United States Court of Appeals
for the Ninth Circuit

No. 12-16082

LOCAL SEARCH ASSOCIATION,

Plaintiff-Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO; BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; and EDWIN M. LEE, in his official capacity as MAYOR of the City and County of San Francisco,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 4:11-cv-02776-SBA
The Honorable Saundra Brown Armstrong

APPELLANT'S OPENING BRIEF

Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101
Telephone: (202) 263-3000

Donald M. Falk
Eugene Volokh
MAYER BROWN LLP
Two Palo Alto Square
Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000

Attorneys for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Plaintiff -Appellant Local Search Association has no parent corporation and is a non-stock corporation, and so no publicly held corporation owns more than 10% of its stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutions, Statutes and Rules

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Yellow Pages directories have been delivered to the doorsteps of San Francisco residents and businesses for generations. The City and County of San Francisco (the "City"), however, decided that the Yellow Pages are not worth the paper they're printed on, and should be suppressed. To achieve that goal, City Ordinance No. 78-11 outlaws the delivery of Yellow Pages directories—and only Yellow Pages directories—unless the publisher obtains prior or in-person consent from each individual resident or business.

Thus, anyone in San Francisco is free to distribute any printed material—no matter how bulky and wasteful—unless the printed material happens to be a Yellow Pages directory. A neighborhood grocer is free to deliver weekly advertisements, regardless of who looks at them, even if they add up to hundreds of pages per year; a local newsweekly is free to deliver its papers to neighborhood residents, regardless of who reads them; and retailers like Neiman Marcus or Restoration Hardware are free to send yearly, monthly, or even weekly catalogs, regardless of whether anybody ever makes a purchase. The First Amendment does not permit the government to interpose itself between speakers and listeners in this way, especially by drawing content-based distinctions between favored and disfavored speech in service of a judgment that some speech does not justify the resources consumed to produce and communicate it.

In reality, the Yellow Pages are an important source of valuable information to San Francisco residents. Plaintiff Local Search Association ("LSA") is an international trade organization representing publishers of Yellow Pages directories, including the two remaining publishers of directories affected by San Francisco's new Ordinance: AT&T's *The* Real *Yellow Pages* and Valley Yellow Pages' *The "Buy Local" Phone Book*. (A third publisher, Seccion Amarilla, has ended home and business delivery of its Spanish-language directory.)

LSA sued to enjoin the Ordinance and moved for a preliminary injunction; briefing on that motion was completed on November 21, 2011. LSA is entitled to an injunction because the First Amendment does not permit the City to stifle the expression of LSA's members based on a governmental belief that Yellow Pages directories are less valuable than other publications with similar or greater environmental and visual impact. Unless enjoined now, the Ordinance will irreparably harm LSA members by burdening their expression and disrupting the months-long production process for the next Yellow Pages editions. Merely by prolonging doubt about the legal status of Yellow Pages directories, the City (and, by its extraordinary inaction, the district court) are achieving the stated goal of the Ordinance's co-author: to put Yellow Pages publishers out of business in San Francisco, and thus to suppress that channel of speech forever.

Notwithstanding the demonstrable chilling effect of delay, the district court did not rule on LSA's motion for a preliminary injunction for more than five months before denying it on May 2, 2012. Even then, the district court avoided addressing the constitutionality of the Ordinance, holding instead that LSA and its members can wait for adjudication indefinitely while their ability to publish slips away. The district court stayed the entire case—postponing final adjudication as well—for four additional months, or (at a minimum) until this Court decides a case, *Dex Media West, Inc. v. City of Seattle*, Nos. 11-35399 and 11-35787 (argued Feb. 9, 2012), that addresses a less restrictive "opt-out" scheme. *Dex Media* thus can only reinforce—not impair—LSA's entitlement to preliminary and permanent injunctive relief.

In the meantime, LSA members are at the City's mercy. The City asserts that it will not enforce the Ordinance until *Dex Media* is decided, but such indefinite, temporary forbearance only increases the chilling effect of the Ordinance's ban on Yellow Pages distribution. The most that can happen if *Dex Media* is decided—or the City changes its mind—is that the district court will reopen the case to proceed on the same sluggish schedule it has followed so far. At the current pace, LSA would be fortunate to have its claims adjudicated within this calendar year. A preliminary injunction would block the Ordinance until its constitutionality is finally adjudicated, rather than leaving it in place to be enforced

at the City's option with no meaningful likelihood of a judicial evaluation of the Ordinance's validity until much later.

The district court abused its discretion by failing to enter a preliminary injunction and thus passively allowing the City to evade accountability for its unconstitutional legislation. As this Court has repeatedly made clear, preliminary injunctions against unconstitutional infringements of free speech rights are available to stop such enactments in their tracks until their constitutionality is finally decided. In light of the urgency of this matter and the *de novo* review required for First Amendment issues, this Court should direct the district court to enter a preliminary injunction. To ensure timely final resolution of this constitutional challenge, the Court also should order this matter reassigned for further proceedings.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367 because the complaint asserted federal claims, including claims to redress the deprivation of federal constitutional rights, along with state-law claims that form part of the same case or controversy. On August 30, 2011, LSA filed a motion for preliminary injunction. Dkt. No. 20. On April 19, 2012, LSA filed a motion for a temporary restraining order and order to show cause why a preliminary injunction should not be issued. Dkt. No. 153. On May 2, 2012, the district court ordered

that "LSA's pending motions for preliminary injunction are DENIED without prejudice to renewal upon the reopening of this action," in an order captioned "Order Granting Defendants' Motion for Stay of Proceedings." ER1-7. LSA filed a timely notice of appeal on May 4, 2012. Because the May 2 order "refus[ed]" an "injunction," this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED

1. Whether this appeal from an order stating that "LSA's pending motions for preliminary injunction are DENIED" comes within the grant of appellate jurisdiction over "interlocutory orders of the district courts of the United States … refusing … injunctions" in 28 U.S.C. § 1292(a)(1).

2. Whether the district court abused its discretion by denying LSA's motion for a preliminary injunction to bar enforcement of an ordinance that prohibits the distribution of Yellow Pages directories without the recipient's prior or in-person consent.

STATEMENT OF THE CASE

On May 18, 2011, the City enacted Ordinance No. 78-11, which the mayor signed into law the next day. S.F. Env't Code § 2101 *et seq*. On June 7, 2011, LSA filed its Complaint for Violation of the First Amendment, Fourteenth Amendment, Supremacy Clause, California Constitution, and 42 U.S.C. § 1983, and for Declaratory Relief. ER542-560.

LSA filed a Motion for Preliminary Injunction on August 30, 2011. That motion was fully briefed on November 21, 2011. It was initially set for a hearing on December 13, 2011, but the district court *sua sponte* continued the hearing three times—to January 10, 2012 (Dkt. No. 50), to February 7, 2012 (Dkt. No. 123), and then to March 6, 2012 (Dkt. No. 126).

On February 28, 2012, the City filed a letter with the district court advising that the City would voluntarily forbear from enforcing the Ordinance until the *Dex Media* decision was issued. ER36-37. The district court invited the City to file a motion to stay proceedings and ordered the motion for preliminary injunction—by then ripe for decision for 3½ months—to be held in abeyance. ER33-35.

The stay motion was fully briefed on March 13, 2012, but the district court did not rule on it in March or April. After the district court continued a case management conference from April 18, 2012, to May 2, 2012 (*i.e.*, the day *after* the Ordinance's effective date), LSA on April 19 moved for a temporary restraining order to preserve the status quo until the motion for preliminary injunction (by then languishing nearly 5 months) could be resolved.

On May 2, the district court entered an order denying LSA's motions for a preliminary injunction and a temporary restraining order and staying all proceedings in the case. ER1-7. At the City's request, the court took the

additional step of closing the matter until 30 days after this Court decides *Dex Media* or October 15, 2012, whichever is earlier.

STATEMENT OF FACTS

A. San Francisco Ordinance No. 78-11

Consumers and businesses receive many free publications at their doorsteps, ranging from grocery store circulars to mail-order catalogs, from municipal newsletters to telephone books—both residential and commercial. But San Francisco has imposed a unique burden on one type of publication because the City has determined that it is less valuable.

Ordinance No. 78-11 amended the San Francisco Environment Code to target the telephone directories commonly known as Yellow Pages. In particular, the Ordinance created a three-year "pilot program," during which it is unlawful to distribute a "Commercial Phone Directory" to any private residence or business unless the directory was requested in advance or is accepted in person. S.F. Env't Code §§ 2102(k), 2103(a). For purposes of the Ordinance, a Commercial Phone Directory is any printed publication, at least 100 pages long, "consisting of nonresidential phone number listings and advertisements for those listed in the publication, with the listings segregated under headings for similar types of businesses." § 2102(b). (All statutory references are to the San Francisco Environment Code unless otherwise indicated.)

The Ordinance applies to Yellow Pages however they are delivered, including delivery through the U.S. postal service. And only the Yellow Pages are restricted. The Ordinance does not limit the unsolicited distribution of residential telephone directories ("White Pages"), mail-order catalogs, local newspapers, or advertising circulars, no matter how bulky.

Significantly, the Ordinance imposes an "opt-in" regime. Whereas Yellow Pages directories are typically delivered to residents and businesses unless they request otherwise (or "opt out"), the Board of Supervisors chose an opt-in system because it would be "far more effective in meeting the goals of this [Ordinance] than any 'opt-out' program." §2101(h). The private co-author of the Ordinance forthrightly advocated an "opt-in" approach as "the way to ban these things," which he likened to "free subsidized toilet paper." ER521, 537. Predicting success, the City's Economic Impact Report ("EIR") estimates that the Ordinance will decrease Yellow Pages distribution by 80%. ER334-335; 422, 424.

The Ordinance incorporates findings asserting that the distribution of Yellow Pages without the prior consent of recipients "results in gross overproduction and significant wastage" that "greatly exacerbates the environmental harm and economic costs inherent in the production and disposal of such directories" and "creates neighborhood blight." § 2101(b), (c), (c)(2). In the view of the Board of Supervisors, "overproduction of Commercial Phone Directories unnecessarily

pollutes the environment," and recycling is not a feasible option "because of their bulk, weight, and composition." § 2101(c)(1), (2). The findings assert that "[t]he nature and magnitude of the environmental and related harms caused by delivery of unsolicited Phone Directories is unique to Phone Directories," a category that includes both Yellow Pages and White Pages, and that "Commercial Phone Directories comprise a large subset—almost certainly a majority—of the Phone Directories delivered unsolicited to private residences and businesses in San Francisco." § 2101(e).

B. Yellow Pages Directories

A Yellow Pages directory is a comprehensive reference guide for civic, commercial, and emergency information. Consumers and businesses have relied on these directories for guidance when they need to determine how to get a toilet fixed or how to register to vote. The key to the success of the Yellow Pages has always been their easily navigable organization. Each area business with a registered business telephone receives a free informational listing. ER39. Those listings are then sorted by business classification to make it easier to find a plumber among the thousands of business listings.

But Yellow Pages directories do not just list local businesses; they also contain community information. For example, the 2011-12 edition of Valley Yellow Pages' *The "Buy Local" Phone Book* includes 26 pages of information

about how to contact government agencies; and a 110-page "San Francisco Community Guide" providing a comprehensive overview of San Francisco's government structure, a detailed earthquake preparedness guide including contact information for emergency agencies, and a first-aid guide with contact information for CPR and first-aid training providers. ER176-177; 197-219. AT&T's December 2010 "The *Real* Yellow Pages" similarly includes a detailed first-aid and survival guide; a comprehensive list of emergency and crisis intervention agencies; a recycling guide; and a "newcomer's guide," with information about obtaining a driver's license, registering to vote, and navigating mass transit. ER176-177; 220-245.

Yellow Pages directories also include paid advertisements. Because the vast majority of Yellow Pages users who consult one of the categorized headings have already decided to make a purchase, businesses rely on the Yellow Pages to reach out to would-be customers, seeking to convey greater detail about their products and services and to make their company stand out from competitors. ER 367. The proceeds from advertising sales permit Yellow Pages directories to be compiled, published, printed, and distributed free of charge. ER127; 130.

Companies advertise in Yellow Pages directories because consumers find them useful. Survey-based estimates of directory retention have shown that approximately four in five San Francisco households possess a Yellow Pages

directory. ER137. The 2010 Experian-Simmons National Consumer Study conducted by Simmons Market Research Bureau, Inc., found that more than 70% of San Franciscans had used the Yellow Pages during the three-month period ending in September 2010. ER109. And a 2011 study by CRM Associates found that the average advertisement in a San Francisco Yellow Pages generated 191 telephone calls. ER110. The return on a Yellow Pages advertisement is remarkable—the average advertiser generates $29 of revenue for every $1 spent on Yellow Pages advertisements. ER424; 464, 466.

Yellow Pages are delivered to all residential and business telephone subscribers, not only as annual editions come out, but also on a rolling basis to new residents and businesses. ER20. The Yellow Pages have remained popular notwithstanding the growth of the Internet. According to the 2010 Local Media Tracking Study commissioned by LSA from national research firm Burke, Inc., 76% of consumers who have Internet access prefer to continue receiving at least one Yellow Pages directory. ER109.

Publishers of Yellow Pages directories have incentives to avoid the costs of delivering directories that will not be used. ER136-137. Advertising rates typically depend on the demonstrated usage and effectiveness of directory ads, rather the sheer volume of copies in circulation. ER110-111; 114-115; 131. Accordingly, publishers provide and publicize convenient means (including

websites and toll-free telephone numbers) to permit unwilling recipients to opt out. ER111-112; 119; 128; 132; 246-259; 260; 261-327. Nationally, such opt-out systems have reduced unwanted circulation by hundreds of thousands of directories. ER111-112; 328-330.

Studies have shown that some four in five consumers retain a Yellow Pages directory—a far higher rate than, say, direct mail. ER137. Like any printed publication, however, a Yellow Pages directory will ultimately enter the waste stream.

When a Yellow Pages directory enters the waste stream, its fate is not materially different from that of other used newsprint. ER145-146, 147.[1] San Francisco law requires residents to segregate recyclables, such as Yellow Pages directories. *See* S.F. Env. Code § 1903. Those recyclables are collected, sorted, processed, and ultimately sold for processing into recycled paper. The City estimates that the average cost for collecting and processing *any* material in the waste stream (*i.e.*, not Yellow Pages directories in particular) is $300/ton. But as acknowledged by Recology—the City's own recycling contractor—the City would not save $300/ton in recycling costs if Yellow Pages directories were eliminated from the waste stream. ER534. Indeed, it might not save anything at all because

[1] Some publishers conduct "sweeps" in which they collect and recycle directories that are left unclaimed in apartment lobbies and on doorsteps. ER112; 119-120; 130.

the costs of recycling (such as truck routes, machinery, and labor) are fixed and would not be affected by eliminatng a small amount of waste. *See, e.g.*, ER159.

Moreover, the City recovers $180/ton when waste "mixed paper" is sold, ER161, so that a 3-pound Yellow Pages directory has a net recycling cost of at most 18 cents. That cost is the same whether a directory (or a catalog) is discarded immediately or used often until the next edition is released. ER145. In any event, data from the U.S. Environmental Protection Agency shows that telephone directories (including both yellow pages and white pages) account for a trivial portion of the waste stream—less than 0.3% of waste. ER147.

C. Ordinance No. 78-11 Will Have Broad Harmful Effects.

1. The Ordinance Is Designed To Suppress Yellow Pages Directories.

The Ordinance is designed not just to reduce the distribution of Yellow Pages directories, but to destroy the Yellow Pages completely by making it economically infeasible to distribute the free guides. Although the City has agreed to voluntarily defer enforcement of the Ordinance until some unknown future date,[2] the Ordinance imposes costs so long as it is on the books with its

[2] *See* ER37 ("[I]n order to use Department [of Environment] resources efficiently, in the event that [*Dex Media*] ha[s] not been finally resolved before the effective date of the program on May 1, 2012, the Department will postpone all implementation and enforcement activity in connection with the program until 30 days after the final disposition.").

enforcement imminent. The production cycle for a Yellow Pages directory is lengthy. For example, sales campaigns for the advertising that funds the Valley Yellow Pages are scheduled to begin in June 2012 for the edition to be distributed in March 2013. ER13-14. The uncertainty shrouding that edition will damage the industry, likely irreversibly. Businesses buy advertisements because potential customers use Yellow Pages directories as a resource. If it will be illegal to distribute the Yellow Pages to most consumers by the time the edition is distributed, then advertisers will not get nearly as much access to consumers. And without the advertisements, the free listings and community information (which are subsidized by the advertisements) are imperiled.

Because the Ordinance could be enforced at any time, publishers must either risk being entirely unable to distribute their next editions, or commit resources to the expensive and time-consuming enterprise of soliciting opt-ins from individual consumers. *See, e.g.*, ER11-13 (estimating costs), 13-14 & 17-18 (discussing timeline). That effort and expense, which the City contends would only preserve 20% of current circulation, would be entirely wasted if the Ordinance is later struck down. In the meantime, however, the City would achieve its goal of using regulation to render Yellow Pages economically infeasible.

The uncertainty about the Yellow Pages' future in San Francisco has already led some long-time employees to leave for other jobs. ER190-191; *see also*

ER118; 127-128; 131-132; 186-187. If the publishing cycle is disrupted by the prospect that the Ordinance will be enforced before the directories are distributed, a cascade of harms (including job losses) will ensue for the publishers, distributors, printers, and suppliers of the Yellow Pages, as well as the local businesses that rely on the Yellow Pages to inform and attract customers.

The EIR for the Ordinance assumes that few residents will expend the effort to opt in, reducing distribution by 80% (and cites industry studies suggesting an 85%-90% decline). *See* ER337-338; 422, 424. That would mean that most San Francisco residents will lack this resource when confronting the kinds of unexpected events—the sudden need for that plumber, a tow truck, or an emergency physician—that drive much Yellow Pages usage. ER268, 274; 354.

2. The Ordinance Will Injure Local Businesses.

If the Yellow Pages no longer reach most consumers, local businesses will lose a highly cost-effective means of reaching their potential customers. Many businesses prefer a listing or advertisement in a printed Yellow Pages directory over reliance on Internet searches. *See* ER186; 184; 428-449. Some 8,000 to 10,000 local businesses purchase advertisements in San Francisco Yellow Pages directories each year. ER424. The average advertisement produces nearly 200 calls per year; some produce hundreds of calls per month. ER357; 450-459. Although the average advertiser spends $5,500 per year on Yellow Pages

advertising (ER 360), those advertisements produce average sales of $162,000 (ER 379; 424; 464, 466)—a far higher return than generally results from newspaper, magazine, television, or radio ads. ER464, 466; *see also* ER379. That is true in part because consumers tend to consult the Yellow Pages when they are ready to buy: in California, 75% of Yellow Pages uses result in a purchase or stated intent to purchase, and 65% produce contact with or a visit to a *local* business. ER109-110. By contrast, paid Internet search listings generate an average "click-through" rate of 3.2%, while 63% of consumers disregard Internet ads altogether. ER371.

In addition, Yellow Pages directory advertising levels the playing field for local small businesses, who can afford to match the presence of their largest competitors in a way they cannot do on the Internet. *See* ER184. For many small businesses, Yellow Pages are the only affordable and cost-effective form of advertising available. *Id.*; ER154; *see also* ER428-449. Local businesses cannot shift their advertising dollars to another medium and expect anything approaching the same results. ER167. As one advertiser said, losing the Yellow Pages "will be a death blow to me." ER66.

Although the EIR predicted that the Ordinance would reduce Yellow Pages circulation by 80%, the EIR concluded that local business sales derived from Yellow Pages advertising would drop only 42%. The City reached this lower number based on an unsupported belief that "the most devoted users of Yellow

Pages will be the ones most likely to opt-in." ER339. Yet market research has established that the vast majority of Yellow Pages use is "event-driven": consumers reach for the Yellow Pages a few times a year in response to unanticipated events that are equally likely to befall the 80% or more of San Franciscans who are expected not to opt in. *See* ER268, 274; 354. Thus, the City's figure rests on a false premise; sales derived from Yellow Pages advertising can be expected to drop much more than 42%. ER164. Unsurprisingly, small business owners and the groups that represent them have vigorously opposed the Ordinance. *See* ER428-449,468-472;183-184; http://www.youtube.com/user/YPforSF/ (small business owners discuss Ordinance's effect).

3. The Ordinance Will Harm Thousands of San Francisco Residents.

The Ordinance also will seriously harm the community by reducing or eliminating the availability of a comprehensive, familiar, and convenient informational resource. This will likely hurt underserved and disadvantaged populations the most, because they are the least able to use the Internet instead. The Ordinance's findings suggest that "[t]he information contained in Commercial Phone Directories is readily available on the Internet or may easily be made available on the Internet," and claim that "[t]he large majority of private residences and businesses in San Francisco have access to the Internet." § 2101(f). But a substantial minority is left behind: the City estimates that as many as 200,000 of

its 777,000 residents—over 25%—lack home Internet access, and non-white residents are "substantially less likely to have home computers and Internet access than the City's white population." ER474. While 68% of all Americans have access to the Internet, only 57% of African Americans and 37% of Hispanics are online; equally underserved are persons with disabilities (38%), or without a high school diploma (29%), or over age 60 (26%). *Id*. About 85% of Americans over 50 rely on printed Yellow Pages (ER281), and the City has estimated that its senior citizens are even less likely to have Internet access than those elsewhere. *Id*. Yet reduced Yellow Pages availability will make it more difficult for this population to obtain vital services. *See* ER181 (over 70% of clients find Nursing Home & Elder Abuse Law Center in the Yellow Pages).

In addition, many persons with Internet access prefer to consult printed Yellow Pages directories for some purposes. Although City functionaries may believe "no one uses the book anymore" (ER527 (all-caps deleted)), in fact about half of Americans use Yellow Pages directories at least once a month, and 33% consult them in the average week. ER482, 487. For the kinds of information typically sought in the Yellow Pages—particularly information about small local establishments—interpreting Internet search results can be difficult and unreliable. *See* ER143-145. And the information in the Yellow Pages is often most urgently in demand—and most useful—when unexpected emergencies or disasters strike. For

example, within days of Hurricane Katrina, AT&T delivered thousands of commercial phone directories to help New Orleans residents rebuild their city. *See* ER195-196; *see also* ER197-200, 278-279, 276-277, 278, 279. By threatening continued Yellow Pages distribution in San Francisco, the Ordinance stands to deprive City residents of a resource they consider valuable.

D. Procedural History

As noted above, LSA filed this action on June 7, 2011, and completed briefing on its motion for a preliminary injunction on November 21, 2011—more than five months before the Ordinance's effective date. The district court repeatedly postponed hearings on the motion before denying it (and LSA's April 19, 2012, motion for a temporary restraining order and order to show cause why a preliminary injunction should not issue) on May 2, 2012—the day *after* the Ordinance took effect.

The district court's order did more than deny preliminary relief, however. The court also also stayed all proceedings and closed the matter, so that LSA cannot even bring its constitutional challenge to a final resolution. Although it expressly "DENIED" the motion for a preliminary injunction, ER7, the district court nonetheless insisted that its stay order was *not* "tantamount to a denial of a preliminary injunction," because "the City will not implement or enforce the Ordinance, if at all, until at least thirty days after it receives the requisite guidance

from the Ninth Circuit." ER6. Accordingly, the court found that "[t]o the extent that the City opts to proceed with the enforcement of the Ordinance in its present form after the ruling in *Dex Media*, LSA will have the opportunity to seek a preliminary injunction before the Ordinance takes effect," ER6, *i.e.*, during the City's 30-day post-*Dex Media* period of forbearance. Given the pace of proceedings in this court, the practical effect is that the City will be able to enforce its Ordinance for many months before the district court addresses any future motion, much less finally resolves this "closed" case.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which confers jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States … refusing … injunctions." The district court's Order stated that "LSA's pending motions for preliminary injunction are DENIED without prejudice to renewal upon the reopening of this action." ER7. An order denying an injunction is an order "refusing" an injunction.

II. The district court abused its discretion by denying LSA's motion for a preliminary injunction. A preliminary injunction is appropriately issued where a plaintiff demonstrates that it is likely to succeed on the merits, that it will face irreparable harm absent preliminary relief, and that the balance of equities and the public interest favor an injunction. Because each of those elements is satisfied in

this case, this Court should direct the entry of a preliminary injunction enjoining the Ordinance.

The district court punted on the merits of the First Amendment claim until this Court decides another case addressing a less onerous restriction on Yellow Pages distribution—a case that, as a result, can only increase LSA's likelihood of success. In effect, the district court held, the three non-merits factors were too insubstantial to require timely consideration of the merits of LSA's First Amendment claims. The district court was wrong on all counts.

A. The possibility that a future appellate decision may be pertinent is no reason to defer consideration of *preliminary* relief indefinitely. Preliminary relief presupposes some uncertainty; a court must predict the *likelihood* that a movant will prevail. Because the law and facts can always change between the entry of a preliminary injunction and final disposition, the district court's insistence on awaiting new developments was erroneous.

In any event, this Court's forthcoming decision in *Dex Media* is not so closely related to this case so as to preclude meaningful evaluation of San Francisco's Ordinance. The ordinance at issue in *Dex Media* follows the "opt-out" model under which distribution is presumptively lawful unless a prospective recipient asks not to receive a directory, while the San Francisco Ordinance applies a more restrictive "opt-in" model that presumptively prohibits directory

distribution unless the publisher obtains the recipient's prior or in-person consent. As a consequence, while a decision in *Dex Media* invalidating the Seattle ordinance necessarily would require invalidating the ordinance at issue here, a decision sustaining the Seattle ordinance would have little bearing on the constitutionality of the more restrictive San Francisco law. The pendency of *Dex Media* weighs heavily in favor of a preliminary injunction; it provides no basis for withholding relief.

B. No matter which First Amendment standard of review applies, San Francisco's targeted attack on the distribution of Yellow Pages directories is unsustainable. If Yellow Pages directories are subject to the intermediate scrutiny appropriate for commercial speech, the City bears the burden of establishing that the Ordinance is narrowly drawn to directly advance a substantial government interest. But this Ordinance plainly does not satisfy this test. Although the Ordinance purports to target litter and waste, the City did not regulate printed materials based on attributes that contribute to litter and waste; rather, the City chose to regulate publications based on their content. In similar circumstances, the Supreme Court has rejected targeted regulations of commercial speech that do not regulate commercial harms. Moreover, the Ordinance's invalidity is still more clear in light of the heightened First Amendment scrutiny that applies because the Ordinance is content-based.

Indeed, the Ordinance is properly subject to the strict scrutiny generally applicable under the First Amendment. The category of "commercial speech" is limited to communications proposing a commercial transaction. But Yellow Pages directories do much more than that. They convey information of many types and are accompanied by related ads—not unlike a newspaper. The Ordinance cannot satisfy strict scrutiny; indeed, the City has never contended that it could.

In addition, the Ordinance violates the Free Speech Clause of the California Constitution, violates the Equal Protection Clauses of the Fourteenth Amendment and of the California Constitution, and is preempted by federal law to the extent that it would penalize publishers for their use of the U.S. mail.

C. An immediate injunction is necessary because LSA's members will suffer irreparable harm without one. The district court plainly erred in asserting that LSA will not be prejudiced by still further delay. Settled precedent of this Court establishes that the suppression of constitutionally protected speech constitutes irreparable harm warranting a preliminary injunction, whether the speech is characterized as political or commercial. The interruption of Yellow Pages production schedules—and of the speech entailed in the distribution of those directories—constitutes additional irreparable injury. It makes no difference that the City has unilaterally decided to postpone enforcing the Ordinance until some time after its effective date. It is well-settled that a defendant's voluntary cessation

of unconstitutional conduct does not moot proceedings that challenge that conduct. Application of that rule is particularly appropriate here, where the City's voluntary cessation is admittedly temporary and does not halt the injury to LSA's members even in the interim.

D. Finally, the balance of equities and the public interest both favor a preliminary injunction. By deferring enforcement, the City has disclaimed *any* interest in the present enforcement of the Ordinance. Meanwhile, the public interest strongly favors an injunction, both because the public interest always favors the protection of First Amendment rights and because San Francisco residents and businesses stand to lose an important source of community information if Yellow Pages distribution is burdened or postponed.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish 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. NRDC*, 555 U.S. 7, 20 (2008). In evaluating preliminary injunctions, this court employs a "sliding scale" analysis, under which "a stronger showing of one element may offset a weaker showing of another," so long as all elements are present to some degree. *Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *see also id.* at 1134-35

("A preliminary injunction is appropriate when a plaintiff demonstrates … that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor.") (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). The denial of a preliminary injunction is reviewed for abuse of discretion. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009). A district court abuses its discretion in denying a request for a preliminary injunction if it "base[s] its decision on an erroneous legal standard or clearly erroneous findings of fact." *Id.*

In this case, the district court abused its discretion by denying a preliminary injunction without addressing the merits of the First Amendment challenge, which are apparent as a matter of law. A proper evaluation of the *Winter* factors shows that a preliminary injunction is warranted. The Ordinance at issue here is unconstitutional regardless of how *Dex Media* is decided, and the other *Winter* factors are satisfied. This Court should direct the district court to reopen the case and to enter a preliminary injunction.

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL.

This Court has jurisdiction over "[i]nterlocutory orders of the district courts of the United States … refusing … injunctions." 28 U.S.C. § 1292(a)(1).[3] The

[3] We brief this issue separately in accord with this Court's order dated May 16, 2012 (Dkt. No. 8).

district court's May 2 Order stated that "LSA's pending motions for preliminary injunction are DENIED without prejudice to renewal upon the reopening of this action." ER7. An appeal from an order of the district court that "specifically denie[s] [a party's] request for an injunction … falls squarely within the language of section 1292(a)(1)." *See Atika v. Sealaska Corp.*, 39 F.3d 247, 248 (9th Cir. 1994).

It makes no difference that the court stated that the denial is "without prejudice"; any interlocutory order may be revisited. But an interlocutory order "refusing" an injunction is appealable as of right.

Even if the district court's efforts to paint its order as something other than a denial of a preliminary injunction could overcome the plain meaning of the ordering clause, the Court nonetheless has jurisdiction over this appeal because a stay order issued while a motion for preliminary injunction is pending has the "practical effect of refusing an injunction," *Privitera v. California Bd. of Medical Quality Assur.*, 926 F.2d 890, 893 (9th Cir. 1991), and this decision, if unreviewed, "might have a serious, perhaps irreparable, consequence." *Carson v. American Brands Inc.*, 450 U.S. 79, 84 (1981).

Here, an urgent request for a preliminary injunction has gone many months without a ruling, or any prospect of a ruling, while the constitutionally protected speech of LSA's members is being unconstitutionally chilled. Indeed, the Order

causes greater harm than a mere denial of a preliminary injunction. An ordinary denial would not delay final adjudication of the merits, but the Order here not only refused timely preliminary relief but also ensured that LSA will have to wait many additional months, if not years, to have the constitutionality of the Ordinance adjudicated at all. That delay alone meets the standard for review under 28 U.S.C. § 1292(a). *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992).

This Court, in short, has jurisdiction based on the express terms of the Order as well as its extraordinary practical effects.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING THE MOTION FOR A PRELIMINARY INJUNCTION.

LSA's motion for a preliminary injunction satisfies each of the requirements for preliminary relief. LSA is likely to succeed on the merits because the Ordinance's burdens on protected expression violate the First Amendment and other constitutional provisions. LSA's members face irreparable harm from the chilling of their protected expression, while maintaining the status quo would impose no hardship on the City; this tips the balance of equities sharply in LSA's favor. Finally, the public interest favors an injunction that will ensure that San Francisco residents have ready access to an important informational resource.

In light of the pressing need for injunctive relief to preserve the constitutional rights of LSA's members, this Court should direct the district court

to reopen the case and to enter the preliminary injunction. *See, e.g.*, *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1060 (9th Cir. 2007); *Sammartano v. First Judicial Dist. Court, in & for County of Carson City*, 303 F.3d 959, 975 (9th Cir. 2002). It is particularly important that this Court direct prompt entry of preliminary relief because, as the Order reflects, the district court has repeatedly postponed the disposition of this urgent matter.

A. The District Court Impermissibly Declined To Determine LSA's Likelihood Of Success.

"A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights." *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D.N.Y. 1959)). LSA filed this action—and the motion for a preliminary injunction—because the Ordinance threatens to suppress its members' constitutionally protected speech.

"[I]n the absence of extraordinary circumstances," a party "is entitled to have a motion for *pendente lite* relief considered on its merits," and not deferred indefinitely. *Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 703-04 (3d Cir. 1991). The district court's failure to reach the merits of LSA's motion—or to articulate and apply the correct legal standard for that motion—is a quintessential abuse of discretion. "A district court necessarily abuse[s] its discretion if it applie[s] the incorrect legal standard." *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1105 (9th

Cir. 2011). Here, by refusing to consider the merits of a facial constitutional challenge, the district court applied an "incorrect legal standard" to the motion for a preliminary injunction.

In denying LSA's motion for a preliminary injunction, the district court went to unusual lengths to avoid resolving the constitutional issues presented here. By entering a stay of the litigation, the court indefinitely postponed final relief as well. The court indicated that the City's unilateral decision not to enforce the Ordinance until *Dex Media* is decided by this Court made it unnecessary to resolve the motion on the merits and that LSA's interests would not be prejudiced in the interim. But neither the forthcoming decision in *Dex Media* nor the City's voluntary non-enforcement undercuts LSA's showings of harm, balance of equities, and public interest, much less in light of the strong showing—which the district court entirely disregarded—of likely success on the merits no matter how *Dex Media* turns out.

Whatever bearing this Court's decision in *Dex Media* might have on the constitutionality of the Ordinance did not excuse the district court from making the predictive judgment about a case's potential merits required of every court considering a motion for preliminary injunction. Possibly forthcoming new authority is properly considered in the final decision, not as a basis for leaving a preliminary injunction unresolved.

1. The district court explained that waiting for the decision in *Dex Media* would likely "simplify and inform the issues before the Court, and aid in the speedy resolution of the action, while conserving judicial resources and the parties' time and resources." ER4. That reasoning may make sense for postponing a trial or holding up final judgment—though not while constitutional rights are being infringed. Yet preliminary injunctions presuppose that issues of law and disputes of fact will be finally resolved at some later date. Indeed, 28 U.S.C. § 1657 provides that every federal court "shall expedite the consideration of … any action for temporary or preliminary injunctive relief." The proceeding is designed to provide "speedy relief from irreparable injury." *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953). By definition, "[t]he urgency of obtaining a preliminary injunction necessitates a prompt determination." *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

A district court's predictive judgment of the likelihood of success is necessarily interim, for as any case proceeds, there the law and the facts may well become clearer. But a district court abuses its discretion by denying the preliminary injunction "on the ground that there will ultimately be a trial and the desirability of injunctive relief can be considered at that time on the basis of a fuller record." *Rolo*, 949 F.2d at 703-04. Thus, the district court could not

postpone resolving LSA's motion for a preliminary injunction simply by hoping that *Dex Media* would make its job easier.

2. Moreover, no plausible outcome in *Dex Media* will do anything but strengthen the case for invalidating the Ordinance here.

First, the Seattle ordinance at issue in *Dex Media* permits distribution of Yellow Pages directories unless potential recipients communicate their desire not to receive them using a government-mandated *opt-out* system. *See* Seattle Mun. Code 6.255.090. San Francisco adopted a far more restrictive ordinance that bans distribution of directories except to recipients who *opt in* to delivery by requesting directories in advance or accepting them in person. *See* S.F. Env't Code §2103(a). Although judgment in favor of the publishers in *Dex Media* would compel judgment for LSA here, the converse is far from true.

Second, the legal issue shared by this case and *Dex Media* is not outcome-determinative as to LSA's motion for preliminary injunction. The district court found that "[a] central issue in *Dex Media*, as well as in the instant case, is whether the Yellow Pages directories should be deemed commercial speech—or non-commercial speech, which is entitled to a higher level of First Amendment protection." ER4. Yet the level of scrutiny will not necessarily determine the validity of the ordinance in *Dex Media*, which is unlikely to survive the intermediate scrutiny applicable to commercial speech. More important, as we

establish below, LSA satisfies the standard for preliminary injunctive relief even if Yellow Pages are deemed commercial speech. *See infra* pp. 32-43.

B. LSA Is Likely To Succeed On The Merits.

LSA is likely to succeed on the merits on several independent grounds for relief. The Ordinance cannot survive even the intermediate First Amendment scrutiny applicable to commercial speech. Moreover, the Ordinance is properly subject to heightened scrutiny, because it reflects a targeted, content-based attack on Yellow Pages publications. If the Court holds (here or in *Dex Media*) that Yellow Pages are noncommercial speech covered by the full panoply of First Amendment protections, the case is over: the City has not contended that the Ordinance could withstand strict scrutiny. LSA also is likely to succeed in showing that the Ordinance violates the free speech provisions of the California Constitution and the Equal Protection Clauses of the U.S. and California constitutions, and that it is preempted in part by federal law governing delivery of U.S. mail.

1. The Ordinance Cannot Survive Intermediate First Amendment Scrutiny.

At minimum, the Ordinance is subject to the intermediate scrutiny reserved for First Amendment challenges to regulations of commercial speech. LSA is likely to prevail on the merits because the Ordinance does not satisfy intermediate scrutiny.

As the Supreme Court has recognized on numerous occasions, the "dissemination of information" is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("if the acts of disclosing and publishing information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct") (internal quotation marks omitted). In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), the Supreme Court explained that a State can regulate commercial speech such as an advertisement only when the regulation directly advances a substantial government interest in a manner that is no more extensive than is necessary to serve that interest. *Id.* at 566. Under *Central Hudson*, "[f]irst, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advanced that interest; and third, the regulation must be 'narrowly drawn.'" *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995). "[T]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993). Even assuming that the distribution of Yellow Pages

directories is subject only to *Central Hudson* scrutiny, the City cannot sustain its burden.

The City's substantial burden to justify the Ordinance "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). "[T]he typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech" is to further "an interest in preventing *commercial* harms by regulating the *information* distributed." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (emphasis added). The interests asserted in Ordinance No. 78-11 have nothing to do with commercial harms, but only with physical impacts shared by all paper.

a. The Supreme Court's decision in *Discovery Network* makes clear that the Ordinance is unconstitutional. *Discovery Network* concerned a Cincinnati ordinance that banned the distribution of commercial publications—but not non-commercial publications—on freestanding newsracks. In support of the ordinance, Cincinnati invoked an interest in "ensuring safe streets and regulating visual blight." 507 U.S. at 415. But the Supreme Court found that justification insufficient because such a justification could not explain why the regulation

targeted only commercial publications. Thus, because "the distinction between commercial and noncommercial speech" on which the restriction relied "bears no relationship *whatsoever* to the particular interests that the city has asserted," the ordinance was "impermissible." *Id*. at 424 (emphasis in original).

Like the law invalidated in *Discovery Network*, Ordinance No. 78-11 distinguishes between "Commercial Phone Director[ies]" and any other printed material, whether commercial speech or noncommercial directories. But none of the City's asserted justifications has anything to do with harms that are specific to Yellow Pages directories.

Much like the ordinance challenged in *Discovery Network*, the findings accompanying the Ordinance contend that Yellow Pages contribute to "neighborhood blight" and unique environmental harms. § 2101(b), (c). But the contribution to "neighborhood blight" has nothing to do with the layout, content, or commercial nature of the Yellow Pages—indeed, free newspapers and grocery store circulars are no less likely to end up abandoned on the street.

Nor can the City rely upon supposedly "unique" environmental harms in its efforts to eliminate the Yellow Pages. Yellow Pages constitute only a tiny fraction of the City's paper waste, and the inclusion of commercial content in the directories neither distinguishes them from most other paper waste nor increases their blight or environmental burden. If the City were genuinely concerned about

waste characteristics, it would have regulated the "bulk, weight, and composition" of publications (§ 2101(c) (2))—not their content. *Cf. Discovery Network*, 507 U.S. at 417 ("The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."). Instead, it is only a Yellow Pages directory containing 50 or more double-sided pages that cannot be distributed without prior consent. Because the harm the City claims to address "bears no relationship to the problematic exclusions at issue here," the Ordinance cannot survive intermediate scrutiny. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 641 (5th Cir. 2012).

b. The City's judgment that "some speech"—speech in Yellow Pages directories—"is not worth it," *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010), is equally invalid. The City cannot simply decide that Yellow Pages are not worth their environmental impact, but that similar forms of expression are worth greater impact, especially when the impact is unrelated to the criteria for regulation.

Such content-based restrictions in the face of broad exceptions for less-disfavored speech do not sufficiently "fit" the asserted government interest. *See Sorrell*, 131 S. Ct. at 2668. Thus, the "fundamental" flaw of a federal statute that

prohibited broadcast advertising of gambling—but exempted several favored speakers—was that the statute "and its attendant regulatory regime [were] so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190 (1999). Like the Ordinance here, the broadcast restriction "prohibit[ed] accurate product information"—and "only when conveyed over certain forms of media" by particular speakers. *Id*. at 191. Similarly, this Court struck down an ordinance that generally prohibited portable signs, but provided exceptions for real-estate signs, among others. *See Ballen v. City of Redmond*, 466 F.3d 736, 740 (9th Cir. 2006). There was no "reasonable fit between the restriction" and the safety and aesthetic goals asserted, because the city failed to show how the signs permitted under the "content-based" exceptions "reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs." *Id*. at 742-43.

If the "fits" in *Greater New Orleans* and *Ballen* were too loose to justify their speech restrictions, the Ordinance here is still more fundamentally flawed. To advance an interest in reducing environmental waste, the Ordinance singles out only a small, content-based category of publications for restriction, and leaves unregulated the vast majority of paper waste—including most paper advertising.

To reduce blight, it singles out the category of paper communications least likely to blow into the City's streets, fences, and bushes.

"Laws singling out a small number of speakers for onerous treatment are inherently suspect." *Time Warner Cable*, 667 F.3d at 638. And as the Supreme Court put it in *Sorrell*, a law does not advance a sufficiently "coherent policy" if the offending acts—there, transmitting "prescriber-identifying information"—remain "available to ... all but a narrow class of disfavored speakers." 131 S. Ct. at 2668. Ordinance No. 78-11's approach to blight and environmental waste is equally incoherent because it permits all but a handful of disfavored speakers—publishers of Yellow Pages directories—to deliver paper communications to San Francisco doorsteps and mailboxes.

Moreover, the fit is still worse because the avoidable costs of recycling directories may be exceeded by lost revenue from sales to paper recyclers, and the environmental costs of paper and in-person solicitation of opt-ins weigh against any modest benefits that the Ordinance might provide. *See* ER 161. Thus, even if the "stated policy goals may be proper," the restriction "does not advance them in a permissible way." *Sorrell*, 131 S. Ct. at 2670.

c. Indeed, even if Yellow Pages directories are commercial speech, the Ordinance is subject to heightened scrutiny because it is a content-based regulation. In *Sorrell*, the Supreme Court explained that "heightened judicial

scrutiny is warranted" whenever legislation "is designed to impose a specific, content-based burden on protected expression" and that "[c]ommercial speech is no exception." 131 S. Ct. at 2664.

By its very terms, the Ordinance imposes content-based restrictions on speech. "Rules are generally considered content-based when the regulating party must examine the speech to determine if it is acceptable." *United Bhd. of Carpenters & Joiners Local 586 v. NLRB*, 540 F.3d 957, 964 (9th Cir. 2008). That is unquestionably the case here. The Ordinance restricts delivery only of "Commercial Phone Directories," which as defined contain "nonresidential phone number listings and advertisements for those listed in the publication." § 2102(b). The City believed that its delivery restrictions targeted only two directories (overlooking Seccion Amarilla, which since then has decided no longer to distribute its directories to residents and businesses). ER 336. Thus, the Ordinance restricts delivery only of a specific type of disfavored content provided by two or three speakers. These restrictions are content-based whether or not the interests the restrictions purport to serve are related to the content. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (finding a restriction on photographic reproductions of currency to be content-based because it discriminated based on the purpose of the photograph).

Although content-based restrictions on commercial speech are particularly suspect, the Supreme Court has not articulated with precision the standard of review that applies. Nevertheless, the appropriate standard is stricter than the intermediate scrutiny compelled by *Central Hudson*. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2677 (Breyer, J., dissenting) ("The Court (suggesting a standard yet stricter than *Central Hudson*) says that we must give *content-based* restrictions that burden speech 'heightened' scrutiny."). And in recent years, the Supreme Court has in recent years regularly struck down commercial speech restrictions, even while generally upholding content-neutral regulations of noncommercial speech under intermediate scrutiny.[4]

d. For similar reasons, the Ordinance fares no better if characterized as a mere restriction on one channel of communication—delivery of unsolicited materials. As this Court has explained, the government cannot "'shut off the flow of' protected speech, even when the speaker seeks access to the recipient's private home, and even when the speech in question is commercial speech," in part

[4] *Compare Sorrell*, 131 S. Ct. 2653 (striking down commercial speech restriction); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (same); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (same) *with Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (upholding content-neutral noncommercial speech restriction); *Hill v. Colorado*, 530 U.S. 703 (2000) (same); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (same). *But see Watchtower Bible and Tract Soc. of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002) (striking down content-neutral noncommercial speech restriction); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (same).

because such a restriction would interfere with the speaker's right to communicate with those "who may want to receive his speech even though they are not present at the time of distribution." *Klein v. City of San Clemente*, 584 F.3d 1196, 1204 (9th Cir. 2009). The Supreme Court has recognized the general right to send unsolicited commercial materials, holding that the First Amendment "does not permit the government to prohibit speech as intrusive unless the captive audience cannot avoid objectionable speech." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983). Rather, to deal with the problem of expression that is both unsolicited and unwanted, "the short, though regular, journey from mail box to trash can … is an acceptable burden, at least so far as the Constitution is concerned." *Id*. (internal quotation marks omitted, alteration in original). The City's asserted interest in the contents of its residents' trash cans does not save its speech restriction.

e. Finally, opt-in regimes that prohibit unsolicited distribution of publications do not withstand constitutional scrutiny—regardless of whether this Court applies strict or intermediate scrutiny, or some standard in between. The primary difference between an opt-in regime and an opt-out regime is that, in the former, the government assumes the role of gatekeeper between speaker and listener, presumptively banning communication before it takes place.

The California Supreme Court has recognized that the First Amendment bars even content-neutral government restrictions on speech that "condition[] distribution on the prior consent of the occupant of the property where distribution is to take place." *Van Nuys Pub. Co. v. City of Thousand Oaks*, 5 Cal. 3d 817, 824 (1971) (Tobriner, J.). The court explained that a prior-consent restriction "will, as a practical matter, frequently operate to curtail completely this means of communication," and might make distribution "prohibitively time-consuming and expensive, since successful communication will often require repeated visits." *Id.* As a consequence, the court held, "a proper accommodation of the competing First Amendment and privacy values at issue requires that the initial burden be placed on the homeowner to express his objection to the distribution of material." *Id.* at 826. Other state and federal courts have rejected efforts to impose governmental judgment as the initial barrier to distribution of speech.[5]

[5] *See, e.g.*, *Ramsey v. City of Pittsburgh*, 764 F. Supp. 2d 728, 731-32 (W.D. Pa. 2011) (preliminary injunction against ordinance restricting delivery of unsolicited publications); *Statesboro Pub. Co., Inc. v. City of Sylvania*, 516 S.E.2d 296, 297-99 (Ga. 1999) (rejecting anti-littering ordinance restricting home delivery of any printed or written material, despite exception for personally handing the publication to a willing recipient); *Miller v. City of Laramie*, 880 P.2d 594, 597-98. (Wyo. 1994) (First Amendment precludes littering prosecution against distributor of free newspaper based on complaints from residents who found copies in their yards); *H&L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 452-53 (Tenn. 1979) (ordinance barring distribution of "any commercial handbill in any public place" not permissible for the purpose of regulating litter on city streets).

If content-*neutral* prohibitions of unsolicited distribution of noncommercial expression cannot withstand scrutiny, neither can content-*based* prohibitions aimed at commercial speech. Indeed, as we noted above, the Supreme Court has in recent years been more likely to strike down content-based commercial speech restrictions than content-neutral regulations of noncommercial speech. *See* note 4, *supra*. Making it more difficult for Yellow Pages publishers to distribute their publications to consumers and businesses was, in fact, the driving force behind Ordinance No. 78-11. The Board of Supervisors found that its opt-in regime "will be far more effective in meeting the goals of this [Ordinance] than any 'opt-out' program permitting unsolicited distribution of Commercial Phone Directories to private residences and businesses unless the resident or business expresses a preference not to receive the directory." S.F. Envt. Code § 2101(h). But if the City's goal was simply to reduce the incidence of unwanted deliveries, it could have promoted the opt-out programs currently operated by LSA's members. Rather than take steps better tailored to the alleged problem at hand, the City chose to take a far more speech-restrictive—and unconstitutional—path.

2. The Ordinance Cannot Survive Strict First Amendment Scrutiny.

Because the Ordinance is unsustainable under intermediate scrutiny, LSA is likely to succeed on the merits whether or not Yellow Pages are noncommercial speech. In fact, however, the Yellow Pages directories at issue here are fully

protected speech. Indeed, in the district court, the City did not contend that the Ordinance could survive the strict constitutional scrutiny that therefore applies.

a. Although the LSA members that publish Yellow Pages directories, like most newspaper publishers, are for-profit enterprises, speech does not lose full constitutional protection merely because "the dissemination takes place under commercial auspices." *Smith v. California*, 361 U.S. 147, 150 (1959). Rather, for First Amendment purposes, commercial speech is "usually defined as speech that *does no more than* propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added). "If speech is not 'purely commercial'—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection." *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004).

Yellow Pages do far more than propose a commercial transaction. In addition to providing a variety of community-oriented information and residential listings that are not business-related at all, Yellow Pages provide reference listings of business names, addresses, and phone numbers, organized both alphabetically and by category, at no charge to the business subscriber. *See* ER177; 107-108. Those free business listings are not commercial speech. Like entertainment listings in a newspaper, the free business listings provide information consumers could use to initiate a commercial transaction, but make no proposal of a

commercial transaction between the Yellow Pages (or its business partners) and the reader.

The mere fact that Yellow Pages directories also include paid advertisements does not permit the government to regulate the directories as commercial speech. Almost all newspapers and magazines rely on advertising. In fact, the proportion of advertising content in a typical Yellow Pages directory is comparable to (and sometimes less than) the proportion of advertising in newspapers and magazines that are indisputably entitled to full First Amendment protection. *See* ER176-177.[6] Like newspapers, the publishers of Yellow Pages are not themselves the advertisers.

This Court's established approach to mixed communications compels application of strict scrutiny here. Unless the "explicit terms" of a regulation on expression "limit its restrictions to *purely* commercial speech," the regulation runs a "substantial likelihood that [it] could inhibit the expression of fully protected

[6] Of course, including non-advertising content does not necessarily render a communication noncommercial. "[S]peech could properly be characterized as commercial when (1) the speech is admittedly advertising, (2) the speech references a specific product, and (3) the speaker has an economic motive for engaging in the speech." *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004). No one of these factors is sufficient. *Bolger*, 463 U.S. at 66-67. As applied here, Yellow Pages directories are not advertisements; they *contain* advertisements. If Yellow Pages were considered commercial speech under *Bolger*, so too would nearly all newspapers and magazines, as well as TV and radio broadcasts, most of which are published with economic motives and are supported by advertisements referencing specific products.

speech intertwined with commercial speech" and must be measured against the full force of the First Amendment. *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1144 (9th Cir. 1998) (emphasis added). In *S.O.C.*, this Court held that an ordinance prohibiting "off-premises canvassing" could not be evaluated as a restriction of commercial speech because the law did not "limit its application to those materials that do 'no more' than propose a commercial transaction"; rather, the ordinance could prohibit a full range of "publications that contain some form of commercial advertising, even if the noncommercial content is unrelated to the advertising copy." *Id*. Ordinance No. 78-11 similarly fails to limit its restrictions to purely commercial speech. To the contrary, it restricts expression of any speech that is published between the covers of a "commercial phone directory," where much of the "noncommercial content" is equally "unrelated to the advertising copy."[7] In short, the Ordinance is not a commercial speech regulation.

This Court recently underscored the principle that publications do not become commercial speech merely because they are financed by advertising. In *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820 (9th Cir. 2011), the court

[7] Indeed, the Ordinance offers no limiting principle to prevent its application to publications that consist overwhelmingly of noncommercial content. The Ordinance prohibits unsolicited delivery of *any* publication of at least 100 pages—*i.e.*, 50 sheets of paper—that includes both telephone listings organized by type of business and *any amount* of advertising for listed businesses. *See* S.F. Envt. Code § 2102(b).

vacated an injunction against a "DMV.org" website that "[c]onsumers visit ... for help renewing driver's licenses, buying car insurance, viewing driving records, beating traffic tickets, registering vehicles, even finding DUI/DWI attorneys." *Id.* at 824. The website was financed by "selling sponsored links and collecting fees for referring site visitors," *id.*, much as Yellow Pages are financed by advertising. The district court ordered defendants to present each visitor to the site with a "splash screen" explaining that the site was not affiliated with any state Department of Motor Vehicles. *Id.* Even though the DMV.org site could mislead consumers, however, this Court held that the injunction could not be evaluated as a regulation of deceptive commercial speech—precisely because "it erect[ed] a barrier to *all* content on the DMV.org website," some of which was "informational and thus fully protected, such as guides to applying for a driver's license, buying insurance, and beating traffic tickets." *Id.* at 830. The injunction thus "burden[ed] access to DMV.org's First Amendment-protected content," because the additional step of clicking through a splash screen would "deter[] some consumers from entering the website altogether." *Id.* Accordingly, this Court remanded with instructions to burden no more protected speech than necessary to remedy confusion caused by past deception. *Id.* Because Ordinance 78-11's delivery prohibition imposes a far greater barrier than a splash screen, *without* serving any interest in preventing consumer deception, it cannot survive review.

Indeed, that the Ordinance "targets a small handful of speakers for discriminatory treatment 'suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.'" *Time Warner Cable*, 667 F.3d at 640 (citing *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 585 (1983)). That "inherently suspect" regulatory approach reinforces the conclusion that strict scrutiny is appropriate here. *Id.* at 638.

b. Because Ordinance 78-11 restricts speech that is entitled to full constitutional protection—and singles out a narrow class of speech based on its content—the Ordinance is subject to strict scrutiny and thus can survive only if it is narrowly tailored to a compelling government interest. *See, e.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The City has not disputed that its Ordinance fails that test.

In addition to all the reasons provided above (at pp. 32-43), which apply with still greater force in the context of strict scrutiny, long-standing precedent establishes that the government interest in reducing environmental waste and visual blight is insufficiently compelling to justify curtailing protected expression. As this Court has recognized, "language in Supreme Court decisions suggest[s] that preventing littering is simply not a sufficiently significant interest to preclude leafleting." *Klein*, 584 F.3d at 1202 n.5 (citing *Schneider v. New Jersey*, 308 U.S.

147, 165 (1939)). That "language" provides more than a strong suggestion: "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." *Schneider*, 308 U.S. at 162. Rather, "[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." *Id.*

Communications on paper necessarily have environmental impacts and create a risk of litter, but speech restrictions aimed at those characteristics could be applied to prohibit any publication the government didn't like. Just as Van Nuys could not "attack 'litter' … by prohibiting all distribution without 'prior consent,'" *Van Nuys Publishing*, 5 Cal. 3d at 827, San Francisco cannot advance similar goals with a similar prohibition—one that, moreover, singles out protected expression for regulation based on its content.

Furthermore, the Ordinance plainly cannot satisfy the requirement of narrow tailoring. The City's insistence on an opt-in program is far more restrictive than an opt-out counterpart. The City has not appropriately considered restrictions that are directly targeted at the ills that the City claims to be addressing.

3. The Ordinance Violates California's Constitutional Free Speech Protections.

For similar reasons, the Ordinance violates the free speech clause of the California Constitution, which provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2(a). That provision is "more protective, definitive, and inclusive of rights to expression of speech" than the First Amendment. *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 769 (2002). The California provision "protects commercial speech … in the form of truthful and nonmisleading messages about lawful products and services." *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 493-94 (2000). Thus, the Ordinance violates California's free speech guarantees as well.

4. The Ordinance Violates The Equal Protection Clauses Of The Fourteenth Amendment And The California Constitution.

"[R]egulatory distinctions among different kinds of speech" also "may fall afoul of the Equal Protection Clause." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 n.9 (1994). Restrictions targeting certain kinds of expression violate the Equal Protection Clause of the Fourteenth Amendment unless the government proves that the restricted expression implicates the concerns addressed by the restriction more than the expression left unregulated. *See Carey v. Brown*, 447 U.S. 455, 462-63

(1980) (ordinance exempting labor picketing from picketing prohibition violated Equal Protection Clause). Although equal protection claims are generally reviewed only for a rational basis, "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Id.* at 461-62. For the same reasons that the Ordinance is insufficiently tailored to comply with the First Amendment, it fails Equal Protection review.

The California Constitution's equal protection clause (Art. I, § 7(a)) also protects against regulations that distinguish among different types of speech. For example, in *Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706 (1971), the court invalidated on equal protection grounds an ordinance that prohibited (as an aesthetic nuisance) outdoor business signs that posted rates or prices. *Id*. at 708-09. The court held that, to avoid being unconstitutionally arbitrary, "the classification of advertising signs … must be based upon some distinction, natural, intrinsic or constitutional, which suggests a reason for, and justifies, the particular legislation." *Id*. at 712. Because, "[f]rom an aesthetic standpoint, there is no difference between" two signs that differ only in whether they include a price, the court held that "[t]he ordinance in question creates an invalid classification under the guise of aesthetics." *Id*. at 714.

Ordinance No. 78-11 has the same defect. Because the environmental impact and visual blight of a Yellow Pages directory do not differ in nature from those of other paper publications, the distinction between Yellow Pages and other publications is an invalid classification in a regulation aimed at mitigating waste. *See also Gawzner Corp. v. Minier*, 46 Cal. App. 3d 777, 791 (1975) (law regulating advertising by motels but not by hotels violated equal protection).

5. The Ordinance Is Preempted In Part By Federal Law Governing The Use Of The U.S. Mail.

Under the Supremacy Clause of the Constitution, state regulations must give way when Congress supplants them with uniform national rules. *Law v. General Motors Corp.*, 114 F.3d 908, 909 (9th Cir. 1997). "Conflict preemption" arises "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Ninth Circuit has made clear that local law presents such an impermissible conflict when it purports to limit the activities of the Postal Service. *See United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981). A trespass ordinance requiring mail carriers to obtain prior express permission from residents before crossing lawns "frustrate[d] a major Congressional objective" of "promot[ing] the efficiency of mail delivery," and therefore was preempted. *Id.* at 785. That conclusion accords with the principle that the "activities of federal

installations are shielded by the Supremacy Clause from direct state regulation." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). Because "[t]he Postal Service is 'an independent establishment of the executive branch of the Government of the United States,'" it follows that "the Supremacy Clause preempts the application of non-federal laws that frustrate or interfere with the operations of the Postal Service." *Wesley v. United States*, 2007 WL 1367699, at *1 (W.D. Wash. May 7, 2007).

Congress has legislated in great detail what material is "nonmailable," and has authorized the Postal Service to prescribe implementing regulations. 39 U.S.C. §§ 3001-3018. It has long been established that the Postal Service must accept for delivery any materials that federal law and regulations do not exclude. *See*, *e.g.*, *Stanford v. Lunde Arms Corp.*, 211 F.2d 464, 466 n.1 (9th Cir. 1954); *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d. Cir. 1960). Indeed, the Domestic Mail Manual—which is incorporated by reference into the Code of Federal Regulations, *see* 39 C.F.R. § 111.1—specifies that "[t]he USPS accepts properly packaged and marked parcels but reserves the right to refuse nonmailable or improperly packaged articles or substances." Domestic Mail Manual ("DMM") § 601.1.6, *available at* http://pe.usps.com/text/dmm300/601.htm.

Moreover, the Postal Service has issued regulations establishing what forms of "Advertising Matter" may not be mailed. DMM § 601.13.4; *see also* DMM

§§ 508.9.0, 508.10.0, *available at* http://pe.usps.com/text/dmm300/508.htm. The Ordinance effectively declares Yellow Pages directories to be unmailable based on their physical and communicative characteristics, which conflicts with the Postal Service's contrary determination. Any attempt by state or local governments to limit the services provided by the Postal Service—and thus threaten its revenue—also conflicts with the Service's mandate to "assure adequate revenues, including retained earnings, to maintain financial stability." 39 U.S.C. § 3622.

Preemption also "arises when state law 'regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.'" *Pacific Merchant Shipping Assoc. v. Goldstene*, 639 F.3d 1154, 1165 (9th Cir. 2011) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). Congress has occupied the field of the regulation of postal mail. The postal "power possessed by Congress" under Article I, section 8, "embraces the regulation of the entire Postal System of the country"; Congress alone has "'[t]he right to designate what shall be carried'" and "'*what shall be excluded*.'" *USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126-27 (1981) (quoting *Ex Parte Jackson*, 96 U.S. 727, 732 (1878)) (emphasis added).

Ordinance 78-11 involves just such a prohibited interference. The City has acknowledged that the Ordinance would penalize the sender of an unsolicited Yellow Pages directory for delivery by mail (Dkt. No. 70, at 22-24), while

excusing the Postal Service itself from liability. § 2102(f)-(g). To that extent, he Ordinance is preempted by federal law.

C. LSA's Members Will Suffer Irreparable Harm Absent A Preliminary Injunction.

If no injunction is entered, LSA's members will be irreparably harmed . The nature of the First Amendment is such that speech delayed is speech denied. In the present posture of this case, the Ordinance stands to silence LSA's members at a moment's notice, either by preventing the citywide distribution of new editions of Yellow Pages directories or by preventing the year-round distribution of directories to new addresses.

The district court indicated—in two sentences—that a stay was appropriate because "the purported harms cited by LSA are principally financial harms, i.e., loss of advertising revenue and compliance costs" that "generally are not considered irreparable harm." ER5 (citing *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980)).

But that statement overlooks the "long line of precedent" establishing that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011); *accord Klein*, 584 F.3d at 1207; *Sammartano*, 303 F.3d at 973-74; *S.O.C.*, 152 F.3d at 1148. That principle fully applies to restricdtions of commercial speech is. *See, e.g., Utah Licensed Beverage Ass'n v.*

Leavitt, 256 F.3d 1061, 1076 (10th Cir. 2001); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). The authority relied upon by the district court—*L.A. Memorial Coliseum*—was an antitrust case; First Amendment freedoms were not on the line.

The district court suggested that it need not evaluate LSA's claim for a preliminary injunction because the City has unilaterally decided not to enforce the Ordinance until 30 days after *Dex Media* is decided. ER5. But the City's voluntary suspension of enforcement does not affect the Ordinance's chilling effect, nor does it impair LSA's entitlement to a preliminary injunction that would block enforcement until final determination of the Ordinance's constitutionality—not just until the City decides the liability risks of enforcement were worth the speech-suppressing benefits.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). Likewise, "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Thus, "[a] request for an injunction, preliminary or otherwise, simply is not mooted because the parties have … maintained the status quo." *Lucini Italia Co. v. Grappolini*, 288 F.3d 1035, 1038 (7th Cir.2002).

The reasons for that rule are simple. An injunction is enforceable by a court, whereas a party can alter its voluntary conduct at any time. And an injunction is tailored to the particular circumstances of a case and the particular burdens that necessitate the maintenance of the status quo. But here, the City's representation that it will not enforce the Ordinance until 30 days after the decision in *Dex Media* offers cold comfort to LSA's members.

The decision whether to enforce the Ordinance now rests in the sole discretion of the City. As a result, the prospect that the City will enforce its already-effective Ordinance chills protected expression—later editions of LSA members' directories—right now, by restricting LSA members' ability to finance those editions and requiring them to seek out different means of distribution in anticipation of a sudden need to comply with the Ordinance whenever the City decides to enforce it. The Ordinance thus forces LSA members to "modify [their] speech and behavior to comply" with the presumptive prohibition imposed by the Ordinance—the type of "chilling effect" that is injury in itself. *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003).

In addition, publishers will incur direct costs of compliance with the Ordinance well before the delivery restrictions go into effect. Mass distribution of a new edition of a directory is only one late step in the process.

To continue publishing at all, publishers need to solicit and receive authorization from City residents and businesses before their advertising sales cycles begin—many months before actual distribution. *See* ER116-118; 20-23. Indeed, given that it would take 6-12 months to obtain opt-ins, the next edition of Yellow Pages directories would be jeopardized if the City were permitted to begin enforcing the Ordinance whenever it chose. *See* ER13-14. Seeking opt-ins would be very costly; to offset the cost of obtaining opt-ins, publishers estimate that they would have to more than double advertising rates and not lose a single advertiser. *See* ER10; 23.

To publish their upcoming editions, moreover, the publishers are already selling ads and will soon begin full sales campaigns. ER28; 31. Those campaigns will be hindered if the City remains free—on its own accord—to change its enforcement position at a moment's notice. And the uncertainty generated by the City's power to begin enforcement after (or before) *Dex Media* has present consequences: When deciding whether, and how much, to spend on advertising in a directory, advertisers demand to know how many directories will be distributed the following year. *See* ER25; 10. Advertisers who know that a Yellow Pages directory may never be distributed necessarily contemplate shifting advertising dollars to a more reliable medium; once they leave, they are hard to win back.

ER29; 32. Unless and until the Ordinance is enjoined, these effects will directly and substantially impair LSA members' protected expression.

If the City's temporary forbearance were sufficient to defeat review now, then no ordinance, regulation, or statute could be challenged until the moment the government announced it was beginning active enforcement. But that is not the law. Contrary to the holding below, a constitutional challenge is not a game of "Mother May I" where the government dictates when citizens may assert and protect their constitutional rights. LSA is entitled to challenge the Ordinance now in light of the impending harm that will occur when it is enforced and that has begun to occur while its enforcement looms on the horizon.

D. The Balance Of Equities And The Public Interest Strongly Favor A Preliminary Injunction.

Finally, both the balance of the equities and the public interest favor a preliminary injunction. In contrast with the harm to LSA members, the City would suffer no hardship if the *status quo* were maintained while this case is pending. Indeed, the City has conceded as much by voluntarily postponing enforcement. In any event, "the equities tip[] in [LSA's] favor because the burden of the restriction on [its members'] speech … outweigh[s] the disruption to the City's" goal of reducing paper waste by a few percent. *Thalheimer*, 645 F.3d at 1129. The economic harms to be suffered by LSA's members further tip the balance in favor

of an injunction. *See Earth Island Institute v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).

Likewise, this Court has "consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano*, 303 F.3d at 974. The public interest is especially acute here. By making Yellow Pages directories less available, the Ordinance reduces the access of San Francisco residents to information—particularly those residents who prefer to use the Yellow Pages rather than the Internet to find certain kinds of information. This harm falls disproportionately on members of vulnerable populations that lack convenient Internet access. The public interest is served by ensuring that *all* San Francisco residents continue to have reliable access to the information made freely available in the Yellow Pages.

Additionally, the Ordinance's economic harms extend to the small, local businesses who have concluded that the Yellow Pages is the most effective—and often the only affordable—medium to advertise to a wide local audience. If they cannot reach potential customers through Yellow Pages listings and advertisements, countless San Francisco businesses will see a decline in business that in some cases will threaten their competitiveness and survival. For this reason, too, a preliminary injunction will serve the public interest.

III. THIS CASE SHOULD BE REASSIGNED TO A DIFFERENT DISTRICT JUDGE.

This Court will exercise its supervisory power under 28 U.S.C. § 2106 to reassign a matter to a different district judge when "reassignment is advisable to preserve the appearance of justice," so long as reassignment would not "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 372-73 (9th Cir. 2005) (citations omitted). The extraordinary inaction of the district court here in the face of a motion for preliminary injunction hasdenied LSA not just the "appearance of justice," but the *operation* of justice, especially because inaction bolsters the Ordinance's chilling effect. That inaction makes clear that reassignment would be efficient rather than wasteful. This case could be resolved quickly on summary judgment—as *Dex Media* itself demonstrates. So that this case may proceed expeditiously toward final resolution, and the cloud of illegality may be removed from the routine distribution of Yellow Pages directories, we respectfully request that this matter be reassigned to a different district judge.

CONCLUSION

The district court's order denying LSA's motion for a preliminary judgment should be reversed and the matter remanded to the district court with instructions to enter a preliminary injunction of Ordinance No. 78-11.

Respectfully submitted.

Dated: June 1, 2012

MAYER BROWN LLP
Donald M. Falk
Eugene Volokh
Brian D. Netter

By: /s/ Donald M, Falk

Attorneys for Plaintiff-Appellant
Local Search Association

STATEMENT OF RELATED CASES

LSA states that there are no cases pending in this Circuit that satisfy the definition of "related case" under Ninth Circuit Rule 28-2.6. The district court, however, found that this case bears similarities to *Dex Media West, Inc. v. City of Seattle*, Nos. 11-35399 and 11-35787 (argued Feb. 9, 2012).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman typeface.

Dated: June 1, 2012

MAYER BROWN LLP
Donald M. Falk
Eugene Volokh
Brian D. Netter

By: /s/ Donald M. Falk

Attorneys for Plaintiff-Appellant
Local Search Association

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opening Brief for Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 1, 2012.

All persons who are required to be served are registered CM/ECF users, who will be served by the appellate CM/ECF system.

Dated: June 1, 2012

By: Donald M. Falk