



**INSTITUTE FOR
FREE SPEECH**

May 9, 2022

The Hon. Molly Dwyer, Clerk of Court
United States Court of Appeals, Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

Re: *Mobilize the Message, LLC v. Bonta*,
U.S. Court of Appeals, Ninth Cir. No. 21-55855

Notice of Supplemental Authority, Fed. R. App. P. 28(j), via ECF

Dear Ms. Dwyer:

In *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. ___, No. 20-1029 (Apr. 21, 2022), the Supreme Court upheld an ordinance privileging on-premises over off-premises signs as a neutral time, place and manner restriction, rejecting a claim that the sign regulation was content based. Its approach confirms that here, AB 5 is a content-based speech restriction.

Although “enforcing the City’s challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location,” the ordinance was nonetheless content neutral, because “[t]he message on the sign matters *only* to the extent that it informs the sign’s relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions.” *Reagan*, slip op. at 8 (emphasis added).

But *Reagan* cautioned 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.” *Id.* at 11. In classifying Plaintiffs’ speech based on its subject matter—whether Plaintiffs are promoting consumer products, or delivering publications whose content qualifies them as “newspapers” under AB 5—California has done exactly that. Yet the content of Plaintiffs’ speech does not inform its time, place, or manner. The content of Plaintiffs’ speech informs only its subject matter, function, or purpose. AB 5 is thus content based.

Moreover, *Reagan* precludes California’s argument that AB 5’s challenged provisions are content neutral because they are, allegedly, economic regulations. In *Reagan*, the Supreme Court confirmed that courts first determine whether a law is content based or neutral, and only then turn to the state’s justification. *Reagan* considered only whether the ordinance was facially content neutral, not its purpose or justification. The Court remanded *Reagan* for further consideration of those questions, because the “determination that the City’s ordinance is facially content neutral [did] not end the First Amendment inquiry.” *Id.* at 13. California should raise its economic justifications for AB 5 on remand, if it attempts to carry its strict scrutiny burden.

The Hon. Molly Dwyer
Page Two

Sincerely,

Alan Gura
Alan Gura
Counsel for Appellants

The body of this letter contains 347 words as measured by Microsoft Word.
cc: Jose A. Zelidon-Zepeda, counsel for Appellee (via ECF)