



ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 510-4400
Telephone: (415) 510-3879
Facsimile: (415) 703-1234
E-Mail: Jose.ZelidonZepeda@doj.ca.gov

October 18, 2021

Via electronic filing

Molly C. Dwyer, Clerk of Court
Ninth Circuit Court of Appeals
James R. Browning Courthouse
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Mobilize the Message, LLC et al. v. Rob Bonta*
United States Court of Appeals for the Ninth Circuit, Case No. 21-55855

Dear Ms. Dwyer:

Per Federal Rule of Appellate Procedure 28(j), Defendant submits this letter brief regarding this Court's recent decision in *American Society of Journalists and Authors v. Bonta*, No. 20-55734, ___ F.4th ___, 2021 WL 4568057 (9th Cir. Oct. 6, 2021). This case is pertinent to the discussion in the answering brief regarding *ASJA*, appearing at pages 23-24.

In *ASJA*, this Court rejected a First Amendment challenge to Assembly Bill 5, in a context nearly identical to the claims raised by Plaintiffs here. 2021 WL 4568057, at *4. The plaintiffs unsuccessfully argued that certain AB 5 exemptions under California Labor Code section 2778 improperly imposed content-based restrictions, in contravention of the First Amendment. This Court noted that the case law distinguishes between "restrictions on protected expression," and "restrictions on economic activity," and the First Amendment "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* (citation omitted). "Section 2778 fits within this line of cases because it regulates economic activity rather than speech." *Id.* at *5. Looking at the terms of AB 5, the Court concluded that it "is aimed at the employment relationship," and that its classification standards "vary based on the nature of the work performed or the industry in which the work is performed." *Id.*

Further, while recognizing that "economic regulations can still implicate the First Amendment when they are not 'generally applicable,'" and instead target particular types of speech, this Court ruled (in terms equally applicable to the exemptions at issue here) that "Section 2778 poses none of these problems" since it does not "target the press or a few speakers, because it applies across California's economy." *Id.* at **5-6. Even assuming that section 2778 imposes an economic burden through its classification standard, "its applicability

Molly C. Dwyer
October 18, 2021
Page 2

does not turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged.” *Id.* at *6. Ultimately, “the inclusion of provisions specific to such ‘speaking’ professionals does not . . . transform a broad-ranging, comprehensive employment law like section 2778 into a content-based speech regulation.” *Id.* at *6.

Sincerely,

/s/ Jose A. Zelidon-Zepeda
JOSE A. ZELIDON-ZEPEDA
Deputy Attorney General

For ROB BONTA
Attorney General

cc: Alan Gura, counsel for Plaintiffs (via electronic filing)

SA2021303839
42906323.docx