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7 Attorneys for Plaintiffs
Mobilize the Message, LLC; Moving
8 Oxnard Forward, Inc.; and Starr
Coalition for Moving Oxnard Forward
9

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13 MOBILIZE THE MESSAGE, LLC;
MOVING OXNARD FORWARD,
14 INC.; and STARR COALITION FOR
MOVING OXNARD FORWARD,

15 Plaintiffs,
16

17 v.

18 ROB BONTA, in his official capacity
as Attorney General of California,

19 Defendant.
20
21

Case No.:

**COMPLAINT FOR
DECLARATORY, INJUNCTIVE,
AND OTHER RELIEF**

22 JURISDICTION AND VENUE
23

24 1. This Court has subject matter jurisdiction over this action
25 pursuant to 28 U.S.C. §§ 1331 and 1343, as plaintiffs allege that
26 defendant is violating 42 U.S.C. § 1983 by depriving them, under color of
27 state law, of rights, privileges, and immunities secured by the First and
28 Fourteenth Amendments to the United States Constitution.

1 THE PARTIES

2 6. Plaintiff Mobilize the Message, LLC, (“MTM”) is a Florida
3 limited liability company providing door-knocking and signature
4 gathering services.

5 7. Plaintiff Moving Oxnard Forward, Inc., (“MOF”) is a California
6 nonprofit corporation dedicated to making Oxnard, California’s
7 government more efficient and transparent. It seeks to ensure that
8 Oxnard residents receive value for the taxes and fees they pay, to see to it
9 that Oxnard’s government provides quality services at a low cost, and to
10 improve Oxnard’s business climate and lower the cost of operating a
11 business in Oxnard. MOF attempts to focus Oxnard’s City Hall on
12 providing basic goods and services such as roads, infrastructure, and
13 public safety, while reducing bureaucracy.

14 8. Plaintiff Starr Coalition for Moving Oxnard Forward (“Starr
15 Coalition”) is MOF’s political action committee. Once MOF decides that its
16 community action requires going to the ballot box, Starr Coalition handles
17 all aspects of the initiative campaigns, including creating, qualifying and
18 enacting ballot measures in Oxnard’s municipal elections. Starr
19 Coalition’s measures regularly appear on the ballot, and at times prevail.

20 9. Defendant Rob Bonta is California’s Attorney General. As
21 such, he has enforced and continues enforcing the laws, customs, practices
22 and policies challenged in this action, including California’s laws relating
23 to the classification of workers as either employees or independent
24 contractors. Defendant Bonta is sued in his official capacity.

25 STATEMENT OF FACTS

26 *Worker Classification: Employee or Independent Contractor?*

27 10. With respect to those who hire them, workers are typically
28 classified as either employees or independent contractors. A hirer has

1 greater control over employees than over independent contractors, but
2 with that control come often expensive obligations, such as the payment of
3 unemployment insurance taxes and its associated administrative costs,
4 Cal. Unemp. Ins. Code §§ 976, 13020, 13021; workers' compensation
5 insurance, Cal. Labor Code § 3700; and sick leave, Cal. Labor Code § 246.
6 Employers also face additional payroll expenses, and may also be more
7 readily susceptible to tort claims arising from their employees' conduct,
8 generating additional insurance costs.

9 11. From a worker's perspective, formal employment may include
10 certain benefits, but often carries a significant cost in loss of freedom and
11 flexibility over one's working hours and conditions.

12 12. Many pursuits make personal and economic sense, for hirer
13 and worker, only within the context of an employment or independent
14 contractor relationship. Whichever relationship one prefers, as a worker
15 or as one hiring others, depends on the circumstances of the work at hand.

16 *The Regulatory Scheme*

17 13. Prior to 2018, California's test for classifying workers as either
18 employees or independent contractors was set forth, for all purposes, in
19 *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations*, 48 Cal. 3d 341
20 (1989). *Borello* employed a multi-factor balancing test under which no one
21 factor was dispositive. But "[w]hether a common law employer-employee
22 relationship exists [under *Borello*] turns foremost on the degree of a
23 hirer's right to control how the end result is achieved." *Ayala v. Antelope*
24 *Valley Newspapers, Inc.*, 59 Cal.4th 522, 528 (2014) (citing *Borello*, 48
25 Cal.3d at 350).

26 14. In 2018, California's Supreme Court adopted a different, three-
27 part test—the "ABC test"—to determine workers' classification for
28 purposes of the California Industrial Welfare Commission's wage orders.

1 The ABC test presumes that workers are employees unless “the hiring
2 entity establishes:

- 3 (A) that the worker is free from the control and direction of the
4 hiring entity in connection with the performance of the work,
5 both under the contract for the performance of the work and in
6 fact; *and*
- 7 (B) that the worker performs work that is outside the usual course
8 of the hiring entity’s business; *and*
- 9 (C) that the worker is customarily engaged in an independently
10 established trade, occupation, or business of the same nature
11 as the work performed.”

12 *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 957
13 (2018) (citations and footnote omitted) (paragraph breaks added).

14 15. In *Dynamex’s* wake, California’s legislature enacted Assembly
15 Bill 5 (“AB 5”), which codified *Dynamex’s* application of the ABC test to
16 wage orders, and extended the ABC test’s application to the entirety of
17 California’s Labor and Unemployment Insurance Codes. That general
18 imposition of the ABC test is now codified at Cal. Labor Code § 2775(b)(1).

19 16. However, AB 5 contained myriad exemptions for livelihoods
20 that are again, notwithstanding *Dynamex*, governed by the *Borello* test for
21 all purposes. Assembly Bills 170 and 2257 enacted additional *Borello*
22 exemptions at the behest of various lobbies. And in the November 2020
23 election, California’s voters enacted Proposition 22, codified at Cal. Bus. &
24 Prof. Code § 7451, which classifies drivers for app-based companies—AB
25 5’s original prime targets—as independent contractors.

26 17. Accordingly, since 2018, the question of whether a particular
27 California worker is classified under the ABC test, under *Borello*, or under
28 some definitive legislative command, is determined by the ever-shifting
political vicissitudes of the moment within the legislature and among the
voters.

1 18. Two exemptions from the ABC test are of special relevance to
2 this action: the exemptions for “direct sales salespersons,” and for
3 “newspaper distributors” and “newspaper carriers.”

4 19. Cal. Labor Code § 2783 provides that “Section 2775 and the
5 holding in *Dynamex* do not apply to” various listed occupations listed in
6 that section, “and instead, the determination of employee or independent
7 contractor status for individuals in those occupations shall be governed by
8 *Borello*.”

9 20. Among these occupations exempted from Section 2775 and
10 *Dynamex*’s application of the ABC test is “[a] direct sales salesperson as
11 described in Section 650 of the Unemployment Insurance Code, so long as
12 the conditions for exclusion from employment under that section are met.”
13 Cal. Labor Code § 2783(e).

14 21. Cal. Unemp. Ins. Code § 650 provides that “‘Employment’ does
15 not include services performed as a . . . direct sales salesperson . . . by an
16 individual,” if

- 17 (a) The individual . . . is engaged in the trade or business of
18 primarily in person demonstration and sales presentation
19 of consumer products, including services or other
20 intangibles, in the home or sales to any buyer on a buy-
21 sell basis, a deposit-commission basis, or any similar
22 basis, for resale by the buyer or any other person in the
23 home or otherwise than from a retail or wholesale
24 establishment.
- 25 (b) Substantially all of the remuneration (whether or not
26 paid in cash) for the services performed by that
27 individual is directly related to sales or other output
28 (including the performance of services) rather than to the
number of hours worked by that individual.
- (c) The 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.

1 22. The Direct Selling Association “work[ed]” with AB 5’s sponsor
2 to enact the exemption, and understands that the exemption provides
3 “that direct sellers are clearly and specifically independent contractors.”
4 *Direct Selling Association Applauds Direct Seller Exemption in California*
5 *AB 5*, Sep. 26, 2019, <https://bit.ly/3xOArGF>.

6 23. Newspaper distributors and carriers are also exempted from
7 the ABC test and subject to *Borello*, Cal. Labor Code § 2783(h)(1), as
8 “[c]lassifying independent contractors as employees would impose at least
9 \$80 million in new costs on the newspaper industry.” Bill Swindell,
10 *Legislature passes one-year exemption for newspaper carriers from AB 5*,
11 *The Press Democrat*, Sep. 20, 2019, <https://bit.ly/3gVc0Aq>.

12 24. California’s legislature anticipated legal challenges to its new
13 worker classification scheme, and chose a remedy in the event that any
14 part of the scheme were struck down. “If a court of law rules that the
15 [ABC test] cannot be applied to a particular context based on grounds
16 other than an express exception to employment status as provided under
17 [the Labor Code, the Unemployment Insurance Code, or an Industrial
18 Welfare Commission order], then the determination of employee or
19 independent contractor status in that context shall instead be governed by
20 the California Supreme Court’s decision in [*Borello*].” Cal. Labor Code §
21 2775(b)(3).

22 25. “Misclassifying” an employee as an independent contractor
23 carries significant criminal and civil penalties. Civil penalties for
24 misclassifying employees begin at \$5,000 per violation. Cal. Labor Code §
25 226.8(b). Even the unintentional failure to withhold unemployment
26 insurance tax is a misdemeanor punishable by \$1,000 and imprisonment
27 up to a year. Cal. Unemp. Ins. Code § 2118. And misclassifying a worker
28 can trigger a variety of other penalties, e.g., for not reporting a new or

1 rehired employee, *id.* § 1088.5(e); not reporting a new independent
2 contractor, *id.* § 1088.8(e); or not electronically reporting wages paid to
3 employees, *id.* § 1114(b); *see, generally*, Cal. Empl. Dev. Dep’t, *Penalty*
4 *Reference Chart*, https://www.edd.ca.gov/pdf_pub_ctr/de231ep.pdf.

5 26. Moreover, the Labor Code Private Attorneys General Act of
6 2004 enables employees to sue alleged employers to recover civil penalties
7 for Labor Code violations. Cal. Labor Code §§ 2699(a) and (g)(1).
8 Prevailing employees may recover attorney fees and costs. *Id.* § 2699(g)(1).

9 27. Putative employers are also subject to claims “for injunctive
10 relief to prevent the continued misclassification of employees as
11 independent contractors” brought by the state’s attorney general, district
12 attorneys, or various city or city and county attorneys, “upon their own
13 complaint or upon the complaint of a board, officer, person, corporation, or
14 association.” Cal. Labor Code § 2786.

15 *Plaintiff MTM’s Use of Doorknockers and Signature Gatherers*

16 28. MTM hires doorknockers to canvass neighborhoods and
17 personally engage voters in the home on behalf of its client campaigns, in
18 an effort to persuade them to vote for and gather feedback on candidates
19 and ballot measures. MTM also hires signature gatherers to persuade
20 voters, at home and in public places, to sign petitions qualifying measures
21 for the ballot.

22 29. MTM hires doorknockers and signature gatherers on an
23 independent contractor basis. Under the typical arrangement, MTM’s
24 doorknockers and signature gatherers supply their own appropriate
25 clothing, cell phones, computers, and transportation to the work areas.
26 When the work requires driving, doorknockers and signature gatherers
27 supply their own vehicles, though MTM provides gas cards to offset the
28 transportation costs.

1 30. MTM provides workers optional housing in the campaign
2 areas, and in the case of doorknockers, identifies the homes to be
3 contacted, but it does not pay time-based wages. Rather, MTM pays
4 doorknockers only for reaching particular door milestones. Signature
5 gathering campaigns may target particular areas to satisfy legal
6 requirements, but gatherers may gather signatures from anywhere within
7 such boundaries, and are paid per valid signature obtained. Pay for all
8 MTM workers is negotiable.

9 31. Signature gatherers' pay also fluctuates with market
10 conditions. When many competing petitions circulate, signature gatherers
11 can and do demand more money for their services. It is also easier to
12 gather signatures earlier in the qualification process. Consequently, a
13 gatherer's price per signature may rise as time winds down and the
14 signature gathering campaign approaches its goal.

15 32. MTM provides some training and a generalized script or
16 talking points, but door knockers and signature gatherers are expected to
17 use their improvisational, conversational and persuasive skills to "sell"
18 MTM's client campaigns.

19 33. MTM does not prescribe fixed hours, breaks, or schedules,
20 apart from requesting that door knockers perform their work during the
21 times of day when people are most likely to be home.

22 34. MTM's door knockers and signature gatherers understand and
23 agree that they provide MTM their services as independent contractors.

24 35. Considering MTM's lack of control over its door knockers and
25 signature gatherers, and the degree of independent judgment that these
26 individuals must exercise in generating the performance milestones for
27 which MTM pays them, MTM's doorknockers and signature gatherers
28

1 have always been essentially independent direct sales salespeople—
2 notwithstanding that their advocacy is political rather than commercial.

3 *Oxnard Plaintiffs' Use of Signature Gatherers*

4 36. As MOF and Starr Coalition's purpose is to effect political change
5 by enacting ballot measures, they depend utterly on signature gatherers
6 who persuade voters, at home and in public places, to sign petitions
7 qualifying measures for the ballot.

8 37. MOF and Starr Coalition have historically hired signature
9 gatherers as independent contractors. MOF and Starr Coalition paid
10 these gatherers by the signature, but exercised no control over when,
11 where, or how these gatherers worked.

12 38. Typically, MOF and Starr Coalition's signature gatherers
13 would set their own schedule, and walk around highly-trafficked public
14 spaces or go door-to-door to speak to voters and persuade them to sign
15 petitions to qualify MOF and Starr Coalition's ballot measures. MOF and
16 Starr Coalition did not tell their signature gatherers when or where to
17 gather signatures. They were expected to use their improvisational,
18 conversational and persuasive skills to "sell" MOF and Starr Coalition's
19 ballot measures.

20 39. As with MTM's doorknockers and signature gatherers, MOF
21 and Starr Coalition's signature gatherers' pay is negotiable, and has
22 fluctuated with market conditions.

23 40. MOF and Starr Coalition's signature gatherers understood and
24 agreed that they provided MOF and Starr Coalition their services as
25 independent contractors.

26 41. Considering MOF and Starr Coalition's lack of control over
27 their signature gatherers, and the degree of independent judgment that
28 these individuals exercised in generating the performance milestones for

1 which plaintiffs paid them, MOF and Starr Coalition’s signature
2 gatherers have always been essentially independent direct sales
3 salespeople—notwithstanding that their advocacy is political rather than
4 commercial.

5 *The Regulatory Scheme’s Impact on Plaintiffs’ Political Speech*

6 42. Under *Borello*, the doorknockers and signature gatherers that
7 plaintiffs would hire would be classified as independent contractors.

8 43. However, under *Dynamex* and Cal. Labor Code § 2775, these
9 workers would most likely be classified as employees. All such workers
10 would pass the “A” portion of the ABC test—they are, in fact and under
11 contract, free from plaintiffs’ supervision and control. Most such workers
12 would also pass the “C” portion of the ABC test, in that they generally
13 perform the same work or work of a similar nature. But they could
14 probably not pass the “B” portion of the ABC test, because their work falls
15 within the usual course of plaintiffs’ businesses.

16 44. Prior to AB 5’s enactment, MTM provided its services in
17 California. However, MTM abandoned the California market upon AB 5’s
18 enactment. MTM passed on doorknocking and signature gathering
19 contracts in California because it cannot afford the administrative
20 expenses of hiring its independent contractors as employees, and it does
21 not wish to encourage inefficient work by disconnecting performance
22 milestones from pay.

23 45. MTM intends to provide its services in California, including to
24 MOF and Starr Coalition, but refrains from doing so solely because hiring
25 doorknockers and signature gatherers as employees, per the ABC test, is
26 infeasible. MTM reasonably fears criminal and civil penalties for
27 “misclassifying” workers as independent contractors, as well as the costs
28 of defending itself from misclassification claims.

1 46. MOF and Starr Coalition intend to participate in Oxnard's
2 2022 municipal elections. Starr Coalition has already prepared ballot
3 language for one measure that it would seek to qualify for that election,
4 the "Oxnard Property Tax Relief Act." Pursuant to Cal. Const. art. XIII C,
5 § 3, the measure would require that Oxnard's pension obligations be
6 funded by the city's general and other available funds, as is the case with
7 most of California's cities, rather than through a special property tax.
8 Starr Coalition is also drafting additional ballot measures to be qualified
9 for the same election.

10 47. The time to start gathering signatures for the 2022 election is
11 now. Any additional delays in beginning the signature-gathering
12 campaign jeopardizes Starr Coalition's odds of gathering sufficient
13 signatures in time to qualify for the ballot, especially as additional or
14 competing signature-gathering petitions are launched. Moreover, delaying
15 the completion of Starr Coalition's signature gathering campaigns delays
16 its ability to effectively proceed to the next phase of advocating for the
17 qualified measures' adoption by voters.

18 48. Starr Coalition intends to immediately hire MTM to gather
19 signatures for the Oxnard Property Tax Relief Act and their other
20 measures. Failing that, it intends to hire its own signature gatherers as
21 independent contractors, as it has done in years past before the advent of
22 AB 5. Given MOF and Starr Coalition's limited resources, Starr Coalition
23 cannot afford the burden of hiring signature gatherers as employees.

24 49. Starr Coalition currently refrains from hiring signature
25 gatherers solely because doing so as an employer, per the ABC test, is
26 infeasible. It reasonably fears criminal and civil penalties for
27 "misclassifying" signature gatherers as independent contractors, as well
28 as the costs of defending itself from misclassification claims.

1 55. But for Cal. Labor Code § 2783(e), direct sales salespersons
2 who work on the same terms that plaintiffs would offer doorknockers
3 would be classified as employees under the ABC test. But Section 2783(e)
4 exempts such direct sales salespersons from the ABC test's application,
5 and instead causes their classification as independent contractors under
6 the rule of *Borello*. Thus, a worker hired to visit homes to engage in
7 persuasive speech is classified as an employee or as an independent
8 contractor, depending on whether the speech concerns a political
9 candidate or the demonstration or sale of goods and services.

10 56. But for Cal. Labor Code § 2783(h)(1), newspaper distributors
11 and carriers who work on the same terms as plaintiffs would offer
12 doorknockers would be classified as employees under the ABC test. But
13 Section 2783(h)(1) exempts such newspaper distributors and carriers from
14 the ABC test's application, and instead causes their classification as
15 independent contractors under the rule of *Borello*. Thus, a worker hired to
16 visit homes to distribute written materials about politics is classified as
17 an employee or as an independent contractor, depending on whether the
18 publications are a candidate's campaign material, or newspapers that
19 often discuss, endorse, and oppose political candidates.

20 57. California lacks a compelling state interest in classifying
21 doorknockers differently from direct sales salespersons, newspaper
22 distributors, and newspaper carriers, based on the content of their speech.

23 58. California's content-based regulation of speech, subjecting
24 doorknockers to the ABC test, but classifying direct sales salespersons,
25 newspaper distributors, and newspaper carriers per *Borello*, is not
26 narrowly tailored to achieving any compelling state interest.

27 59. By classifying doorknockers per the ABC test, while classifying
28 direct sales salespersons, newspaper distributors, and newspaper carriers

1 per *Borello*, Defendant, under color of law, deprives Plaintiffs, their
2 customers, and their audience, of their right of free speech guaranteed by
3 the First and Fourteenth Amendments to the United States Constitution.
4 Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983, and are
5 therefore entitled to declaratory and preliminary and permanent
6 injunctive relief against continued enforcement and maintenance of
7 Defendant's unconstitutional customs, policies, and practices; and
8 attorney fees and expenses pursuant to 42 U.S.C. § 1988.

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COUNT II
FIRST AMENDMENT RIGHT OF FREE SPEECH, 42 U.S.C. § 1983
APPLICATION OF THE ABC TEST TO SIGNATURE GATHERERS

60. Plaintiffs reallege and incorporate paragraphs 1 through 59 of this complaint.

61. But for Cal. Labor Code § 2783(e), direct sales salespersons who work on the same terms that plaintiffs would offer signature gatherers would be classified as employees under the ABC test. But Section 2783(e) exempts such direct sales salespersons from the ABC test's application, and instead causes their classification as independent contractors under the rule of *Borello*. Thus, a worker hired to visit homes or interact with people in public to engage in persuasive speech is classified as an employee or as an independent contractor, depending on whether the speech solicits signatures on ballot qualification petitions or the demonstration or sale of goods and services.

62. But for Cal. Labor Code § 2783(h)(1), newspaper distributors and carriers who work on the same terms as plaintiffs would offer signature gatherers would be classified as employees under the ABC test. But Section 2783(h)(1) exempts such newspaper distributors and carriers from the ABC test's application, and instead causes their classification as independent contractors under the rule of *Borello*. Thus, a worker hired to

1 deliver papers to homes is classified as an employee or as an independent
2 contractor, depending on whether the papers are petitions to qualify a
3 ballot measure for which signatures are sought, or newspapers that often
4 discuss, endorse, and oppose ballot measures.

5 63. California lacks a compelling state interest in classifying
6 signature gatherers differently from direct sales salespersons, newspaper
7 distributors, and newspaper carriers, based on the content of their speech.

8 64. California's content-based regulation of speech, subjecting
9 signature gatherers to the ABC test, but classifying direct sales
10 salespersons, newspaper distributors, and newspaper carriers per *Borello*,
11 is not narrowly tailored to achieving any compelling state interest.

12 65. By classifying signature gatherers per the ABC test, while
13 classifying direct sales salespersons, newspaper distributors, and
14 newspaper carriers per *Borello*, Defendant, under color of law, deprives
15 Plaintiffs, their customers, and their audience, of their right of free speech
16 guaranteed by the First and Fourteenth Amendments to the United
17 States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C.
18 § 1983, and are therefore entitled to declaratory and preliminary and
19 permanent injunctive relief against continued enforcement and
20 maintenance of Defendant's unconstitutional customs, policies, and
21 practices; and attorney fees and expenses pursuant to 42 U.S.C. § 1988.

22 PRAYER FOR RELIEF

23 WHEREFORE, Plaintiffs Mobilize the Message, LLC; Moving
24 Oxnard Forward, Inc.; and Starr Coalition for Moving Oxnard Forward
25 request that judgment be entered in their favor as follows:

- 26 A. Orders preliminarily and permanently enjoining Defendant,
27 his officers, agents, servants, employees, and all persons in
28 active concert or participation with him who receive actual

1 notice of the injunction, from applying the ABC Test to classify
2 Plaintiffs' doorknockers and signature gatherers;

3 B. Declaratory relief consistent with the injunction, to the effect
4 that California's discriminatory application of the ABC
5 classification test to Plaintiffs' doorknockers and signature
6 gatherers, per Cal. Labor Code § 2775(b)(1) or any other
7 authority, while applying the *Borello* classification test to
8 direct sales salespersons, newspaper distributors, and
9 newspaper carriers, violates the Plaintiffs' right to free speech,
10 and the free speech rights of Plaintiffs' customers and
11 audience, secured by the First and Fourteenth Amendments;
12 and consequently declaring further that, pursuant to Cal.
13 Labor Code § 2775(b)(3), Plaintiffs' doorknockers and signature
14 gatherers must be classified under *Borello*.

15 C. Costs of suit;

16 D. Attorney's fees and expenses pursuant to 42 U.S.C. § 1988; and

17 E. Any other relief as the Court deems just and appropriate.

18 Dated: June 23, 2021

19 Respectfully submitted,

20
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