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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DEX MEDIA WEST, INC., et al.,

11 Plaintiffs,

12 v.

13 CITY OF SEATTLE, et al.,

14 Defendants.

CASE NO. C10-1857JLR

ORDER DENYING MOTION
FOR PRELIMINARY
INJUNCTION

15 **I. INTRODUCTION**

16 This matter comes before the court on Plaintiffs Dex Media West, Inc. (“Dex”),
17 SuperMedia, LLC (“SuperMedia”), and Yellow Pages Integrated Media Association’s
18 (collectively “Plaintiffs”) motion for preliminary injunction (Dkt. # 41). Having
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1 reviewed the submissions of the parties and the relevant law, the court DENIES
 2 Plaintiffs' motion for preliminary injunction.¹

3 **II. BACKGROUND & FINDINGS OF FACT**

4 **A. The Ordinance**

5 Over a period of six meetings, between June and October 2010, Defendant City of
 6 Seattle ("the City") heard testimony from residents who were frustrated by the delivery of
 7 unwanted yellow pages directories to their homes. (Rasmussen Decl. (Dkt. # 30) ¶ 4.)
 8 Residents complained that these unwanted deliveries violated their right to privacy and
 9 pointlessly generated large amounts of waste. (*Id.*; *see also* O'Brien Decl. (Dkt. # 32)
 10 Ex. 2 (attaching copies of complaints emailed to the City).)

11 In October 2010, the City enacted Ordinance 123427, which bans the distribution
 12 of "yellow pages phone books" in Seattle unless telephone phone book publishers meet
 13 certain conditions. First, phone book publishers must "obtain[] an annual yellow pages
 14 phone book distributor license," "separate from and in addition to . . . the business license
 15 required pursuant to [SMC] chapter 5.55." SMC 6.225.030. Second, publishers must
 16 pay the City fourteen cents "for each yellow pages book distributed within the City."

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 19 ¹ The parties submitted substantial written testimony in the form of declarations, but also
 20 requested oral argument. The court finds that the facts material to its resolution of this motion
 21 are undisputed, and therefore a hearing is unnecessary. It is within the court's discretion to deny
 22 a motion for a preliminary injunction without a hearing when there are no relevant facts in
 dispute. *See Anderson v. Jackson*, 556 F.3d 351, 361 (5th Cir. 2009); *Nat'l Propane Gas Ass'n*
v. U.S. Dep't of Homeland Sec., 534 F. Supp. 2d 16, 19 (D.D.C. 2008); *Rottman v. Penn.*
Interscholastic Athletic Ass'n, Inc., 349 F. Supp. 2d 922, 928 (W.D. Pa. 2004).

SMC 6.255.100(A).² Third, publishers must “prominently and conspicuously display on . . . the front cover of each yellow pages phone book distributed within the City” and “on their websites” a message mandated by the City about the City’s program for opting out of receiving phone books. SMC 6.255.110. Finally, the Ordinance creates an “Opt-Out Registry . . . for residents and businesses to register and indicate their desire not to receive delivery of some or all yellow pages phone books.” SMC 6.255.090(A).

The Ordinance defines a “[y]ellow pages phone book” as “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(D). Three purposes motivated the City in its decision to enact the Ordinance: waste reduction, protection of residents’ privacy from unwanted intrusions, and the recovery of costs incurred to maintain and enforce the opt-out registry. (Mullins Decl. (Dkt. #17) Ex. A, Preamble to Ordinance.)

B. Yellow Pages Phone Books

Washington requires local exchange carriers (“LECs”) to publish and distribute residential, business listings, and certain consumer information. *See* WAC 480-120-251. Neither Dex nor SuperMedia are LECs. (Norton Decl. (Dkt. # 18) Ex. A. ¶ 9.) Nevertheless, Dex contracts to publish directories that satisfy these requirements on behalf of Qwest, while SuperMedia does the same on behalf of Verizon. (*Id.*) Directory

² On January 31, 2011, the City amended the Ordinance to eliminate a \$148 per ton recovery fee for the cost of recycling that the City had originally enacted with the Ordinance. (O’Brien Decl. Ex. 1.)

1 companies, such as Dex and SuperMedia, do not charge residents or businesses for this
2 service. (*Id.* ¶¶ 12-13.) Dex and SuperMedia, therefore, have turned to advertising to
3 defray the cost of printing and distribution. (*Id.* ¶ 17.)

4 The directories published by Dex and SuperMedia are commonly called “yellow
5 pages.” (*Id.* ¶ 7.) The contents of a yellow pages directory typically include a business
6 “white pages” section, providing the names, addresses, and telephone numbers of local
7 businesses and professionals. (Stonecipher Decl. (Dkt. # 19) ¶ 5.) The Dex 2010 Seattle
8 Metro yellow pages directory contains 404 such pages. (*Id.*) Further, the publication
9 contains listings of businesses by category of product or service. (S.J. Mot. (Dkt. # 14) at
10 6.) Unlike the white pages, this section contains a significant amount of advertising.
11 (*Id.*) Finally, a yellow pages directory contains a public-interest section that includes
12 pages of community information, maps, and government listings. (*See* Stonecipher Decl.
13 ¶ 6.) The Dex 2010 Seattle Metro yellow pages directory contain nearly 100 pages of
14 this type of public interest material. (*Id.*) Ultimately, advertising comprises less than
15 half of the content of a typical yellow pages directory. (Norton Decl. ¶ 24.) Display
16 advertising, in-column display, coupons, and advertising on the cover and tabbed inserts
17 comprise approximately 35% of the Dex 2010 Seattle Metro yellow pages directory.
18 (Stonecipher Decl. ¶ 8.) Similarly, display advertising ranges from 15-35% of
19 SuperMedia’s Seattle area yellow pages directories. (Gatto Decl. (Dkt. # 16) ¶ 4.)
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III. ANALYSIS & CONCLUSIONS OF LAW

A. Preliminary Injunction Standards

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To obtain a preliminary injunction, the moving party must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25 (2008). In addition, the Ninth Circuit has held that its “serious questions” version of the sliding scale test for preliminary injunctions “remains viable after the Supreme Court’s decision in *Winter*,” and that this court may still apply that test. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). In so ruling, the Ninth Circuit formulated its revised sliding scale test as follows:

. . . [S]erious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

Id. at 1135. Thus, under either the four-part test in *Winter* or the sliding scale test formulated in *Cottrell*, Plaintiffs are required to demonstrate a likelihood of irreparable injury and that the injunction is in the public interest. *Id.*; *Winter*, 555 U.S. at 24.

The court finds the likelihood of irreparable harm and the public interest element to be central to its analysis here. In support of their motion for preliminary injunction,

1 Plaintiffs assert two types of harm: Constitutional harm and monetary harm. (*See infra* §
 2 III.C.) As discussed more fully below, although monetary harm alone is ordinarily
 3 insufficient to support the imposition of a preliminary injunction, *Rent-A-Center, Inc. v.*
 4 *Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 2001), “[t]he
 5 loss of First Amendment freedoms, for even minimal periods of time, unquestionably
 6 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal
 7 quotation marks omitted). Further, courts have recognized a significant public interest in
 8 upholding First Amendment principles. *Sammartano v. First Judicial Court*, 303 F.3d
 9 959, 974 (9th Cir. 2002). Thus, the determination of whether Plaintiffs have
 10 demonstrated a likelihood of irreparable harm, as well as whether they have demonstrated
 11 that a preliminary injunction would be in the public interest, hinges in part on whether
 12 Plaintiffs have demonstrated a likelihood of success on the merits of their First
 13 Amendment claim. The court, therefore, turns to each of these three issues, beginning its
 14 analysis with Plaintiffs’ likelihood of success on the merits of their First Amendment
 15 claim.

16 **B. Likelihood of Success on the Merits of Plaintiffs’ First Amendment Claim³**

17 The only substantive claim that the court finds necessary to consider in the context
 18 of this motion for preliminary injunction is Plaintiffs’ claim that the Ordinance violates

20 ³ In their motion for preliminary injunction, Plaintiffs incorporate by reference the
 21 memoranda and declarations filed in support of their motion for summary judgment. (Mot. at 3-
 22 4 (citing Dkt. ## 14, 37).) Defendants do the same in their responsive memorandum. (Resp. at
 1.) Thus, the court periodically refers to these memoranda and the declarations in its order here
 as well.

1 their First Amendment rights. As discussed below, the court's analysis of Plaintiffs'
2 assertions (1) that they will suffer a likelihood of irreparable injury if a preliminary
3 injunction is not imposed, and (2) that issuance of a preliminary injunction is in the
4 public interest is tied in part to the court's analysis of Plaintiff's likelihood of success on
5 the merits of their First Amendment claim. Therefore, thorough analysis of this claim is
6 a prerequisite to the court's determination of Plaintiffs' motion for preliminary
7 injunction. Because the court ultimately concludes that Plaintiffs fail to establish either a
8 likelihood of irreparable injury or that a preliminary injunction would be in the public
9 interest (both of which are required elements under either *Winter* or *Cottrell*), it is
10 unnecessary for the court to consider the likelihood of success on the merits of any of
11 Plaintiffs' other substantive claims in the context of this motion.

12 **1. Yellow Pages Directories Are Commercial Speech**

13 Plaintiffs allege that because yellow pages directories are "fully protected" First
14 Amendment speech, the City's Ordinance violates the First Amendment. (S.J. Mot. at
15 11.) The degree of protection afforded by the First Amendment depends on whether the
16 activity sought to be regulated constitutes commercial or noncommercial speech. *Bolger*
17 *v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). With respect to noncommercial
18 speech, "content-based restrictions [are permitted] only in the most extraordinary of
19 circumstances." *Id.* However, "the Constitution accords less protection to commercial
20 speech than to other constitutionally safeguarded forms of expression." *Id.* at 64-65.
21 "[C]ontent based restrictions on commercial speech may be permissible." *Id.* at 65.
22

1 Thus, the Court must first determine the proper classification of the publications at issue.
2 Are yellow pages directories commercial or noncommercial speech?

3 “Although the boundary between commercial and noncommercial speech has yet
4 to be clearly delineated, the ‘core notion of commercial speech’ is that it ‘does no more
5 than propose a commercial transaction.’” *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d
6 894, 906 (9th Cir. 2002) (quoting *Bolger*, 463 U.S. at 66). However, any consideration of
7 whether speech is commercial should rest on “‘the commonsense’ distinction between
8 speech proposing a commercial transaction, which occurs in an area traditionally subject
9 to government regulation, and other varieties of speech.” *Bolger*, 463 U.S. at 64.

10 Under *Bolger*, “[w]here the facts present a close question, ‘strong support’ that the
11 speech should be characterized as commercial speech is found where the speech is an
12 advertisement, the speech refers to a particular product, and the speaker has an economic
13 motivation” for engaging in the speech. *Hunt v. City of Los Angeles*, ___ F.3d ___, 2011
14 WL 982475, at *9 (9th Cir. Mar. 22, 2011) (citing *Bolger*, 463 U.S. at 66-67). In
15 applying this test, a finding of just one of the factors does not make speech commercial.
16 Rather, “the combination of all of these characteristics . . . provides strong support for the
17 . . . conclusion that the [speech in question can be] properly characterized as commercial
18 speech.” *Bolger*, 463 U.S. at 67.

19 In *Bolger*, the Supreme Court held that condom pamphlets, which were produced
20 and distributed by a contraceptives manufacturer, and which contained advertising as
21 well as discussions of family planning and disease prevention, were properly regulated as
22 commercial speech. *Id.* at 66. Although the Court noted that the pamphlets could not “be

1 characterized merely as proposals to engage in commercial transactions” and contained
 2 discussion of important public information, they were properly characterized as
 3 commercial speech because they were advertisements, referenced specific products, and
 4 the publisher had an economic motivation for mailing them. *Id.* at 66-68.

5 In the present case, Plaintiffs argue that yellow pages directories should receive
 6 the highest level of First Amendment protection because each publication provides a
 7 guide not only to commercial activities, but also to community, public safety, and
 8 political information. (S.J. Mot. at 12.) The court disagrees. Although yellow pages
 9 directories, like the pamphlets in *Bolger*, “cannot be characterized merely as proposals to
 10 engage in commercial transactions,” a consideration of the three factors outlined in
 11 *Bolger* dictates that yellow pages directories constitute commercial speech. First, yellow
 12 pages directories contain many advertisements for many different products.⁴ Indeed, as
 13 noted above, various forms of advertising comprise approximately 35% of the Dex 2010
 14 Seattle Metro yellow pages directory and approximately 15-35% of SuperMedia’s Seattle
 15 area yellow pages directories. (Stonecipher Decl. ¶ 8; Gatto Decl. ¶ 4.) Second, yellow
 16 pages directories reference specific products. For example, the front cover of the Dex
 17 2010 Seattle Metro Directory contains a specific advertisement for Geico Auto Insurance,
 18 while the back cover contains an advertisement for South West Plumbing. (Dex 2010
 19 Seattle Metro Directory (*see* Dkt. # 22).) In fact, that same directory contains a specific

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 21 ⁴ (*See, e.g.*, Dex 2010 Seattle Metro Directory (*see* Dkt. # 22) at Business White Pages at
 22 1, 5, 12, 27, 35, 39, 42; Business Yellow Pages at 6, 30, 31, 38, 39, 44, 45; Government Pages at
 66 (“You deserve a vacation. Call now...”); Community Pages at 11 (“Call now to learn how to
 donate your car”).)

1 advertisement for Dex’s advertising services. (*Id.* at Business Yellow Pages 9 (“Discover
2 Directory Advertising Services from Dex”).) Third, Plaintiffs have an economic motive
3 for publishing the directories and delivering the yellow pages to residents’ doorsteps.
4 (*See* Norton Dec. ¶¶ 17-20; *see also* Baldasty Decl. (Dkt. # 15) ¶ 7.) Originally, the
5 LECs published the residential and business listings contained in the yellow pages. (*See*
6 Norton Dec. ¶ 7.) Plaintiffs have recognized the “potential profitability of display and
7 other advertising” in yellow pages directories, however, and have contracted with LECs
8 to publish the residential and business listings as a part of their yellow pages directories.
9 (*Id.* ¶¶ 9, 17; *see also* Rasmussen Decl. Exs. 5-6.)

10 Besides the *Bolger* factors, common sense – the touchstone of the commercial
11 speech doctrine – dictates that the yellow pages directories should not receive the highest
12 level of protection afforded by the First Amendment. *See, e.g., Central Hudson Gas &*
13 *Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980). Despite
14 Plaintiffs’ emphasis on the percentage of noncommercial material contained within the
15 directories, the presence of noncommercial speech does not alter the commonsense
16 conclusion that yellow pages directories are commercial speech. In fact, one of the
17 pamphlets considered by the Supreme Court in *Bolger* contained only one reference to a
18 product on the bottom of the last page of an eight-page pamphlet. *Bolger*, 463 U.S. at 67
19 n.13. Nevertheless, the Supreme Court still found the overall character of the
20 informational pamphlet to be commercial in nature. *Id.* at 67. As the Supreme Court has
21 stated, “[a] company has a full panoply of protections available to its direct comments on
22 public issues, so there is no reason for providing similar protection where such statements

are made in the context of commercial transactions.” *Id.* at 68 (footnote omitted). Thus, the court cannot conclude that Plaintiffs are likely to succeed on the merits of their assertion that yellow pages directories are “fully protected” noncommercial speech under the First Amendment.

2. Commercial and Noncommercial Speech Are Not “Inextricably Intertwined” in the Yellow Pages

Plaintiffs nevertheless assert that even if the court were to find that yellow pages directories constitute commercial speech, the directories would still be entitled to the highest level of First Amendment protection because the commercial speech in the directories is “inextricably intertwined” with fully protected noncommercial speech. (S.J. Mot. at 14.) Commercial speech does not retain its commercial character “when it is inextricably intertwined with otherwise fully protected speech.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

The Supreme Court’s decisions in *Riley* and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), provide a framework for the court’s analysis here. In *Riley*, the Supreme Court considered a state-law requirement that professional fundraisers must include in any appeal for charitable funds information setting forth the percentage of charitable contributions collected and actually turned over to charities. 487 U.S. at 786; *see also Fox*, 492 U.S. at 474 (describing *Riley*). The Court has held that charitable fundraising is fully protected speech. *Id.* Assuming without deciding that the statement compelled by the regulation was commercial speech, the Court concluded that the commercial speech was “inextricably intertwined” with the fully protected charitable

1 fundraising. *See id.* (citing *Riley*, 487 U.S. at 796.) As a result, the Supreme Court
2 applied its “test for fully protected expression” in evaluating the state law even though
3 portions of the speech may have been considered commercial. *Id.*

4 Conversely, in *Fox*, the Supreme Court considered a university’s refusal to permit
5 product demonstrations, such as Tupperware parties, in dorm rooms. The Court found
6 that there was “no doubt” that the Tupperware parties proposed commercial transactions.
7 492 U.S. at 473. The Court also recognized that other subjects were also touched upon
8 during the demonstrations such as “how to be financially responsible and how to run an
9 efficient home.” *Id.* at 474. Nevertheless, the Court rejected the argument that the
10 commercial speech of selling Tupperware and the fully protected discussions of financial
11 responsibility were inextricably intertwined. *Id.* at 474-75. Unlike *Riley*, where the state
12 law at issue made it impossible for the noncommercial messages to be delivered without
13 the compelled commercial speech, in *Fox* the Court found that “no law of man or nature
14 makes it impossible to sell housewares without teaching home economics” and that
15 nothing in the nature of the restriction “requires [the noncommercial messages] to be
16 combined with commercial messages.” *Id.* at 474. Because the commercial and
17 noncommercial aspects of the demonstrations or Tupperware parties were not
18 inextricably intertwined, the Court analyzed the speech as a whole and the university’s
19 regulation of that speech under standards applicable to commercial and not fully
20 protected speech. *Id.* at 475.

21 The court here finds the regulations in the City’s Ordinance to be more like the
22 restriction at issue in *Fox* and less like the state law in *Riley*. Unlike in *Riley* – where the

1 | protected charitable solicitation could not be made without the compelled commercial
2 | disclosures – and like *Fox* – where housewares could be sold without teaching economics
3 | – nothing in the Ordinance nor in the nature of these directories requires that their
4 | noncommercial aspects, such as maps, listings, and street guides, be combined with
5 | advertising. The two aspects of these directories – the commercial and the
6 | noncommercial – are therefore not inextricably intertwined.

7 | Plaintiffs advance three reasons why yellow page advertising is nevertheless
8 | inextricably intertwined with fully protected speech. First, Plaintiffs assert that the City
9 | could not address its objectives without regulating the combination of commercial and
10 | noncommercial speech. (S.J. Mot. at 14.) This assertion, however, looks at the question
11 | through the wrong lens. The analysis in *Riley* and *Fox* indicates that it is the contents of
12 | the speech itself, which determines whether the speech is inextricably intertwined, and
13 | therefore entitled to heightened protection or not. *See Riley*, 487 U.S. at 796-97; *Fox*,
14 | 492 U.S. at 473-75.

15 | Second, Plaintiffs contend that like the regulation in *Riley*, the state law here
16 | requires the publication of basic business listings. (S.J. Rep. at 4.) This contention is not
17 | valid for several reasons. While it is true that WAC 480-120-251 requires LECs to
18 | publish basic business listings, the Plaintiffs are not LECs. Furthermore, unlike *Riley*,
19 | where the restriction at issue required commercial speech to be added to noncommercial
20 | speech, here there is no legal requirement that business and residential listings or other
21 | noncommercial material be published with commercial advertising.
22 |

1 Third, Plaintiffs argue that, like newspapers, the distribution of the noncommercial
2 content is dependent on the funding provided by advertising. (S.J. Mot. at 14.) As the
3 Court noted in *Fox*, however, including home economics elements in a Tupperware party
4 would no more convert the parties into educational speech, than opening a sales
5 presentation with a prayer or the Pledge of Allegiance would convert it into religious or
6 political speech. *Fox*, 492 U.S. at 474-75. While advertising may be a convenient way to
7 defray the expense of the state-mandated directories, and while the noncommercial
8 information may render receipt of the advertising contained in these directories more
9 palatable to portions of the public, Plaintiffs point to no legal or other mandate requiring
10 combination of the commercial and noncommercial aspects of these directories. The
11 court, therefore, cannot conclude that Plaintiffs are likely to succeed on the merits of their
12 assertion that the various noncommercial aspects of the yellow pages directories are
13 inextricably intertwined with the commercial aspects.

14 **3. The Ordinance Satisfies the Intermediate Scrutiny of *Central***
15 ***Hudson***

16 Having concluded that Plaintiffs are unlikely to succeed on the merits of their
17 claim that yellow pages directories are fully protected speech, the court considers
18 whether the Ordinance violates the First Amendment under the lesser standard applicable
19 to commercial speech. A restriction on commercial speech must satisfy the four-part test
20 announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of*
21 *New York*: (1) the speech concerns lawful activity that is not misleading; (2) the
22 government interest is substantial; (3) the regulation directly advances that interest; and

(4) the regulation is not more extensive than necessary. 447 U.S. 557, 566 (1980). Here, the parties do not contest the first factor; therefore the court turns to the remaining *Central Hudson* factors.

a. The City's Interests are Substantial

The City expresses three primary interests in enacting the Ordinance, summarized as (1) waste reduction, (2) resident privacy, and (3) cost recovery. (*See* S.J. Resp. (Dkt. # 28) at 8-9; Mullins Decl. Ex. A, Preamble.) First of all, an interest “in promoting resource conservation and reducing the burden on . . . brimming landfills” is substantial. *See Ass’n of Nat’l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 735 (9th Cir. 1994). Second, governments have a significant interest in protecting residents’ privacy. *See Watchtower Bible & Tract Soc’y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002); *Bland v. Fessler*, 88 F.3d 729, 734 (9th Cir. 1996). Third, the City’s interest in recouping the costs expended in the Ordinance’s enforcement and administration is substantial. *See, e.g., Trans. Alts., Inc. v. City of New York*, 218 F. Supp. 2d 423, 439 (S.D.N.Y. 2002), *aff’d*, 340 F.3d 72 (2d Cir. 2003).

Plaintiffs rely on *Bolger*, however, to argue that the City has no substantial privacy interest in enforcing a resident’s decision to uninvite the distribution of yellow pages to their doorstep. (S.J. Rep. at 9.) In *Bolger*, the Court rejected the government’s interest in creating an opt-in regulation in order to shield residents from receiving in the mail potentially offensive and intrusive advertisements for contraceptives, because the City’s stated interest and the regulation were paternalistic. 463 U.S. at 71-74. Here, by contrast, the City’s interest in privacy is substantial and does not suffer from the type of

1 paternalism that the Supreme Court rejected in *Bolger*. Unlike the opt-in regulation in
 2 *Bolger*, the Ordinance creates an opt-out system, where the resident, and not the City,
 3 makes the choice to not receive the speech or directories at issue. *Anderson v. Treadwell*,
 4 294 F.3d 453, 464 (2d Cir. 2002) (unlike some commercial restrictions where an interest
 5 is vulnerable because of paternalism, a resident opt-out ordinance “entirely avoids such
 6 concerns because it applies only where homeowners elect to seek its protection”).

7 The City needs only to identify one substantial interest to meet the *Central*
 8 *Hudson* test. *See Bland*, 88 F.3d at 734 n.8 (noting that the government need only
 9 identify one substantial interest). Based on the record before the court in the context of
 10 this motion for preliminary injunction, as well as the foregoing case authority, it appears
 11 that the City has established three. The court, therefore, cannot conclude that Plaintiffs
 12 are likely to succeed on the merits of their assertion that the City has no substantial
 13 interest underpinning the Ordinance.

14 **b. The Fit Between the Ends and the Means is**
 15 **Reasonable**

16 The Supreme Court has effectively collapsed the last two *Central Hudson*
 17 elements into a single inquiry of whether the City has shown a “reasonable fit” between
 18 the government’s ends and the means chosen to accomplish those ends. *See City of*
 19 *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415 (1993). This fit requirement
 20 does not need to be

21 necessarily perfect, but reasonable; that represents not necessarily the single
 22 best disposition but one whose scope is in proportion to the interest served,
 . . . that employs not necessarily the least restrictive means but, as we have

1 put it in the other contexts . . . , a means narrowly tailored to achieve the
2 desired objective.

3 *Fox*, 492 U.S. at 480 (internal quotation marks and citations omitted). In other words,
4 regulation of commercial speech (or the means) must simply “provide more than
5 ineffective or remote support for a legitimate governmental policy goal.” *Lungren*, 44
6 F.3d at 732 (internal quotation marks omitted).

7 The Ordinance’s opt-out registry, recovery fee, and license requirement all
8 “provide more than ineffective or remote support” for the City’s stated interests. First,
9 the opt-out registry provides the City a means to enforce residents’ choices and is limited
10 because it only restricts delivery to those individuals who do not wish to receive yellow
11 pages directories. *See e.g., Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358
12 F.3d 1228 (10th Cir. 2004) (upholding “do-not-call” registry). Second, the “recovery fee
13 is intended to reflect the cost to the City of administering the Opt-Out Registry” and thus
14 is a precise means to recoup the opt-out registry’s actual costs. SMC 6.255.100(A).
15 Charges made by cities to recoup expenses incurred as a result of regulation have been
16 upheld even in the realm of fully protected speech. *See, e.g., Kaplan v. County of Los*
17 *Angeles*, 894 F.2d 1076, 1081 (9th Cir. 1990). Finally, the Ordinance’s licensing
18 requirement is a narrowly tailored means of protecting residential privacy and recovering
19 administrative costs.⁵ In addition to providing a means for the City to collect distribution

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21 ⁵ Citing *O’Day v. King County*, 749 P.2d 142, 146-47 (Wash. 1988), Plaintiffs argue that
22 even if the licensing system could survive under the federal Constitution, the licensing system
would still violate the Washington Constitution which “categorically rules out prior restraints on
constitutionally protected speech under any circumstances.” (Mot. at 17.) The Washington

1 data and set proportionate recovery fees, the licensing requirement is a mechanism
 2 through which the City may ensure compliance with the opt-out list. *See S.O.C., Inc. v.*
 3 *County of Clark*, 152 F.3d 1136, 1147 (9th Cir. 1998) (noting that an acceptable, less-
 4 restrictive alternative to banning handbilling would be to issue canvassing permits, and
 5 that a “permit system could help regulate congestion and build in accountability should
 6 problems arise”), *amended on other grounds*, 160 F.3d 541 (9th Cir. 1998).

7 Plaintiffs rely primarily on *Discovery Network* in support of their argument that
 8 the City has failed to establish a reasonable fit between the Ordinance and its interests in
 9 waste reduction and resident privacy. In *Discovery Network*, the Court invalidated a city
 10 ordinance that prohibited commercial handbills from being displayed in news racks,
 11 while allowing ordinary newspapers. 507 U.S. at 413-14. The Court concluded that the
 12 City’s regulation violated the First Amendment under the “reasonable fit” standard. *Id.* at
 13 417. The City of Cincinnati’s purported interest was in limiting sidewalk debris,
 14 although the ban affected only 62 racks, while leaving some 2000 racks unaffected. *Id.* at
 15 417-18. Most importantly, the City of Cincinnati’s justification for singling out
 16 commercial papers was premised on nothing more than a “naked assertion that
 17 commercial speech has ‘low value.’” *Id.* at 429. In invalidating the regulation, the Court
 18 stated: “Not only does Cincinnati’s categorical ban on commercial newsracks place too
 19 much importance on the distinction between commercial and noncommercial speech, but

21 Supreme Court has since held, however, that Washington’s Constitution affords no greater
 22 protection to commercial speech than does the First Amendment. *Ino Ino, Inc. v. City of*
Bellevue, 937 P.2d 154, 163, *amended in non-relevant part*, 943 P.2d 1358 (Wash. 1997).

1 in this case, the distinction bears no relationship whatsoever to the particular interests that
2 the city has asserted.” *Id.* at 424. Accordingly, the Court found that the ban was “an
3 impermissible means of responding to the city’s admittedly legitimate interests.” *Id.*

4 The Supreme Court’s “narrow” holding in *Discovery Network* does not undermine
5 the City’s Ordinance here. *Id.* at 428. Plaintiffs argue that just as newspapers in
6 Cincinnati continued to litter the street, the Ordinance here fails because it “imposes no
7 similar requirements on distribution of any other printed material.” (S.J. Mot. at 22.)
8 Thus, although the City’s interests “apply just as strongly to other materials as they do to
9 yellow pages,” City residents will continue to receive other unwanted printed materials
10 on their doorsteps. (*Id.*) This analogy fails, however, because the City considered opt-
11 out legislation specifically in response to concerns raised by Seattle residents regarding
12 the unwanted delivery of yellow pages directories. (Rasmussen Decl. ¶ 4.) Thus, while
13 the City of Cincinnati singled out commercial handbills based on nothing more than what
14 it perceived as the lesser speech value of handbills as opposed to newspapers, the
15 decision by the City in this case to single out yellow pages directories bears a direct
16 relationship to the concerns raised by the City’s residents and the City’s stated interest in
17 protecting its residents’ privacy and reducing unwanted waste.

18 Furthermore, the fact that residents will continue to receive “junk” mail or “other
19 printed materials” does not mean that the City has failed to establish a reasonable fit.
20 *See, e.g., World Wide Rush, LLC v. City of Los Angeles.*, 606 F.3d 676, 689 (9th Cir.
21 2010). The government is not required to legislate in a way that wholly eliminates a
22 particular problem; rather, it may advance its goals in piecemeal fashion with a graduated

1 response. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 910 (9th Cir. 2009).
 2 Thus, the court is unable to conclude that the Plaintiffs are likely to succeed on the merits
 3 of their assertion that the Ordinance fails the *Central Hudson* test or violates their First
 4 Amendment rights.

5 **4. The City's Required Message Does Not Violate the First** 6 **Amendment**

7 Plaintiffs assert that the City's required message is compelled speech in violation
 8 of the First Amendment. (S.J. Rep. at 11-12.) The Supreme Court has upheld compelled
 9 commercial speech where the state required inclusion of "purely factual and
 10 uncontroversial information," and the compelled speech was "reasonably related to the
 11 State's interest." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966
 12 (9th Cir. 2009) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651
 13 (1985) (upholding state's requirement that attorney include in his advertisements a
 14 disclosure that clients may be responsible for litigation costs because the disclosure was
 15 factual in nature and served the state's interest in preventing customer deception)); *see*
 16 *also United States v. Schiff*, 379 F.3d 621, 630-31 (9th Cir. 2004) (holding that
 17 government could compel website operator to post factual information about potential
 18 criminal liability patrons could face if they used the website to evade taxes).

19 The standard set forth in *Zauderer* applies in this case. *See, e.g., Nat'l Elec. Mfrs.*
 20 *Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (finding state labeling law requiring
 21 manufacturers of mercury containing products to disclose information about product
 22

1 disposal governed by reasonable relationship rule of *Zauderer*).⁶ As the Supreme Court
2 has stated, “[b]ecause the extension of First Amendment protection to commercial speech
3 is justified principally by the value to consumers of the information such speech provides,
4 . . . [Plaintiffs’] constitutionally protected interest in *not* providing any particular factual
5 information . . . is minimal.” *Zauderer*, 471 U.S. at 651 (italics in original; citation
6 omitted).

7 The City’s required message includes only “purely factual and uncontroversial
8 information” because it simply informs residents about the availability and process of the
9 opt-out program. (Lilly Decl. (Dkt. # 55) Ex. 5). Indeed, the required message makes no
10 mention of the value or the necessity of recycling yellow pages. (*Id.*) The message
11 furthers the City’s interest in reducing both waste and maintaining resident privacy
12 because it notifies residents about the availability of the opt-out program. Thus, because
13 the required message about the City’s opt-out registry is factual in nature and because it
14 is consistent with the City’s regulatory goals and overall scheme of the Ordinance, the
15 required message does not offend the First Amendment.

16 Having now concluded all of the various twists and turns of its analysis of
17 Plaintiffs’ First Amendment claim, the court cannot conclude that Plaintiffs have
18 demonstrated a likelihood of success on the merits with regard to that claim. The court
19 now turns to an analysis of Plaintiff’s assertions that they will likely suffer irreparable
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22

⁶ See *Video Software Dealers*, 556 F.3d at 966 (citing *Sorrell* with approval).

1 harm in the absence of a preliminary injunction and that such an injunction would be in
2 the public interest.

3 C. Likelihood of Irreparable Harm

4 Central to the court's ruling on Plaintiffs' motion for preliminary injunction is
5 whether they can establish a likelihood that they will suffer irreparable harm.⁷ *See Kotok*
6 *v. Homecomings Fin., LLC*, No. C09-662RSM, 2009 WL 1652151, at *2 (W.D. Wash.
7 June 12, 2009) ("The showing of irreparable harm is considered 'the single most
8 important prerequisite for the issuance of a preliminary injunction.'") (quoting *Dominion*
9 *Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)).

10 As noted above, satisfaction of this element is required under either the preliminary
11 injunction test set forth by the Supreme Court in *Winter*, or the Ninth Circuit's
12 reformulated sliding-scale test in *Cottrell*.

13 Here, Plaintiffs assert that they are likely to suffer irreparable harm in the absence
14 of a preliminary injunction because complying with the Ordinance "would not only
15 trench upon the First Amendment," but also impose other significant burdens. (Mot. at
16 2.) For example, Plaintiffs contend that complying with the Ordinance would cost
17 thousands of dollars in additional production and distribution costs. (Stonecipher Decl. ¶
18 17; *see* Supp. Stonecipher Decl. (Dkt. # 38) at 5; *see also* Mot. at 2.) In addition,
19 Plaintiffs assert that complying with the Ordinance would inhibit revenue generation by

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21 ⁷ Defendants note that although the motion for preliminary injunction is brought on
22 behalf of all Plaintiffs, only Dex has asserted that it is likely to suffer irreparable injury absent
preliminary injunctive relief. (Resp. at 1.)

1 displacing advertising on the cover with the City's message. (Stonecipher Decl. ¶ 17; *see*
2 *also* Mot. at 2.) Plaintiffs also argue that the Ordinance will require them to spend
3 thousands of dollars to make changes to databases, processes, and staffing levels, to
4 enable them to act on data from the City's opt-out program. (Stonecipher Decl. ¶ 17; *see*
5 *also* Mot. at 3.)

6 Except for their alleged First Amendment injury, the burdens asserted by Plaintiffs
7 are all economic in nature. It is, however, a well-established principle that irreparable
8 injury cannot be established where harm is measurable in damages. *See eBay, Inc. v.*
9 *MercExchange, LLC*, 547 U.S. 388, 391 (2006) (recognizing in the context of a
10 permanent injunction that a plaintiff must demonstrate "that remedies available at law,
11 such as monetary damages, are inadequate to compensate for that injury."). A harm that
12 is merely monetary will not ordinarily support injunctive relief. *Rent-A-Center, Inc.*, 944
13 F.2d at 603 ("It is true that economic injury alone does not support a finding of
14 irreparable harm, because such injury can be remedied by a damage award.").

15 Accordingly, to satisfy the irreparable injury element, Plaintiffs' assertion of harm
16 must be grounded in their alleged First Amendment injury. Because the court finds that
17 Plaintiffs have failed to establish that they are likely to succeed on the merits of their First
18 Amendment claim (*see supra* § III.B), the court cannot find that Plaintiffs have
19 established that they are likely to suffer irreparable First Amendment injury in the
20 absence of a preliminary injunction. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th
21 Cir. 2005) (holding that a preliminary injunction was not warranted because Plaintiff
22 failed to show likelihood of success on the merits of the First Amendment claim and

demonstrated no irreparable harm); *see also Putzer v. Donnelly*, No. 07-00620, 2009 WL 3271315, at *5 (D. Nev. Aug. 17, 2009) (“[P]laintiff has not demonstrated a likelihood of success on his First Amendment claim. Therefore, plaintiff has not presented evidence sufficient to show a likelihood of irreparable injury.”); *Comfort v. MacLaughlin*, 473 F. Supp. 2d 1026, 1029-30 (C.D. Cal. 2006) (“Because Plaintiffs’ First Amendment claim is unlikely to succeed, the Court does not find that the prohibition on speech is currently causing an irreparable injury.”).⁸ Because the court finds that Plaintiffs are unable to establish that they are likely to suffer irreparable harm, their request for a preliminary injunction necessarily fails both the four-part *Winters* test and the sliding-scale test in *Cottrell*. On this basis alone, the court may deny Plaintiffs’ motion for preliminary injunction. *Center for Food Safety v. Vilsack*, ___ F.3d ___, 2011 WL 676187, at *6 (9th Cir. Feb. 25, 2011) (“Because Plaintiffs have failed to show that they are likely to suffer irreparable harm in the absence of preliminary relief, . . . we need not address the district court’s analysis of the remaining elements of the preliminary injunction standard.”).

⁸ In 2003, the Ninth Circuit held that to establish irreparable injury in the First Amendment context, the Plaintiff “need only ‘demonstrat[e] the existence of a colorable First Amendment claim.’” *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003) (quoting *Sammartano v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir. 2002)). This standard is no longer viable because the analysis in *Brown* and *Sammartano* was based on the balancing test for preliminary injunction formulated by the Ninth Circuit prior to the Supreme Court’s decision in *Winter*. Specifically, the *Sammartano* court states that “even if the merits of the constitutional claim were not ‘clearly established’ . . . the fact that a case raises serious First Amendment questions compels a finding that there exists the *potential* for irreparable injury” (italics added). The finding of the mere potential of irreparable injury is no longer sufficient to support entry of a preliminary injunction after *Winter*. 555 U.S. at 24; *see also Cottrell*, 632 F.3d at 1135.

D. The Public Interest

To be entitled to a preliminary injunction, Plaintiffs must also demonstrate that an injunction would be in the public interest. *Winter*, 555 U.S. at 24; *Cottrell*, 632 F.3d at 1135. A court's inquiry into the public interest element of a preliminary injunction motion primarily addresses the impact on non-parties rather than parties. *Sammartano*, 303 F.3d at 974.

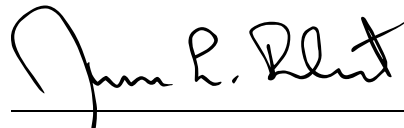
Courts considering motions for preliminary injunctions have recognized a significant public interest in upholding First Amendment principles. *Id.* As discussed above, however, Plaintiffs here have failed to demonstrate a likelihood of success on the merits of their First Amendment claim. (*See supra* § III.B.) This failure undermines any assertion of a First Amendment public interest in this instance. *See Preminger*, 422 F.3d at 826. Further, the Ninth Circuit has recognized that in some cases “[t]he public interest in maintaining a free exchange of ideas . . . [can be] overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated.” *Sammartano*, 303 F.3d at 974. Here, any First Amendment impact on the public, to the extent there is such an impact at all, would be limited because the Ordinance will not prevent delivery to any City residents who wish to receive yellow pages directories. Further, the Ordinance was enacted in large measure after considerable public testimony that Plaintiffs’ opt-out system was ineffective and that unwanted deliveries by Plaintiffs violated City residents’ right to privacy and generated large amounts of waste. (Rasmussen Decl. ¶ 4; O’Brien

1 Decl. Ex. 2.) Because Plaintiffs have failed to demonstrate a likelihood of success on the
2 merits of their First Amendment claim, because any First Amendment impact on the
3 public is limited, and because the City and its residents have competing public interests in
4 privacy and waste reduction, the court finds that Plaintiffs have failed to demonstrate that
5 a preliminary injunction is in the public interest. Accordingly, the court denies
6 Plaintiffs' motion for a preliminary injunction on this ground as well.

7 **IV. CONCLUSION**

8 For the reasons stated above, the court DENIES Plaintiffs' motion for preliminary
9 injunction (Dkt. # 41).

10 Dated this 8th day of May, 2011.

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14 JAMES L. ROBART
United States District Judge
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