

THE HONORABLE JAMES L. ROBART

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UNITED STATES DISTRICT COURT
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.

No. 10-cv-1857

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER**

NOTE ON MOTION CALENDAR:
May 9, 2011

PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER (NO. 10-CV-1857)

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1 Seattle Ordinance 123427 violates the First Amendment by banning distribution of yellow
2 pages without a license, taxing publishers for every book they distribute, and forcing publishers to
3 print the City’s messages on their books and to participate in the City’s delivery opt-out program.
4

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6
7 Plaintiffs have done all they can to delay the onset of irreparable harm from the Ordinance’s
8 unconstitutional requirements, but in days those harms become unavoidable. To publish on time,
9 plaintiff Dex must finish the cover for its 2011 Seattle Metro Directory by May 25. Third
10 Declaration of Maggie Stonecipher (“Third Stonecipher Decl.”) ¶ 4. If the Ordinance is not
11 enjoined by then, Dex will be forced to publish the City’s message on every Seattle phone book or
12 face serious and potentially irreversible consequences for refusing. That same week, Dex will be
13 forced to submit a permit application seeking the City’s permission to distribute its publications, as
14 its delivery will begin on June 17 and the City has 20 days to act on Dex’s application. *Id.* ¶ 3;
15 SMC 6.255.050. As explained in our Motion for Preliminary Injunction (Feb. 10, 2011, Dkt. 41)
16 and summarized below, these are irreparable harms.
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27 Plaintiffs recognize that the Court has before it our motions for preliminary injunction and
28 summary judgment. Plaintiffs understand the Court’s demanding schedule and the complexities of
29 this case, but ask that the Court issue at least an interim order as soon as possible, even if a full
30 opinion is to follow, to preserve the status quo and allow Dex to go forward with its printing and
31 delivery without having to sacrifice its First Amendment rights or face after-the-fact punishment.
32 Such relief is justified because Plaintiffs have shown a likelihood of success on the merits,
33 irreparable harm, and that the equities and public interest weigh in favor of such relief. Even were
34 the Court inclined to deny Dex relief as to its 2011 publication, Dex is entitled to an opportunity to
35 be heard by the Ninth Circuit before its asserted First Amendment rights are extinguished.
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45 **I. SUMMARY OF ANALYSIS**

46 Yellow pages are fully protected speech, and the Ordinance cannot survive strict scrutiny.
47 Even if yellow pages are commercial speech, however, the Ordinance still violates the First
48 Amendment because the City has failed to show a substantial government interest and a “fit”
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1 between [its] ends and the means chosen to accomplish those ends.” *United States v. Edge Broad.*
 2 *Co.*, 509 U.S. 418, 427-28 (1993). Moreover, the Ordinance is plainly content based: “by its very
 3 terms, [it] singles out particular content for differential treatment.” *Berger v. City of Seattle*, 569
 4 F.3d 1029, 1036, 1051 (9th Cir. 2009) (en banc). Plaintiffs are thus likely to succeed on the merits
 5 (or at least have raised serious questions as to the merits), and preliminary relief is justified because
 6 it is necessary to avoid irreparable harm and the public interest and equities favor Plaintiffs.
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12 II. FACTS

13 Plaintiffs incorporate the relevant facts from their Motion for Summary Judgment (Dkt. 14)
 14 and Reply (Dkt. 37), Motion for Preliminary Injunction (Dkt. 41) and Reply (Dkt. 57), and
 15 accompanying declarations and exhibits. The focus below is on facts crucial to this motion.
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21 A. The Ordinance

22 Ordinance 123427 bans distribution of yellow pages unless publishers meet four conditions:

- 23 • **License:** It is “unlawful for any person to engage in business as a distributor of yellow pages
 24 phone books” without a “yellow pages phone book distributor license.” SMC 6.255.030.
- 25 • **Distribution Fee:** Publishers must pay the City fourteen cents “for each yellow pages phone
 26 book distributed within the City.” SMC 6.255.100(A).
- 27 • **Required Message:** Publishers must publish on “the front cover of each yellow pages phone
 28 book” the City’s message about its opt-out program. SMC 6.255.110. And under a recently
 29 published rule, the City requires the message also to be displayed in seven languages on the
 30 inside cover of each directory. Third Stonecipher Decl. Exh. A.
- 31 • **Opt-Out Registry:** The Ordinance directs Seattle Public Utilities to create an “Opt-Out
 32 Registry . . . for residents and businesses to register and indicate their desire not to receive
 33 delivery of some or all yellow pages phone books.” SMC 6.255.090(A). The Ordinance
 34 forbids publishers from distributing yellow pages to these residents. SMC 6.255.090(D).

35 A publisher who fails to comply with any part of the Ordinance may be fined, SMC 6.255.140, or
 36 lose its license. SMC 6.255.130.
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1 **B. Dex’s Publication Schedule and Procedures**

2 Dex’s 2011 Seattle Metro Directory delivery will begin June 17. Third Stonecipher Decl. ¶
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 4 2. To publish on time, Dex must finalize the cover for this directory by May 25. *Id.* ¶ 4. Absent
 5
 6 judicial relief by that time, Dex must print the City’s message, not publish at all, or face serious and
 7
 8 potentially irreversible consequences for exercising its rights. Similarly, absent judicial relief by
 9
 10 May 27, Dex will have to apply to the City for the permit that provides official permission to
 11
 12 publish and distribute. *Id.* ¶ 3.
 13

14
 15 Complying with the Ordinance would not only trench upon the First Amendment, but also
 16
 17 impose other burdens on Dex. Dex delivers 60% of its Seattle Metro yellow pages outside Seattle,
 18
 19 and would have to substantially alter its delivery practices to ensure that those outside Seattle do not
 20
 21 receive directories advertising an unusable Seattle opt-out program. First Declaration of Maggie
 22
 23 Stonecipher (“First Stonecipher Decl.”) (Dkt. 19) ¶ 19. Printing the City’s required messages and
 24
 25 otherwise complying with the Ordinance will also force Dex to forego significant advertising
 26
 27 revenue. *Id.* ¶ 17.

28
 29 Dex already offers an effective opt-out system, accessed at selectyourdex.com or via a toll-
 30
 31 free number. *Id.* ¶ 9. Plaintiff YPA offers yellowpagesoptout.com, where residents may decline
 32
 33 delivery of any yellow pages, including those published by Dex. Dex carefully manages its delivery
 34
 35 system to honor opt-out requests, and the rate of error is extremely low. *Id.* ¶¶ 12-13, 15.
 36

37 **C. Yellow Pages’ Content and Purposes**

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 39 Defendants have never contested that basic listings and community information comprise
 40
 41 the majority of yellow pages, while advertising comprises a minority. Declaration of Neg Norton
 42
 43 (“Norton Decl.”) (Dkt. 18) ¶ 24; *see id.* ¶¶ 14-16. Nor have they contested that the listings provide
 44
 45 useful information to consumers, are required by law, and were the original purpose and content of
 46
 47 yellow pages. *Id.* ¶¶ 7-8. The City itself directs residents to yellow pages for information. Third
 48
 49 Declaration of Kimball Mullins (Dkt. 59) Exh. B.
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1 It is also undisputed that yellow pages contain less advertising than many newspapers and
 2 magazines. Declaration of Gerald Baldasty (Dkt.15) ¶ 6. Though the City claims there is some
 3 difference in the motivation of yellow pages publishers and other media, “[t]he City is incorrect.”
 4 Supplemental Declaration of Gerald Baldasty (Dkt. 39) ¶ 4. The hallowed media the City portrays
 5 “are in many ways simply vehicles for advertising, and they shape content to meet the needs and
 6 interests of advertisers.” *Id.* ¶ 5. “The City is naïve if it thinks the ‘mainstream media’ accept
 7 advertising only to fund their editorial messages and that none operate primarily out of the desire to
 8 make a profit.” *Id.* ¶ 7. For yellow pages, as for other media, “it is by offering content readers want
 9 that publishers make themselves attractive to advertisers.” *Id.* ¶ 14.

10 In short, the City has offered no objective evidence distinguishing yellow pages from other
 11 media supported by advertising. It simply values the non-advertising content of other media more.
 12

13 **D. The City’s Purposes and Whether the Ordinance Advances Them**

14 The City says that the Ordinance’s purposes are eliminating unnecessary “privacy
 15 violations” and recycling that occur when yellow pages are delivered despite proper opt-out
 16 requests. Dkt. 49 at 3. The City’s own actions and alleged facts show how insubstantial these
 17 interests are, how little the Ordinance would further them, and how the City’s real but undefended
 18 purpose is to exclude print versions in favor of online even for residents who want or need print.
 19

20 First, the City recognizes that in delivery jobs the size of Plaintiffs’, with many independent
 21 contractors and hundreds of thousands of addresses, mistakes will occur. That is why the City will
 22 not “consider seeking civil penalties” unless “the number of complaints of wrongful distribution
 23 exceeds . . . (0.5%) of the number of residents and businesses who filed timely opt-out requests with
 24 the Registry.” Declaration of Dick Lilly (“Lilly Decl.”) Exh. 5 (Dkt. 55-1), Rule 4B1.
 25

26 Second, an opt-out system can be effective only if residents direct their requests to the right
 27 place and in time for publishers to respond. That is why the City’s rules limit enforcement to
 28 situations in which a citizen’s opt-out request was both timely and through the City’s Registry. *Id.*
 29 Rule 4B4 (“[A] complaint alleging improper delivery must be based on an opt-out request filed with
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1 the Opt-Out Registry 30 or more days prior to the first day of a distributor’s delivery cycle and the
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3 Opt-Out Registry must contain data substantiating this.”). After-the-fact complaints are not enough.
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5 Calls or emails to publishers’ general, sales, or other non-opt-out numbers or addresses are not
6
7 enough. Use of the Registry in the last month before distribution is not enough until the next cycle.
8
9 And residents who opted out of receiving only certain yellow pages cannot validly complain about
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11 the “privacy violation” of receiving others, or of white pages delivery. *Id.* Rule 4A.

12
13 In enacting and defending the Ordinance, the City relies on evidence that ignores these
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15 crucial facts and exaggerates wildly the amount of unwanted print books. Third Stonecipher Decl.
16
17 ¶ 7. In arguing that Plaintiffs’ opt-out systems fail, the City relies on examples that are irrelevant or
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19 that would also occur under the City’s system. For example, the City relies heavily on emails that
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21 ask the City to impose an opt-in rule, never claiming the person had opted out. *See* Dkt. 49 at 1, 8-9
22
23 & nn.42, 47. Other emails come from outside Seattle, address publishers not operating in Seattle, or
24
25 are from people who opted out less than the City’s required 30 days before delivery. *Id.* at 7-8 &
26
27 nn.40, 45. Still others complain about deliveries to apartment common areas without saying
28
29 whether the manager consented or any residents had opted out. Dkt. 49 at 8 & n.46. Ultimately, the
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31 City has no idea how many valid opt-out requests currently fail. *See, e.g.*, Third Mullins Decl. ¶ 5
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33 (Councilmember Harrell: “I don’t know if we have any real proof of the efficiency or inefficiency
34
35 or effectiveness or ineffectiveness of the opt-out [programs].”).

36
37 Moreover, the City has offered no evidence that its opt-out system would function any better
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39 than Plaintiffs’. The contractor the City has hired to run its opt-out program, Catalog Choice,
40
41 already allows Seattle residents to opt out of delivery of every directory in Seattle. Dkt. 49 at 5.
42
43 And as to the current motion, the City’s system will not be operating in time to make a meaningful
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45 impact on Dex’s 2011 delivery. Third Stonecipher Decl. ¶ 7.

46
47 While the Ordinance’s benefits are minimal at best, its burdens on speech are severe. In
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49 addition to the burdens described above, the Ordinance has already played a part in causing the only
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51 Spanish-language yellow pages distributed in Seattle, Seccion Amarilla, to cease publishing print

1 directories for Seattle. Declaration of Jason Guerrettaz (Dkt. 58) ¶ 2. While no doubt satisfying to
 2 the City, such a result is anathema to the First Amendment.
 3

4 III. ANALYSIS

5 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
 6 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 7 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
 8 *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). This test is applied on a sliding scale,
 9 so “serious questions going to the merits’ and a balance of hardships that tips sharply towards the
 10 plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that
 11 there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance*
 12 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). “The standard to obtain a
 13 temporary restraining order is the same as that to obtain a preliminary injunction.” *Zango, Inc. v.*
 14 *PC Tools Pty Ltd.*, 494 F. Supp. 2d 1189, 1194 (W.D. Wash. 2007).
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27 A. Plaintiffs Are Likely To Succeed on the Merits

28 Yellow pages are fully protected speech. *See* Dkt. 14 at 11-15; Dkt. 37 at 2-6. “If speech is
 29 not “purely commercial”—that is, if it does more than propose a commercial transaction—then it is
 30 entitled to full First Amendment protection.” *Nissan Motor Co. v. Nissan Computer Corp.*, 378
 31 F.3d 1002, 1017 (9th Cir. 2004) (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th
 32 Cir. 2002)). Yellow pages do “more than propose a commercial transaction.”
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39 The community information in yellow pages—contact information for government agencies,
 40 details about local attractions, information on nonprofits, and local guides such as maps—is plainly
 41 fully protected speech, and it makes up nearly 100 pages of Dex’s 2010 Seattle Metro yellow pages,
 42 as it has for years. First Stonecipher Decl. (Dkt. 19) ¶¶ 5-6. The business and professional listings
 43 in yellow pages also do “more than propose a commercial transaction” because they provide a
 44 comprehensive list of and contact information for product and service providers rather than merely
 45 proposing a transaction with any one of them. Just as a guidebook that provides contact information
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1 for restaurants and hotels plainly does more than propose a commercial transaction, so do yellow
 2 pages. That directory listings do not generally rank or grade businesses, but leave that next step to
 3 users, is irrelevant, for “[e]ven dry information, devoid of advocacy, political relevance, or artistic
 4 expression, has been accorded First Amendment protection.” *Universal City Studios, Inc. v. Corley*,
 5 273 F.3d 429, 446 (2nd Cir. 2001).¹ Indeed, if these listings served no purpose beyond proposing a
 6 transaction, then regulators (including those in Washington) would not require telephone companies
 7 to provide them. In short, yellow pages are not “purely commercial”—they contain more non-
 8 commercial content than most magazines and newspapers, Baldasty Decl. ¶ 6—and are “entitled to
 9 full First Amendment protection.” *Nissan*, 378 F.3d at 1017 (quoting *Mattel*, 296 F.3d at 906).

10
 11 Yellow pages also are not commercial speech under *Bolger v. Youngs Drug Products Corp.*,
 12 463 U.S. 60 (1983), because most of their content is not advertising, much of their content does not
 13 refer to a specific product, and the “speaker” of the overall communication and of the non-
 14 advertising content is not the advertiser and does not have the advertiser’s economic motive to sell a
 15 particular product. *Cf. Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004)
 16 (finding that statute regulated only commercial speech under *Bolger* because it “identifies that the
 17 object of its regulation is ‘advertising,’” and “[t]he advertising regulated relates to a specific
 18 product, medical services”). They also are not commercial speech under *Board of Trustees of*
 19 *SUNY v. Fox*, 492 U.S. 469 (1989), because their commercial and noncommercial content are
 20 “inextricably intertwined.” The advertising and non-advertising content of yellow pages are
 21 inextricably intertwined because the funding from advertising is what allows publishers to distribute
 22 the non-advertising content for free; this is the same manner in which newspaper ads and editorial
 23 content are inextricably intertwined, and it is the reason newspapers are treated as fully-protected
 24 speech even when they are primarily advertising. *See, e.g., Hays County Guardian v. Supple*, 969
 25 F.2d 111, 120 (5th Cir. 1992) (because “advertisements in the *Guardian* were included to finance

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¹ *See also Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (noting that although computer code, “[i]nstructions, do-it-yourself manuals, recipes, [and] even technical information about hydrogen bomb construction are often purely functional[,] they are also speech”) (citation omitted).

1 the publication,” the “commercial speech was inextricably linked to the newspaper’s non-
2 commercial speech, making the whole paper non-commercial”); *Ad World, Inc. v. Doylestown*
3 *Twp.*, 672 F.2d 1136, 1137, 1140 (3rd Cir. 1982) (treating “a 16 page tabloid which includes
4 extensive advertising and a few pages of consumer and community information” as fully protected
5 because “each issue . . . contains noncommercial material”).
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10 If the Court agrees that yellow pages are fully protected speech, it is essentially undisputed
11 that the Ordinance is invalid. The City has barely argued that the Ordinance can survive strict
12 scrutiny. And the City has virtually abandoned its theory that the Ordinance is a valid time, place,
13 or manner law, for such a restriction “must be content-neutral,” and “[a] regulation is content-based
14 if . . . , by its very terms, [it] singles out particular content for differential treatment.” *Berger*, 569
15 F.3d at 1036, 1051. Ordinance 123427 does exactly that, targeting only “publication[s] that
16 consist[] primarily of a listing of business names and telephone numbers and contain[] display
17 advertising for at least some of those businesses.” SMC 6.255.025(E).
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26 Even if yellow pages were commercial speech, the Ordinance would be unconstitutional.
27 “The party seeking to uphold a restriction on commercial speech carries the burden of justifying it,”
28 *Bolger*, 463 U.S. at 71 n.20, and must show a substantial government interest and a “‘fit’ between
29 [its] ends and the means chosen to accomplish those ends.” *Edge Broad.*, 509 U.S. at 427-28.
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35 There is no “fit” between the Ordinance and the City’s waste reduction goal. Phone books
36 (including yellow and white pages) are less than 2% of what the City recycles, Mullins Decl. (Dkt.
37 17) Exh. L, and “wrongfully delivered” books are just a small fraction of that. Thus, “the
38 distinction” the City has drawn between yellow pages and all other printed material “bears no
39 relationship *whatsoever* to the particular interests that the city has asserted,” and “is therefore an
40 impermissible means of responding to the city’s . . . interests.” *City of Cincinnati v. Discovery*
41 *Network, Inc.*, 507 U.S. 410, 424 (1993) (finding no “fit” where ordinance addressed only 3-4% of
42 problem the city aimed to solve).
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51 To the extent the Ordinance supposedly addresses “privacy” interests, the City has yet to

1 show that delivery to the doorstep is a cognizable “privacy” invasion. Whatever the beliefs of some
2 residents, the Supreme Court has rejected as insubstantial the government’s interest in protecting
3 people from even contraceptive advertising in their homes, holding that “the short, though regular,
4 journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is
5 concerned.” *Bolger*, 463 U.S. at 72. The City does not suggest that Plaintiffs ignore no trespassing
6 signs or go where the public and other delivery people are unwelcome. Even if the City had
7 asserted a substantial privacy interest, it has failed to show a fit between the Ordinance and that
8 interest, as it has not met its burden of proving that erroneous yellow pages deliveries to people who
9 have opted out contribute substantially to violations of such interests. Dkt. 37 at 9-10.
10

11 All of these flaws call to mind the Court’s statement in *Discovery Network* that “the
12 principal reason for drawing a distinction between commercial and noncommercial speech has little,
13 if any, application to a regulation of their distribution practices.” 507 U.S. at 426 n.21. They also
14 help explain why each part of the Ordinance fails commercial speech standards individually.
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16

17 **1. Required License**

18 The City asserts that “the Ordinance’s licensing requirement is permissible because it is
19 reasonable.” Dkt. 49 at 11. That is not the rule. “A permitting requirement is a prior restraint on
20 speech and therefore bears a ‘heavy presumption’ against its constitutionality.” *Berger*, 569 F.3d at
21 1037 (quoting *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)). The City
22 has yet to explain coherently why the permit requirement is necessary at all, and “[t]he Supreme
23 Court has consistently struck down prior restraints on speech where a state could achieve its
24 purported goal of protecting its citizens from wrongful conduct by punishing only actual
25 wrongdoers, rather than screening potential speakers.” *Id.* at 1044.
26

27 **2. Required Message**

28 The City argues that “[m]andated speech is acceptable so long as it does not require an
29 ideological message.” Dkt. 49 at 12. That is not the law, for even “compelled statements of ‘fact’
30 . . . burden[] protected speech.” *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98
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1 (1988). The City relies exclusively on *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003),
2 but it was crucial to that ruling that the regulations at issue did “not dictate a specific message” and
3 merely required “educational and public information activities that need not include any specific
4 speech at all.” *Id.* at 849. By contrast, the City requires publishers to “devote cover space of no
5 less than three (3) square inches” specifically to “advise Seattle residents that they may stop future
6 deliveries of any yellow pages directory by using the City of Seattle opt-out registry.” Dkt. 55-1
7 Rule 4D1. Moreover, the regulation in *Envtl. Def. Ctr.* did “not prohibit the [plaintiff] from stating
8 its own views,” 344 F.3d at 850, while the City has specified that “[t]he space required for Opt-Out
9 Registry messaging cannot be used for any recycling and/or recycled content messages, or any other
10 messages which may be desired by the distributor.” Dkt. 55-1 Rule 4D1.
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21 3. Distribution Fee and Opt-Out Registry

22 The City has chosen to customize Catalog Choice’s opt-out system. Dkt. 49 at 4. But
23 according to the City, “Seattle residents may opt out of the delivery of Dex yellow pages on Catalog
24 Choice’s website *today*,” and “[e]ach of the other companies delivering yellow pages in Seattle also
25 are *already* listed on Catalog Choice’s website.” *Id.* at 5. It is thus entirely unclear what benefits
26 residents will obtain through the City’s contract with Catalog Choice. But the costs to publishers
27 are clear: 14 cents for every book distributed in Seattle. The City has failed to show that this burden
28 on speech is necessary, as the program it will fund already exists. The burden is thus invalid, for “if
29 the Government could achieve its interests in a manner that does not restrict speech, or that restricts
30 less speech, [it] must do so.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002).
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41 The fee and opt-out registry also lack the required “fit” because they single out yellow pages
42 even though Seattle residents receive many other publications—from junk mail to nightclub leaflets
43 to free neighborhood newspapers—that some citizens do not want and that impose recycling costs
44 or supposed “privacy intrusions.” The fee and opt-out program thus draw “distinctions among
45 different kinds of speech” that do not “relate to the interest the government seeks to advance.”
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51 *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 906 (9th Cir. 2009).

1 **B. Plaintiffs Will Suffer Irreparable Harm Absent Relief**

2 “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably
3 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). “To establish irreparable
4 injury . . . , [Plaintiffs] need only ‘demonstrat[e] the existence of a colorable First Amendment
5 claim.’” *Brown v. Cal. Dept. of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003) (quoting *Sammartano*
6 *v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir. 2002)).
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10 On April 1, 2011, it became unlawful to distribute “yellow pages phone books” in Seattle
11 without a government license. SMC 6.255.030(A). Any yellow pages distributed in Seattle now
12 must “display on . . . the front cover” a message mandated by the City about the City’s opt-out
13 program. SMC 6.255.110. Absent judicial relief, Dex will imminently have to apply for and obtain
14 a permit and print its directories with the City’s message. Third Stonecipher Decl. ¶¶ 3-4; *see also*
15 Dkt. 28 at 16 (City concedes that Plaintiffs must “lay out and publish their directories months
16 before” delivering them). These are irreparable First Amendment harms.
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27 **C. The Balance of Equities Favors Plaintiffs, and an Injunction Is in the Public Interest**

28 “[T]he fact that a case raises serious First Amendment questions compels a finding that . . .
29 at the very least the balance of hardships tips sharply in [Plaintiffs’] favor.” *Sammartano*, 303 F.3d
30 at 973. At the very least, this case “raises serious First Amendment questions.” *Id.* Allowing the
31 Ordinance to take effect not only will violate Plaintiffs’ First Amendment rights, but also will
32 impose large compliance costs on Plaintiffs. *See* Dkt. 14 at 27-28. *See also, e.g., Earth Island Inst.*
33 *v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (“Economic harm may indeed be a factor in
34 considering the balance of equitable interests.”). Moreover, “Courts considering requests for
35 preliminary injunctions have consistently recognized the significant public interest in upholding
36 First Amendment principles.” *Sammartano*, 303 F.3d at 974 (citing many cases). Those principles
37 apply strongly here, where the City has imposed a range of significant burdens on speech.
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48 It is difficult to foresee any harm to Defendants if the Ordinance is temporarily enjoined
49 such that it cannot be applied to alter or punish Dex’s 2011 publication. Any resident who wishes
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1 to opt out of Dex’s 2011 delivery may do so through “Select Your Dex,” as over 17,000 Seattle
2 residents have done. First Stonecipher Decl. (Dkt. 19) ¶ 10. Dex’s rate of erroneous deliveries to
3 those who have opted out is extremely low, *id.* ¶ 15, and there is no reason to think that
4 implementation of the Ordinance will reduce it further, *id.*
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9 The City argues that it will suffer harm if the Ordinance is delayed because its opt-out
10 program might be more effective than Plaintiffs’, Dkt. 49 at 15, but that argument is undermined by
11 the City’s contention that its opt-out program merely customizes Catalog Choice’s existing
12 program, in which Dex already participates. *Id.* at 5. The City also claims it will be harmed by not
13 being allowed to use Dex’s publication to advertise its opt-out program, *id.* at 15, but that is exactly
14 backwards—it is Dex that will be harmed by having to convey the City’s message.
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21 Even if the Court ultimately upholds the Ordinance, the delay will have caused Defendants
22 no meaningful injury. After Dex’s, the next scheduled delivery of yellow pages in Seattle is
23 YellowBook’s, slated for October, and the City can seek an earlier trial date earlier if necessary to
24 get a resolution before then. In short, allowing the Ordinance to take effect will bring little or no
25 benefit, but will unquestionably burden speech.
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30 31 IV. CONCLUSION

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33 Plaintiffs have satisfied all aspects of the test for preliminary relief and ask the Court to
34 temporarily restrain the City from taking any action to enforce the Ordinance until the Court enters
35 a final judgment on the merits. At the very least, Plaintiffs have raised “serious questions going to
36 the merits,” *Cottrell*, 632 F.3d at 1135, and “the fact that a case raises serious First Amendment
37 questions compels a finding that . . . at the very least the balance of hardships tips sharply in
38 [Plaintiffs’] favor.” *Sammartano*, 303 F.3d at 973. “[S]erious questions going to the merits’ and a
39 balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary
40 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that
41 the injunction is in the public interest.” *Cottrell*, 632 F.3d at 1135.
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1 DATED this 5th day of May, 2011.
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4 *s/ David J. Burman*

5 _____
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CERTIFICATE OF SERVICE

On May 5, 2011, 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 attorneys of record:

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I certify under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of May, 2011.

s/ Noah Purcell

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THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
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.

No. 10-cv-1857

[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER

NOTE ON MOTION CALENDAR:
May 9, 2011

This matter came before the Court on Plaintiffs' Motion for Temporary Restraining Order. The Court has considered: (1) Plaintiffs' motion; (2) Plaintiffs' Motion for Preliminary Injunction and reply memorandum along with Defendants' memorandum in opposition; (3) Plaintiffs' Motion for Summary Judgment and reply in support of the motion together with Defendant's opposition and cross-motion and the declarations (and related exhibits) accompanying each of these filings; and (4) oral argument, if any.

The Court, having considered the above and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law.

[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER (NO. 10-CV-1857) – 1

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Findings of Fact

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3 1. Seattle Ordinance 123427 will soon impose several burdens on yellow pages publishers.

4 Since April 1, 2011, it has been “unlawful for any person to engage in business as a distributor of
5 yellow pages phone books” in Seattle without a “yellow pages phone book distributor license.”
6

7 SMC 6.255.030(A). Any yellow pages directory distributed in Seattle after that date must
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9 “prominently and conspicuously display on . . . the front cover” a message mandated by the City
10
11 about the City’s opt-out program. SMC 6.255.110.
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15 2. Plaintiff Dex has long intended to begin printing its 2011 Seattle Metro directory on May 26
16 and to distribute it in June. Changing that schedule delays Dex’s speech against its will and
17 imposes significant burdens because the printing and distribution companies have scheduled other
18 projects around the Dex project. Absent preliminary relief, Dex will soon have to apply for and
19 obtain the permit required by the Ordinance and publish the City’s required messages on its books.
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24 3. Complying with the Ordinance would not only force Dex to engage in compelled speech and
25 obtain a permit, but would also impose large costs on Dex’s printing and distribution of its
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27 publication.
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31 4. Plaintiffs already maintain their own systems allowing residents to opt out of delivery of
32 directories. Publishers represent that they manage their delivery systems to honor opt-out requests,
33 that they have no incentive to deliver to a resident who has made it clear that a directory is
34 unwanted, and that the rate of erroneous delivery to those who have opted out is extremely low.
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36 The City contends that mistakes have been made by publishers, but it has not shown that fewer
37 mistakes would be made under the Ordinance or that the requested relief will harm it or the public.
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42 5. The Ordinance imposes new requirements that the City and its residents have apparently
43 been able to get by without in the past.
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Conclusions of Law

- 1 The Court has jurisdiction over Defendants and over the subject matter of this action.
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- 3 1. The Court has jurisdiction over Defendants and over the subject matter of this action.
- 4
- 5 2. A temporary restraining order is appropriate if the plaintiff “establish[es] that he is likely to
- 6 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
- 7 relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”
- 8
- 9 *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008).
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- 13 3. This standard is satisfied here.
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- 15 4. Plaintiffs have demonstrated a likelihood of success on the merits by showing that the
- 16 Ordinance substantially burdens speech and that the Ordinance is unlikely to survive review under
- 17 either strict or intermediate scrutiny.
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- 20 5. Plaintiffs have shown a likelihood of irreparable harm if relief is not granted, as “[t]he loss
- 21 of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
- 22 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal quotation marks omitted).
- 23 Being forced, in violation of the First Amendment, to obtain a permit to engage in protected speech
- 24 and to publish compelled speech, are irreparable harms.
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- 27 6. “[T]he fact that a case raises serious First Amendment questions compels a finding that . . .
- 28 at the very least the balance of hardships tips sharply in [Plaintiffs’] favor.” *Sammartano v. First*
- 29 *Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002). This
- 30 rule applies here, as allowing the Ordinance to take effect will not only likely violate Plaintiffs’
- 31 First Amendment rights, but will also impose substantial costs on Plaintiffs. By contrast,
- 32 temporarily enjoining the Ordinance will impose few if any costs on Defendants.
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- 35 7. “Courts considering requests for preliminary injunctions have consistently recognized the
- 36 significant public interest in upholding First Amendment principles.” *Id.* at 974 (citing cases). This
- 37 principle applies here, as the Ordinance severely burdens a range of important First Amendment
- 38 rights. Moreover, temporarily enjoining the Ordinance will cause no harm to the public.
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Temporary Restraining Order

Now, therefore, it is hereby ORDERED that:

1. Plaintiffs’ motion for a temporary restraining order is GRANTED.
2. Defendants and all of their officers, agents, servants, and employees are hereby enjoined from taking any action to enforce or apply Ordinance 123427 to Plaintiff Dex’s 2011 Seattle publication and distribution.
3. Defendants may continue their efforts to develop their own opt-out system, at their risk that they ultimately will not be allowed to require Plaintiffs to comply with it or fund it.
4. The Court will address in resolving the other pending motions whether Defendants may apply the Ordinance to publication and distribution by Plaintiff SuperMedia or others later this year or by Plaintiff Dex in subsequent years.

DATED this _____ day of _____, 2011.

THE HONORABLE JAMES L. ROBERT
United States District Court Judge

1 Presented by:
2
3

4 s/ David J. Burman

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[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER (NO. 10-CV-1857) – 5

CERTIFICATE OF SERVICE

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I certify under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of May, 2011.

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