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8

9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
11

12	MOBILIZE THE MESSAGE, LLC;	} Case No 2:21-cv-05115 VAP (JPRx)
13	MOVING OXNARD FORWARD,	
14	INC.; and STARR COALITION	
15	FOR MOVING OXNARD	
16	FORWARD,	} PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
17	Plaintiffs,	
18	v.	
19	ROB BONTA, in his official	
20	capacity as Attorney General of	} Date: Sept. 20, 2021
21	California,	
22	Defendant.	
23		
24		} Time: 2:00 p.m.
25		} Courtroom: 8A
26		} Judge: The Honorable
27		Virginia A. Phillips
28		} Trial Date: Not set
		} Action Filed: 6/23/2021

22 PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
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1 INTRODUCTION

2 Defendant's motion is at best premature. At this time, the Ninth
3 Circuit has exclusive jurisdiction over all matters "inextricably bound up
4 with" this Court's order denying Plaintiffs' preliminary injunction
5 motion, "from which appeal is taken, including the merits of the case."
6 *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d
7 676, 680 (9th Cir. 1990) (internal quotation marks omitted). While this
8 Court retains jurisdiction over other aspects of this case, Defendant's
9 arguments are "inextricably bound up with" the pending appeal.

10 Defendant's introduction plainly reveals the jurisdictional defect.
11 "[T]his Court recognized" Defendant's renewed contention that AB 5 is a
12 generally applicable economic regulation "in denying Plaintiffs' request
13 preliminary injunctive relief;" and "this Court concluded," as Defendant
14 reasserts now, "that the limitations Plaintiffs challenge are based on
15 occupation." Def. Mem., Dkt. 28-1, at 1. Indeed, there is nothing here
16 that is not "inextricably bound up with" this Court's previous order, Dkt.
17 24, which Defendant cites eight times in arguing for dismissal. But that
18 order is now on appeal pending *de novo* review of its legal conclusions,
19 which divests this Court of jurisdiction over these issues.

20 The current motion to dismiss should be held in abeyance, or denied
21 without prejudice pending the appeal's outcome. But should this Court
22 determine that it has jurisdiction to hear Defendant's motion and
23 decline to stay the proceedings, it should deny the motion. The
24 challenged provisions classify speakers according to the content of their
25 speech, and privilege commercial speech over political speech. The
26 challenged provisions are thus subject to strict scrutiny. And under any
27 level of heightened scrutiny, Defendant would bear an evidentiary
28 burden that he cannot and does not meet on the pleadings.

1 BACKGROUND

2 *The Regulatory Regime*

3 California generally classifies workers as employees or as
 4 independent contractors under either of two regimes: an “ABC Test,” or
 5 the multifactor test set forth in *S.G. Borello & Sons, Inc. v. Dep’t of*
 6 *Industrial Relations*, 48 Cal. 3d 341 (1989). Cal. Lab. Code § 2775, et
 7 seq. (“AB 5”); Complaint, Dkt. 1, ¶¶ 13-16. The ABC Test governs absent
 8 a statutory exemption applying *Borello*. Complaint ¶¶ 15, 16.¹
 9 “Misclassifying” an employee as an independent contractor carries
 10 significant criminal and civil penalties. *Id.* ¶¶ 25-26.

11 *Borello*’s “foremost” factor is “the degree of a hirer’s right to control
 12 how the end result is achieved.” *Ayala v. Antelope Valley Newspapers,*
 13 *Inc.*, 59 Cal. 4th 522, 528 (2014) (citing *Borello*, 48 Cal. 3d at 350).
 14 Complaint ¶ 13. The ABC Test presumes that workers are employees
 15 unless the hirer establishes not only that the worker is free of its
 16 control, but that the work at issue is outside its usual course and scope
 17 of business, and is performed within the worker’s independently
 18 established trade, occupation, or business. Cal. Lab. Code § 2775(b)(1);
 19 Complaint ¶¶ 14-15.

20 “Direct sales salesperson[s]” are *Borello*-exempted. Cal. Labor Code §
 21 2783(e). To qualify, such workers must be “engaged in the trade or
 22 business of primarily in person demonstration and sales presentation of
 23 consumer products, including services or other intangibles, in the home .
 24 . . or otherwise than from a retail or wholesale establishment,” earn
 25 “[s]ubstantially all” of their remuneration in direct relation to “sales or
 26 other output (including the performance of services) rather than to the

27 _____
 28 ¹ App-based drivers are defined as independent contractors. Cal.
 Bus. & Prof. Code § 7451.

1 number of hours worked,” and agree in writing to be treated as
2 independent contractors. Cal. Unemp. Ins. Code § 650. The Direct
3 Selling Association “work[ed]” with AB 5’s sponsor to enact the
4 exemption, and understands it provides “that direct sellers are clearly
5 and specifically independent contractors.” *Direct Selling Association*
6 *Applauds Direct Seller Exemption in California AB 5*, Sep. 26, 2019,
7 <https://bit.ly/3xOArGF>. Complaint ¶¶ 20-22.

8 Newspaper distributors and carriers are also *Borello*-exempted, Cal.
9 Labor Code § 2783(h)(1), as “[c]lassifying independent contractors as
10 employees would impose at least \$80 million in new costs on the
11 newspaper industry.” Bill Swindell, *Legislature passes one-year*
12 *exemption for newspaper carriers from AB 5*, *The Press Democrat*, Sep.
13 1, 2020, <https://bit.ly/3gVc0Aq>; Complaint ¶ 23.

14 *The Challenged Provisions’ Impact on Plaintiffs*

15 Plaintiff Mobilize the Message, LLC (“MTM”) hires doorknockers to
16 canvass neighborhoods and personally engage voters in the home on
17 behalf of its client political campaigns. Complaint ¶ 28. MTM also hires
18 signature gatherers to persuade voters, at home and in public places, to
19 sign petitions qualifying measures for the ballot. *Id.* MTM hires these
20 workers on an independent contractor basis. *Id.* ¶¶ 29, 34. It does not
21 pay them by the hour, but by milestones, and does not control their
22 performance of the work. *Id.* ¶¶ 30, 32, 33, 35. Plaintiffs Moving Oxnard
23 Forward and its political committee, Starr Coalition for Moving Oxnard
24 Forward, have likewise historically hired signature gatherers for their
25 ballot measure campaigns as independent contractors. *Id.* ¶¶ 36-38, 41.

26 With AB 5’s advent, plaintiffs ceased hiring door knockers and
27 signature gatherers in California because they fear that these would be
28 classified as employees under the new ABC Test. Complaint ¶¶ 42, 43,

1 45, 49. Plaintiffs cannot afford the administrative expenses of hiring
2 their independent contractors as employees, do not wish to encourage
3 inefficient work by disconnecting performance milestones from pay, and
4 cannot afford the cost of defending themselves from “misclassification”
5 claims under the new regime. *Id.* ¶¶ 42-45, 48, 49.

6 Oxnard plaintiffs intend to participate in Oxnard’s 2022 municipal
7 elections. Starr Coalition has already prepared ballot language for one
8 measure that it would seek to qualify for that election, and is drafting
9 additional ballot measures to be qualified for the same election. *Id.* ¶ 46.
10 The time to start gathering signatures for the 2022 election is now. Any
11 additional delays in beginning the signature-gathering campaign
12 jeopardizes Starr Coalition’s odds of gathering sufficient signatures in
13 time to qualify for the ballot, and effectively campaign for the measure’s
14 adoption. *Id.* ¶ 47. Starr Coalition intends to immediately hire MTM to
15 gather signatures for the Oxnard Property Tax Relief Act and their
16 other measures. Failing that, it intends to hire its own signature
17 gatherers as independent contractors, as it has done in years past before
18 the advent of AB 5. *Id.* ¶ 48. Lack of access to paid signature gatherers,
19 caused solely by the ABC test, prevents Oxnard plaintiffs from speaking
20 to the voters and qualifying their ballot measures. *Id.* ¶ 50.

21 *Plaintiffs’ Legal Claims*

22 Plaintiffs allege that AB 5 discriminates against their speech on the
23 basis of its content in violation of the First Amendment. *Id.* ¶¶ 59, 65.
24 Their workers perform the same work, under the same conditions, as
25 *Borello*-exempted “direct sales salesperson[s]” and newspaper carriers,
26 but the only meaningful distinction between them is that the exempted
27 canvassers speak about consumer products and deliver particular
28 publications. *Id.* ¶¶ 55-56, 61-62.

1 Defendant confirms that whatever their merit, AB 5’s justifications
2 are primarily economic: purported “misclassification” of workers leads to
3 “the erosion of the middle class and the rise in income inequality.” Def.
4 Mem. at 3 (quoting Stats. 2019, ch. 296, § 1(c) (Cal. 2019)).

5 Defendant does not explain why canvassers who speak about
6 “consumer products” should be classified under a different legal regime
7 than those who speak about politics. Nor does Defendant’s motion
8 explain why delivering particular newspapers and their related
9 publications should be subject to a different classification scheme than
10 delivering other newspapers and publications, including campaign
11 material. Nor does Defendant attempt to explain what it is that
12 Plaintiffs’ workers do differently than the workers subject to *Borello*
13 exemptions as “direct sales salesperson[s]” who promote “consumer
14 products,” and deliver newspapers that meet the code’s definition.
15 Defendant offers nothing of which the Court may take judicial notice
16 that would substantiate such arguments, had he made them. And as
17 Defendant does not seek summary judgment, he has not offered any
18 evidence supporting the distinctions of which Plaintiffs complain.

19 *The Pending Interlocutory Appeal*

20 On August 10, 2021, this Court entered an order denying Plaintiffs’
21 motion for a preliminary injunction. This Court held, inter alia, that
22 “the challenged exemptions in AB 5 are neither content-based nor
23 otherwise require heightened scrutiny.” Order, Dkt. 24, at 7. It held that
24 rather, AB 5 is “directed at economic activity generally [and] does not
25 directly regulate or prohibit speech.” *Id.* (internal quotation marks
26 omitted). “The distinctions based on the types of products sold or
27 services rendered are directly related to the occupation or industry of a
28 worker as opposed to the statements the worker uses to sell such goods

1 or perform such services.” *Id.* at 8. This Court also concluded that
 2 Plaintiffs “failed to point to any facts suggesting that AB 5 favors
 3 commercial speech over political speech due to its exemptions.” *Id.* at 9.

4 On August 10, 2021, Plaintiffs appealed from that order to the Ninth
 5 Circuit. Notice of Appeal, Dkt. 25. On August 20, 2021, Plaintiffs filed
 6 and served their opening brief on appeal. *Mobilize the Message v. Bonta*,
 7 Ninth Cir. No. 21-55855, Dkt. 6. Per Ninth Cir. R. 3-3(b), Defendant’s
 8 brief on appeal is due September 17, 2021 (28 days after service of
 9 Appellants’ opening brief).

10 LEGAL STANDARD

11 On a Rule 12(b)(6) motion to dismiss, a district court must accept all
 12 factual allegations as true and construe the complaint in the light most
 13 favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
 14 Cir. 2009); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A complaint
 15 should not be dismissed unless it appears beyond doubt that plaintiff
 16 can prove no set of facts in support of his claim which would entitle him
 17 to relief.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980
 18 (9th Cir. 2002) (internal quotations and citations omitted).

19 ARGUMENT

20 I. THIS COURT LACKS JURISDICTION OVER DEFENDANT’S MOTION TO 21 DISMISS AT THIS TIME.

22 “The filing of a notice of appeal is an event of jurisdictional
 23 significance -- it confers jurisdiction on the court of appeals and divests
 24 the district court of its control over those aspects of the case involved in
 25 the appeal.” *Griggs v. Provident Consumer Discount*, 459 U.S. 56, 58
 26 (1982) (per curiam).

27 While an interlocutory appeal “does not prevent the district court
 28 from proceeding with matters not involved in the appeal,” *Britton v. Co-*

1 *op Banking Group*, 916 F.2d 1405, 1411 (9th Cir. 1990) (quoting 9 J.
2 Moore, *Moore's Federal Practice* para. 203.11, 3-54), "our jurisdiction
3 under [28 U.S.C.] section 1292(a)(1) extends to all matters inextricably
4 bound up with the order from which appeal is taken, including the
5 merits of the case." *TransWorld*, 913 F.2d at 680 (internal quotation
6 marks omitted). For example, while Fed. R. Civ. P. 62(d) allows this
7 Court to enter further orders relating to injunctive relief that preserve
8 the status quo pending appeal, it "does not restore jurisdiction to the
9 district court to adjudicate anew the merits of the case." *Mayweathers v.*
10 *Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (internal quotation marks
11 omitted).

12 "The operative question in determining jurisdiction is whether 'the
13 district court would be deciding the same issues [as] the appeals court.'"
14 *Pinson v. Estrada*, No. CV 18-00535-TUC-RM, 2020 WL 2308484, at *1
15 (D. Ariz. May 8, 2020) (quoting *Stein v. Wood*, 127 F.3d 1187, 1190 (9th
16 Cir. 1997)). Accordingly, "[a]n important factor in determining whether
17 an interlocutory appeal divests the district court of jurisdiction over
18 particular aspects of the case is whether the appeal has the potential to
19 substantially affect the merits of the case." *SolarCity Corp. v. Salt River*
20 *Agric. Improvement & Power Dist.*, No. CV-15-00374-PHX-DLR, 2016
21 WL 5109887, at *2 (D. Ariz. Sept. 20, 2016).

22 Directly on-point stands this Court's recent decision in *Gish v.*
23 *Newsom*, No. EDCV 20-755 JGB (KKx), 2020 WL 6193306 (C.D. Cal.
24 July 8, 2020), *reconsideration denied*, 2020 WL 6054912 (C.D. Cal. Oct.
25 9, 2020). In *Gish*, Plaintiffs appealed an order denying their TRO
26 motion, "which found, among other things, that Plaintiffs were not likely
27 to succeed on the merits of their claims. Accordingly, the Court lacks
28 jurisdiction to dismiss claims as insufficiently pleaded, as that issue is

1 pending before the Ninth Circuit.” *Id.* at *3 (citation omitted). This
2 Court dismissed the case for mootness, a different topic not bound up
3 with the pending appeal. *Cf. Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d
4 1291, 1293 (9th Cir. 1982) (district court had jurisdiction to grant
5 summary judgment on alternative grounds during pendency of
6 interlocutory appeal).

7 Here, as in *Gish*, “the Ninth Circuit’s ruling has the potential to
8 substantially and permanently affect the rights of the parties.”
9 *SolarCity*, 2016 WL 5109887, at *2. Defendant cites the appealed order
10 for the propositions that:

- 11 • “there is no content-based restriction,” Def. Mem. at 9 (citing
12 Order, Dkt. 24, at 8);
- 13 • “unlike laws that specifically focus on speech or otherwise seek to
14 regulate expression, AB 5 is a generally applicable employment
15 regulation. It does not target or ban any speech, political or
16 otherwise,” *Id.* (citing Order, Dkt. 24, at 7);
- 17 • “the exemptions on which Plaintiffs focus merely determine
18 whether a particular occupation is subject to the ABC test or the
19 *Borello* standard;” *id.* (citing Order, Dkt. 24, at 8);
- 20 • “strict scrutiny does *not* apply here . . . the exemptions . . . are not
21 content-based, but are instead based on occupation” *id.* at 14
22 (quoting Order, Dkt. 24, at 7, for proposition that “the challenged
23 exemptions in AB 5 are neither content-based nor otherwise
24 require heightened scrutiny.”).

25 Unlike as in *Gish* and *Plotkin*, Defendant has not presented any
26 arguments that stand apart from what the Ninth Circuit will have
27 before it in considering the interlocutory appeal. The Ninth Circuit will
28 decide whether Plaintiffs have stated a valid First Amendment claim,
including the central overriding question of whether AB 5 discriminates
on the basis of speech, or, as Defendant again claims, merely classifies
occupations while only incidentally impacting speech; and it will
determine whether strict scrutiny applies. Until the Ninth Circuit
addresses these matters, this Court cannot revisit the issues.

1 II. THE STATE DISCRIMINATES AGAINST SPEECH ON THE BASIS OF ITS
2 SUBJECT MATTER, PURPOSE, AND FUNCTION.

3 The “commonsense meaning of the phrase ‘content based’ requires a
4 court to consider whether a regulation of speech on its face draws
5 distinctions based on the message a speaker conveys.” *Reed v. Town of*
6 *Gilbert*, 576 U.S. 155, 163 (2015) (internal quotation marks omitted). It
7 does not matter whether a law does so by “defining regulated speech by
8 particular subject matter,” or by “defining regulated speech by its
9 function or purpose.” *Id.* “Both are distinctions drawn based on the
10 message a speaker conveys, and, therefore, are subject to strict
11 scrutiny.” *Id.* at 163-64.

12 Under Cal. Lab. Code § 2775, the legal regime governing a
13 canvasser’s classification turns on whether her presentation concerns
14 “consumer products.” Cal. Unemp. Ins. Code § 650(a); Cal. Lab. Code §
15 2778(e). If she says, “Sign up for this shiny new low-interest credit card,”
16 the legality of classifying her as an independent contractor is evaluated
17 under *Borello*. If she says, “Sign this petition to help save the
18 environment,” the ABC test determines the legality of that
19 classification. “That is about as content-based as it gets. Because the law
20 favors speech made for [selling consumer products] over political and
21 other speech, the law is a content-based restriction on speech.” *Barr v.*
22 *Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality).

23 Indeed, the structure of California’s worker classification system, a
24 broad rule with numerous exceptions for different speakers, itself
25 signals content-based discrimination. When a scheme “*favors* particular
26 kinds of speech and particular speakers through an extensive set of
27 exemptions [t]hat means [it] necessarily *disfavors* all other speech
28

1 and speakers.” *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961
2 F.3d 1062, 1072 (9th Cir. 2020) (citations omitted).

3 Defendant’s insistence that AB 5’s exemptions do not “hinge on the
4 *content* of any message,” Def. Mem. at 11, contradicts the statute’s plain
5 language. If a canvasser’s door-to-door message is about “consumer
6 products,” she satisfies Cal. Unemp. Ins. Code § 650’s elements and
7 thereby gains the exemption of Cal. Lab. Code 2783(e). But working on
8 the exact same terms to hawk a ballot measure doesn’t count. A carrier
9 delivering the *L.A. Times* or its shopper’s guide gains Section
10 2783(h)(1)’s exemption. A carrier delivering other publications, does not.

11 Defendant’s focus on occupation as a proxy for speech is also
12 misplaced. Different occupational classifications may arguably describe
13 different expressive functions or purposes—the “direct sales
14 salesperson” is selling “consumer products” rather than ballot
15 measures—but “defining regulated speech by its function or purpose” is
16 still content-based discrimination. *Reed*, 576 U.S. at 163. And the
17 exempted functions or purposes here are commercial—the selling of
18 “consumer products,” the delivery of a “newspaper of general
19 circulation.” AB 5’s exemption scheme thus “leads to the odd result that
20 purely commercial speech, which receives more limited First
21 Amendment protection than noncommercial speech, is allowed and
22 encouraged, while artistic and political speech is not. This bias in favor
23 of commercial speech is, on its own, cause for the rule’s invalidation.”
24 *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009) (en banc)
25 (citations omitted). The state “may not conclude that the communication
26 of commercial information concerning goods and services connected . . .
27 is of greater value than the communication of noncommercial messages.”
28 *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981)

1 (plurality opinion) (footnote omitted); *see also Desert Outdoor*
2 *Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996)
3 (ordinance “unconstitutionally imposes greater restrictions upon
4 noncommercial structures and signs than it does upon commercial
5 structures and signs”).

6 Defendant suggests that plaintiffs suing over content-based speech
7 discrimination “must show that the law reflects an improper preference
8 for the favored speech.” Def. Mem. at 14. Not true. “A law that is content
9 based on its face is subject to strict scrutiny regardless of the
10 government’s benign motive, content-neutral justification, or lack of
11 animus toward the ideas contained in the regulated speech.” *Reed*, 576
12 U.S. at 165 (internal quotation marks omitted). “We have thus made
13 clear that illicit legislative intent is not the *sine qua non* of a violation of
14 the First Amendment, and a party opposing the government need
15 adduce no evidence of an improper censorial motive.” *Id.* (internal
16 punctuation omitted).

17 Defendant correctly notes that “speaker-based laws demand strict
18 scrutiny when they reflect the Government’s preference for the
19 substance of what the favored speakers have to say (or aversion to what
20 the disfavored speakers have to say).” *Turner Broad. Sys., Inc. v. FCC*,
21 512 U. S. 622, 658 (1994). *Turner* subsequently explained that “laws
22 favoring some speakers over others demand strict scrutiny when the
23 legislature’s speaker preference reflects a content preference.” *Turner*,
24 512 U.S. at 658. But in this context, “content preference” is shorthand
25 for discriminating on the basis of subject matter, function, or purpose,
26 *Reed*, 576 U.S. at 163-64, not merely viewpoint.

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28

1 Defendant's reliance on *Am. Soc'y of Journalists & Authors, Inc. v.*
2 *Becerra*, No. 19-cv-10645-PSG, 2020 WL 1444909 (C.D. Cal. Mar. 20,
3 2020) ("ASJA") and *Crossley v. California*, 479 F. Supp. 3d 901 (S.D. Cal.
4 2019) is unavailing. ASJA involved completely different aspects of AB 5.
5 See Order re: Transfer Pursuant to General Order 21-01, Dkt. 12. Even
6 if those provisions did "not reference any idea, subject matter, viewpoint
7 or substance of any speech," 2020 WL 1444909, at *7, the challenged
8 distinctions here are based solely on the "subject matter" and "content"
9 of the canvassers' speech. A worker going door-to-door to persuade
10 residents, paid not by the hour but in direct relation to sales or other
11 output, including the performance of the visit itself, is classified as an
12 independent contractor only if her speech involved "in person
13 demonstration and sales presentation of consumer products." Cal.
14 Unemp. Ins. Code § 650(a). Arguably newspaper carriers usually have
15 less interaction with people than do petition circulators or canvassers
16 who leave campaign literature, but then any distributor of written
17 material is disfavored when not delivering, specifically, newspapers
18 falling within Gov't Code 6000's definition or their related publications.

19 *Crossley* is likewise inapposite. Plaintiffs in that case, for whatever
20 reason, never asserted a First Amendment content-based discrimination
21 claim. *Crossley's* First Amendment claims were limited to a claim of
22 general impact, not made here, and its claims addressing the
23 discriminatory exemptions sounded *only* in equal protection and thus,
24 rational-basis review.

25 Plaintiffs' complaint states valid claims for relief against Defendant,
26 who persists in violating their First Amendment rights by
27 discriminating against their speech on the basis of its content.
28

1 III. AB 5 DOES NOT PASS ANY LEVEL OF HEIGHTENED SCRUTINY.

2 Plaintiffs allege that AB 5, as applied to them, triggers strict
3 scrutiny. That is, after all, the correct test. *See Reed*, 576 U.S. at 163-64.
4 Defendant contests this much, but also argues that AB 5 would survive
5 intermediate scrutiny were that the correct test.

6 Defendants' intermediate scrutiny arguments are inadequate and at
7 best, premature. Not only is the level of scrutiny an issue now before the
8 Ninth Circuit, but a motion to dismiss is often, as here, not the proper
9 vehicle by which to resolve heightened scrutiny claims. Where First
10 Amendment rights are at stake, "there must be *evidence*; lawyers' talk is
11 insufficient." *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463
12 (7th Cir 2009). But Defendant's intermediate scrutiny arguments consist
13 of nothing but statements to the effect that the Legislature worked hard
14 on AB 5 and considered everything. The Legislature was allegedly
15 "concerned about the misclassification of employees." Def. Mem. at 14.
16 "The legislative history reflects that misclassification was rampant in
17 particular industries, and therefore the Legislature crafted AB 5's
18 provisions accordingly." Def. Mem. at 15. And so, "[t]he Legislature
19 considered a number of factors in ascertaining the hallmarks of true
20 independent contractors in crafting these exemptions." *Id.*

21 These are all debatable claims. But more to the point – where is the
22 evidence that the legislature was concerned with, specifically, the
23 classification of door knockers and signature gatherers? What did the
24 evidence on that score reveal? What "factors" were considered with
25 respect to *these* workers? Presumably these "factors" would explain why
26 canvassers should be classified under *Borello* when speaking about
27 consumer products but not when speaking about politics, and why a
28 delivery worker requires a different classification regime when

1 delivering some newspapers and related publication but not others. So
2 what is the explanation? It is not enough to say, even under
3 intermediate scrutiny, that the Legislature worked hard and had its
4 reasons. That is not even a rational basis argument, where the state
5 would at least craft a rationale for its disparate treatment.

6 If Defendant has evidence advancing the state’s heightened scrutiny
7 burden, be it strict or intermediate, then that evidence should be
8 presented at the appropriate time.

9 CONCLUSION

10 Defendant’s motion to dismiss should be held in abeyance pending
11 resolution of Plaintiffs’ interlocutory appeal, or in the alternative,
12 denied.

13 Dated: August 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 30, 2021.

By: /s/ Alan Gura
Alan Gura