THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEX MEDIA WEST, INC.; SUPERMEDIA LLC; and YELLOW PAGES INTEGRATED MEDIA ASSOCIATION d/b/a YELLOW PAGES ASSOCIATION,

Plaintiffs,

v.

CITY OF SEATTLE and RAY HOFFMAN, in his official capacity as Director of Seattle Public Utilities,

Defendants.

Case No. 10-CV-1857 JLR

DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: February 18, 2011

ORAL ARGUMENT REQUESTED

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The City of Seattle Ordinance has not caused the constitutional deprivations of which Plaintiffs Dex Media, Supermedia and the Yellow Pages Association (the "Yellow Pages Companies" or "Plaintiffs") complain. It does *not* dictate what speech is acceptable and what speech is not. Rather, the City will use the Ordinance to enforce the choices made *by Seattle residents* not to receive voluminous unwanted commercial speech that otherwise would be delivered to their doors. The Constitution does not give Plaintiffs the right to impose their publications on those who do not wish to receive it. Under the First Amendment and the Commerce Clause, the Ordinance is a proper mechanism to regulate the *delivery* of speech, irrespective of what message it conveys. Pursuant to Federal Rule of Civil Procedure 56, Defendants move for summary judgment dismissal of Plaintiffs' First Amendment and Commerce Clause claims. Correspondingly, Plaintiffs' Motion for Summary Judgment should be denied.

I. BACKGROUND

A. Testimony Before the City Council.

At seven hearings over four months, the City Council heard considerable testimony from residents who were extremely frustrated by the delivery of unwanted yellow pages to their homes, particularly where such delivery occurred *despite* their direction to Plaintiffs to cease delivery. Rasmussen Decl. ¶ 4. Residents complained that these unwanted deliveries violated their right to privacy and pointlessly generated large amounts of waste. *Id.* E-mail complaints to the City Council reiterated the magnitude of the problem for residents. O'Brien Decl., Ex. 2. Many residents demanded creation of an opt-in program prohibiting Plaintiffs from delivering their product to anyone who had not affirmatively requested it. Rasmussen Decl. ¶ 4. Plaintiffs sent representatives to each hearing and lobbied forcefully against *any* regulation. *Id.* ¶ 5.

B. The Yellow Pages.

The purpose of yellow pages is to sell advertising. According to Plaintiff Dex Media's website, Dex is "[a] leading marketing services company that helps local businesses reach, win and keep ready-to-buy customers." *Id.*, Ex. 1. It provides a broad variety of:

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> [P]roducts and services to help local businesses grow – from identifying target audiences and developing messaging, to optimizing marketing programs and leveraging appropriate products such as online and mobile search solutions, print yellow pages directories, voice based search platforms, and one of the largest pay-per-click ad networks in the U.S.

Id. Regarding its "products and services," Dex tells advertisers that it "delivers marketing services and products that help local businesses like yours get found and selected by active shoppers." *Id.*

Plaintiff Supermedia "bring[s] buyers and sellers together" and is "a source of confidence for consumers." *Id.*, Ex. 2. Supermedia explains:

> **We specialize in results**. Their results. Click-here results. Knock-on-the-door results. Click. Ring. Knock. That's the sound of business growing. Because we know the consumer. We know what they're looking for. And what they value.

Id. "When consumers are ready to buy, they turn to the Superpages. It is packed with powerful advertising products designed to attract your target market." *Id.* In addition to yellow pages advertising, Supermedia sells white pages advertising and urges advertisers to ensure that:

> [C]customers find your ad no matter which type of directory they reach for. 42% of consumers reference the white pages rather than the yellow pages when they know the name of the business they are looking for.

Id. Supermedia's advertisers may purchase various kinds of white pages ads:

> Display advertising maximizes your presence with up to a full page of advertising space including graphics and highlights.
> Banners & billboards repeat your exposure throughout the white pages.
> In-column/half-space ads attract more attention with more space, graphic elements and available highlight shadow box.
> Listing options stand out with an Enhanced Bold or Feature Listing or include extra contact information with a Communication Listing.

Id. Plaintiffs' laser-like focus on advertising drives their business. Recently, "the leading world expert on Yellow Pages," *id.*, Ex. 3, concluded they must "communicat[e] and convinc[e] advertisers of the value delivered by Yellow Pages," "convinc[e] a larger number of advertisers to participate in the Yellow Pages," "develop[] and modify[] products to better meet the evolving needs of consumers," and "captur[e] a greater share of advertising spending" *Id.*, Ex. 4.

Under Washington law, the local exchange carriers ("LECs") are required to publish a telephone directory listing the name, address and telephone number for each customer in the local

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exchange area. WAC 480-120-251. Plaintiffs contract with the LECs to be the exclusive publishers of this information which Plaintiffs then include in their yellow pages. *Id.*, Exs. 5-6.

Plaintiffs have filed an exemplar Dex yellow pages. ECF No. 20. It contains 840 pages of yellow pages advertising. It contains 401 pages of business white pages which are replete with advertising; there are virtually no pages in this section which *do not* contain advertising.[1] It contains 96 pages of government phone listings. That section too contains ads.[2] It has 35 pages of maps and 28 pages of "Community Pages," which also contain ads.[3] Finally, there are ads on the front and back covers, on the inside of the front and back covers, and on the binding.

C. Ordinance 123427.

Following months of hearings and analysis, the City Council passed Ordinance 123427 (the "Ordinance"). Instead of the opt-*in* program advocated by many residents, the Council adopted a more limited opt-*out* regulation which permits the delivery of yellow pages to any resident who does not affirmatively opt-out of deliveries. Three purposes motivated the Council: waste reduction, protection of residents' privacy from unwanted intrusions, and the recovery of costs incurred to maintain and enforce the opt-out registry. ECF No. 17, Ex. A, Preamble. On January 31, 2011, the City Council amended the regulations to require that the City issue or deny a license within 20 days of receiving the application and to require the City to issue a temporary license if a denial of an application is appealed. The City Council also eliminated the recovery fee for the cost of recycling yellow pages ($148/ton). O'Brien Decl., Ex. 1.

II. ARGUMENT

A. The Ordinance Satisfies the First Amendment.

Plaintiffs wrongly contend that yellow pages are equivalent to core First Amendment speech which only may be regulated subject to strict scrutiny. Rather, the Ordinance must be reviewed under intermediate scrutiny. Yellow pages are commercial speech and fully satisfy the deferential *Central Hudson* test. If the dominant commercial purpose of yellow pages is ignored,

[1] *See, e.g.*, ECF No. 20, Business White Pages at 1, 5, 12, 27, 35, 39, 42.
[2] *Id.*, Government Pages at 66 ("You deserve a vacation. Call now ….").
[3] *Id.*, Community Pages at 11 ("paid advertisement" stating: "Call now to learn how to donate your car ….").

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the applicable standard would be the intermediate scrutiny of the time, place and manner test, which the Ordinance more than satisfies. However, even if the yellow pages were entitled to the highest First Amendment protection, the narrow Ordinance satisfies strict scrutiny.

1. The Ordinance Must Be Tested Under Intermediate Scrutiny.

a. The Yellow Pages Are Commercial Speech.

Plaintiffs misconceive commercial speech law. They claim that the Ordinance is content-based and, hence, subject to strict scrutiny as non-commercial speech. ECF No. 14 at 11:23-45. While the Ordinance is, in fact, content-neutral, even *if* it were content-based this would not lead to the conclusion that the Ordinance regulates non-commercial speech. To the contrary, the Supreme Court long has recognized that commercial speech *may* be regulated based on its content without running afoul of the First Amendment.[4] Consequently, in *Spafford v. Echostar Commc'ns Corp.*, 448 F. Supp. 2d 1220 (W.D. Wash. 2006), this Court "concluded that [the statute at issue] is content-based, and thus, subject to the test announced in *Central Hudson*." *Id.* at 1223.

b. The Yellow Pages' Primary Message Is Advertising.

That the Ordinance regulates commercial speech is determined by looking at the nature of yellow pages. Yellow pages speech is commercial because its primary "message" is advertising. The fact that they contain some incidental non-advertising speech does not alter this conclusion. In the seminal *Central Hudson* case, the Court held that speech which would otherwise merit the highest protection is commercial speech when it is made in the advertising context. Recognizing that commercial speakers enjoy full First Amendment protection when speaking *only* about non-commercial issues, "[t]here is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions." 447 U.S. at 562 n.5. Rather, the Court's decisions on commercial expression rest "on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech." *Id.*

[4] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983); *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 903 n.6 (9th Cir.), *cert. denied*, 130 S. Ct. 1014 (2009).

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Following *Central Hudson*, the Supreme Court held in *Bolger* that condom ads containing a *significant amount* of public service information were properly regulated as commercial speech. Two mailings were at issue: a 12-page pamphlet discussing the use and desirability of condoms and describing defendant's condoms, and an eight-page pamphlet discussing venereal disease and the use of condoms to prevent it, which mentioned defendant's name *once*. The Court noted that these pamphlets could *not* be "characterized merely as proposals to engage in commercial transactions." 463 U.S. at 66. However, "notwithstanding the fact that they contain discussions of important public issues," they were advertisements, they referenced specific products, and the publisher had an economic motivation for mailing them. These three characteristics dictated that the pamphlets properly were characterized as commercial speech. *Id.* at 66-68. The Court reiterated that "[a] company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Id.* at 68 (fn. omitted).[5]

The "commercial speech doctrine rests heavily on the 'common-sense' distinction between speech proposing a commercial transaction and other varieties of speech" and "advertisements undeniably propose a commercial transaction." *Zauderer*, 471 U.S. at 637 (1985) (quotation marks & citation omitted).[6] Pursuant to *Central Hudson*, *Bolger*, and *Zauderer*, the incidental non-commercial speech that is included in yellow pages does not alter the common-sense fact that yellow pages are advertising and commercial speech. Each of the *Bolger* characteristics describes the yellow pages: they are advertising – and advertising is their purpose; they reference specific products and services; and Plaintiffs have an economic – and purely economic – motive for selling advertising and delivering it to residents' doorsteps. Unlike newspapers where the advertising funds the publishers' substantive messages, yellow pages ads *are* Plaintiffs' message. Of course, the Yellow Pages Companies do not argue that they sell many hundreds of pages of advertising *for*

[5] *Accord Zauderer v. Office of Disc. Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 n. 7 (1985).

[6] *Accord Anderson v. Treadwell*, 294 F.3d 453, 460 (2nd Cir. 2002). *Bolger*'s pragmatic, "common sense" analysis does not consider the relative ounces of the commercial and the incidental non-commercial speech as Plaintiffs suggest. ECF No. 14 at 13:11-15. Rather, the test is a functional and holistic one. So, in *Bolger*, one reference to the advertiser in an eight-page pamphlet dictated that the pamphlet, all of it, should be treated as commercial speech.

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the purpose of enabling their 28 pages of emergency and community information.[7]

c. Plaintiffs Misapply the Concept of "Inextricably Intertwined."

To avoid the relaxed *Central Hudson* test, Plaintiffs argue that the commercial and non-commercial elements of yellow pages are "inextricably intertwined" and require treatment as fully-protected speech. ECF No. 14 at 14:19-37. Plaintiffs rely on *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), and *Board of Trs. of the State Univ. of New York v. Fox*, 492 U.S. 469 (1989). *Riley* and *Fox*, in fact, mandate the opposite result.

In *Riley*, the Court reaffirmed that the level of scrutiny applicable to restrictions on speech must be based on "the nature of the speech taken as a whole …." 487 U.S. at 796. The speech in *Riley* was charitable solicitations which historically have been subject to the highest protection. With such speech, the solicitation (presumed to be commercial speech) and the highly-protected speech regarding the charity's mission are "inextricably intertwined" and cannot be separated; the charity cannot ask for money without explaining the noble purpose for which it will be used. On that basis, the Supreme Court reviewed the regulation under the test for fully protected speech. *Id.*

In *Fox*, the Court considered a university's restriction of "Tupperware parties" where commercial speech – the invitation to buy goods – was combined with non-commercial speech – discussion of financial responsibility. The Court rejected the argument that the commercial and non-commercial speech were "inextricably intertwined" and that this required classifying the speech as non-commercial as in *Riley*. 492 U.S. at 474.

> No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Fox, 492 U.S. at 475. So, the Court had no difficulty recognizing that the "the principal type of expression at issue is commercial speech." *Id.* at 473. Reiterating the *Bolger* holding that commercial speech containing a discussion of important public issues is *still* commercial speech,

[7] *See, e.g., American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 862 (3rd Cir. 1984) ("The *Bolger* criteria are employed to discern whether speech is … part and parcel of a proposed commercial transaction. It is this connection to a commercial transaction that justifies the government's greater role in regulating the speech ….").

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the Court explained: "Including these home economics elements no more converted [plaintiffs'] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Id.* at 474-75.

Unlike in *Riley* – where the solicitation *could not* be made without engaging in the highly protected description of the charity – and like *Fox* – where housewares *could* be sold without teaching home economics – "no law of man or of nature" requires that the ads that are the yellow pages' *raison d'être* be combined with maps and street guides. Plaintiffs nevertheless insist that their ads are inextricably intertwined with fully protected speech for two reasons: first, "because the City could not address its objectives without regulating the combination." ECF No. 14 at 14:25-27. However, as *Riley* and *Fox* make plain, it is the nature of the speech itself, not the regulation of that speech, which determines whether commercial and non-commercial speech are inextricably intertwined. So, it is *Plaintiffs'* objectives, not *the City's*, which are determinative.

> *Bolger* and *Fox* involved speech that was not substantially motivated by or intertwined with the speaker's political message. In both, the political aspect of the speech was merely tangential to a predominant commercial purpose. The companies referenced issues of public concern merely as a tactic for promoting their products; their products were not a means of political expression ….

Frazier v. Boomsma, No. CV 07-08040-PHX, 2007 WL 2808559, *13 (D. Ariz. Sept. 27, 2007).[8]

Second, Plaintiffs argue that their non-commercial and commercial speech are inextricably intertwined because "the funding provided by advertising is what allows publishers to distribute the non-advertising content for free." ECF No. 14 at 14:29-31. This presumes that their purpose is to provide public service information. That is not the case. The purpose of distributing yellow pages is to sell advertising. *See supra* § II.B. The notion that they are comparable to newspapers because newspapers also contain ads, ECF No. 14 at 14:31-37, is the proverbial "apples to oranges" comparison. Newspapers use ads to fund the editorial content that is their reason for existing. As in *Frazier*, Plaintiffs use public service information to attract purchasers to the ads that are their reason for existing. So, while the newspaper's mission to publish editorial content

[8] *Accord Am. Future Sys.*, 752 F.2d at 862 n.26 ("The critical question would be whether the primary purpose of the organization was to sponsor religious activity or to sell Bibles, and the *Bolger* criteria would be applied in an attempt to answer this question.").

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"could not survive without funding from advertisers," *id.* at 14:37, Plaintiffs' purpose of selling and distributing ads *can* survive without the incidental public service information. From a First Amendment perspective, yellow pages' public service information is "severable" from their advertising. *Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 730 (9th Cir. 1994).

As commercial speech, regulation of yellow pages must be tested under *Central Hudson*.

2. The Ordinance Satisfies the Intermediate Scrutiny of *Central Hudson* and the Time, Place and Manner Test.

The Ordinance easily passes muster under both intermediate scrutiny tests. The "more relaxed" *Central Hudson* inquiry, *id.* at 728-29, is satisfied where: (1) the government interest is substantial; (2) the regulation directly advances that interest; and (3) the regulation is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 563, 566. If the yellow pages' incidental, non-commercial speech were to transform its advertising purpose into non-commercial speech – the tail wagging the dog – the Ordinance would be tested under the "substantially similar," *Fox*, 492 U.S. at 477, time, place and manner test which requires that the regulation: (1) be content-neutral; (2) serve a significant government interest; (3) be narrowly tailored; and (4) leave open ample alternative channels of communication. *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009).

a. The City's Interests Are Substantial.

Each of the City's three interests is substantial. First, residents have an overriding right to stop speech at their doorsteps and governments have a substantial interest in enforcing residents' choices. *Spafford*, 448 F. Supp. 2d at 1224.[9] However, Plaintiffs contend that this interest is not substantial for the novel reason that the Ordinance duplicates Plaintiffs' existing opt-out websites. ECF No. 14 at 24:31-33. In fact, the Ordinance – which will allow for a resident to register her choice through a single registry – does *not* duplicate Plaintiffs' inadequate system which requires that residents visit multiple websites to opt-out from the multiple yellow pages delivered to their homes and which lacks an enforcement mechanism.[10] In any event, whether or not the interest in

[9] *See also Rowan v. Post Office Dep't*, 397 U.S. 728, 736-38 (1970); *Berger*, 569 F.3d at 1038; *Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996); *National Coal. of Prayer, Inc. v. Carter*, 455 F.3d 783, 790 (7th Cir. 2006).
[10] Rasmussen Decl. ¶ 4 & Ex.7.

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protecting residential privacy is substantial is an independent consideration; it is not judged by the nature of the regulatory mechanism used to advance it (or by Plaintiffs' efforts to self-regulate). Second, the interest "in promoting resource conservation and reducing the burden on its brimming landfills" is substantial. *Association of Nat'l Advertisers*, 44 F.3d at 735. Plaintiffs do not dispute this and, in fact, contend they fully support the City's interest.[11] Third, Plaintiffs also do not dispute that the interest in recouping the costs expended in the Ordinance's enforcement and administration is substantial. *See, e.g.*, *Hudson v. Transportation Alts., Inc. v. City of NY*, 218 F. Supp. 2d 423, 439 (S.D.N.Y. 2002), *aff'd*, 340 F.3d 72 (2nd Cir. 2003).

b. The Fit Between the Ends and the Means Is Reasonable.

(i) The Standard Is Deferential.

The final steps of the *Central Hudson* test require that "the 'fit' between the legislature's ends and the means chosen to accomplish those ends" be "reasonable." *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986); *Spafford*, 448 F. Supp. 2d at 1225. A regulation need not have a perfect fit, the single best means to accomplish the ends, or even the least restrictive means. *Fox*, 492 U.S. at 480.[12] This standard "take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive branches needed leeway in a field (commercial speech) traditionally subject to governmental regulation." *Id.* at 481 (quotation marks & citation omitted). It is "up to the legislature to decide" whether the means adequately satisfy the ends "so long as its judgment was reasonable." *Id.* at 480. Regulation of commercial speech must simply "provide more than ineffective or remote support for a legitimate governmental policy goal." *Association of Nat'l Advertisers*, 44 F.3d at 732 (quotation marks & citation omitted). A regulation that satisfies

[11] ECF No. 18 ¶ 26 & Ex. B.

[12] *Ward*, 491 U.S. at 799 (Under the time, place and manner test, if "the means chosen are not substantially broader than necessary to achieve the government's interest, …the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."); *accord Reed v. Town of Gilbert*, 587 F.3d 966, 980 (9th Cir. 2009) ("test is not convenience or optimal display").

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Central Hudson's other prongs passes muster "in the absence of a far less restrictive and *more precise* means." *Id.* at 736 (quotation marks & citation omitted).[13]

Applying the deferential *Central Hudson* test, the Ninth Circuit in *Destination Ventures, Ltd. v. Federal Commc'ns Comm'n*, 46 F.3d 54 (9th Cir. 1995), upheld a federal statute that banned unsolicited faxes containing advertisements. The plaintiff argued that "the government has not shown that faxes containing advertising are any more costly to consumers than other unsolicited faxes such as those containing political or prank messages." *Id.* at 56. The court rejected the argument that Congress "could not single out advertisements for regulation when other types of unsolicited faxes produce the same cost-shifting" and found the fit to be reasonable. *Id.* "Because Congress's goal was to prevent the shifting of advertising costs, limiting its regulation to faxes containing advertising was justified." *Id.*

The Ninth Circuit was similarly deferential in *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037 (9th Cir. 2002), under the time, place and manner test. That ordinance required publications to use city-provided news racks, with free publications being placed together and pay publications being placed together. A free newspaper complained that the regulation forced it to be grouped with commercial publications, not with its true-competition, the newspapers sold for a fee. The district court agreed and "suggested that the city could distinguish between publications based on the size of the publication rather than whether they charge readers." *Id.* at 1046. The Ninth Circuit reversed and faulted the district court for "try[ing] a little too hard to imagine an ordinance that would best balance the goals of the city with the desires of the publishers." *Id.*

> Whether this manner of addressing the problems of aesthetics and safety, or any possible alternatives we could think of, might have been better than the one chosen by the City and County of Honolulu is not our concern because the ordinance is not "*substantially* broader than necessary to achieve [the city's desired goals]." *Ward [v. Rock Against Racism]*, 491 U.S. [781,] 800 … [(1989)] (emphasis added). We do not compel more.

Id.

[13] *Accord Posadas*, 478 U.S. at 344; *Association of Nat'l Advertisers*, 44 F.3d at 735; *Menotti v. City of Seattle*, 409 F.3d 1113, 1137 (9th Cir. 2005) (Under time, place and manner test, reviewing courts need not agree with the legislative decision makers regarding the most appropriate method for promoting significant government interests.).

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Because the City of Seattle Ordinance certainly provides more than ineffective or remote support for the City's interests, each of the Ordinance's challenged provisions must be upheld.

(ii) The Opt-Out Registry.

Opt-Out Regulations Are Routinely Upheld. The opt-out registry provides the City a means to enforce *residents*' choices not to receive yellow pages. While Plaintiffs cannot imagine why residents would have a greater desire to opt out of receiving yellow pages than other commercial speech, ECF No. 14 at 24:37-39, the evidence shows that the delivery of unwanted yellow pages is a pernicious problem for residents; there is no evidence that other forms of commercial speech delivered to homes pose the same problem. *See Supra* § II.A. Thus, like many governments before it, Seattle acted reasonably in crafting an opt-out system, a limited regulation restricting the delivery of yellow pages to precisely those individuals who do not wish to receive them. *Martin v. City of Struthers*, 319 U.S. 141, 147-49 (1943) ("the decision as to whether distributers of literature may lawfully call at a home … belongs … with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant.").

In *Anderson*, the court upheld a statute prohibiting agents from soliciting the sale of residential property at the home of a property owner who had signed a cease-and-desist list. The court described facts strikingly similar to the ones that led the City of Seattle to adopt the Ordinance.

> The record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree. The popularity of the program, statements at the public hearings in support of the cease-and-desist zones, and complaints of violations of the registry all support the contention that homeowners feel harassed by the amount and the intensity of the solicitations…. As to reasonable fit, the regulation can hardly be accused of being "more extensive than necessary"; it is precisely co-extensive with those who are experiencing the particular harm that it is designed to alleviate.

294 F.3d at 462.

In *Mainstream Mktg. Servs., Inc. v. Federal Trade Comm'n*, 358 F.3d 1228 (10th Cir. 2004), the Tenth Circuit upheld a law prohibiting most commercial telemarketers from calling

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numbers on the "do-not-call" registry. The Court held that the law "directly advances" the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener. *Id.* at 1238. "To be sure, the do-not-call list will not block all of these calls. Nevertheless, it will prohibit a substantial number of them, making it difficult to fathom how the registry could be called an 'ineffective' means of stopping invasive or abusive calls …." *Id.* at 1240. Moreover, the court held that the do-not-call registry "does not itself prohibit any speech. Instead, it merely 'permits a citizen to erect a wall … that no advertiser may penetrate without his acquiescence.'" *Id.* at 1243 (quoting *Rowan*, 397 U.S. at 738).[14]

Underinclusivity Does Not Invalidate the Opt-Out Registry. Despite the precedent upholding opt-out regulations, Plaintiffs contend that the Ordinance lacks a reasonable fit because it is underinclusive, that is, it should have restricted *more* speech. ECF No. 14 at 24:33-39. Yet, underinclusiveness rarely results in constitutional infirmity. In *Posadas*, the Court rejected the argument that a regulation on advertising casinos was underinclusive because no restrictions were imposed on advertising other kinds of gambling. This was so for two reasons. First, whether or not other kinds of gambling advertising were regulated, the restrictions on advertising casino gambling *did* directly advance the interest in reducing demand for games of chance. Second, the legislature's interest was "not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling," and that more limited interest was based on the legislature's conclusion that other types of gambling posed a less significant risk. Hence, the Court held that "the legislature's separate classification of casino gambling, for purposes of the advertising ban, satisfies the third step of the *Central Hudson* analysis." 478 U.S. at 342-43.

Posadas dictates the same conclusion here. First, whether or not the City regulated other forms of unwanted commercial speech arriving at residents' doorsteps, its regulation of unwanted yellow pages does directly advance the City's interest in preserving residential privacy. Second,

[14] *See also Project 80's, Inc. v. City of Pocatello*, 857 F.2d 592, 596-97 (9th Cir. 1988) (citizens who want privacy may

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the Ordinance reflects the City's conclusion that the invasion of residential privacy caused by the unwanted delivery of yellow pages is a significant problem for residents who did not complain to the City Council about other types of unwanted commercial speech. *See also National Coal. of Prayer*, 455 F.3d at 784-85, 790 ("do-not-call" statute that allowed residents to opt-out of fundraising calls by telemarketers but not fundraising calls by others was not underinclusive where the statute was prompted by citizen complaints about telemarketers).

In essence, "[t]he underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further." *Mainstream Marketing*, 358 F.3d at 1238-39. Thus, the government need not "make progress on every front before it can make progress on any front." *United States v. Edge Broad. Co.*, 509 U.S. 418, 435 (1993); *accord Destination Ventures*, 46 F.3d at 56. So, even if the City Council had heard from citizens who wish not to receive other commercial speech at their doorsteps, the City is constitutionally empowered to "advance its goals in piecemeal fashion." *Spafford*, 448 F. Supp. 2d at 1225-26.

Because the opt-out registry is a reasonable means of achieving the goals of preventing the delivery of unwanted yellow pages and avoiding recycling costs, it satisfies intermediate scrutiny.

(iii) The Recovery Fee.

Undoubtedly, a city may charge fees to recoup expenses it incurs as a result of the exercise and regulation of even *fully-protected* speech. *Cox v. State of N.H.*, 312 U.S. 569 (1941); *Kaplan v. County of L.A.*, 894 F.2d 1076, 1081 (9th Cir. 1990); *BSA, Inc. v. King County*, 840 F.2d 1104, 1109 (9th Cir. 1986). The Ordinance originally included two recovery fees, one to pay for the opt-out system and one to pay for the collection and recycling of yellow pages. While both fees satisfy intermediate scrutiny, the latter fee has since been eliminated and is no longer at issue ("Recovery Fee" is hereinafter used to refer only to the opt-out registry fee). The Recovery Fee was derived through a precise calculation of the anticipated costs to administer the opt-out registry and the

"inform a central registry established by the city.") (fn. omitted), *vacated on other grounds*, 493 U.S. 1013 (1990).

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anticipated volume of yellow pages that will be distributed in Seattle. Lilly Decl. ¶¶ 2-9 & Ex. 1. "[T]he recovery fee is intended to reflect the cost to the City of administering the Opt-Out Registry" and "Seattle Public Utilities may recommend adjustments to the recovery fee as part of the development of adjustments to the solid waste rates." SMC 6.255.100(A). Thus, the Recovery Fee is a precise means to recoup only the opt-out registry's actual costs.

Plaintiffs contend that the Recovery Fee fails the *Central Hudson* test because "it singles out … only those directories published by out-of-state companies – for discriminatory treatment" and thus is fatally underinclusive. ECF No. 14 at 23:37-41, 23:51. This is wrong. The Ordinance regulates distributors of unsolicited yellow pages no matter where the distributor is based, SMC 6.255.025(B), and looks only to those distributors to recoup the opt-out registry costs. It would be absurd – and patently indefensible – for the City to charge a recovery fee to entities that are *not* subject to the opt-out program. Moreover, for the reasons that Plaintiffs' underinclusivity argument as to the opt-out provision fails, *see supra* § III.A.2.b(ii), it also must be rejected here.

(iv) The License Requirement.

Licensing Requirements Are Permissible. Reasonable time, place and manner restrictions may require permits even with core political speech in traditional public fora. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 10223 (9th Cir. 2009); *Berger v. City of Seattle*, No. C03-3238JLR, slip op. at 8 (W.D. Wash. Apr. 22, 2005) ("as long as a prior restraint is content neutral, a court analyzes it no differently than other time, place, or manner regulations"), aff'd, 569 F.3d 1029 (9th Cir. 2009). With commercial speech, permits regularly are required and upheld. *See, e.g., Project 80's*, 857 F.2d at 597 (approving requiring solicitor registration).

The Ordinance's licensing requirement is a narrowly tailored means of protecting residential privacy and recovering administrative costs. Plaintiffs must simply pay a $100 fee, report the number of yellow pages they distributed the prior year, and pay the Recovery Fee. SMC 6.255.050. In addition to providing a means for the City to collect distribution data and set each distributor's proportionate Recovery Fee, the license requirement is a mechanism through

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which the City may ensure compliance with the prohibition on distribution to residents who have opted-out and provide control over the opt-out list. *See S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1147 (9th Cir.) (acceptable, less-restrictive alternative to banning handbilling would be to "issue canvassing permits. A permit system could help regulate congestion and build in accountability should problems arise"), *amended on other grounds*, 160 F.3d 541 (9th Cir. 1998).

The Licensing Requirement is Reasonable. Plaintiffs contend that the license requirement fails because the City "could achieve its interests in a manner that restricts less speech … by punishing only actual wrongdoers, rather than screening potential speakers." ECF No. 14 at 23:29-33 (quotation marks & citation omitted). However, it is not true that the City could enforce citizen privacy as effectively by simply fining Plaintiffs if they disregard resident direction not to deliver yellow pages. An after-the-fact fine does not preserve the resident's *paramount* right not to receive unwanted speech in his home in the first place. Moreover, the license serves the independent interest of recouping the opt-out system costs and punishing wrongdoers would not accomplish this goal as effectively, if at all. Lilly Decl. ¶¶ 10-11. *Central Hudson* requires only that the licensing requirement "provide more than ineffective or remote support" for the City's interests. *Association of Nat'l Advertisers*, 44 F.3d at 732. The Ordinance, at least, does so.

Berger Is Inapposite. Citing to *Berger*, Plaintiffs contend the licensing requirement is an unconstitutional prior restraint. ECF No. 14 at 16:24-30. However, it does not suffer from the three infirmities that caused the Ninth Circuit to strike down the Seattle Center's permitting requirement for street performers. First, the *Berger* Court concluded that the need to apply for a permit and wait for it to be granted might discourage potential speakers. 569 F.3d at 1038. The type of speakers there at issue – street performers – varies markedly from the sophisticated advertising companies that are regulated here. Plaintiffs do not argue that the need to fill out a simple application will in any way discourage their desire to communicate to Seattle's shoppers. More-over, the Ordinance has a streamlined process requiring issuance or denial of a permit within 20 days and issuance of a temporary permit pending an appeal. O'Brien Decl., Ex. 1. The second reason why the *Berger*

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Court struck down the permit requirement was that it would "dissuade potential speakers by eliminating the possibility of anonymous speech." 569 F.3d at 1038. There is no such thing as "anonymous" speech by yellow pages publishers. Their purpose is to advertise and yellow pages are littered with *their own* ads to potential advertisers.[15] Last, the *Berger* Court struck down the permit requirement because it eliminated spontaneous speech. *Id.* at 1039. It is hard to conceive of a *type* of speaker that is *less* spontaneous than a yellow pages publisher. As Plaintiffs have explained, they lay out and publish their directories months before depositing them on Seattle doorsteps. ECF No. 19 ¶ 4. There is no risk here of dissuading spontaneous speech.

The Licensing Requirement is Sufficiently Definite. Plaintiffs also complain that the licensing requirement is unconstitutional because it lacks specific grounds for granting or denying a permit. ECF No. 14 at 17:1-11. They point to two cases, each of which dictates the opposite conclusion. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Court reviewed an ordinance that required a permit to participate in a parade and allowed for denial of a permit request if the City "in its judgment" concluded that "the public welfare, peace, safety, health, decency, good order, moral or convenience require that it be refused." *Id.* at 149-50 (quoting the ordinance). The regulation "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,'" leaving the City "to be guided only by their own ideas of 'public welfare ….'" The Court struck down the regulation as an unconstitutional prior restraint because of the absence of "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 150-51. It "clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks." *Id.* at 153. The second case upon which Plaintiffs rely also concerned unbounded permitting discretion. *See Gaudiya Vaishnava Soc'y v. City & Cnty of S.F.*, 952 F.2d 1059, 1062 (9th Cir. 1990) (invalidating a permitting scheme with "unguided discretion" that "grants the police chief complete power to allow or prohibit charitable sales solicitation for any reason, including the message conveyed by the sales pitch or by the goods themselves").

[15] *See, e.g.*, ECF No. 20, Yellow Pages at 68; *id.* at 220.

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The opposite is true here. The Ordinance supplies precise requirements for the license and the correlated bases for denial. Pursuant to SMC 6.255.130, "[f]ailure of a licensee to comply with any provision of this chapter is sufficient grounds for the denial, suspension or revocation of the license."[16] The operative provisions of the Ordinance unmistakably state what the applicant must do.[17] Thus, it does precisely what the Court faulted the Birmingham ordinance for *not* doing: it provides "narrow, objective, and definite standards to guide the" City and those criteria *are* precisely "[]related to legitimate municipal regulation." *Shuttlesworth*, 394 U.S. at 151, 153.

The Licensing Requirement Satisfies the Washington Constitution. Plaintiffs contend that even if their First Amendment argument fails, Washington's Constitution prohibits *all* permitting schemes impacting speech. ECF No. 14 at 17:23-31. The one case on which they rely is *O'Day v. King County*, 109 Wn.2d 796, 749 P.2d 142 (1988), a challenge to an ordinance regulating nude dancing. In that context, the court stated that Washington's Constitution "categorically rules out prior restraints on constitutionally protected speech under any circumstances. *Coe*, at 374-75…." *O'Day*, 109 Wn.2d at 804. The court said nothing more regarding prior restraints. However, *Coe v. State of Washington*, 101 Wn.2d 364, 679 P.2d 353 (1984), the lone case cited in *O'Day*, is a comprehensive discussion of prior restraints. The court in *Coe* held that "not all prior restraints are prohibited" and "a regulation may not rise to the level of a prior restraint if it is merely a valid time, place or manner restriction on the exercise of protected speech." *Id.* at 372-73. The court has since held that Washington's Constitution affords no greater protection to commercial speech than does the First Amendment, *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116, 937 P.2d 154, *amended in non-relevant part*, 943 P.2d 1358 (1997), and upheld a licensing requirement impacting commercial speech. *National Fed. of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 117-19, 838 P.2d 680 (1992). Thus, the definite standards of the Ordinance's licensing provision satisfy both Constitutions.[18]

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[16] *See also* SMC 6.202.230.

[17] SMC 6.255.060, .080, .090(B), .090(D), .090(E), .100, .110(A-B), .110(C), 110(D).

[18] Plaintiffs contend that the permitting provision is unconstitutional because it lacks a time limit to process permit applications and subsequent appeals. ECF No. 14 at 17:11-21. This issue is moot because the Ordinance, as amended, requires that permit applications be decided within 20 days and requires issuance of a temporary permit pending any appeal from a permit denial. O'Brien Decl., Ex. 1.

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In sum, the *Central Hudson* test is satisfied here and the Ordinance is a proper regulation of commercial speech. The final two prongs of the time, place and manner test are discussed below, demonstrating that this standard also is met.

c. The Ordinance Is Content Neutral.

In addition to the factors discussed above, the Ordinance satisfies the intermediate time, place and manner test because it "is justified, *i.e.*, based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *Menotti*, 409 F.3d at 1129 (quotation marks & citation omitted); *accord Ward*, 491 U.S. at 791 (regulation is content-neutral if it "serves purposes unrelated to the content of expression … even if it has an incidental effect on some speakers or messages but not others"). The Ninth Circuit's recent decision in *Reed*, dictates that the application of a regulation to only some modes of speech does not make the regulation content-based. In *Reed*, the court considered an ordinance restricting the posting of certain types of signs. The regulation permitted temporary directional signs relating only to activities "sponsored, arranged or promoted by a religious, charitable, community service, educational or other similar non-profit organization." 587 F.3d at 977 (quoting the ordinance). The court concluded that the ordinance did not "mention any idea or viewpoint, let alone single one out for a differential treatment." *Id.* Rather, it merely considered the "content-neutral" "elements of 'who' is speaking and 'what event' is occurring" without limiting the substance of the speech in any way. *Id.* at 977-78; *accord Honolulu Weekly*, 298 F.3d at 1045 n.8 ("Simply drawing a distinction among speakers is not enough to establish a First Amendment violation.").

As with *Reed*, there is no evidence that the City cares about the messages the yellow pages communicate. In fact the evidence shows that the City's purposes have nothing whatsoever to do with the yellow pages' content. ECF No. 17, Ex. A, Preamble. Rather than singling out particular content, the Ordinance singles out a specific speech-delivery mechanism. As in *Reed*, the Ordinance considers a content-neutral category of speakers – publishers of yellow pages – without in any way limiting the substance of that speech or its delivery to those who desire it. *See also Hill*

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v. Colorado, 530 U.S. 703, 723 (2000) ("[A] statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside."); *Honolulu Weekly*, 298 F.3d at 1044 (upholding ordinance that "targeted the *manner* in which *Honolulu Weekly* is distributed, not the content of its message").

But Plaintiffs contend that the Ordinance is content-based because it only applies to "'publication[s] that consist[] primarily of a listing of business names and telephone numbers and contain[] display advertising for at least some of those businesses'" and because the very act of deciding whether any publication qualifies under that definition requires examining the publication's content. ECF No. 14 at 11:23-45 (quoting the Ordinance). Plaintiffs cite to *United Bhd. of Carpenters & Joiners of American Local 586 v. National Labor Relations Bd.*, 540 F.3d 957 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 533 (2009), for the proposition that "'[r]ules are generally considered content-based when the regulating party must examine the speech to determine if it is acceptable.'" ECF No. 14 at 11:29-33. The Ninth Circuit has since disavowed this unduly "expansive" construction. In *Reed*, the court rejected the notion that "any time an ordinance requires a law enforcement officer to read a sign, the ordinance must be content based." 587 F.3d at 976. Rather, the "test actually turns on whether the ordinance singles out certain speech for differential treatment based on the idea expressed." *Id.* (quotation marks & citation omitted). Because an officer could decide if a "religious, charitable, community service, educational or other similar non-profit organization" was speaking "without assessing the substance of the sign's contents," the ordinance was content-neutral. *Id.* at 978.

> This case also highlights the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based. While a Gilbert officer needs to briefly take in what is written on the Qualifying Event Sign to note who is speaking and the timing of the listed event, this "kind of cursory examination" is not akin to an officer synthesizing the expressive content of the sign.

Id.

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The "officer must read it" litmus test also is of no use here. If the City must determine whether a phone directory is a "publication that consists primarily of a listing of business names and telephone numbers and contains display advertising for at least some of those businesses," SMC 6.255.025(E), the City will do so without paying *any* attention to the ideas expressed therein, let alone favoring any particular idea. As in *Reed*, because the Ordinance "does not mention any idea or viewpoint, let alone single one out for special treatment" and because the City can decide if a publication qualifies as a yellow pages by a cursory confirmation that it has a list of business names and phone numbers and some advertising "without assessing the *substance* of [its] contents," the Ordinance is content-neutral. *Reed*, 587 F.3d at 977-78 (emphasis added).

The Ordinance ensures that those who do not wish to receive yellow pages do not receive them and that the City will not have to recycle unwanted yellow pages¸ *whatever their content*.

d. There Are Ample Alternative Channels of Communication.

Under the final prong of the time, place and manner test, the regulation must allow ample alternative channels of communication. Alternative channels exist unless the regulation prohibits "an entire medium of public expression across the landscape of a particular community or setting." *Id.* at 980 (quotation marks & citation omitted). "[T]he test is not whether another option would be more optimal" for the speaker. *Id.* at 980-81. The only channel of communication removed here is to those who have rejected Plaintiffs' speech. Plaintiffs may continue to deliver yellow pages to all other residents and the broad internet speech Plaintiffs offer is not impacted at all.

The Ordinance amply satisfies the First Amendment under the proper *Central Hudson* measure *and* under the intermediate scrutiny of the time, place and manner test.

3. *Discovery Network* Does Not Support Invalidation of the Ordinance.

a. *Discovery Network* Was a "Narrow" Holding and Is Inapposite.

The Yellow Pages Companies contend that *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), dictates that the Ordinance be found an unconstitutional regulation of commercial speech. However, the Supreme Court's "narrow" holding in *Discovery Network*, *id.* at

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428, does not immunize Plaintiffs from regulation by the City of Seattle. At issue in *Discovery Network* was an ordinance that banned the use of news racks for commercial handbills, while allowing their use for newspapers. With this regulation, the city sought to improve the safety and appearance of city sidewalks. The Court reaffirmed that governments need not employ the least restrictive means under *Central Hudson* "but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Id.* at 417 n.13. The Court found there to be an obvious less-burdensome alternative to an outright ban in the form of restrictions on news rack size, shape, appearance, or number. *Id.* at 417. The Court held that the "paltry" effect on safety and beautification of removing 62 commercial news racks while 1,500-2,000 other news racks remained in place was not a reasonable fit. *Id.* at 418. The different treatment of commercial and non-commercial news racks doomed the ordinance because *all* news racks caused the *same* problem. The distinction between commercial and non-commercial speech "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424.

The Supreme Court emphasized the "narrow" nature of its holding.

> [W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial news racks. We simply hold that *on this record* Cincinnati has failed to make such a showing. Because the distinction Cincinnati has drawn has *absolutely no bearing* on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the "fit" between its goals and its chosen means that is required ….

Id. at 428 (emphasis added).[19]

Plaintiffs argue that the Ordinance is impermissible because it "imposes no similar requirements on distribution of any other printed material" while the City's interest in preserving residential privacy assertedly "appl[ies] just as strongly to other materials as they do to yellow pages." ECF No. 14 at 22:21-27. Plaintiffs have failed to describe the "other printed materials"

[19] The Ninth Circuit recognizes that *Discovery Network*'s narrow ruling did not undercut the *Bolger* test, *Association of National Advertisers*, 44 F.3d at 730, a test which the Ordinance more than satisfies. *See supra* § II.A.1.a(i).

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they have in mind. In any event, the City Council was not presented with complaints about "other printed materials" delivered to residents' doorsteps over their objection.[20]

b. *Metro Lights* Requires Upholding the Ordinance.

To the degree that "other printed materials" is meant to refer to the publications that are excluded from the Ordinance, Plaintiffs fair no better. *Central Hudson* requires only "a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application." *Metro Lights*, 551 F.3d at 905. Plaintiffs recognize as much, having quoted *Metro Light*'s holding that regulatory exceptions distinguishing among different kinds of speech satisfy this standard if they "'relate to the interest the government seeks to advance.'" ECF No. 14 at 22:51-23:3 (quoting *Metro Lights*, 551 F.3d at 906). The City agrees that *Metro Lights* is instructive and, in fact, requires upholding the Ordinance.

In the 2009 *Metro Lights* case, the Ninth Circuit upheld an ordinance that banned offsite advertising, but allowed to the city's contractor the exclusive advertising right at bus stops, effectively creating a major exception to the offsite advertising ban. The city's purpose was to reduce physical and visual clutter on sidewalks. 551 F.3d at 901. The city justified the exception by explaining that "the proliferation of offsite advertising by numerous and disparate private parties creates more distracting ugliness than a single, controlled series of advertisements on city property over which the City wields contractual supervision." *Id.* at 910. The Ninth Circuit found this distinction sufficient to justify disfavoring offsite signs away from transit stops. *Id.* The Ninth Circuit reversed the district court and rejected the plaintiff's reliance on *Discovery Network* because "here there is 'some basis for distinguishing'" the two types of offsite advertising, *id.* at 911 (quoting *Discovery Network*, 507 U.S. at 428), and the exception "does not work at inexorable cross-purposes" to the ordinance. *Id.* Although plenty of offsite advertising remained, the city's regime "still arrests the uncontrolled proliferation of signage and thereby goes a long way toward cleaning up the clutter, which the City believed to be a worthy legislative goal." *Id.*

[20] The Yellow Pages Companies' comparison of the amount of solid waste generated by yellow pages and other printed material, ECF No. 14 at 22:27-45, is immaterial given that the City has stricken the recovery fee for recycling.

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Seattle's Ordinance more than satisfies this standard. It contains three exceptions: (1) LECs distributing only those phone books required by state law, SMC 6.255.035; (2) membership organizations that distribute phone books "to their members or to other residents or businesses requesting or expressly accepting delivery," SMC 6.255.025(B); and (3) those distributing fewer than four tons annually. *Id.* Unlike *Discovery Network* where there was no meaningful basis to distinguish the commercial and non-commercial news racks, the City had "some basis for distinguishing" the excepted phone books; in fact it had much more than "some" basis. The first exemption is mandated by state law which requires that LECS distribute a directory of the names and phone numbers of telephone subscribers. WAC 480-120-251. The second exemption goes to the heart of the City's purpose, preventing the delivery of *unwanted* yellow pages. The City has no interest in preventing the delivery of yellow pages to residents who want them, including individuals who are entitled to receive phone books as part of their membership in an organization or who have requested their delivery. The final exemption excludes small publishers where the administrative cost to the City of regulation outweighs the insignificant advancement, if any, of residential privacy that would have been accomplished by including them. Lilly Decl. ¶ 12.

c. Pursuant to *Spafford*, the Ordinance Is Constitutional.

In *Spafford*, this Court rejected the same underinclusivity argument Plaintiffs advance. The Court upheld a statute prohibiting commercial use of automatic dialing and announcing devices ("ADAD") despite the fact that "the statute differentiates between messages that contain a sales pitch and those that do not." 448 F. Supp. 2d at 1223-24. The plaintiff argued that the fit was unreasonable because the goal of protecting privacy was undermined by excluding non-commercial ADAD use and those calls "will continue to invade privacy, just as the newspapers in *Discovery Network* continued to litter the streets." *Id.* at 1225. This Court rejected the argument because "the Legislature heard testimony that commercial ADAD calls were more frequent than non-commercial calls" and "the complaint statistics reflect that commercial ADAD calls" were more invasive. *Id.* In contrast, the Court noted that "in *Discovery Network*, the City singled out commercial handbills

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based on nothing more than what it perceived as a lesser speech value." The

> State's decision to single out use of ADADs for commercial use, as the greater threat to privacy, bears a direct relationship to its stated interest. That the public will continue to receive non-commercial ADAD messages does not mean that the State has failed to establish a reasonable fit. That is, the government is not required to legislate in such a way as to wholly eliminate a particular problem; rather, it may advance its goals in piecemeal fashion.

Id. at 1225-26. The Ninth Circuit recently reaffirmed this holding. *World Wide Rush, LLC v. City of LA*, 606 F.3d 676, 685 (9th Cir. 2010).

As with the ADAD statute, the Ordinance resulted from citizen testimony that the unwanted delivery of yellow pages was an insidious violation of privacy. The City Council heard no such complaints about "other materials." Hence, the City's use of a mechanism to enforce citizen choice regarding the delivery of yellow pages "bears a direct relationship to its stated interest" in protecting privacy. And, even if there had been testimony about other types of unwanted publications reaching residents' homes, the City was not required to obliterate all invasions of privacy before taking an important step to protect residents from unwanted commercial speech.

4. The Ordinance Also Satisfies Strict Scrutiny.

No basis exists to judge the Ordinance under the strict scrutiny standard reserved for core First Amendment speech. Nonetheless, the Ordinance satisfies that test too. Under this standard, the Supreme Court has "not insisted that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests." *Fox*, 492 at 478 (quotation marks & citation omitted). The Ordinance creates a precise mechanism to ensure that Seattle residents who have expressed their desire – and right – not to receive the yellow pages will not receive the undesired speech at their doorsteps.

5. The Public Service Message Requirement Satisfies the First Amendment.

The Ordinance requires Plaintiffs to inform residents, on Plaintiffs' websites and on the yellow pages, of the City's opt-out procedure. SMC 6.255.110. The government may properly require the publication of such non-ideological information. In *Environmental Defense Center*,

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Inc. v. United States Environmental Protection Agency, 344 F.3d 832 (9th Cir. 2003), the court rejected a First Amendment challenge to EPA regulations requiring municipalities to "distribute educational materials to the community … about the impacts of stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff" and to "[i]nform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." *Id.* at 848 (quoting the regulation). These regulations were not unconstitutional compelled speech because they did not require dissemination of an ideological message. *Id.* at 849. Moreover, the Court noted that "since all permittees are engaged in the handling of stormwater runoff that must be conveyed in reasonably unpolluted form to national waters, it is … fair to presume that they will agree with the central message of a public safety alert encouraging proper disposal of toxic materials." *Id.* at 850. Likewise, Plaintiffs agree that it is appropriate for the yellow pages to inform residents of the ability to opt-out, though Plaintiffs would prefer that the opt-out system itself be one that they control. ECF No. 14 at 9:19.

Moreover, publicizing information about the opt-out registry *only* on the City's website or mailings would not be nearly as effective as *also* supplying that information to Seattle residents on the very yellow pages at issue. Lilly Decl. ¶ 13. The Yellow Pages Companies press the opposite conclusion in reliance on *Wooley v. Maynard*, 430 U.S. 705 (1977). ECF No. 14 at 18:19-27. However, in *Wooley*, the Court held that a state may not force a citizen to disseminate "the State's ideological message," in that case the motto "Live Free or Die" that had been required on New Hampshire license plates. 430 U.S. at 715. The Supreme Court has explained that *Wooley* does not govern cases where the government requires citizens to make non-ideological statements. In *Zauderer*, a case regarding attorney advertising, the Court upheld a regulation that required:

> [T]hat appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.

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471 U.S. at 651 (citations omitted). This minimal right is adequately protected as long as disclosure requirements are reasonably related to the government's interests in informing consumers of their rights. *Id.* The Court specifically rejected the strict scrutiny analysis advanced here by the Yellow Pages Companies. ECF No. 14 at 18:35-49; *Zauderer*, 471 U.S. at 651 n.14.

B. The Ordinance Satisfies the Dormant Commerce Clause.

The "central rationale" of the dormant Commerce Clause is "to prohibit state or local laws whose object is local economic protectionism…." *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 466 (9th Cir. 2001) (quotation marks & citation omitted). But this limitation on government power was "never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997). The Ninth Circuit employs a two-tiered approach when reviewing Commerce Clause challenges:

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Myers, 253 F.3d at 466. To take advantage of the heightened scrutiny of the first approach, "[p]laintiffs must offer substantial evidence of an actual discriminatory effect." *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1233 (9th Cir. 2010) (quotation marks & citation omitted). Under this test, the Ordinance does not offend the Commerce Clause: it does not directly regulate nor discriminate against interstate commerce and Plaintiffs have offered no evidence that it has a discriminatory effect or that it favors local interests over similarly situated out-of-state interests.

1. It Does Not Directly Regulate or Discriminate Against Interstate Commerce.

Plaintiffs implicitly concede – as they must – that the Ordinance is facially neutral. It does not distinguish between distributors located in Seattle and those located elsewhere. Rather, SMC 6.255.030 requires an annual license "regardless of where publication takes place or the location of

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the business's offices, storage or transshipment facilities." It applies even-handedly to any "person or organization engaged in the business of arranging for the distribution of yellow pages phone books in the City." SMC 6.255.025.[21]

Nor does it directly regulate or discriminate against interstate commerce. A regulation's practical effect is "the critical inquiry" in determining whether it directly regulates interstate commerce. *Myers*, 253 F.3d at 467. To determine whether it has a discriminatory effect, the Court must compare the allegedly burdened out-of-state companies with similarly situated in-state entities. *Black Star Farms*, 600 F.3d at 1230; *National Ass'n of Optometrists & Opticians, LensCrafters, Inc. v. Brown*, 567 F.3d 521 (9th Cir. 2009). Plaintiffs compare themselves to exempt "membership organizations," and contend that this exemption effectively favors local publishers over out-of-state publishers. But Plaintiffs are *not* similarly situated to membership organizations. To prevail on this issue, Plaintiffs must supply "substantial evidence of discriminatory effect." *Black Star Farms*, 600 F.3d at 1231. But the *only* evidence they advance on this point – that they allegedly compete for advertising with exempt membership organizations – does not establish that they are similarly situated. "[C]ompeting in the same market is not sufficient to conclude that entities are similarly situated." *LensCrafters*, 567 F.3d at 527.

The Ninth Circuit's decision in *LensCrafters* is instructive. Opticians challenged a California law which prevented them from offering services in the same locations as optometrists and ophthalmologists. *Id*. at 523. LensCrafters argued that the law unconstitutionally favored optometrists and ophthalmologists (largely local individuals and entities) over opticians (largely out-of-state businesses). *Id.* at 524. According to LensCrafters, the law impermissibly burdened interstate commerce by allowing local optometrists and ophthalmologists, but not out-of-state opticians, to offer one-stop shopping where patients could get an eye examination and buy prescription eyewear. *Id.* LensCrafters argued that the law constituted economic protectionism because opticians compete with optometrists and ophthalmologists in the eyewear market. *Id.* at

[21] It is, therefore, distinguishable from the regulations in many of the cases Plaintiffs cite. *See, e.g., Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (striking down statute imposing greater surcharge for disposal of waste generated out-of-state than waste generated in state); *National Meat Ass'n v. Deukmejian*, 743 F.2d 656 (9th Cir. 1985) (tax on out-of-state beef processors discriminatory on its face).

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527. The Ninth Circuit rejected this argument because there was no discrimination between similarly situated entities. While the law treated opticians differently than ophthalmologists and optometrists, opticians located within California were subject to the same rules as opticians from out of state. Because ophthalmologists/optometrists and opticians have different responsibilities, purposes, and business structures, the Court concluded that they were not similarly situated. *Id.*

The same is true here. Out-of-state distributors are *not* similarly situated with membership organizations. They serve different constituencies, with membership organizations serving a self-selected group of members, while Plaintiffs reach a broader group of users, *none of whom* have chosen to receive the yellow pages. The Ordinance treats all distributors the same (regardless of whether they are located inside or outside Washington), just as it treats all membership organizations the same (regardless of whether they are located inside or outside Washington). The City Council had the right to distinguish between these different entities and, in the absence of discrimination against interstate commerce, its choice is entitled to deference. *Id.* at 526.

That there were prior versions of the Ordinance, or that the Council revised the Ordinance after lobbying efforts by local interests, has no bearing on the Commerce Clause analysis. Rather, the relevant question is whether the Ordinance *as enacted* has a discriminatory effect upon interstate commerce. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 746 (9th Cir. 2001). Alleged collusion with local interests and allegedly discriminatory legislative motive alone are insufficient to invalidate legislation. *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1013 (E.D. Cal. 2006).

Because the Ordinance neither directly regulates, nor discriminatorily burdens, interstate commerce, it satisfies the Commerce Clause.

2. The Local Benefits Far Outweigh Any Burden On Interstate Commerce.

When a regulation has only indirect effects on interstate commerce, the Ninth Circuit asks whether the local interest is legitimate and whether the burden on interstate commerce *clearly exceeds* the local benefits. *Myers*, 253 F.3d at 466. For a facially neutral statute like the

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Ordinance to violate the Commerce Clause, its burdens must so outweigh its benefits as to make the statute irrational. *Wal-Mart Stores*, 483 F. Supp. 2d at 1017. The party challenging the enactment bears the burden of proof on this issue. *LensCrafters*, 567 F.3d at 528.

> States enacting statutes affecting interstate commerce "are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 …(1981). Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* (citation and internal quotation marks omitted).

Spoklie v. Montana, 411 F.3d 1051, 1059 (9th Cir. 2005). Local laws and regulations are "rarely struck down" under this test. *See National Ass'n of Optometrists & Opticians, LensCrafters, Inc. v. Brown*, 709 F. Supp. 2d 968, 973 (E.D. Cal. 2010).

The Ordinance easily meets this rational basis test. The interests it serves plainly are legitimate. While Plaintiffs question its effectiveness in serving these goals, the rational basis test does not permit courts to "second guess the empirical judgments of lawmakers concerning the utility of the legislation." *Lil' Brown Smoke Shack v. Wasden*, No. CV 09-044CWD, 2010 WL 427388, *3 (D. Idaho Feb. 1, 2010) (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987)). "Unwise legislation does not constitute a commerce clause violation." *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1197 (9th Cir. 1990). That Plaintiffs believe their opt-out mechanisms are sufficient simply does not render the City's judgment on this issue irrational.

Moreover, Plaintiffs' claim that they will suffer financial burdens should the Ordinance remain in effect does not demonstrate a burden upon *interstate commerce*. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 126. The Ordinance does not act as a barrier to entry for Plaintiffs.

Finally, Plaintiffs' arguments about the potential burden that would result if other cities enacted similar legislation are nothing more than hypothetical scare tactics. "[I]t is insufficient for the Plaintiff to speculate about conflicting regulation. Plaintiff must either present evidence that conflicting legislation is already in place or that the threat of such legislation is both actual and

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imminent." *Lil' Brown Smoke Shack*, 2010 WL 427388, at *4. "[T]he Supreme Court has never invalidated a state or local law under the dormant Commerce Clause based upon the mere speculation about the possibility of conflicting legislation." *Myers*, 253 F. 3d at 470.

Because the claimed burdens caused by the Ordinance do not clearly outweigh its legitimate benefits, it satisfies the Commerce Clause.

III. CONCLUSION

For the reasons set forth above, Defendants request that Plaintiffs' First Amendment and Commerce Clause claims be dismissed and that Plaintiffs' Motion for Summary Judgment be denied.

DATED this 31st day of January, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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