is speaker based' does not 'automatically render the

distinction content neutral.'" *Barr*, 140 S. Ct. at 2347 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015)); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011). "Indeed, the Court has held that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* (quoting *Reed*, 576 U.S. at 170); *Turner Broad. Sys., Inc. v. FCC*, 512 U. S. 622, 658 (1994).

The legislature's definition of "direct sales salespersons" reflects its preference for demonstrations and sales presentations of consumer products. The legislature's definition of "newspaper carriers and distributors" reflects its preference for "newspaper[s] of general circulation, as defined in Section 6000 of the Government Code" and their various extensions and substitutions. Cal. Lab. Code § 2783(h)(2)(A).

If anything else distinguishes these allegedly different occupations from Plaintiffs' doorknockers and signature gatherers, the state has not explained what that might be. That omission is critical, because "rules understandably vary based on the nature of the work performed or the industry in which the work is performed." *ASJA*, 2021 U.S. App. LEXIS

30020, at *12-*13. Courts are less understanding when the rules vary based on the content of speech. "[E]conomic regulations can still implicate the First Amendment when they are not 'generally applicable' but instead target certain types of speech and thereby raise the specter of government discrimination." *Id.* at *13.

Plaintiffs acknowledge that in the context of *ASJA*'s challenge, and "in another context," *id.* at *16, dealing with AB 5's impact on the trucking industry, this Court found AB 5 to be generally-applicable. *California Trucking Assn. v. Bonta*, 996 F.3d 644 (9th Cir. 2021), *cert. petition pending*, No. 21-194 (filed Aug. 9, 2021). But neither of those cases dealt with occupational classifications that are so precisely defined by the subject-matter of workers' speech. Plaintiffs' putative workers need only change their topic of a home visit, or the publication they deliver, to gain *Borello*'s benefits. Some of them might well have done so.[1]

[1] The state's continued grasping at *Crossley v. California*, 479 F. Supp. 3d 901 (S.D. Cal. 2019) is misplaced. *Crossley* might have had a First Amendment challenge to AB 5, Appellee's Br. 24, but it was just a generalized grievance, not a content-based discrimination challenge. Appellants' Br. 33-34. To the extent *Crossley* plaintiffs raised the "consumer products" and Gov't Code § 6000 newspaper exemptions, they did so only in the context of a rational basis argument. *Id.* at 34-

ASJA repeatedly acknowledged the fact-specific nature of whether and when a regulation crosses the line from generally regulating economic activity, to focusing primarily on speech distinctions. In addition to warning of excessively "granular" speech-focused classifications, this Court upheld an exemption that discriminates against freelance journalists because "its applicability does not turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged." *ASJA*, 2021 U.S. App. LEXIS 30020, at *16. Here, in contrast, the exempt and non-exempt workers provide the same service (door-to-door pitches and other direct sales on a non-hourly basis, delivery of printed material), and fit within the same dictionary definition of their industry (canvassing). The legislative distinctions are highly artificial, and defined by the content of speech—"consumer products" and Gov't Code § 6000 newspapers and their related publications. These are not traditional "'speaking' profession[s]." *Id.* at *17. These are the highly-specific reflections of legislative speech preferences.

35. The *Crossley* plaintiffs had the right facts, but made none of the arguments made here.

While Plaintiffs believe that *ASJA*'s freelance journalists sustained speech-based discrimination, there is no question that the classifications here are far more "granular" in addressing the content of speech. The offending statutory text here directly addresses the subject matter of speech and the type of publication that distinguishes people whose work is otherwise indistinguishable. "That is about as content-based as it gets." *Barr*, 140 S. Ct. at 2346.

And the state has no answer to *Barr*, which is directly on-point. *Barr* found that a "law favor[ing] speech made for collecting government debt over political and other speech . . . is a content-based restriction on speech." *Id.* at 2346. Here the law favors canvassing for "consumer products" and the delivery of particularized publications. In *Barr*, the government offered, as the state does here, Appellee's Br. 28-29, that the law was not content-based because it dealt with different speakers. The argument went nowhere—and not just because the law specifically addressed speech, not speakers. *Barr* explained that would be a distinction without a difference, since speaker discrimination can reflect speech discrimination. *Id.* at 2347. And with respect to the exemptions

here, what else defines the different occupational classifications, if not, and very specifically, the workers' different speech.

II. THE CHALLENGED PROVISIONS ARE NOT MERE FORMS OF ECONOMIC REGULATION THAT INCIDENTALLY BURDEN SPEECH, BUT RATHER TARGET SPEECH AND SPEAKERS DIRECTLY.

In its defense, the state claims that its discrimination sounds in economic regulation, throwing in a misplaced political argument painting AB 5 in rosy policy terms. "The sole consequence of AB 5 is the classification of a worker as an independent contractor or as an employee, with the attendant protections under state labor law." Appellee's Br. 18-19. A lengthy footnote suggests that the distinction may not matter, because notwithstanding the newspaper industry's fierce lobbying for a *Borello* exemption valued at a minimum $80 million per year, Appellants' Br. 8, some carriers still wind up classified as employees. Appellee's Br. 19 n.4. Because "the exemptions on which Plaintiffs focus *merely* determine whether a particular occupation is subject to the ABC test or the *Borello* standard . . . cases involving the prohibition on protected activities are inapposite." Appellee's Br. 19 (emphasis added).

To be sure, whether the ABC test gets one classified as an employee "with attendant protections under state labor law" or, as in the possible case of Plaintiffs' putative workers, classified as unemployed or Arizonan, is a matter of some dispute. But politics aside (as they must be here), the ABC test plainly limits workers' choices as to how they wish to work, and Defendant has not contested the plain fact that Plaintiffs are short of essential help.

More to the point, every discrimination case—including this content-based speech discrimination case—rests on the theory that the legal relationships between individuals and the state matter. It makes all the difference to people whether the state subjects them to one set of laws or another—one set of laws requiring one form of proof to maintain essential freedoms, or a different set of laws requiring a different form of proof to maintain those freedoms. It makes a difference to enforcement officials as well, and to judges and other adjudicators. If, in the end, it did not matter whether workers are classified under one test or another, the state would not be defending against this case, and perhaps, nobody would care whether AB 5 had any exemptions or who received them. But the applicable classification tests are of paramount

importance—to the state, in seeking to enforce the differences that AB 5 establishes; and to individuals, who must worry about compliance with state law.

Here, the state directly burdens some people, but not others, owing to the content of their speech. Although it claims that "cases involving the prohibition on protected activities are inapposite" because its regulations are allegedly less severe, Appellee's Br. 19, "[t]he Court has recognized that the 'distinction between laws burdening and laws banning speech is but a matter of degree' and that the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell*, 576 U.S. at 565–66 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Id.* at 566 (citations omitted).

Should Plaintiffs be thankful that their speech is not formally banned? As a practical matter, it is. They can no more afford the state's regulation than can the direct sales and newspaper industries. But only the latter obtained a break. Plaintiffs' workers perform the same functions—they just deliver different content. Regardless of whether

the state believes that this burden is severe, the challenged regulation functions by discriminating on the basis of speech's content, and that function triggers strict scrutiny.

III. THAT PLAINTIFFS SUFFER IRREPARABLE HARM WITH EACH DAY THAT THEY CANNOT ENGAGE IN THE 2022 CAMPAIGN IS OBVIOUS.

The state's delay arguments in opposing irreparable harm are tenuous at best. The existence of a colorable First Amendment claim, particularly with respect to election speech, establishes irreparable harm. That is not seriously in dispute. Appellants' Br. 36.

No, there was no way for Plaintiffs to predict their situation heading into the 2022 election back in 2019. But nowhere is it written that Plaintiffs must challenge a law immediately upon its enactment or forever be precluded from irreparable harm when circumstances begin to point that way.

There was no delay here.

Moreover, it bears repeating that even where delay exists, "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).

Yet to the string of irrelevant delay decisions noted by the District Court, the state now adds some more. Both *Miller for and on behalf of N.L.R.B. v. Cal. Pac. Medic. Ctr.*, 991 F.2d 536 (9th Cir. 1993) and *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076 (3d Cir. 1984) involved unfair labor complaints and the National Labor Relations Board's subsequent delay in requesting injunctive relief *after* a charge had already been filed. The NLRB had already become embroiled in legal disputes, but still chose to wait to file for injunctive relief. This Court, and the Third Circuit, were also upset with the Board's overall slowness. *See Miller*, 991 F.2d at 544 ("[NLRB] proceedings are notorious for their 'glacial speed in adjudicating unfair labor practices'"); *Kobell*, 731 F.2d at 1102 (Aldisert, J., concurring) (decrying that NLRB "decelerated from its usual snail's pace"). Likewise inapplicable, *Lydo Enter., Inc., v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) involved a *five-year* delay in seeking to enjoin a zoning ordinance.

That Plaintiffs are irreparably harmed by a discriminatory worker classification regime that effectively silences their election speech is plain.

IV. THE REMAINING *WINTER* FACTORS FAVOR INJUNCTIVE RELIEF.

The state offers an odd argument to the effect that as soon as a new law is enacted, it becomes the "status quo," and the status quo must only reluctantly be touched by a preliminary injunction.

This is not the law. The state's primary precedent for offering this rule, *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112 (9th Cir. 2008), *rejects* the status quo's relevance, and the artificial mandatory/prohibitory distinction. "Maintaining the status quo is not a talisman." *Id.* at 1116.

> It must not be thought . . . that there is any particular magic in the phrase 'status quo.' The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . . The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Id. at 1116 (internal quotation omitted).

The state also paints this lawsuit in starkly ideological terms over the desirability of AB 5's so-called worker protections, but there is not one word in its brief, let alone in the record, explaining what thought (if any) the legislature gave to these challenged exemptions. Especially

where fundamental rights are concerned, the Court cannot simply assume that the legislature thought of everything, worked hard, and came to an ideal or even constitutional result. Nor can this Court adjudicate AB 5's political wisdom.

If Plaintiffs can cite no *specific* "authority" as to the classification status of doorknockers and signature-gatherers, Appellee's Br. 33, of course, neither does the state. The reason is obvious: *Borello* is authoritative enough—no additional authority is required—and perhaps for that reason, the state never apparently challenged these workers' classification as independent contractors under that test. The notion that Plaintiffs "have failed to show that the application of either test will have any effect on them," Appellee's Br. 33, is specious. Plaintiffs are refraining from speaking because they cannot afford the risk inherent in a regime that the state, in its next breath, swears is needed to radically alter worker classification on a large scale. Indeed, the state claims that an injunction would injure *it*, because it would not be able to classify as many workers as employees.

The state cannot wordsmith its way around a constitutional violation. The idea that vague notions of legislative dignity or

regulatory interests trump fundamental First Amendment rights is unsound. *See* U.S. Const. art. VI, cl. 2. Again, the state's reliance on *Golden Gate*, this time for the notion that "responsible public officials" know best, Appellee's Br. 36, is misplaced. A court could conclude that an ordinance does not serve the public interest "if it were obvious that the Ordinance was unconstitutional . . . ." *Golden Gate*, 512 F.3d at 1127. In any event, whatever "responsible public officials" may decide, in our legal system, *courts* decide whether those legislative decisions are constitutional. And when it appears that legislative enactments are unconstitutional, and are harming the enjoyment of fundamental rights, the policy opinions of those who enacted the unconstitutional law cannot override the imperative to enforce the Constitution.

CONCLUSION

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

Dated: October 8, 2021

Respectfully submitted,

By: /s/ Alan Gura

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