



**INSTITUTE FOR
FREE SPEECH**

February 11, 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

Response to Supplemental Authority, Fed. R. App. P. 28(j), via ECF

Dear Ms. Dwyer:

At oral argument, Appellee’s counsel discussed an opinion not cited in Appellee’s brief, *HomeAway.com v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2018), noting “the ‘threshold question [of] whether conduct with a ‘significant expressive element’ drew the legal remedy or the ordinance has the inevitable effect of ‘singling out those engaged in expressive activity.’” *Id.* at 685 (internal quotation marks omitted).

HomeAway rejected a First Amendment challenge to rental regulations because “the conduct at issue—completing booking transactions for unlawful rentals—consists only of nonspeech, nonexpressive conduct.” *Id.* at 685. With respect to the challenged exemption of Cal. Lab. Code § 2783(e), an analogous conduct regulation would target, simply, the demonstration or sale of consumer products.

But the challenged exemption is more focused, reaching the demonstration or sale of consumer products only when it is the subject, function or purpose of a particular expressive activity—canvassing—the act of directly engaging with individuals at their door, or otherwise outside an establishment. *See* Appellants’ Br. at 18. Consumer retail workers are not exempt. *HomeAway*’s narrow view of conduct suggests that canvassing, not sales, is the relevant “nature of the work performed or the industry in which the work is performed,” *Am. Soc’y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 961 (9th Cir. 2021), just as telemarketing, not, specifically, government-debt collection, was the relevant activity in *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335 (2020). Because the California regulates this expressive activity differently according to its “subject matter . . . function, or purpose,” the state must defend its regulation under strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

Sincerely,

Alan Gura
Alan Gura
Counsel for Appellants

The body of this letter contains 279 words as measured by Microsoft Word.
cc: Jose A. Zelidon-Zepeda, counsel for Appellee (via ECF)