ROB BONTA
Attorney General of California
HEATHER HOESTEREY
Supervising Deputy Attorney General
JOSE A. ZELIDON-ZEPEDA
Deputy Attorney General
State Bar No. 227108
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3879
Fax: (415) 703-1234
E-mail: Jose.ZelidonZepeda@doj.ca.gov
Attorneys for Defendant Attorney General Rob Bonta, in his official capacity

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD, INC.; and STARR COALITION FOR MOVING OXNARD FORWARD, Plaintiffs, **v.** **ROB BONTA, in his official capacity as Attorney General of California,** Defendant.	2:21-cv-05115-VAP (JPRx) **MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANT ROB BONTA'S MOTION TO DISMISS COMPLAINT** Date: September 20, 2021 Time: 2:00 P.M. Courtroom: 8A Judge: The Honorable Virginia A. Phillips Trial Date: Not set Action Filed: 6/23/2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

INTRODUCTION

In 2019, the California Legislature passed Assembly Bill 5 (AB 5) to address concerns with erosion of the middle class and a rise in income inequality. Under AB 5, a worker is an employee, and not an independent contractor, unless the hiring entity establishes certain conditions. Despite AB 5's clear focus on employee classification and attendant labor protections under state law, Plaintiffs Mobilize the Message, LLC, *et al.*, challenge this statutory scheme on First Amendment grounds, claiming that it imposes content-based restrictions on speech. These claims fail as a matter of law.

As this Court recognized in denying Plaintiffs' request for preliminary injunctive relief, Plaintiffs' First Amendment claims fail because AB 5 is a generally applicable economic regulation, with at most an incidental impact on speech. Such economic regulations are not subject to First Amendment challenges. Indeed, specifically as to AB 5, other courts have already concluded that it regulates the employer-employee relationship, and does not seek to improperly curtail speech. Also, like other courts, this Court concluded that the limitations Plaintiffs challenge are based on occupation; they are not restrictions on speech nor do they draw distinctions based on the content of speech. Ultimately, Plaintiffs' claims fail under AB 5's plain terms. And even assuming arguendo that this Court concludes that intermediate scrutiny applies, AB 5 amply meets this standard. For these reasons, the Court should dismiss the Complaint.

BACKGROUND

Plaintiffs raise First Amendment challenges to the "ABC" test under AB 5, 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); *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 also 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).)

By codifying the ABC test, the Legislature sought to "restore[] these important protections to potentially several million workers who have been denied these basic

[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 memorandum refers to AB 5, as amended.

workplace rights that all employees are entitled to under the law." Stats. 2019, ch. 296, § 1(e) (Cal. 2019). AB 5 codifies the ABC test adopted in *Dynamex*, and extends its scope 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 also 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 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 also 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 application of the ABC test: (1) 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"; 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. (ECF No. 1 at 8 ¶ 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.* at 8 ¶ 29.) MTM alleges that it left the California market after AB 5 passed. (*Id.* at 11 ¶ 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.* at 3 ¶ 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.* at 3 ¶ 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. (*Id.* at 12 ¶ 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.* at 12 ¶¶ 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.* at 12 ¶ 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." (ECF No. 1 at 11 ¶ 42.) Under AB 5, however, Plaintiffs allege that "these workers would most likely be classified as employees." (*Id.* at 11 ¶ 43.) Plaintiffs contend 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* ECF No. 1.)

Plaintiffs claim that "California's regime for worker classification discriminates against speech according to its particular subject matter, function, and purpose." (ECF No. 1 at 13 ¶ 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 "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." (ECF No. 1 at 14 ¶ 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.* at 14 ¶ 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. (ECF No. 1 at 13 ¶¶ 51-59.) Second, they claim that application of the ABC test to signature gatherers violates their free speech rights. (*Id.* at 15-16 ¶¶ 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." (ECF No. 1 at pp. 16-17.)

E. THIS COURT DENIED PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF.

On August 9, 2021, this Court denied Plaintiffs' motion for a preliminary injunction, which sought to preclude the application of the ABC test to classify Plaintiffs' doorknockers and signature gatherers as employees. (ECF No. 24.) The

[2] Plaintiffs state that section 2783(e) "causes their classification as independent contractors," but that is incorrect. (ECF No. 1 at 14 ¶ 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.

Court concluded that "the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny." (*Id.* at 7.) 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.* at 8.) The Court also 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.* at 9.)[3]

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. A court should dismiss a complaint "if it fails to plead enough facts to state a claim to relief that is plausible in its face." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010) (citation omitted). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In ruling on a motion to dismiss, a court does not have to accept as true a complaint's legal conclusions. *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

In ruling on a motion to dismiss, courts can "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss

[3] Although not directly relevant here, the Court also concluded that Plaintiffs failed to show the need for emergency injunctive relief, given their long delay in bringing their claims. (ECF No. 24 at 10-11.)

into a motion for summary judgment." *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A FIRST AMENDMENT CLAIM BECAUSE AB 5 IS A GENERALLY APPLICABLE LABOR REGULATION.

The Complaint fails to state a claim for relief under the First Amendment, as a matter of law. As this Court already concluded in denying Plaintiffs' motion for preliminary injunctive relief, AB 5 is a generally applicable labor regulation governing the employer-employee relationship. (ECF No. 24 at 9.) 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). (ECF No. 1 at 15-16 ¶¶ 60-65.) But as the plain terms of AB 5 reflect, there is no content-based restriction. (ECF No. 24 at 8 [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 Complaint argues at length that AB 5 "discriminates against speech based on its content," and that it purportedly treats "commercial speech more favorably than it treats political speech." (ECF No. 1 at 13 ¶ 54.) 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. (ECF No. 24 at 7 ["Here, the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny."].) The Complaint's reliance on *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), is misplaced because those cases involved direct content-based restrictions on speech. (ECF No. 13 at ¶¶ 52-53.) Specifically, *Mosley* involved a city ordinance prohibiting picketing near

schools but exempting labor picketing. *Mosley*, 408 U.S. at 94-95. And *Reed* dealt with a municipal sign ordinance that "single[d] out specific subject matter for differential treatment." 576 U.S. at 169. AB 5 does not single out or even focus on speech. Contrary to Plaintiffs' allegations in the Complaint, 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. And the exemptions on which Plaintiffs focus merely determine whether a particular occupation is subject to the ABC test or the *Borello* standard. (ECF No. 24 at 8 [concluding that the distinctions in AB 5's exemptions "are based on the worker's occupation."].)

As this Court noted in denying Plaintiffs' request for preliminary injunctive relief, restrictions on economic activity, or nonexpressive conduct generally, are not equivalent to restrictions on protected expression. *Intern'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015). For example, in upholding a minimum wage ordinance against a First Amendment challenge, the Ninth Circuit pointed out that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* (citation omitted). In *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879 (9th Cir. 2018), the Ninth Circuit 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").

Here, it is clear that application of AB 5 and its exemptions focusses on the *status* of a worker, and the type of work performed, not on the substantive content of his or her work product. (ECF No. 24 at 7-8.) Indeed, none of the specific criteria for the direct sales salesperson or newspaper distributor exemptions involves 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 these 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. FEDERAL COURTS HAVE REJECTED CHALLENGES SIMILAR TO THOSE PLAINTIFFS BRING HERE.

Federal courts have concluded that AB 5 focuses on occupation and industry, and does not improperly target speech, further undermining Plaintiffs' claims. (ECF No. 24 at 9 ["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 Plaintiffs' motion for a preliminary injunction against AB 5, as applied to freelance writers and photojournalists. Like Plaintiffs here, the plaintiffs in that case argued that certain AB 5 exemptions improperly imposed content-based restrictions, warranting strict 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). In denying the plaintiffs' motion, the district court "agree[d] that the challenged provisions in AB 5 are based on distinctions between speakers," and 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. Particularly relevant here, the court concluded that "[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."). Although that decision involved the "professional services" exemption under former California Labor Code § 2750.3(c)(2)(B), the same rationale applies here to Plaintiffs' challenges to the direct sales salespersons and newspaper distributor exemptions.

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. The district court rejected the argument that the claims warranted heightened scrutiny because of "their proximity to the voting process." *Id.* at 912. The court explained that "the initiative process is one step removed from the act of voting

since these proposed ballot initiatives have not yet qualified for inclusion on the voting ballot." *Id.* And, 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 that these were not meaningfully different from their own work as signature collectors for purposes of their equal protection claim. *Id.* at 914. The court rejected the argument. *Id.*; *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").

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 (in rejecting federal preemption challenge to AB 5, noting that it is a "generally applicable labor law"); *Olson v. State of Cal.*, No. CV 19-10956-DMG, 2020 WL 905572, at *8 (C.D. Cal. Feb. 10, 2020) (in denying request to preliminarily enjoin AB 5, rejecting claim that AB 5 singled out gig economy companies and noting "the expansive language of the statute"); *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).

III. ASSUMING ARGUENDO THAT INTERMEDIATE SCRUTINY APPLIES HERE, THE COMPLAINT FAILS TO STATE A CLAIM UNDER INTERMEDIATE SCRUTINY.

As explained above, AB 5 does not restrict speech and therefore does not implicate First Amendment rights. Contrary to the allegations in the Complaint, strict scrutiny does not apply. (ECF No. 1 at 13 ¶¶ 53-54.) Further, even if the Court concludes that intermediate scrutiny applies, this standard is amply met.[4]

At the outset, strict scrutiny does *not* apply here. (ECF No. 1 at 14 ¶ 57.) Although Plaintiffs contend that AB 5 "defines regulated speech according to its particular subject matter, function, and purpose," the exemptions they challenge are not content based, but are instead based on occupation (as the statutory language plainly shows). (ECF No. 24 at 7 [concluding that "the challenged exemptions in AB 5 are neither content-based nor otherwise require heightened scrutiny."].) In the context of such "speaker-based" laws, the challenger must show that the law reflects an improper preference for the favored speech to establish a First Amendment claim. "[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broadcasting Sys.*, 512 U.S. at 658; *Reed*, 576 U.S. at 171. The Complaint fails to so establish. *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018) ("Regardless of the theory, the conduct must be 'inherently expressive' to merit constitutional protection."); *Crossley*, 479 F. Supp. 3d at 916-17 (concluding that AB 5 passes constitutional muster under rational basis).

Here, AB 5's findings demonstrate that the Legislature was concerned about the misclassification of employees as independent contractors, not a preference for speech. Stats. 2019, ch. 296, § 1(c) (Cal. 2019); *see also ASJA*, 2020 WL 1444909, at *8 ("There is no indication that AB 5 reflects preference for the substance or

[4] The Complaint makes no allegations that AB 5 fails under intermediate scrutiny. (*See generally* ECF No. 1; ECF No. 24 at 9.)

content of what certain speakers have to say, or aversion to what other speakers have to say."). The legislative history reflects that misclassification was rampant in particular industries, and therefore the Legislature crafted AB 5's provisions accordingly. (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].) The Legislature considered a number of factors in ascertaining the hallmarks of true independent contractors in crafting these exemptions. (*Id.*) The Complaint does not demonstrate 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. (*See generally* ECF No. 1.)

Further, AB 5 is valid even if this Court concludes that some form of intermediate scrutiny applies. The Supreme Court has held that a "content-neutral regulation will be sustained if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner*, 512 U.S. at 662 (citation omitted). This requirement is satisfied as long as the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (citation omitted). Here, any incidental restriction on claimed First Amendment freedoms by AB 5 is no greater than essential to the furtherance of the State's interest in proper classification for purposes of labor law protections. *ASJA*, 2020 WL 1444909, at **9-10 (rejecting First Amendment challenge to certain AB 5 exemptions, concluding the law is generally applicable and content-neutral and that "even if intermediate scrutiny applies," the statute likely satisfies that standard).

CONCLUSION

For these reasons, the Court should dismiss the Complaint.

Dated: August 16, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
HEATHER HOESTEREY
Supervising Deputy Attorney General

/s/ Jose A. Zelidon-Zepeda

JOSE A. ZELIDON-ZEPEDA
Deputy Attorney General
Attorneys for Defendant Attorney General Rob Bonta, in his official capacity

SA2021303104
42826761.docx