



**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

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

Dear Ms. Dwyer:

Questioning at oral argument suggested that demonstrating or selling consumer products may be an activity distinct from canvassing. This Court, however, has described canvassing as a discrete activity that may be engaged in for commercial or non-commercial purposes.

In *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998), this Court struck down an ordinance targeting commercial canvassing. *S.O.C.* “regularly hired canvassers to distribute handbills, leaflets, and newspapers advertising erotic dance entertainment services” on the streets, *id.* at 1140, an activity protected by a challenged exemption here. *See* Cal. Unemp. Ins. Code § 650 (promoting “services or other intangibles, in the home . . . or otherwise than from a retail or wholesale establishment.”). This Court rejected Clark County’s contention that its definition of “off-premises canvassing” reached purely commercial speech. *Id.* at 1144.

Because the County “disapproved of canvassers handing out commercial handbills,” the ordinance constituted content-based discrimination. *Id.* at 1145. It failed strict scrutiny: “all canvassers, whether distributing commercial or non-commercial handbills, contribute to the problems of sidewalk congestion, harassment of pedestrians, and littering.” *Id.* at 1146 (citation omitted). “[A]ny type of canvasser [might] affect pedestrian safety and the likelihood [of unwanted solicitations].” *Id.* at 1147. “There is no evidence in the record that *only* commercial canvassers harass pedestrians . . . there is no evidence that an outright ban on commercial canvassing is necessary” *Id.*

The Tenth Circuit agrees that canvassing is a discrete activity that can be commercial or noncommercial, *Aptive Envtl., LLC v. Town of Castle Rock*, 959 F.3d 961, 969 n.4 (10th Cir. 2020) (adopting terms “noncommercial and commercial” “solicitors”); *id.* at 984 (referring to sales as “door-to-door canvassing and pamphleteering”) (internal quotation marks omitted), and has held that regulating commercial and noncommercial canvassing differently is content-based discrimination. *Id.* at 982-83; *see also Pa. All. for Jobs & Energy v. Council of Borough of Munhall*, 743 F.2d 182, 186 (3d Cir. 1984) (ordinances “exempt certain commercial canvassing from regulations that extend to all other door-to-door canvassing, both commercial and non-commercial”) (footnote omitted).

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Sincerely,

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The body of this letter contains 343 words as measured by Microsoft Word.
cc: Jose A. Zelidon-Zepeda, counsel for Appellee (via ECF)