FOR PUBLICATION

FILED

OCT 11 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD, INC.; STARR COALITION FOR MOVING OXNARD FORWARD, Plaintiffs-Appellants, v. ROB BONTA, in his official capacity as Attorney General of California, Defendant-Appellee.	No. 21-55855 D.C. No. 2:21-cv-05115-VAP-JPR OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Argued and Submitted February 7, 2022
San Francisco, California

Before: Andrew D. Hurwitz and Lawrence VanDyke, Circuit Judges, and Joan N. Ericksen,[*] District Judge.

Opinion by Judge Ericksen;
Dissent by Judge VanDyke

[*] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

SUMMARY[**]

Civil Rights

The panel affirmed the denial of plaintiff's motion for a preliminary injunction which sought to restrain the California Attorney General from applying California's "ABC test," codified in California Labor Code § 2775(b)(1) to classify plaintiffs' doorknockers and signature gatherers as either employees or independent contractors.

For certain purposes, California classifies "a person providing labor or services for remuneration" as an employee unless the hiring entity satisfies the "ABC test" adopted in Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018). Cal. Lab. Code § 2775(b)(1). Section 2775 and Dynamex do not apply to several occupations. E.g., id. § 2783. For workers in the exempt occupations, the multifactor test of S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 769 P.2d 399 (Cal. 1989), governs in determining whether the worker is an employee or an independent contractor. Although Dynamex was initially limited to wage orders, with Borello applying outside that context, the California legislature codified the ABC test and expanded its applicability through the enactment of Assembly Bill No. 5 (AB 5) in 2019.

Plaintiff Mobilize the Message provides political campaigns with doorknockers and signature gatherers, which it purports to hire as independent contractors. Plaintiff Moving Oxnard Forward is a nonprofit corporation dedicated to making the government of Oxnard, California, more efficient and transparent and in the past have hired signature gatherers as independent contractors. Plaintiffs claimed that the California law violates the First Amendment because it discriminates against speech based on its content by classifying their doorknockers and signature gatherers as employees or independent contractors under the ABC test while classifying direct sales salespersons, newspaper distributors, and newspaper carriers under Borello.

The panel accepted, for present purposes, plaintiffs' assertion that application of the ABC test to their doorknockers and signature gatherers increased the likelihood

---

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that they will be classified as employees. The panel also accepted that classification of their doorknockers and signature gatherers as employees might impose greater costs on plaintiffs than if these individuals had been classified as independent contractors, and that as a result they might not retain as many doorknockers and signature gatherers. Such an indirect impact on speech, however, does not violate the First Amendment. Section 2783 does not target certain types of speech. Unless an occupational exemption exists, the ABC test applies across California's economy. Thus, plaintiffs were not unfairly burdened by application of the ABC test to their doorknockers and signature gatherers.

The panel also rejected plaintiffs' assertion that section 2783's exemptions for direct sales salespersons, newspaper distributors, and newspaper carriers constituted content-based discrimination. Section 2783's exemptions do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations. Although determination of whether an individual is, for example, a direct sales salesperson might require some attention to the individual's speech, the Supreme Court has rejected the view that any examination of speech or expression inherently triggers heightened First Amendment concern.

Because Plaintiffs had not established a colorable claim that their First Amendment rights had been infringed, or were threatened with infringement, they had not demonstrated a likelihood of success on the merits. The district court did not abuse its discretion in denying a preliminary injunction.

Dissenting, Judge VanDyke stated he would reverse the denial of a preliminary injunction. The governmental burdens challenged here turned primarily on what is said, not labor distinctions unrelated to speech. Regardless of whether such content-based distinctions hide under the veneer of a labor classification, the First Amendment's protections remain the same. Plaintiffs face cost-prohibitive expenses under AB 5 because of the content of the speech in which they engage.

COUNSEL

Alan Gura (argued), Institute for Free Speech, Washington, D.C., for Plaintiffs-Appellants.

Jose A. Zelidon-Zepeda (argued), Deputy Attorney General; Heather Hoesterey, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the Attorney General, San Francisco, California; for Defendant-Appellee.

ERICKSEN, District Judge:

For certain purposes, California classifies "a person providing labor or services for remuneration" as an employee unless the hiring entity satisfies the "ABC test" adopted in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018). Cal. Lab. Code § 2775(b)(1). Section 2775 and *Dynamex* do not apply to several occupations. *E.g.*, *id.* § 2783. For workers in the exempt occupations, the multifactor test of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989), governs in determining whether the worker is an employee or an independent contractor.

Mobilize the Message, LLC, Moving Oxnard Forward, Inc., and Starr Coalition for Moving Oxnard Forward (collectively "Plaintiffs") claim that this California law violates the First Amendment. They sued the California Attorney General and moved for a preliminary injunction to restrain him from classifying their doorknockers and signature gatherers according to the ABC test. The district court denied the motion. Plaintiffs appealed. We have jurisdiction under 28 U.S.C. § 1292(a)(1) and affirm.

I

A

"Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly

an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction." *Dynamex*, 416 P.3d at 14 (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 121 (1944)).

"[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions." *Id.* "[T]he question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor." *Id.* Before *Borello*, "California decisions generally invoked this common law 'control of details' standard beyond the tort context, even when deciding whether workers should be considered employees or independent contractors for purposes of the variety of 20th century social welfare legislation that had been enacted for the protection of employees." *Id.* "In addition to relying upon the control of details test, . . . the pre-*Borello* decisions listed a number of 'secondary' factors that could properly be considered in determining whether a worker was an employee or an independent contractor." *Id.* at 15.

Borello addressed the distinction between employees and independent contractors for purposes of California's Workers' Compensation Act. The California Supreme Court stated that "the concept of 'employment' embodied in the Act is not inherently limited by common law principles"; that "the Act's definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute"; and that, "under the Act, the 'control-of-work-details' test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation." 769 P.2d at 405–06. After summarizing the purposes of the Act, the court acknowledged that "[t]he Act intends comprehensive coverage of injuries in employment"; that the Act "accomplishes this goal by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee'"; and that the Act's exclusion of "independent contractors" "recognizes those situations where the Act's goals are best served by imposing the risk of 'no-fault' work injuries directly on the provider, rather than the recipient, of a compensated service." *Id.* at 406.

Borello did not adopt "detailed new standards for examination of the issue." *Id.* Rather, it explained:

> [T]he Restatement guidelines heretofore approved in our state remain a useful reference. The standards set forth for contractor's licensees in section 2750.5 are also a helpful means of identifying the employee/contractor distinction. The relevant considerations may often overlap those pertinent under the common law. Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.

Id. at 406–07 (citations omitted). The court also noted a "six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation." *Id.* at 407. Recognizing "many points of individual similarity between these guidelines and [its] own traditional Restatement tests," the court concluded that "all [of the factors] are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." *Id.*

Borello came "to be viewed as the seminal decision" in California on whether a worker is an employee or an independent contractor. *Dynamex*, 416 P.3d at 15. California courts have applied it "in distinguishing employees from independent contractors in many contexts, including in cases arising under California's wage orders." *Id.* at 27.

In *Dynamex*, the California Supreme Court addressed "what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage*

orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees." *Id.* at 5. Under the applicable wage order, "to employ" meant "(a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." *Id.* at 6 (quoting *Martinez v. Combs*, 231 P.3d 259, 278 (Cal. 2010)). Acknowledging "the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors," *id*. at 35, the *Dynamex* court "conclude[d] it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test":

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Id. (footnote omitted).

"Although *Dynamex* was initially limited to wage orders, with *Borello* applying outside that context, the California legislature codified the ABC test and expanded its applicability through the enactment of" Assembly Bill No. 5 in 2019.[1] *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 958 (9th Cir. 2021) (footnote omitted) (citations omitted), *cert. denied*, 142 S. Ct. 2870 (2022). "The legislature gave several reasons for taking this step. It found that misclassification caused workers to 'lose significant workplace protections,'

---

[1] The ABC test is codified at California Labor Code § 2775(b)(1):

> For 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 demonstrates that all of the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

deprived the state of needed revenue, and ultimately contributed to the 'erosion of the middle class and the rise in income inequality.' With [Assembly Bill No. 5], the legislature declared, it was protecting 'potentially several million workers.'" *Id.* (citations omitted). Assembly Bill No. 5 "did not apply *Dynamex* across the board, however, but specified that the *Borello* standard would continue governing many occupations and industries." *Id.* at 958–59. A direct sales salesperson,[2] a newspaper distributor, and a newspaper carrier[3] are among the occupations

---

[2] "A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met," is governed by *Borello*. Cal. Lab. Code. § 2783(e). Section 650 provides that "'[e]mployment' does not include services performed as . . . a . . . direct sales salesperson . . . by an individual" if "[t]he individual . . . is engaged in the trade or business of primarily inperson demonstration and sales presentation of consumer products, including services or other intangibles, in the home or sales to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment," "[s]ubstantially all of the remuneration (whether or not paid in cash) for the services performed by that individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual," and "[t]he services performed by the individual are performed pursuant to a written contract between that individual and the person for whom the services are performed and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes."

[3] "A newspaper distributor working under contract with a newspaper publisher, . . . or a newspaper carrier" is governed by *Borello*. Cal. Lab. Code § 2783(h)(1). The definitions of "newspaper" and "carrier" were amended after the parties filed their briefs. 2021 Cal. Stat. 5542. A "newspaper" is:

> [A] newspaper of general circulation, as defined in Section 6000 or 6008 of the Government Code, and any

governed by *Borello*.

B

Mobilize the Message provides political campaigns with doorknockers and signature gatherers, which it purports to hire as independent contractors. It formerly provided services in California, but left the state upon the enactment of Assembly Bill No. 5, and has since declined prospective "contracts in California because it cannot afford the administrative expenses of hiring its independent contractors as employees." Mobilize the Message would like to provide services to Starr Coalition and others in California, but refrains from doing so "solely because

---

> other publication circulated to the community in general as an extension of or substitute for that newspaper's own publication, whether that publication be designated a "shoppers' guide," as a zoned edition, or otherwise. "Newspaper" may also be a publication that is published in print and that may be posted in a digital format, and distributed periodically at daily, weekly, or other short intervals, for the dissemination of news of a general or local character and of a general or local interest.

Id. § 2783(h)(2)(A). A "newspaper carrier" is:

> [A] person who effects physical delivery of the newspaper to the customer or reader, who is not working as an app-based driver, as defined in Chapter 10.5 (commencing with Section 7448) of Division 3 of the Business and Professions Code, during the time when the newspaper carrier is performing the newspaper delivery services.

Id. § 2783(h)(2)(D).

hiring doorknockers and signature gatherers as employees, per the ABC test, is infeasible."

Moving Oxnard Forward is a nonprofit corporation dedicated to making the government of Oxnard, California, more efficient and transparent. The purpose of Moving Oxnard Forward and Starr Coalition, its political action committee, "is to effect political change by enacting ballot measures." They depend on signature gatherers to qualify their measures for the ballot. Moving Oxnard Forward and Starr Coalition have in the past hired signature gatherers as independent contractors. Starr Coalition now, however, "refrains from hiring signature gatherers solely because doing so as an employer, per the ABC test, is infeasible." Starr Coalition would like to contract with Mobilize the Message to gather signatures or to hire its own signature gatherers as independent contractors.

Plaintiffs sued the California Attorney General under 42 U.S.C. § 1983, claiming that California law violates their right of free speech under the First Amendment by classifying their doorknockers and signature gatherers as employees or independent contractors according to the ABC test and classifying direct sales salespersons, newspaper distributors, and newspaper carriers according to *Borello*. They alleged that direct sales salespersons, newspaper distributors, and newspaper carriers who work on the same terms that Plaintiffs would offer doorknockers and signature gatherers would be classified as employees under the

ABC test but for the exemptions in California Labor Code § 2783(e) and (h)(1).

Plaintiffs moved for a preliminary injunction to restrain the California Attorney General from classifying their doorknockers and signature gatherers according to the ABC test. The district court denied the motion, finding that Plaintiffs failed to show a likelihood of success on the merits. The district court rejected their contention that Assembly Bill No. 5 imposes content-based restrictions on speech, concluding instead that it is "a generally applicable law that regulates classifications of employment relationships by industry as opposed to speech." The district court also noted that Plaintiffs failed "to show the need for emergency injunctive relief to prevent immediate and irreparable harm." They appealed.

II

A

"We review the denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo." *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 835 (9th Cir. 2020) (quoting *Fyock v. City of Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015)). "An abuse of discretion occurs when the district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 838 (9th Cir. 2019) (quoting *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942

(9th Cir. 2014)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because we find that likelihood of success on the merits is determinative, we confine our analysis to that factor. *See Hall*, 984 F.3d at 835.

B

Plaintiffs assert that California discriminates against their speech based on its content by classifying their doorknockers and signature gatherers as employees or independent contractors under the ABC test while classifying direct sales salespersons, newspaper distributors, and newspaper carriers under *Borello*. The state responds that Assembly Bill No. 5 and "its exemptions do not . . . impose content-based restrictions on speech." The district court agreed and so do we.

"The First Amendment, applied to states through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech or the press. Governments cannot, therefore, 'restrict expression because of its message, its ideas, its subject matter, or its content.'" *Am. Soc'y of Journalists*, 15 F.4th at 960 (citation omitted) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the

government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. "A regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (alteration in original) (quoting *Reed*, 576 U.S. at 163).

However, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Therefore, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* "Consistent with this view, the Supreme Court has rejected First Amendment challenges to the Fair Labor Standards Act and its exceptions, the National Labor Relations Act, the Sherman Act, and taxes." *Am. Soc'y of Journalists*, 15 F.4th at 961 (citations omitted).

In *American Society of Journalists*, we stated that California Labor Code § 2778, which applies *Borello* instead of section 2775 and *Dynamex* to certain contracts for "professional services," "fits within this line of cases because it regulates economic activity rather than speech":

> It does not, on its face, limit what someone can or cannot communicate. Nor does it restrict when, where, or how

> someone can speak. It instead governs worker classification by specifying whether *Dynamex*'s ABC test or *Borello*'s multi-factor analysis applies to given occupations under given circumstances. In other words, the statute is aimed at the employment relationship—a traditional sphere of state regulation. Such rules understandably vary based on the nature of the work performed or the industry in which the work is performed, and section 2778 is no different in this regard. But whether employees or independent contractors, workers remain able to write, sculpt, paint, design, or market whatever they wish.

15 F.4th at 961–62 (footnote omitted) (citation omitted). We acknowledged that use of the ABC test might increase the likelihood of a worker being classified as an employee and that classification of workers as employees "may indeed impose greater costs on hiring entities, which in turn could mean fewer overall job opportunities for workers, among them certain 'speaking' professionals." *Id.* at 962. But we stated that "such an indirect impact on speech does not necessarily rise to the level of a First Amendment violation." *Id.*

We recognized that "economic regulations can still implicate the First Amendment when they are not 'generally applicable' but instead target certain types of speech and thereby raise the specter of government discrimination." *Id.* But we concluded that "[s]ection 2778 poses none of these problems":

> It does not target the press or a few speakers, because it applies across California's economy. That is, it establishes a default rule applying *Dynamex*'s ABC test to the classification of all work arrangements *unless* an arrangement falls within an exemption, in which case

> *Borello* applies. Freelancers and related professionals enjoy one exemption and may understandably want it broadened. But many occupations have no exemption at all; the ABC test governs their classification regardless of the circumstances. So if a freelance writer falls out of his exemption's scope—by, say, being restricted from working for more than one entity—he is not uniquely burdened. Rather, he is then treated the same as the many other workers governed by the ABC test.

Id. at 962–63.

We also concluded that section 2778 does not "impose content-based burdens on speech" because "its applicability does not turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged." *Id.* at 963. We recognized that "some regulated occupations 'speak' as part of their professions," but we discerned no "legislative content preference" in "section 2778's text, structure, or purpose":

> Notably, the practice of most exempted professions—such as home inspectors, foresters, and fisherman—does not equate to "speech." Other regulated services, which could constitute "speech," do not serve as stand-ins for particular subject matters. These include freelance writers, graphic designers, and photo editors. Creative marketers will, of course, communicate about marketing, just as lawyers will about law. But the inclusion of provisions specific to such "speaking" professionals does not, in our view, transform a broad-ranging, comprehensive employment law like section 2778 into a content-based speech regulation. If it did, it is difficult to see how any occupation-specific regulation of speakers would avoid strict scrutiny. We decline ASJA's invitation to apply the First Amendment in this manner.

Id. at 963–64 (footnote omitted) (citations omitted). We indicated that examination of the content of a worker's message to determine whether the ABC test or *Borello* applies does not necessarily mean the law "impermissibly singles out speech based on its subject matter." *Id.* at 963 n.8. We also noted that "[a] legislature could conceivably define services or occupations so granularly that a court could isolate the speech's communicative intent as a defining distinction." *Id.* at 964 n.9. Ultimately, we held that "[s]ection 2778's use of different worker-classification tests for different occupations under different circumstances does not implicate the First Amendment." *Id.* at 966.

"For 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" satisfies the ABC test. Cal. Lab. Code § 2775(b)(1). Several occupations, including direct sales salesperson, newspaper distributor, and newspaper carrier, are exempt from section 2775 and *Dynamex* and instead governed by *Borello*. *Id.* § 2783(e), (h)(1). This statutory scheme does not restrict what, when, where, or how a worker may communicate. California's classification of a worker as an employee or an independent contractor is "aimed at the employment relationship—a traditional sphere of state regulation." *Am. Soc'y of Journalists*, 15 F.4th at 961. It is a

regulation of economic activity, not speech.[4]

We accept, for present purposes, Plaintiffs' assertion that application of the ABC test to their doorknockers and signature gatherers increases the likelihood that they will be classified as employees. We also accept that classification of their doorknockers and signature gatherers as employees might impose greater costs on them than if these individuals had been classified as independent contractors, and that as a result they might not retain as many doorknockers and signature gatherers. Such an indirect impact on speech, however, does not violate the First Amendment. *Id.* at 962. Economic regulations can, of course, "implicate the First Amendment when they are not 'generally applicable' but instead target certain types of speech and thereby raise the specter of government discrimination." *Id.* Section 2783 does not target certain types of speech. Unless an occupational

---

[4] Plaintiffs' reliance on various cases was expressly foreseen and rejected in *American Society of Journalists*:

> In *Reed*, the Court invalidated an ordinance restricting residents' display of signs—"a canonical First Amendment medium—on the basis of the language they contained." *Sorrell* dealt with content-based prohibitions on disseminating information, an established form of speech. And *Pacific Coast Horseshoeing* [*School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020),] concerned a law that "squarely" implicated the First Amendment by "regulat[ing] what kind of educational programs different institutions can offer to different students."

15 F.4th at 962 n.7 (alteration in original) (citations omitted).

exemption exists, the ABC test "applies across California's economy." *Id.* at 962–63. Thus, Plaintiffs are not unfairly burdened by application of the ABC test to their doorknockers and signature gatherers.

We also reject Plaintiffs' assertion that section 2783's exemptions for direct sales salespersons, newspaper distributors, and newspaper carriers constitute content-based discrimination.[5] Citing a dictionary definition of "canvass,"[6] they maintained that their doorknockers, their signature gatherers, and the exempted direct sales salespersons, newspapers distributors, and newspaper carriers are engaged in the identical occupation of canvassing and that California favors the commercial speech of the direct sales salespersons and certain newspapers over the political speech of their doorknockers and signature gatherers. We are not persuaded that a dictionary definition of "canvass" sets the outer limit of California's ability to classify workers who go to people's homes. We perceive a mighty gap between the pernicious granularity rebuked in *American Society of Journalists*, 15 F.4th at 964 n.9, and the broad brush of Merriam-Webster.

More importantly, section 2783's exemptions for direct sales salespersons,

---

[5] Plaintiffs do not assert an Equal Protection claim nor do they claim that no rational basis exists for the exemptions.

[6] *Canvass*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/canvass (last visited Aug. 19, 2021) ("to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments").

newspapers distributors, and newspaper carriers do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations. Although determination of whether an individual is, for example, a direct sales salesperson might require *some* attention to the individual's speech, the Supreme Court has rejected "the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern." *City of Austin*, 142 S. Ct. at 1474.

III

Because Plaintiffs have not established "a colorable claim that [their] First Amendment rights have been infringed, or are threatened with infringement," *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022) (citation omitted), they have not demonstrated a likelihood of success on the merits. The district court did not abuse its discretion in denying a preliminary injunction.

AFFIRMED.

Mobilize the Message LLC v. Rob Bonta, No. 21-55855
VANDYKE, Circuit Judge, dissenting:

The majority spends much of its decision explaining the complexities and history of California's attempt to govern "the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." I don't disagree that's been a vexing problem for California, but it's also not particularly relevant in this case. This case comes down to a single constitutional question: whether AB 5's employment classification before us turns predominately on the content of the workers' speech. If it doesn't, then this is a permissible labor regulation as the majority concludes. But if it does, then the law is a content-based regulation that must pass strict scrutiny. And if the latter is true, because this law could not meet strict scrutiny's demanding burden, Plaintiffs are likely to prevail on their claim and should have been granted a preliminary injunction.[1]

[1] The majority limits its analysis to Plaintiffs' likelihood of success on the merits, so I also focus on that criterion, concluding that Plaintiffs are likely to succeed on "the most important factor." *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). And where, as here, a plaintiff has shown a likelihood of a First Amendment violation, the remaining preliminary injunction factors inevitably weigh in the plaintiff's favor also. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief …." (internal quotation marks omitted)); *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757–58 (9th Cir. 2019) ("[T]he fact that Plaintiffs have raised serious First Amendment questions compels a finding that ... the balance of hardships tips sharply in Plaintiffs' favor. Finally, we have 'consistently recognized the significant public interest in upholding First

In just a few paragraphs of analysis, the majority rejects Plaintiffs' argument that AB 5's exemption of certain occupations but not others constitutes content-based discrimination. Under this view, California can treat doorknockers and signature gatherers differently than direct salespeople and newspaper carriers because they are different industries and occupations. But dig beneath the surface of these "occupations" and it becomes clear that these occupational labels turn predominantly, if not entirely, on the content of the workers' speech. And "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This is no less true when that content-based distinction is embedded within a labor law. Because the governmental burdens challenged here turn primarily on what is said, not labor distinctions unrelated to speech, I must respectfully dissent from the majority's refusal to protect that speech.

I.

The First Amendment ensures that any content-based law is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The "commonsense meaning of the phrase 'content based' requires a court to consider whether a

---

Amendment principles.' Indeed, 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" (cleaned up) (citations omitted)).

regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted). This covers not only the laws that obviously define "regulated speech by particular subject matter," but also the "more subtle" laws that define "regulated speech by its function or purpose." *Id.*

The majority finds no issue with AB 5 because the exemptions focus on economic activity, not protected expression. This is a false dichotomy. As Plaintiffs correctly note, the occupational classifications challenged here are directly defined by the messages those workers communicate. That is how a direct salesperson and a political canvasser, both of whom go door-to-door pitching something to the public, can result in different labor classifications. Put another way, the difference between these otherwise quite similar jobs is the content of the message being shared with the public.

Notwithstanding this dynamic, the majority asserts ipse dixit that the exemptions "do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations." This position subverts First Amendment protections to the mere semantics of legislation—content-based speech restrictions are impermissible, but labor classifications based on the content of the industry's speech are allowed, and the legislature's choice of label determines which bucket a classification falls into. The Supreme Court has warned against this,

explaining that "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022). That is what is happening here with AB 5's labor classifications.

II.

To justify its conclusion, the majority relies heavily on *American Society of Journalists and Authors, Inc. v. Bonta* ("*ASJA*"), 15 F.4th 954 (9th Cir. 2021). But *ASJA* was clear to disavow this type of classification. In *ASJA*, media associations sued California over a different section of AB 5 that "burdened journalism … by forcing freelancers to become employees, thereby reducing their work opportunities and inhibiting their 'freedom to freelance.'" *Id.* at 959. Our court rejected the claim in part because "the specific conditions complained of apply not only to journalists, but to all freelance writers, photographers, and others in the state—including narrators and cartographers for journals, books, or 'educational, academic, or instructional work[s] in any format or media.'" *Id.* at 963 (citing Cal. Lab. Code § 2778(b)(2)(I)–(K)) (alteration in original). AB 5 therefore did not uniquely impose any First Amendment burdens on journalists *because of what they said*; it evenly applied to a broad group of speakers and non-speakers regardless of industry. This is true even though the effect of the law might result in "fewer overall job

opportunities for workers, among them certain 'speaking' professionals." *Id.* at 962. In short, *ASJA* rejected that the speaking professions should somehow get an exemption from broadly applicable, content-neutral labor regulations—just because they earned their bread by speaking. *ASJA* did not purport to undermine our longstanding constitutional skepticism of regulatory classifications that are genuinely content-based.

Indeed, in rejecting the media associations' claim, *ASJA* was clear to demarcate what would be permissible labor classifications and what would be susceptible to First Amendment challenge. It explained that "economic regulations can still implicate the First Amendment when they are not 'generally applicable' but instead target certain types of speech and thereby raise the specter of government discrimination." *Id.* And crucial for our purposes, *ASJA* explained that this concern would be implicated if a legislature defined "services or occupations so granularly that a court could isolate the speech's communicative intent *as a defining distinction*." *Id.* at 964 n.9 (emphasis added). That is precisely what we have before us in this case. California and the majority rely on industry and occupational labels that, when scrutinized, "isolate the speech's communicative intent as"—not just "*a* defining distinction"—but as *the* "defining distinction." *Id.*

III.

None of the majority's other bases for rejecting Plaintiffs' speech claims are persuasive. The majority is quick to dismiss the dictionary definition of "canvass," but it in fact buoys an important point. To "canvass," according to Merriam-Webster, means "to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments." *Canvass*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/canvass (last visited Aug. 24, 2022). The fact that canvassing covers both exempt and non-exempt workers also demonstrates how artificial these labels are as anything other than a speech distinction.

If the majority dislikes dictionaries, our own caselaw makes the same point. In *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998), our court invalidated a county ordinance banning canvassing that "propose[d] one or more commercial transactions." *Id.* at 1145. The county argued that it was only the commercial canvassers who were causing problems, and therefore wanted to regulate just this industry (as opposed to non-commercial canvassers), but our court was clear: "By distinguishing between commercial and noncommercial forms of expression, the Clark County Ordinance is content-based." *Id.* Other courts have also refused to parse commercial from non-commercial canvassers. *See, e.g.*, *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 983 (10th Cir. 2020) ("When an

ordinance makes these sorts of facial distinctions, e.g., between those soliciting for religious purposes and those soliciting for commercial gain, not only the Supreme Court, but our court, has expressly held that it 'contemplates a distinction based on content.'" (citation omitted)).

It seems clear that direct salespeople and newspaper distributors "canvass" in the same way doorknockers and signature gatherers do, and yet they are treated differently under AB 5 because one is selling a vacuum cleaner, while the other is selling a political idea. This labor classification turns squarely on the "speech's communicative intent" and should be subject to strict scrutiny.

The majority's reliance on the breadth of AB 5 is no more persuasive. The majority concludes that any First Amendment concerns are "indirect," because AB 5 "does not target certain types of speech," but rather "applies across California's economy." This misunderstands the relevant First Amendment inquiry. Plaintiffs are not required to engage in some balancing test where the constitutional parts of AB 5 are weighed against the unconstitutional parts of AB 5. Even if most aspects of a given law regulate broadly without regard to speech, that cannot possibly protect the parts of that law that *do* distinguish on speech. If this were true, the government could circumvent the First Amendment simply by hiding content-based distinctions within a sweeping regulation. Rather, the proper inquiry is whether the exact exemptions challenged here predominately turn on the content of the workers'

speech.

The majority also justifies the exemptions by focusing on the direct salespersons' and newspaper distributors' occupations. The majority claims that the distinction between these occupations and industries makes it permissible to regulate them differently. The problem with shifting the focus away from speech and towards the speaker is that the Supreme Court has recently rejected this same type of argument. In *Barr v. American Association of Political Consultants, Inc.* ("*AAPC*"), 140 S. Ct. 2335 (2020), the Supreme Court addressed a First Amendment challenge to a law that banned robocalls except those "made to collect debts owed to or guaranteed by the Federal Government." *Id.* at 2343. The government defended this exemption by arguing that the law does not address speech, but rather "draws distinctions based on speakers (authorized debt collectors)." *Id.* at 2346. The Supreme Court rejected this argument for multiple reasons, including because "'the fact that a distinction is speaker based' does not 'automatically render the distinction content neutral.'" *Id.* at 2347 (quoting *Reed*, 576 U.S. at 170). The Court has elsewhere warned that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Similarly, the defense of the provisions challenged by Plaintiffs attempts to shift the focus away from the content of the

speech and towards the industry of the worker, but such surface-level labels are insufficient to avoid First Amendment scrutiny.

The government in *AAPC* also argued 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." 140 S. Ct. at 2347. In other words, the government tried to classify the exemption as activity, not speech. The Supreme Court likewise rejected this argument, noting that the "law here focuses on whether the caller is *speaking* about a particular topic." *Id.* That same rationale vindicates Plaintiffs' claims here, as AB 5 inevitably focuses on what each worker *says*, even if it uses an occupational label in doing so.

IV.

State governments no doubt have broad power to regulate labor markets within their borders, but that power runs into fundamental rights protected by the Constitution when those regulations turn on the speech of the worker. Regardless of whether such content-based distinctions hide under the veneer of a labor classification, the First Amendment's protections remain the same. Plaintiffs face cost-prohibitive expenses under AB 5 because of the content of the speech in which they engage. I would reverse the denial of a preliminary injunction, and therefore respectfully dissent.