

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Mobilize the Message LLC et al.,
Plaintiffs,
v.
Rob Bonta,
Defendant.

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

**Order DENYING Motion for
Preliminary Injunction (Dkt. 9)**

United States District Court
Central District of California

Before the Court is Plaintiffs’ Mobilize the Message, LLC, Moving Oxnard Forward, Inc., and Starr Coalition for Moving Oxnard Forward (“Plaintiffs”) Motion for Preliminary Injunction. (Dkt. 9). After considering all the papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced at the hearing conducted on August 2, 2021, the Court DENIES the Motion.

I. BACKGROUND

A. Assembly Bill 5

This case challenges Assembly Bill 5 (“AB 5”), codified at Cal. Labor Code § 2775(b)(1), a California law pertaining to the classification of employees and independent contractors.

In 2018, the California Supreme Court in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 916 (2018), held that courts should apply a

1 three-part test, the “ABC Test”, to determine whether a worker is properly
2 classified as an employee for certain purposes. Prior to 2018, California’s
3 test for classifying workers as either employees or independent contractors
4 was set forth, for all purposes, in *S.G. Borello & Sons, Inc. v. Dep’t of Indus.*
5 *Relations*, 48 Cal. 3d 341 (1989). The ABC Test classifies workers as
6 employees unless an employer establishes:

7
8 (A) that the worker is free from the control and direction of the hiring
9 entity in connection with the performance of the work, both under the
10 contract for the performance of the work and in fact;

11
12 (B) that the worker performs work that is outside the usual course of
13 the hiring entity's business; and

14
15 (C) that the worker is customarily engaged in an independently
16 established trade, occupation, or business of the same nature as that
17 involved in the work performed.

18
19 Cal. Labor Code § 2775(b)(1). On September 18, 2019, the California
20 Legislature codified the ABC test adopted in *Dynamex* by enacting AB 5.
21 See A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (“AB 5”); Cal. Labor
22 Code § 2775(b)(1).

23
24 Under AB 5, the ABC test is the standard used for ascertaining
25 whether a worker is an employee. The law nevertheless creates certain
26 exceptions for categories of workers that remain subject to the multi-factor

1 “*Borello*” standard. As relevant here, workers that fall within such
2 exceptions include “[a] direct sales salesperson as described in Section 650
3 of the Unemployment Insurance Code so long as the conditions for
4 exclusion from employment under that section are met.” Cal. Labor Code §
5 2783(e). Per that provision, “[e]mployment’ does not include services
6 performed as a . . . direct sales salesperson . . . by an individual” if “[t]he
7 individual . . . is engaged in the trade or business of primarily in person
8 demonstration and sales presentation of consumer products, including
9 services or other intangibles, in the home . . . or otherwise than from a retail
10 or wholesale establishment. . . .” Cal. Unemp. Ins. Code § 650. Newspaper
11 distributors and carriers are also exempted from the ABC test and are
12 instead subject to *Borello*. Cal. Labor Code § 2783(h)(1).

13
14 **B. Plaintiffs and the Alleged Burden of AB 5**

15 Plaintiff Mobilize the Message, LLC (“MTM”) hires “doorknockers” to
16 canvass neighborhoods and personally engage voters in the residence on
17 behalf of its client campaigns. MTM also hires signature gatherers to
18 persuade voters, at their residence and in public places, to sign petitions
19 that would qualify measures for the ballot.

20
21 Plaintiff Moving Oxnard Forward, Inc., (“MOF”), a California nonprofit
22 corporation dedicated to improving the city of Oxnard, maintains a political
23 action committee, Plaintiff Starr Coalition for Moving Oxnard Forward (“Starr
24 Coalition”), that creates, qualifies, and works to enact ballot measures in
25 Oxnard’s municipal elections.
26

1 Prior to AB 5's enactment, MTM provided its services in California.
2 MTM abandoned the California market upon AB 5's enactment because,
3 *inter alia*, it could not afford the administrative expenses of hiring its
4 independent contractors as employees.
5

6 MOF and Starr Coalition claim that they intend to participate in
7 Oxnard's 2022 municipal elections which require signature gathering for the
8 ballots to begin now. Plaintiffs nevertheless refrain from hiring their
9 doorknockers and signature gatherers as employees because they claim it
10 is unfeasible for them to do so under the current regulatory scheme.
11

12 **C. Procedural Background**

13 On June 23, 2021, Plaintiffs filed this lawsuit against Defendant Rob
14 Bonta, in his official capacity as Attorney General of California ("Defendant"),
15 arguing that AB 5 discriminates against speech based on its content. (See
16 Dkt. 1, at 13). Specifically, Plaintiffs contend that California favors
17 commercial speech over political speech because AB 5 exempts certain
18 workers, such as newspaper deliverers and cosmetics salespersons, from
19 being classified as employees whereas signature gatherers and
20 doorknockers for political campaigns are considered employees under the
21 current framework. (See *id.*) According to Plaintiffs, "[b]y classifying
22 doorknockers per the ABC test, while classifying direct salespersons,
23 newspaper distributors, and newspaper carriers per *Borello*, Defendant,
24 under color of law deprives Plaintiffs ... of their right of free speech
25 guaranteed by the First and Fourteenth Amendment." (Dkt. 1).
26

1 On June 24, 2021, Plaintiffs filed the instant Motion asking the Court
2 to enjoin Defendant from applying the ABC Test to classify Plaintiffs'
3 doorknockers and signature gatherers as employees. Defendant filed an
4 Opposition to the Motion on July 12, 2021. (Dkt. 20). Plaintiffs filed a Reply
5 on July 19, 2021. (Dkt. 21).

6 7 **II. LEGAL STANDARD**

8 "A preliminary injunction is an extraordinary and drastic remedy ...; it
9 is never awarded as of right." *Munaf v. Green*, 553 U.S. 674, 689-90 (2007)
10 (citations omitted). "A plaintiff seeking a preliminary injunction must
11 establish that he is likely to succeed on the merits, that he is likely to suffer
12 irreparable harm in the absence of preliminary relief, that the balance of the
13 equities tips in his favor, and that an injunction is in the public interest."
14 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).
15 In this Circuit, a plaintiff may obtain a preliminary injunction upon a lesser
16 showing of the merits if the balance of hardships tips "sharply" in his favor,
17 and he has satisfied the other two *Winter* requirements. *See Alliance for the*
18 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

19 20 **III. DISCUSSION**

21 As discussed below, Plaintiffs fail to satisfy the requirements set forth
22 in *Winter* for injunctive relief.

23 24 **1. Likelihood of Success on the Merits**

25 The Court finds that Plaintiffs have failed to establish a likelihood of
26 success on the merits. "Likelihood of success on the merits is 'the most

1 important factor' in determining whether interim, injunctive relief is
2 warranted." *Environmental Protection Information Ctr. v. Carlson*, 968 F.3d
3 985, 989 (9th Cir. 2020). "Because it is a threshold inquiry, when a plaintiff
4 has failed to show the likelihood of success on the merits, we need not
5 consider the remaining three *Winter* elements." *Al-Nasser v. Serdy*, No.
6 2:20CV03582 ODW (Ex), 2020 WL 3129206, at *2 (C.D. Cal. June 12,
7 2020) (*citing Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)).
8

9 Plaintiffs allege two claims against Defendant, arguing that the
10 application of the ABC Test violates the First Amendment as applied to their
11 doorknockers and signature gatherers. Plaintiffs have not satisfied their
12 burden of showing they are likely to succeed on either claim.
13

14 A. First Amendment

15 If a law "imposes content-based restrictions on speech, those
16 provisions can stand only if they survive strict scrutiny." *Reed v. Town of*
17 *Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015); *Turner Broad. Sys., Inc. v.*
18 *F.C.C.*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most
19 exacting scrutiny to regulations that suppress, disadvantage, or impose
20 differential burdens upon speech because of its content."). By contrast,
21 "regulations that are unrelated to the content of speech are subject to an
22 intermediate level of scrutiny." *Turner*, 512 U.S. at 642. "[R]estrictions on
23 protected expression are distinct from restrictions on economic activity or,
24 more generally, on nonexpressive conduct ... [T]he First Amendment does
25 not prevent restrictions directed at commerce or conduct from imposing
26 incidental burdens on speech." *Int'l Franchise Ass'n, Inc. v. City of Seattle*,

1 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Sorrell v. IMS Health Inc.*, 564
2 U.S. 552, 565 (2011)). The question is whether there is conduct with a
3 “significant expressive element that drew the legal remedy in the first place”
4 or the statute has the “inevitable effect of singling out those engaged in
5 expressive activity.” *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07
6 (1986). “[G]enerally applicable economic regulations [affecting] rather than
7 targeting news publications” pass constitutional muster. *Interpipe*
8 *Contracting, Inc. v. Becerra*, 898 F.3d 879, 896 (9th Cir. 2018) (generally
9 applicable wage law targeting employer use of employee wages regulated
10 conduct and was not subject to First Amendment scrutiny).

11
12 Plaintiffs contend that AB 5 imposes content-based restrictions and
13 thus is subject to strict scrutiny. The Court disagrees.

14
15 Here, the challenged exemptions in AB 5 are neither content-based
16 nor otherwise require heightened scrutiny. As other courts in this circuit
17 have held, “AB 5 applies a particular test to determine if a worker is
18 considered an ‘employee’ as opposed to an ‘independent contractor,’ to the
19 Labor Code ... [i]t is thus directed at economic activity generally [and] does
20 not directly regulate or prohibit speech.” See *Am. Soc’y of Journalists &*
21 *Authors, Inc. v. Becerra*, No. CV1910645 PSG (KSx), 2020 WL 1444909, at
22 *7 (C.D. Cal. Mar. 20, 2020), appeal dismissed, No. 20-55408, 2020 WL
23 6075667 (9th Cir. Aug. 20, 2020).

24
25 Plaintiffs nevertheless argue at length that AB 5 makes distinctions
26 between speakers’ messages, such as between newspaper deliverers and

1 campaign signature gatherers, and therefore expresses a content
2 preference. See Dkt. 9-1, at 11-12 (“The regulatory scheme, on its face,
3 implicates Plaintiffs’ political speech. Their workers are subject to the ABC
4 test for all purposes ... [y]et other workers, who knock on the same doors
5 and walk the same streets to speak to the same people and deliver them
6 papers, are classified as independent contractors per *Borello*. The
7 distinctions? Rather than talk politics, these workers perform ‘in person
8 demonstration[s] and sales presentation[s].’”). Indeed, Plaintiffs contend
9 that state investigators would need to examine the “worker’s message to
10 see if [an] exception applied.” These arguments are unpersuasive.

11
12 “There is no indication that AB 5 reflects preference for the substance
13 or content of what certain speakers have to say, or aversion to what other
14 speakers have to say.” *Am. Soc’y of Journalists & Authors, Inc.*, 2020 WL
15 1444909, at *8. Rather, as Defendant points out, the distinctions between
16 cosmetics salespersons and campaign signature gatherers or doorknockers
17 under AB 5 are based on the worker’s occupation. The distinctions based
18 on the types of products sold or services rendered are directly related to the
19 occupation or industry of a worker as opposed to the statements the worker
20 uses to sell such goods or perform such services. Courts in this circuit have
21 held the same and have reasoned that “[t]he justification for these
22 distinctions is proper categorization of an employment relationship,
23 unrelated to the content of speech.” (*Id.*; see also *Crossley v. California*, 479
24 F. Supp. 3d 901, 916 (S.D. Cal. Aug. 17, 2019)). The Court sees no reason
25 to reach a different result here. (*Id.*)
26

1 Plaintiffs’ attempt to distinguish these cases is unpersuasive. Notably,
2 Plaintiffs argue *Crossley* is inapposite because that court “plainly erred in
3 describing AB 5 as ‘a generally applicable law that regulates the
4 classification of employment relationships across the spectrum and does not
5 single out any profession or group of professions.’” (Dkt. 9-1, at 17). The
6 Court disagrees. Plaintiffs’ conclusory statement is unsupported as they
7 have failed to point to any facts suggesting that AB 5 favors commercial
8 speech over political speech due to its exemptions.

9
10 The Court agrees with the courts in this circuit that have found AB 5 to
11 be a generally applicable law that regulates classifications of employment
12 relationships by industry as opposed to speech. Plaintiffs’ argument that the
13 content of what a worker says will determine whether an AB 5 exemption
14 applies in this context lacks merit. The more sensible interpretation is that
15 the distinctions hinge on the worker’s industry regardless of speech. While
16 some of AB 5’s exemptions arguably may have been arbitrarily designed or
17 are the result of political motives, “[a]ccommodating one interest group is
18 not equivalent to intentionally harming another.” *Gallinger v. Becerra*, 898
19 F.3d 1012, 1021 (9th Cir. 2018). Accordingly, Plaintiffs have failed to show
20 that strict scrutiny applies.

21
22 Plaintiffs do not argue whether AB 5 could pass the lesser rational
23 based review. (See Dkt. 9-1, at 18 (“Plaintiffs would disagree that AB 5
24 could pass even rational basis review, but that is not the test here.”)). Given
25 that Plaintiffs have only argued the strict scrutiny portion of the analysis that
26

1 the Court rejects, Plaintiffs have failed to satisfy their heavy burden of
2 showing they are likely to succeed on their First Amendment Claims.

3 4 **2. Irreparable Harm**

5 Although it need not address this factor, the Court notes that Plaintiffs
6 also fail to show the need for emergency injunctive relief to prevent
7 immediate and irreparable harm. *Al-Nasser v. Serdy*, No. 220CV03582
8 ODW (Ex), 2020 WL 3129206, at *2 (C.D. Cal. June 12, 2020) (*citing Garcia*
9 *v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)) (“Because it is a threshold
10 inquiry, when a plaintiff has failed to show the likelihood of success on the
11 merits, we need not consider the remaining three *Winter* elements.”). “An
12 essential prerequisite to the granting of a preliminary injunction is a showing
13 of irreparable injury to the moving party in its absence.” *Dollar Rent A Car of*
14 *Washington, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1375 (9th Cir.
15 1985).

16
17 As Defendant notes, AB 5 was signed into law in September 2019.
18 Nevertheless, Plaintiffs waited until June 2021, nearly two years later, to
19 bring their claims regarding AB 5’s exemptions. Plaintiffs admit that they
20 halted all operations in California after AB 5’s implementation and have thus
21 been impacted by the regulation long before this year. Although Plaintiffs
22 now claim there is urgency given the upcoming 2022 elections, Plaintiffs
23 have failed to explain their delay in seeking their requested relief for a
24 declaration that AB 5 should not apply to their workers.

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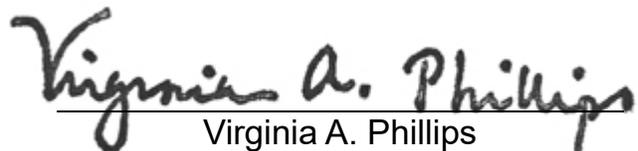
1 Although a delay in filing for injunctive relief is not determinative, it
2 “implies a lack of urgency and irreparable harm.” See *Vital Pharms., Inc. v.*
3 *PhD Mktg., Inc.*, No. 220CV06745 RSWL (JCx), 2020 WL 6545995, at *8
4 (C.D. Cal. Nov. 6, 2020) (citing to *Cuviello v. City of Vallejo*, 944 F.3d 816,
5 833 (9th Cir. 2019) (citations omitted); see also *Dahl v. Swift Distrib., Inc.*,
6 No. CV 10-00551 SJO (RZx), 2010 WL 1458957, at *3 (C.D. Cal. Apr. 1,
7 2010) (noting that an “unexplained delay ... undercuts a claim that an
8 injunction is necessary to prevent immediate and irreparable injury”)). Here,
9 Plaintiffs’ two-year delay in filing this Motion weighs against irreparable
10 harm. See *id.* (citing to *AK Metals, LLC v. Norman Indus. Materials, Inc.*, No.
11 12cv2595-IEG (WVG), 2013 WL 417323, at *10 (S.D. Cal. Jan. 31, 2013)
12 (“Plaintiff’s [two-month] delay in filing the motion ... weighs against the
13 immediacy of the harm.”)).

14
15 **IV. CONCLUSION**

16 For the foregoing reasons, the Court finds that Plaintiffs have not
17 satisfied their heavy burden of establishing they are entitled to the
18 extraordinary remedy of a preliminary injunction. Accordingly, the Court
19 DENIES Plaintiffs’ Motion.

20
21 **IT IS SO ORDERED.**

22
23 Dated: 8/9/21

24 
25 Virginia A. Phillips
26 United States District Judge