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.

On Appeal from the United States District Court
for the Central District of California

No. 2:21-cv-05115-VAP-JPR
The Honorable Virginia A. Phillips, Judge

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INTRODUCTION

This case raises First Amendment challenges to Assembly Bill 5 (AB 5), a California labor law enacted in 2019 that has been the subject of multiple unsuccessful challenges in district courts and in this Court. Plaintiffs Mobilize the Message, *et al.*, filed this suit in June 2021, claiming that AB 5 violates the First Amendment, and seeking preliminary injunctive relief. In line with past decisions rejecting challenges to AB 5, the district court denied Plaintiffs' motion for a preliminary injunction. The court correctly concluded that Plaintiffs did not meet their burden to establish a likelihood of success on the merits of their claims, or their burden to establish irreparable harm, given their long delay of almost two years in seeking relief.

On appeal, Plaintiffs fail to show that the trial court erred. Plaintiffs argue, as they did below, that AB 5 imposes content-based restrictions on speech. This assertion is plainly belied by the language of the statute. As this Court and at least two district courts have concluded, AB 5 is a generally applicable state labor law, which focuses on the proper classification of state workers as employees or independent contractors, and the attendant labor protections under California law. Strict scrutiny does not

apply. The district court therefore properly denied Plaintiffs' motion for a preliminary injunction, and this Court should affirm.

STATEMENT OF JURISDICTION

The complaint purports to bring claims under the Constitution, and seeks declaratory and injunctive relief. (CD 1, ER 41-45.) Accordingly, the district court had jurisdiction under 28 U.S.C. § 1331. On August 9, 2021, the district court denied Plaintiffs' motion for a preliminary injunction. (CD 24, ER 3.) Plaintiffs timely appealed on August 10, 2021 (CD 25, ER 46). Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction to review the interlocutory order denying preliminary injunctive relief under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Did the district court err in denying Plaintiffs' motion for preliminary injunctive relief, given that they failed to show a likelihood of success on the merits of their First Amendment claims, and did not establish irreparable harm?

STATEMENT OF THE CASE

Plaintiffs raise First Amendment challenges to the "ABC" test under AB 5. As this Court has concluded, AB 5 is a "generally applicable labor law" pertaining to the classification of employees and independent

contractors. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 664 (9th Cir. 2021), *petition for cert. filed*, No. 21-194 (Aug. 11, 2021); *see also People v. Super. Ct., L.A. Cty.*, 57 Cal.App.5th 619, 631 (Cal. Ct. App. 2020) ("[T]he ABC test is a worker-classification test that states a general and rebuttable presumption that a worker is an employee unless the hiring entity demonstrates certain conditions.").

A. THE CALIFORNIA SUPREME COURT'S *DYNAMEX* DECISION ADOPTED THE ABC TEST.

The distinction between workers classified as employees and those classified as independent contractors is significant because California law affords employees rights that independent contractors do not enjoy. *See Dynamex Operations W. v. Super. Ct.*, 4 Cal. 5th 903, 912 (Cal. 2018). In April 2018, the California Supreme Court held that courts must apply the "ABC test" to determine whether a worker is classified as an employee for certain purposes under California's labor laws. *Id.* at 916.

Under the ABC test, a worker is considered an employee, rather than an independent contractor, unless the hiring entity establishes that the worker: (a) is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact"; (b) "performs work that is outside the usual course

of the hiring entity's business"; and (c) is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 916-17.

In adopting this test, the California Supreme Court in *Dynamex* explained that the "critically important objectives" of wage and hour laws, including ensuring low-income workers' wages and conditions despite their weak bargaining power, "support a very broad definition of the workers" who fall within the employee classification. *Id.* at 952. Similarly, a broad definition benefits "those law-abiding businesses that comply with the obligations imposed" by state labor laws, "ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices." *Id.* Lastly, the ABC test benefits "the public at large, because if the wage orders' obligations are not fulfilled, the public often will be left to assume the responsibility of the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Id.* at 953.

B. Assembly Bill 5 Codifies the ABC Test and Expands Its Application.

In September 2019, the Legislature enacted AB 5, which codifies the ABC test and expands its scope. The Legislature found that "[t]he

misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality." Stats. 2019, ch. 296, § 1(c) (Cal. 2019).[1] In enacting AB 5, the Legislature intended "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law," including minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave. *Id.* § 1(e). The Legislature noted that "a 2000 study commissioned by the U.S. Department of Labor found that nationally between 10% and 30% of audited employers misclassified workers," and that a 2017 audit program by the California Employment Development Department that conducted 7,937 audits and investigations "identified nearly *half a million* unreported employees." (Bill Analysis, Assembly Comm. on Lab. & Emp. 7/5/19 at p. 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 [last visited July 5, 2021] (emphasis in original).)

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[1]AB 5 can be found online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5. AB 5 was subsequently amended, but those amendments do not impact the legal analysis here. *See Vendor Surveillance Corp. v. Henning*, 62 Cal.App.5th 59, 73 n.5 (Cal. Ct. App. 2021). For ease of reference, this answering brief refers to AB 5, as amended.

By codifying the ABC test, the Legislature sought to "restore[] these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law." Stats. 2019, ch. 296, § 1(e) (Cal. 2019). AB 5 also extends the scope of the ABC test to contexts beyond those at issue in *Dynamex*, to include (among other things) workers' compensation, unemployment insurance, and disability insurance. Cal. Lab. Code § 2775(b)(1); *see People v. Uber Techs.*, 56 Cal.App.5th 266, 274 (Cal. Ct. App. 2020).

C. ASSEMBLY BILL 5 EXEMPTS CERTAIN OCCUPATIONS FROM THE ABC TEST.

AB 5 creates limited statutory exemptions to the ABC test for certain occupations and industries, where the Legislature determined the ABC test was not a good fit. Occupations falling within some of these exemptions are instead governed by the pre-existing multifactor classification test established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (Cal. 1989). *See, e.g.,* Cal. Lab. Code §§ 2776, 2778.

The Legislature considered various factors in delineating these exemptions, including whether the individuals hold professional licenses (for example, insurance brokers, physicians and surgeons, and securities dealers).

(Bill Analysis, Senate Comm. on Lab. Emp. & Ret. 7/8/19 at pp. 2-3, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 [last visited July 5, 2021].) Other factors considered include whether the worker is truly free from the direction or control of the hiring entity (for example, workers providing hairstyling and barbering services who have their own set of clients and set their own rates). (*Id.*) Still others were considered for an exemption if they perform "professional services" as a sole proprietor or other business entity, and meet specific indicia of status as independent businesses. (*Id.*) Attempting to identify the hallmarks of true independent contractors for purpose of the exemptions from the ABC test, the Legislature considered the bargaining power of workers in particular occupations and industries, the ability of workers in particular occupations and industries to set their own rate of pay, and the nature of the relationship between the worker and the client. (*Id.* at 8-10.)

AB 5 thus provides several categories of exemptions from the ABC test, including exemptions for a contract for "professional services," for relationships between sole proprietors, and for individuals involved in certain occupations related to sound recordings or musical compositions, among others. Cal. Lab. Code §§ 2778, 2279, 2780. At issue here are two such exemptions. AB 5 exempts from the ABC test: (1) a "direct sales

salesperson as described in Section 650 of the California Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met"; and (2) a "newspaper distributor working under contract with a newspaper publisher," as defined. *Id.* § 2783(e); § 2783(h)(1). In turn, Section 650 of the California Unemployment Insurance Code excludes from "employment" "services performed as a real estate, mineral, oil and gas, or cemetery broker or as a real estate, cemetery or direct sales salesperson, or as a yacht broker or salesman," when certain conditions are met. Cal. Unemp. Ins. Code § 650.

D. Allegations of the Complaint.

Plaintiff organizations bring a First Amendment challenge to the application of the ABC test under AB 5 to two groups of workers: doorknockers and signature gatherers.

Plaintiff Mobilize the Message (MTM) hires signature gatherers and doorknockers. (CD 1, ER 36 ¶ 28.) Doorknockers "canvass neighborhoods and personally engage voters in the home on behalf of [MTM's] client campaigns," to try to persuade them to support candidates and ballot measures. (*Id.*) Signature gatherers are hired to persuade voters to sign petitions to qualify measures for the ballot. (*Id.*) MTM hires these workers

on an independent contractor basis. (*Id.* ER 36 ¶ 29.) MTM alleges that it left the California market after AB 5 passed. (*Id.* ER 39 ¶ 44.)

Plaintiff Moving Oxnard Forward (MOF) is a nonprofit corporation, whose stated aim is to make the government of Oxnard, California, "more efficient and transparent." (*Id.* ER 31 ¶ 7.) Plaintiff Starr Coalition for Moving Oxnard Forward (Starr Coalition) is a political action committee, and handles all aspects of initiative campaigns for Moving Oxnard Forward, including creating, qualifying, and enacting ballot measures. (*Id.* ER 31 ¶ 8.)

Plaintiffs MOF and Starr Coalition allege that they want to participate in Oxnard's 2022 municipal elections, and have prepared ballot language for a measure for that election. (CD 1, ER 40 ¶ 46.) Plaintiff Starr Coalition would like to hire MTM to gather signatures for the Oxnard Property Tax Relief Act and other measures, or, failing that, hire its own signature gatherers as independent contractors. (*Id.* ¶¶ 47-48.) But it is allegedly concerned that application of the ABC test will mean that its attempt to hire doorknockers and signature gatherers will be subject to misclassification claims under AB 5, with attendant penalties. (*Id.* ¶ 49.)

Plaintiffs claim, without any support, that under the *Borello* standard predating AB 5, "the doorknockers and signature gatherers that plaintiffs

would hire would be classified as independent contractors." (CD 1, ER 39 ¶ 42.) Under AB 5, however, Plaintiffs allege that "these workers would most likely be classified as employees." (*Id.* ¶ 43.) Plaintiffs contend, without any legal or factual support, that the workers on whose behalf they bring claims "could probably not pass the 'B' portion of the ABC test, because their work falls within the usual course of plaintiffs' businesses." (*Id.*) Plaintiffs do not allege that they have been subject to a misclassification action or otherwise been threatened with any penalties under AB 5. (*See generally* CD 1, ER 29-45.)

Plaintiffs claim that "California's regime for worker classification discriminates against speech according to its particular subject matter, function, and purpose." (CD 1, ER 41 ¶ 54.) The Complaint does not cite any specific provision of AB 5 that purportedly enacts or furthers such discrimination. Instead, the basis of Plaintiffs' claim is the *lack of an exemption* for doorknockers and signature gatherers. As explained above, there are multiple exemptions under AB 5, including for a "direct sales salesperson" and newspaper distributor. Cal. Lab. Code § 2783(e), (h)(1). Plaintiffs claim that "[b]ut for Cal. Labor Code § 2783(e)," which applies the *Borello* classification standard to direct sales salespersons, such salespersons "who work on the same terms that Plaintiffs would offer

doorknockers would be classified as employees under the ABC test." (CD 1, ER 42 ¶ 55.)[2] Similarly, Plaintiffs contend that "newspaper distributors and carriers who work on the same terms as plaintiffs would offer doorknockers would be classified as employees under the ABC test," but that section 2783(h)(1) exempts such carriers from the ABC test. (*Id.* ¶ 56.) Plaintiffs claim that these purported statutory distinctions hinge on the content of their speech, thus violating the First Amendment.

Plaintiffs bring two First Amendment claims. First, they claim that application of the ABC test to doorknockers violates their free speech rights. (CD 1, ER 41-43 ¶¶ 51-59.) Second, they claim that application of the ABC test to signature gatherers violates their free speech rights. (*Id.* ER 43-44 ¶¶ 60-65.) They sue California Attorney General Rob Bonta, in his official capacity, and seek declaratory and preliminary and permanent injunctive relief to preclude Defendant "from applying the ABC Test to classify Plaintiffs' doorknockers and signature gatherers." (CD 1, ER 44-45.)

[2] Plaintiffs state that section 2783(e) "causes their classification as independent contractors," but that is incorrect. (CD 1, ER 42 ¶ 55.) Under the statute's plain terms, the consequences of the exemption is that the *Borello* standard applies, not that they are automatically deemed independent contractors. Cal. Lab. Code § 2783.

E. The District Court Denied Plaintiffs' Motion for Preliminary Injunctive Relief, and They Appealed.

On August 9, 2021, the district court denied Plaintiffs' motion for a preliminary injunction, which sought to preclude the application of the ABC test to determine whether Plaintiffs' doorknockers and signature gatherers are employees or independent contractors. (CD 24, ER 3.) The court concluded that Plaintiffs did not show a likelihood of success on the merits of either of their claims. (*Id.* ER 8.) Initially, the district court disagreed with Plaintiffs' contention that AB 5 and its exemptions are content-based restrictions on speech, noting that "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." (*Id.*, citation omitted.). "Here, the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny." (*Id.* ER 9.) Instead, the exemptions Plaintiffs focus on, which are "based on the types of products sold or services rendered, . . . are directly related to the occupation or industry of a worker as opposed to statements the worker uses to sell such goods or perform such services." (*Id.* ER 10.) AB 5 thus targets "economic activity generally," and does not regulate or prohibit speech. (*Id.* ER 9, citation omitted.)

The district court noted that this analysis is consistent with the conclusions reached by other courts in this circuit "that have found AB 5 to be a generally applicable law that regulates classifications of employment relationships by industry as opposed to speech." (*Id.* ER 11.) Although Plaintiffs tried to argue that AB 5 was not a generally applicable law focusing on economic activity, the court rejected that contention. "Plaintiffs' conclusory statement is unsupported as they have failed to point to any facts suggesting that AB 5 favors commercial speech over political speech due to its exemptions." (*Id.* ER 11.) The district court further noted that Plaintiffs did not argue that AB 5 fails under rational basis review, and only argued under strict scrutiny. (*Id.* ER 11-12.) Thus, they failed to meet the likelihood of success prong. (*Id.*)

Significantly, the district court also concluded that Plaintiffs failed to show the need for emergency injunctive relief, given their long delay in bringing their claims. (CD 24, ER 12-13.) AB 5 was signed into law in 2019, yet Plaintiffs waited until June 2021, almost two years later, to bring their claims. (*Id.* ER 12.) "Although Plaintiffs now claim there is urgency given the upcoming 2022 elections, Plaintiffs have failed to explain their delay in seeking their requested relief for a declaration that AB 5 should not apply to their workers." (*Id.*)

Plaintiffs appealed. (CD 25, ER 46.)

STANDARD OF REVIEW

This Court applies a "limited and deferential" abuse of discretion review to the district court's decision denying preliminary injunctive relief. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). An order on a preliminary injunction motion "will be reversed only if the district court relied on an erroneous legal premise or abused its discretion." *Id.* (citation omitted).

If the district court applied the correct legal rule to the requested relief, this Court will reverse only if the trial court's decision "resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed Enter., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (citation omitted). This Court does not reverse the district court's decision "simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017) (citation omitted).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The movant must demonstrate that it is likely to succeed on the merits of its

claims, that it will likely suffer irreparable harm without preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Id.* at 20; *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Alternatively, the movant must establish "serious questions going to the merits" of the claim, "a balance of hardships that tips sharply towards the plaintiff," and "that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies*, 632 F.3d at 1135.

SUMMARY OF ARGUMENT

The district court properly denied Plaintiffs' motion for preliminary injunctive relief. Because AB 5 is a generally applicable labor law and does not restrict First Amendment rights, Plaintiffs failed to show a likelihood of success on the merits of their claims. Although Plaintiffs argued that AB 5 is a content-based restriction, subject to strict scrutiny, that argument is undermined by AB 5's plain terms and the case law. Moreover, even if Plaintiffs had shown a likelihood of success on their claim or serious questions going to the merits, they did not establish that the remaining discretionary factors warranted entry of a preliminary injunction, particularly in light of their long delay in seeking judicial relief.

ARGUMENT

I. PLAINTIFFS FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FIRST AMENDMENT CLAIMS BECAUSE AB 5 DOES NOT IMPOSE CONTENT-BASED RESTRICTIONS ON SPEECH.

Plaintiffs argue that AB 5 violates their First Amendment rights because it is subject to strict scrutiny, and Defendant cannot meet its burden under that standard. Plaintiffs' First Amendment claims, and by extension their arguments supporting the request of preliminary injunctive relief, are premised on the contention that AB 5 and its exemptions are subject to strict scrutiny because they impose content-based restrictions on speech. It is beyond dispute that content-based restrictions on speech are subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S 155, 165 (2015). But this principle is inapplicable here. AB 5 and its exemptions do not in fact impose content-based restrictions on speech, strict scrutiny does not apply, and thus Plaintiffs cannot establish that the district court committed legal error in denying their request for a preliminary injunction.[3]

[3] Even under the alternative "serious legal questions standard," Plaintiffs failed to show entitlement to preliminary injunctive relief because their legal claims lack merit, and they did not otherwise establish that the balance of hardships tips *sharply* in their favor, or the remaining *Winter* factors. *All. for the Wild Rockies*, 632 F.3d at 1135.

As the district court correctly concluded, and as this Court has already held, AB 5 is a generally applicable labor regulation governing the employer-employee relationship. (CD 24, ER 11.) *See Cal. Trucking Ass'n*, 996 F.3d at 664. Although Plaintiffs claim that AB 5 imposes content-based restrictions because two of its exemptions distinguish between direct sales salespersons and newspaper distributors (who are exempt from the ABC test), and the doorknockers and signature gatherers they seek to hire (who are not covered by the exemptions), AB 5's plain terms confirm that there is no content-based restriction. (CD 24, ER 10 [agreeing with other courts in this Circuit that have concluded that the exemptions in AB 5 are based on the "proper categorization of an employment relationship, unrelated to the content of speech."].)

The opening brief makes no attempt to address these conclusions, or otherwise establish that the district court committed legal error. (*See generally* Appellants' Opening Brief (AOB).) Instead, Plaintiffs continue to argue that AB 5 improperly favors certain types of speech. (*Id.* at 18-19.) Plaintiffs argue at length regarding the purported First Amendment protections that are extended to canvassing and other "efforts to engage and persuade voters on political matters." (AOB at 21.) But unlike laws that specifically focus on speech or otherwise seek to regulate expression, AB 5

is a generally applicable employment regulation. It does not target or ban any speech, political or otherwise. (CD 24, ER 9 ["Here, the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny."].)

Plaintiffs' reliance in their opening brief on cases involving restrictions specifically targeting door-to-door canvassing, pamphleteering, and circulation of petitions is misplaced. (AOB at 21-23.) For example, *Martin v. City of Struthers*, 319 U.S. 141 (1943), involved an ordinance prohibiting individuals from ringing doorbells or knocking on doors to deliver leaflets. *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), involved an ordinance prohibiting canvassers from entering private residential property without first obtaining a permit. *See also Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989) (First Amendment challenge to sections of California Election Code banning primary endorsements and restricting internal policy governance of political parties). Unlike the ordinances at issue in those cases, AB 5 does not target or ban any speech, political or otherwise. 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.[4] And the exemptions on which Plaintiffs focus merely determine whether a particular occupation is subject to the ABC test or the *Borello* standard. Thus, cases involving the prohibition on protected activities are inapposite. And unlike the cases cited, AB 5 does not single out or even focus on speech.

Indeed, in rejecting a preemption challenge to AB 5 earlier this year, this Court held that "AB-5 is a generally applicable labor law." *Cal. Trucking Ass'n*, 996 F.3d at 664. That holding is consistent with previous cases decided by this Court, which make clear that restrictions on economic

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[4] The opening brief misstates the terms of the ABC test. (AOB at 23.) Plaintiffs contend that under AB 5, "[t]heir workers are subject to the ABC test for all purposes . . . and are thus classified as employees." (*Id.*) But the ABC test states a *rebuttable* presumption. Cal. Lab. Code § 2775; *Garcia v. Border Transport. Grp., LLC*, 28 Cal.App.5th 558, 569 (Cal. Ct. App. 2018) ("Under the ABC test, a worker is presumed to be an employee" unless the hiring entity establishes certain facts). Similarly, Plaintiffs' assertion that "other workers, who knock on the same doors and walk the same streets to speak to the same people and deliver them papers, are subject to *Borello*, which has long been understood to classify them as independent contractors," lacks support. (AOB at 23.) In fact, at least one district court has concluded that, under *Borello*, a newspaper deliverer was an employee. *Martel v. Hearst Communications, Inc.*, 468 F. Supp. 3d 1212, 1215 (N.D. Cal. 2020) ("There is no genuine dispute of material fact that plaintiff here is an employee under *Borello* because defendant controls the manner and means by which plaintiff delivers newspapers."); *see also Espejo v. The Copley Press*, 13 Cal.App.5th 329 (Cal. Ct. App. 2017) (concluding that newspaper carriers were employees of newspaper under *Borello* standard).

activity, or nonexpressive conduct generally, are not equivalent to restrictions on protected expression. For example, in upholding a minimum wage ordinance against a First Amendment challenge, this Court pointed out that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Intern'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (citation omitted). In *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879 (9th Cir. 2018), this Court similarly rejected a challenge to a state law focusing on employer use of employee wages, distinguishing between "generally applicable economic regulations affecting rather than targeting" speech. *Id.* at 895-96; *see also Pac. Coast Horseshoeing Sch. v. Kirchmeyer*, 961 F.3d 1062, 1070 (9th Cir. 2020) (noting that "generally applicable regulatory schemes" like laws "regulating employer-employee relations . . . do not implicate the First Amendment").

Plaintiffs contend that the challenged regulatory scheme "on its face" implicates their political speech. (AOB at 23.) That claim is belied by the statute's clear terms. Here, AB 5 and its exemptions focus on the *status* of a worker, and the type of work performed, not on the substantive content of his or her work product. (CD 24, ER 9-10.) For example, the general rule under AB 5 states "[f]or purposes of [the Labor] code and the

Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor" unless the hiring entity establishes three conditions. Cal. Lab. Code § 2775(b)(1). And the various exemptions similarly focus on classification of workers, not speech. These include exemptions for a contract for "professional services," for relationships between sole proprietors, and for individuals involved in certain occupations related to sound recordings or musical compositions, among others. Cal. Lab. Code §§ 2778, 2279, 2780. None of these criteria (or the criteria for the direct sales salesperson or newspaper distributor exemptions) involve an examination of the worker's "message." Cal. Lab. Code § 2783(e) (exemption requires meeting terms of California Unemployment Insurance Code § 650, including holding certain salesperson licenses or engaged in sales under particular circumstances); § 2783(h)(1) (setting out conditions for newspaper distributor exemption, including working under contract with specified entities).

"As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994). But

"laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id.* Usually, a regulation's purpose or justification will be evident on its face. *Id.* at 642; *Reed*, 576 U.S. at 171 ("As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message conveyed"). Here, 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. Cal. Lab. Code § 2783(e); § 2783(h)(1). None of the challenged exclusions hinge on the *content* of any message. *See, e.g., Recycle for Change v. City of Oakland*, 856 F.3d 666, 670 (9th Cir. 2017) ("A content-based law is one that targets speech based on its communicative content") (citation omitted).

II. OTHER COURTS HAVE REJECTED SIMILAR CHALLENGES TO AB 5.

Although other courts have confronted (and rejected) similar challenges to AB 5, Plaintiffs do not meaningfully address those cases. Instead, Plaintiffs rely on inapposite cases far afield to support their argument that the district court erred.

A. Multiple District Courts Have Rejected Arguments that AB 5 Improperly Targets Speech.

As the district court noted, the other federal courts to address the issue have concluded that AB 5 focuses on occupation and industry, and does not improperly target speech, further undermining Plaintiffs' claims. (CD 24, ER 11 ["The Court agrees with the courts in this circuit that have found AB 5 to be a generally applicable law that regulates classifications of employment relationships by industry as opposed to speech."].) In fact, two courts in this Circuit have rejected First Amendment and equal protection challenges to AB 5 in similar contexts, concluding that AB 5 does not improperly target speech.

In *American Society of Journalists & Authors v. Becerra*, No. CV-19-10645-PSG, 2020 WL 1444909 (C.D. Cal., March 20, 2020) (*ASJA*), the district court denied the plaintiffs' motion for a preliminary injunction against AB 5, as applied to freelance writers and photojournalists.[5] Like Plaintiffs here, the plaintiffs in that case argued that certain AB 5 exemptions improperly imposed content-based restrictions, warranting strict

[5] The plaintiffs appealed the district court's dismissal in *ASJA*, and that case was argued in this Court on June 11, 2021, and is under submission. *American Society of Journalists & Authors v. Becerra*, No. 20-55734 (9th Cir.).

scrutiny. *Id.* at *6. The district court rejected that argument, reasoning that "AB 5 does not reference any idea, subject matter, viewpoint or substance of any speech; the distinction is based on if the individual providing the service in the contract is a member of a *certain occupational classification*." *Id.* at *7 (emphasis added). The district court "agree[d] that the challenged provisions in AB 5 are based on distinctions between speakers," but noted that "[t]here is no indication that AB 5 reflects preference for the substance or content of what certain speakers have to say, or aversion to what other speakers have to say." *Id.* at *8. Ultimately, "[t]he justification for these distinctions is proper categorization of an employment relationship, unrelated to the content of speech." *Id.*; *see also id.* ("AB 5 was not written in a way that suggests a motive to target certain content by targeting speakers.").

Similarly, in *Crossley v. California*, 479 F. Supp. 3d 901 (S.D. Cal. 2020), the district court rejected First Amendment and equal protection challenges (among others) to AB 5, brought by data processing entities that (like Plaintiffs) utilized individuals and businesses to collect signatures to qualify measures for the ballot. Like the court in *ASJA*, the district court in *Crossley* concluded that "AB 5 is 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." *Id.* at 916 (emphasis added). Like the Plaintiffs here, the plaintiffs in *Crossley* pointed to exempted professions—including the direct sales salespersons and newspaper distributor exemptions Plaintiffs focus on—and argued unsuccessfully that these were not meaningfully different from their own work as signature collectors for purposes of their equal protection claim. *Id.* at 914; *see also Olson v. Bonta*, No. 19-cv-10956-DMG-RAO, 2021 WL 3474015, at *4 (C.D. Cal. July 16, 2021) (analyzing equal protection challenge to AB 5, and concluding that "the Legislature's framework focuses on the *services* each company provides to determine if those services tend to be performed by traditional independent contractors and should be exempt from the ABC test under AB 5").[6]

Plaintiffs argue that *ASJA* is inapposite because it involved different provisions of AB 5, and because this case involves "discrimination favoring commercial over political speech." (AOB at 32.) But while *ASJA* involved the "professional services" exemption under former California Labor Code section 2750.3(c)(2)(B), Plaintiffs' challenges to the direct sales

[6] The plaintiffs appealed the district court's dismissal order in *Olson*, and that case is pending in this Court. *Olson v. State of Cal.*, No. 21-55757 (9th Cir.).

salespersons and newspaper distributor exemptions fail for the same reasons that the challenge to the "professional services" exemption failed. In *ASJA*, the court concluded that "[t]he justification for these distinctions [under AB 5] is proper categorization of an employment relationship, unrelated to the content of speech," and that "AB 5 was not written in a way that suggests a motive to target certain content by targeting speakers." 2020 WL 1444909, at *7. The same is true of the specific exemptions challenged here. Plaintiffs also attempt to distinguish *Crossley* because it allegedly did not involve claims of content-based restrictions. (AOB at 33-34 [disagreeing with the conclusion in *Crossley* that AB 5 "does not single out any profession or group of professions"].) But the district court in *Crossley* concluded that "AB 5 is 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 (emphasis added).

Other federal and state court decisions reinforce the conclusion that AB 5 is a generally applicable labor regulation. *See Cal. Trucking Ass'n*, 996 F.3d at 664; *Super. Ct. of L.A. Cty.*, 57 Cal. App. 5th at 631 (in rejecting federal preemption challenge to AB 5, concluding "the ABC test is a law of

general application"); *Parada v. E. Coast Transp., Inc.*, 62 Cal. App. 5th 692, 702 (Cal. Ct. App. 2021) (same).

B. Plaintiffs' Opening Brief Does Not Meaningfully Address Applicable Precedent, and Instead Relies on Inapposite Case Law Involving Direct Regulation of Speech.

Unable to meaningfully distinguish decisions that control here, Plaintiffs rely on inapposite cases, involving direct restrictions on speech. (AOB at 24-31.) As explained above, AB 5 is a generally applicable labor law, not a direct restriction on speech. These cases therefore fail to establish Plaintiffs' likelihood of success on their claims.

For example, the opening brief cites the rule that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." (AOB at 24, quoting *Reed*, 576 U.S. at 163.) But *Reed* involved a regulation "that appl[ied] to any given sign . . . [based] entirely on the communicative content of the sign." *Reed*, 576 U.S. at 164; *see also Tschida v. Motl*, 924 F.3d 1297 (9th Cir. 2019) (First Amendment challenge to state law requiring confidentiality of ethics complaints filed against elected and unelected officials). By contrast, AB 5's application hinges on the particular *occupation* at issue. Likewise, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), involved a regulation that "forbids sale subject to exceptions based in large part on the content of a

purchaser's speech." *Id.* at 564. And *Pacific Coast Horseshoeing School v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020), held that a state law that barred individuals without high school diplomas or the equivalent from enrolling in certain educational programs without first passing an examination, when viewed in its entirety, "regulates what kind of educational programs different institutions can offer to different students." *Id.* at 1069. The law at issue there warranted heightened scrutiny because its exceptions were based on the content of what the regulated schools taught. *Id.* at 1071. Thus, "these exceptions demonstrate that the [statute] does more than merely impose an incidental burden on speech," and instead targeted speech based on its communicative content. *Id.* at 1070-71. None of these cases address, let alone undermine, a generally applicable labor law like AB 5 that does not focus on the content of the speech.

Plaintiffs' reliance on *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), is similarly misplaced. (AOB at 28-29.) That case involved a First Amendment challenge to a federal statute that prohibited robocalls, but exempted calls "made solely to collect a debt owed to or guaranteed by the United States." *Id.* at 2347. By contrast here,

neither AB 5 nor the specific exemptions at issue hinge on the subject or topic of any speech—they instead hinge on the occupation of the individual.[7]

III. PLAINTIFFS DID NOT MEET THEIR BURDEN TO ESTABLISH THE DISCRETIONARY FACTORS UNDER *WINTER*.

A. The District Court Did Not Abuse Its Discretion in Concluding that Plaintiffs Failed to Meet Their Burden to Establish Irreparable Harm.

As the district court correctly recognized, because Plaintiffs failed to establish a likelihood of success on the merits, there is no need to assess the remaining three *Winter* factors. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Nevertheless, the district court also concluded that Plaintiffs "fail to show the need for emergency injunctive relief to prevent immediate and irreparable harm." (CD 24, ER 12.) Nothing in Plaintiffs' opening brief shows that the district court abused its discretion. As courts have made clear, the burden to establish the discretionary factors under *Winter* is not met merely by a blanket assertion of First Amendment rights. *Doe v. Harris*, 772 F.3d 563, 582-3 (9th Cir. 2014). Even if a plaintiff

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[7] Because the law challenged here does not impose content-based restrictions on speech, strict scrutiny does not apply, and the district court did not err in concluding that Plaintiffs failed to meet their burden to show a likelihood of success on the merits. In this context, Plaintiffs' arguments regarding whether AB 5 can meet the applicable legal standard and the quantum of evidence necessary are inapposite. (AOB at 35-36.)

demonstrates a likelihood of success on the merits of a First Amendment claim, "he 'must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor.'" *Id.* at 582. The Court "do[es] not simply assume that these elements 'collapse into the merits of the First Amendment claim.'" *Id.* at 582-3 (citation omitted).

And courts have made clear that a plaintiff's "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Miller for and on behalf of N.L.R.B. v. Cal. Pac. Medic. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (citation omitted); *see also Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1091 n.27 (3d Cir. 1984). AB 5 was signed into law in September 2019, and went into effect on January 1, 2020. (CD 24, ER 12; CD 1, ER 32-33 ¶¶ 13-15.) Yet Plaintiffs did not bring their claims until June 2021. Plaintiffs delayed almost two years after AB 5 was enacted, and over 15 months after it went into effect before filing suit and seeking preliminary injunctive relief. As the district court aptly summarized it, "Although Plaintiffs now claim there is urgency given the upcoming 2022 elections, Plaintiffs have failed to explain their delay in seeking their requested relief for a declaration that AB 5 should not apply to their workers." (CD 24, ER 12.)

On appeal, Plaintiffs argue that they did not delay in seeking relief. (AOB at 39.) They contend that the legal claim they raise here "is not readily obvious to everyone," and that it takes "time to learn that one has a valid claim." (*Id.*) But there is no authority to support the notion that a party can wait for years to ascertain if it has a viable legal claim. "A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . . " *Lydo Enter., Inc. v. City of Las Vegas*, 745 F.3d 1211, 1213 (9th Cir. 1984) (citation omitted). And Plaintiffs cite no factual support that they did not know of their rights and therefore could not file suit earlier. (AOB at 39.) Plaintiffs also argue that any claim regarding their "potential 2022 election activities would have been unripe in 2019" (*id.*), but again cite no factual support that this was the reason why they delayed filing suit over a law enacted almost two years ago. Similarly, Plaintiffs' contention that they had to wait until *Crossley* was decided is unpersuasive, as they have not pointed to any such legal requirement. (*Id.*)

B. The Remaining Discretionary Factors Militate Against Enjoining AB 5.

Although the district court did not need to address the remaining *Winter* factors, they also weigh against preliminary injunctive relief here.

First, because Plaintiffs seek to enjoin the enforcement of state law, the requested relief would change rather than preserve the status quo. As this Court has previously explained, "the basic function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (citation omitted). Here, the "status quo" is the ABC test, which has been in effect since the California Supreme Court's *Dynamex* decision in April 2018 (for minimum wage protections), and since January 1, 2020 under AB 5 (for other protections including workers' compensation). *See id.* (noting that the "provisions which plaintiff seeks to enjoin have been in effect for a number of years"); *see also Golden Gate Restaurant Ass'n v. City & Cty. of S. F.*, 512 F.3d 1112, 1116 (9th Cir. 2008) (explaining that an injunction against a newly enacted law does not preserve the status quo). This, in turn, means that Plaintiffs must establish that the law and facts *clearly favor* their position, not simply that they are likely to succeed on their claims. *Anderson v. U.S.*, 612 F.2d 1112, 1114

(9th Cir. 1979) (citation omitted). But, even though Plaintiffs seek to *alter* the status quo, they have not shown that the facts and the law "clearly favor" such relief. *Id.* Indeed, Plaintiffs do not cite to any authority holding doorknockers and signature gatherers are either employees or independent contractors under either *Borello* or the ABC test—thus, they have failed to show that the application of either test will have any effect on them.[8]

Next, it is the State that will suffer irreparable injury if this Court enjoins AB 5's enforcement. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."); *but see Latta v. Otter*, 771 F.3d 496, 500 & n.1 (9th Cir. 2014) (per curiam). These concerns are particularly acute here,

[8] Plaintiffs contend that their workers "could probably not pass the 'B' portion of the ABC test, because their work falls within the usual course of plaintiffs' businesses." (CD 1, ER 39 ¶ 43.) But even under the pre-existing *Borello* standard, one of the factors to ascertain if a worker was an employee was "whether or not the work is a part of the regular business of the principal." *S.G. Borello & Sons, Inc.*, 48 Cal. 3d at 351; *see also Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988-89 (9th Cir. 2014).

because a preliminary injunction would prevent the State from enforcing laws designed to address the widespread problem of misclassification of employees, and the attendant deprivation of protections under state labor law to which they are properly entitled. Plaintiffs give short-shrift to these concerns, arguing that the State's interest is limited to monetary loss. (AOB at 40 ["Misclassification might cost the state money. . . "].) But this conclusory and unsupported argument ignores the legitimate and significant state interests in protecting employees from misclassification. *Olson*, 2020 WL 905572, at *16 (denying request to enjoin AB 5 in light of "the potential impact to the State's ability to ensure proper calculation of low income workers' wages and benefits, protect compliant businesses from unfair competition, and collect tax revenue from employers to administer public benefits programs").

Lastly, Plaintiffs must establish that the public interest warrants a preliminary injunction. Where a party requests an injunction enjoining enforcement of state law, like here, the public interest is clearly involved. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). And "[i]n cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *see also Weinberger v.*

Romero-Barcelo, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

Plaintiffs do not meet this burden, and merely rely on a general argument that the public interest weighs in favor of preventing constitutional violations. (AOB at 40.) Plaintiffs' perfunctory argument fails because the public interest weighs heavily against enjoining state law. Here, a court order enjoining the State's enforcement of AB 5 would further delay the State's ability to effectively address the misclassification of workers and the public consequences of such misclassification, which the Legislature concluded warranted remediation. *Olson*, 2020 WL 905572, at **13-16 (concluding that balance of equities and public interest weigh against enjoining AB 5); *ASJA*, 2020 WL 1444909, at *11 (denying preliminary injunction staying AB 5, noting "the impact of an injunction on the State's ability to properly classify and provide protection of the labor laws to those that it determined should be classified as employees"). In enacting the statute, the Legislature intended "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law," including minimum wage, workers' compensation,

unemployment insurance, paid sick leave, and paid family leave. Stats. 2019, ch. 296, § 1(e) (Cal. 2019). AB 5 "restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law." (*Id.*) These paramount state interests outweigh Plaintiffs' interests in avoiding compliance with the law.

In enacting AB 5, the Legislature concluded that misclassification of workers as independent contractors has harmed workers and contributed to the shrinking of the middle class. Stats. 2019, ch. 296, § 1(c), (e) (Cal. 2019). Given that AB 5 was enacted only after extensive discussion during the legislative process about its impact and necessity, and negotiation with various stakeholders including industry, labor, and others, the public interest weighs heavily against a preliminary injunction. As noted above, courts hold that states suffer harm when enforcement of their laws is enjoined. *King*, 567 U.S. at 1303 (citation omitted). Where, as here, "responsible public officials" have considered the public interest and enacted a statute, the public interest weighs against enjoining such legislation. *Golden Gate Restaurant Ass'n*, 512 F.3d at 1126-27. "[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying

out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

CONCLUSION

For these reasons, this Court should affirm the district court's order denying Plaintiffs' motion for preliminary injunctive relief.

Dated: September 17, 2021

Respectfully submitted,

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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.

STATEMENT OF RELATED CASES

Defendant concurs with Plaintiffs' Statement of Related Cases.

Dated: September 17, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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