INSTITUTE FOR FREE SPEECH
Alan Gura, SBN 178221
agura@ifs.org
1150 Connecticut Avenue, N.W.,
Suite 801
Washington, DC 20036
Phone: 202.967.0007
Fax: 202.301.3399

Attorneys for Plaintiffs
Mobilize the Message, LLC; Moving
Oxnard Forward, Inc.; and Starr
Coalition for Moving Oxnard Forward

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)

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

SUMMARY OF ARGUMENT

Nowhere does the state's brief argue that the challenged applications of AB 5 pass strict scrutiny. Nor does the state attempt to defend its indefensible preference of commercial over political speech—an automatic invalidator per the en banc Ninth Circuit. *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009) (en banc). If strict scrutiny applies to the state's disparate treatment of workers on the basis of their speech's content—and it does—the state effectively concedes that Plaintiffs will succeed on the merits.

On the face of its statutes, the state plainly discriminates against speech on the basis of its purpose, function, and message—classic content-based speech discrimination warranting strict scrutiny. But instead of defending itself under strict scrutiny or justifying its preference for commercial over political speech, the state claims that it cannot engage in content-based speech discrimination because it only classifies speakers, not speech; that its regime addressing those who speak about certain topics or deliver certain publications regulates purely economic activity; and that, in any event, only viewpoint discrimination qualifies as content-based speech discrimination.

The Supreme Court has resoundingly rejected these arguments as defenses to content-based speech discrimination. Classifying speakers based on their speech *is* content-based discrimination. So is defining economic activity with reference to speech. And while viewpoint discrimination is *one* form of content-based discrimination, *all* forms of content-based speech discrimination trigger strict scrutiny. If the state has any meaningful defense on the merits, its brief does not relate it.

The state's other arguments prove equally unavailing. Irreparable harm is palpable—the state violates Plaintiffs' First Amendment rights by

discriminating against election-related speech. Plaintiffs did not strategically delay their filing; indeed, no delay here injured the state. And the merged equities and public interest factor does not turn on the alleged "status quo." By definition, it favors plaintiffs who are poised to succeed on constitutional claims. An injunction should issue.

ARGUMENT

I. PLAINTIFFS WILL PREVAIL ON THE MERITS.

A. The state discriminates against speech on the basis of its subject matter, purpose, and function.

Under Cal. Lab. Code § 2775, the legal regime governing a canvasser's classification turns on whether her presentation concerns "consumer products." Cal. Unempl. Code § 650(a); Cal. Lab. Code § 2778(e). If she says, "Sign up for this shiny new low-interest credit card," the legality of classifying her as an independent contractor is evaluated under S.*G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). If she says, "Sign this petition to help save the environment," the ABC test determines the legality of that classification. "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).

The state nonetheless persists in repeating the mantra that "AB 5 is a generally applicable employment regulation, and does not target or ban any speech, political or otherwise." Opp. at 9; *see also* Opp. at 2, 8, 13. But this is an as-applied challenge, not a facial one. And with respect to canvassing and the delivery of papers, the scheme is expressly content-based. Plaintiffs are not imagining that the code privileges sales speech about "consumer products," Cal. Unempl. Code § 650(a), and the delivery

of certain "newspapers," Cal. Lab. Code § 2783(h). The state ignores the point, Pl. Br. at 13, but 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).

Still, notwithstanding Cal. Unempl. Code § 650(a) and Cal. Lab. Code § 2783's clear command, the state claims that "none of the specific criteria for the direct sales salesperson or newspaper distributor exemptions involves an examination of the 'worker's message.'" Opp. at 10 (citations omitted). How about Section 650(a)'s requirement that direct sales salespersons' "demonstration[s] and sales presentation[s]" be "of consumer products, including services or other intangibles[?]" That is one possible message. Politics supply others. But the state treats them differently.

Likewise, the newspaper carrier and distributor exemption pertains to those who circulate a "newspaper," which 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 . . . ." 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.

The state notes that it does not set out different classifications *per se* for different speakers, just different classification regimes. *See, e.g.* Opp. at 7 n.3, 9, 16. But this argument gains the state nothing; lawful or not, that is still discrimination, freedom from which qualifies as real relief. Contrary to the state's assertion, Opp. at 16, application of either *Borello* or the ABC test greatly impacts Plaintiffs: it alters their legal relationship

with the state, guiding their behavior and that of state enforcement officials, to say nothing of the judges who may mediate between them.

In any event, Plaintiffs' motion carefully seeks only the same treatment afforded other canvassers and paper carriers—not any specific classification. The words "independent contractor" are absent from the motion and the complaint's prayer for relief. Plaintiffs will happily take their chances under *Borello*, as they did for years before AB 5's enactment, and which is precisely the relief the legislature contemplated in the event one of its many discriminatory choices proved unconstitutional. *See* Cal. Lab. Code § 2775(b)(3).

If Plaintiffs can cite no *specific* "authority" as to the classification status of doorknockers and signature-gatherers, Opp. at 16, 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. Notably, the state does not dare suggest that *Borello* might classify "direct sales salespersons" and "newspaper carriers" as employees, a claim that would shock the direct sales and newspaper industries who rely on Cal. Lab. Code § 2783.

By the same measure, as the state admits, *the whole point* of AB 5 is to classify more workers as employees, Opp. at 1, and the state claims an injunction would injure it by causing Plaintiffs' workers to be classified as independent contractors, Opp. at 16-17. These classification regimes are plainly relevant to classification.

B. The state's alleged speaker-discrimination is a form of content-based speech discrimination because it reflects legislative speech preferences.

The state primarily relies on the following syllogism in seeking to evade strict scrutiny:

1. Canvassers who speak about "consumer products" are "direct sales salespersons," but canvassers who speak about politics are not so labeled; those who deliver newspapers are "newspaper carriers," and those who deliver other printed material, are not;
2. AB 5 thus classifies different "*occupations*" differently, Opp. at 10, not speech according to its content, Q.E.D.

By its logic, the state can 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 such a scheme would sound in content-based speech discrimination, and the state would thus carry a heavy strict scrutiny burden to justify it.

"'[T]he 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 preference of "direct sales salespersons" reflects its preference for demonstrations and sales presentations of consumer products. The legislature's preference for "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.

C. The challenged provisions are not mere forms of economic regulation that incidentally burden speech, but rather target speech and speakers directly.

Along the same lines as its speaker/occupational theme, the state claims that its preferential treatment of direct-sales salespersons and newspaper deliverers is merely a form of economic, not speech regulation. These arguments fare no better.

Addressing various cases establishing the First Amendment's protection of political canvassing, the state responds that "cases involving the prohibition on certain activities are inapposite" because its regulations are allegedly less severe. Opp. at 9. Its scheme, claims the state, is a mere "regulation, and does not target or ban any speech, political or otherwise." *Id.* But "[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*, 564 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. Plaintiffs 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.

Beyond its erroneous claim that minimizing the regulation's impact can change the standard of scrutiny, the state emphasizes that "restrictions on economic activity, or nonexpressive conduct generally, are not equivalent to restrictions on protected expression." Opp. at 9 (citations omitted). On this much, the parties agree. *See* Pl. Br. at 17. The issue is not that economic regulation impacts speech; rather, the issue is that the regulation functions by discriminating against speech on the basis of content. "[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.

The Supreme Court has explained the difference. In *Sorrell*, it 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 striking down the federal robocall ban's content-based features. In *Barr*, plaintiffs challenged the law because it engaged in content-based speech discrimination by exempting robocalls made to collect government debt. The federal government unsuccessfully made exactly the argument that California makes here. "[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. Likewise, "direct sales" and newspaper deliveries may be discreet economic activities, but the law focuses on whether the canvasser is speaking about consumer products, or whether the literature being delivered qualifies as a "newspaper of general circulation" under the Government Code.

D. All content-based discrimination, not just viewpoint discrimination, triggers strict scrutiny.

The state claims that plaintiffs suing over content-based speech discrimination "must show that the law reflects an improper preference for the favored speech." Opp. at 12. Not true. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 576 U.S. at 165 (internal quotation marks omitted). "We have thus made clear that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive." *Id.* (internal punctuation omitted).

The state conflates viewpoint discrimination with the broader concept of content-based discrimination. But the former is only an example of the the latter. True, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner*, 512 U.S. at 658. But it is not accurate to quote this language for the proposition that "speaker-based laws demand strict scrutiny *only* 'when they reflect [such] preference,'" Opp. at 13-14 (quoting *Turner*, 512 U.S. at 658) (emphasis added), if by that the state means viewpoint-discrimination. As discussed *supra*, *Turner* subsequently explained that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658. And "content preference" is shorthand for discriminating on the basis of subject matter, function, or purpose, *Reed*, 576 U.S. at 163-64, not merely viewpoint.

It does not matter whether the state prefers speech about consumer products to political speech, and newspapers to other literature, because of some ideological preference or because the direct sales and newspaper lobbies are more persuasive. These distinctions trigger strict scrutiny.

* * *

The state repeats some of these arguments in asserting that this case is indistinguishable from *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. 19-cv-10645-PSG, 2020 WL 1444909 (C.D. Cal. Mar. 20, 2020) ("*ASJA*") and *Crossley v. California*, 479 F. Supp. 3d 901 (S.D. Cal. 2019). But *ASJA* involved completely different aspects of AB 5, *see also* Order re: Transfer Pursuant to General Order 21-01, ECF 12, while *Crossley* plaintiffs, for whatever reason, never asserted a First Amendment content-based discrimination claim. *Crossley*'s First Amendment claims

were limited to a claim of general impact, not made here, and its claims addressing the discriminatory exemptions sounded *only* in equal protection and thus, rational-basis review. *See* Pl. Br. at 16-17.

On this point, Plaintiffs are constrained to note that the state misrepresents *Crossley* in claiming that those plaintiffs focused on the direct sales and newspaper exemptions, and then immediately offering that "[n]onetheless, the [*Crossley*] court concluded that such exemptions 'do[] not regulate conduct that is inherently expressive.'" Opp. at 13 (quoting *Crossley*, 479 F. Supp. 3d at 916). This is not a fair reading of *Crossley*. The opinion discussed the exemptions only on page 914, under "I. Equal Protection Claims (claims 1 and 2)" and "b. Plaintiffs' Claims Fall Under Rational Basis Review." Between this discussion of the exemptions, and the discussion of *Crossley*'s generalized First Amendment claim, is an entire section dealing with due process claims. And the state's use of brackets in quoting from page 916 does a lot of work. The quoted sentence does not discuss the "exemptions," as the state claims, but AB 5 as a general matter: "AB 5 does not regulate conduct that is inherently expressive." *Crossley* at 916.

As applied to doorknockers and signature-gatherers, Cal. Lab. Code 2775 engages in content-based speech discrimination and is subject to strict scrutiny. It also prefers commercial to political speech. As the state lacks any defense to the type of scrutiny that controls here, Plaintiffs will succeed on the merits.

II. NO SUSPICIOUS DELAY IMPACTS THE IRREPARABLE HARM SHOWING.

Defendant's lawyers are always standing by ready to fight any lawsuit that may be filed against the state. Individuals injured by the state face a different calculation. Lawsuits like this don't happen overnight. It can take time for lay people to learn of their claims and identify and retain

counsel; and then time to prepare initial pleadings. And had Plaintiffs sued in 2019 over the 2022 election, the state would have doubtless argued ripeness. It also would have made no sense to pursue this claim until *Crossley*'s appellate deadline ran in September, 2020. There was no "suspicious delay" here.

Even were it present, "[u]sually, 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) (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).

The state's "delay" authority is off-base. *First Franklin Fin. Corp. v. Franklin First Fin. Ltd.*, 356 F. Supp. 2d 1048 (N.D. Cal. 2005) involved a laches claim in the trademark context owing to a *12-year* delay. And defendants claiming laches must show prejudice. *Eat Right Foods, Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1115 (9th Cir. 2017) (citation omitted). *Kiva Health Brands LLC v. Kiva Brands Inc.*, 402 F. Supp. 3d 877, 897 (N.D. Cal. 2019) involved a *four-year* delay in seeking to enjoin trademark infringement where evidence of irreparable harm was "not substantial." *Id.* at 897. In *Metromedia Broad. Corp. v. MGM/UA Entm't Co, Inc.*, 611 F. Supp. 415 (C.D. Cal. 1985), money damages were available, and unlike here, the delay itself injured defendant.

III. THE EQUITIES AND PUBLIC INTEREST FAVOR INJUNCTIVE RELIEF.

The state's reliance on *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112 (9th Cir. 2008) in arguing to preserve the alleged status quo is odd. That case *rejects* the status quo's relevance, and the artificial mandatory/prohibitory distinction. "Maintaining the status quo is not a

talisman." *Id.* at 1116. "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.* (quotation omitted).

Even if the state could establish some chance of prevailing, 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, is misplaced. Opp. at 18. 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. 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 Court should grant Plaintiffs' motion for a preliminary injunction.

Dated: July 19, 2021 Respectfully submitted,

By: /s/ Alan Gura

Alan Gura (SBN 178221)
agura@ifs.org
INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, N.W., Suite 801
Washington, DC 20036
Phone: 202.967.0007
Fax: 202.301.3399

Attorneys for Plaintiffs
Mobilize the Message, LLC; Moving Oxnard Forward, Inc.; and Starr Coalition for Moving Oxnard Forward

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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 July 19, 2021.

By: /s/ Alan Gura
Alan Gura