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 REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Our opening brief showed that Ordinance No. 78-11 violates the First Amendment whether or not the City's efforts to eliminate the Yellow Pages are treated as regulation of commercial speech. Because LSA has demonstrated that it likely will prevail on its First Amendment challenge and that its members' First Amendment rights are likely to be infringed whenever the Ordinance is enforced, LSA is entitled to a preliminary injunction.

There is no dispute that this Court has jurisdiction over this appeal. There is nothing extraordinary about an appeal from the denial of a preliminary injunction. The only thing extraordinary here is the district court's delay in deciding LSA's motion for a preliminary injunction—which is especially "troubling in a First Amendment case, where plaintiffs have a special interest in obtaining a prompt adjudication of their rights," *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662 (2011)—and the court's stated basis for denying relief.

Turning the analysis of injunctive relief for First Amendment violations squarely on its head, the court refused to confront the likelihood that LSA will prevail on the merits even though that question largely determines the answer to the other three elements of the standard for preliminary injunctive relief. Nor, for that matter, did the district court explain why LSA's challenge to the Ordinance at issue here could not be heard—for either preliminary or final relief—until this

Court decides the fate of a less restrictive (though still unconstitutional) Yellow Pages regulation in *Dex Media West, Inc. v. City of Seattle*, Nos. 11-35399 and 11-35787 (argued Feb. 9, 2012). Indeed, the order effectively conceded that waiting for a decision in *Dex Media* is unnecessary, because the court specified that the stay will terminate—and LSA could restart the process of seeking preliminary injunctive relief—on October 15, even if *Dex Media* remains undecided. Until then, in the district court's view, LSA members must conduct their business under the continuing cloud of an unconstitutional restriction that can spring into enforcement at any time. Yet even the City recognized when enacting the Ordinance that it was necessary to provide an entire year of advance notice "to give the Yellow Pages industry time to adapt to the new distribution requirements." Answering Br. 4.

While the extraordinary delay in adjudicating the merits in this case promotes the City's purpose of crippling or killing the Yellow Pages industry, the City has no sound answers to the fundamental questions presented by LSA's challenge. Under the appropriate analysis, LSA is entitled to an injunction that will prevent its members from sustaining irreparable harm while this case continues into its second year. This Court should vacate the district court's order and direct the entry of an appropriate injunction. In addition, so that LSA may

obtain timely final resolution of its constitutional challenge, the case should be reassigned to a different district judge.[1]

I. THE DENIAL OF A PRELIMINARY INJUNCTION AGAINST THE UNCONSTITUTIONAL ORDINANCE WAS AN ABUSE OF DISCRETION.

A. The District Court's Upside-Down Analysis Applied An Erroneous Standard That Effectively Assumed That LSA Is Unlikely To Succeed On The Merits.

The district court denied LSA's motion (after a protracted delay) without addressing whether LSA was likely to prevail on its First Amendment challenge to the Ordinance irrespective of the outcome of *Dex Media*. Opening Br. 28-32. Nor did the district court provide the required predictive judgment as to the disposition of the issues common to this case and *Dex Media*. Instead, the district court addressed the three nonmerits factors of the preliminary injunction analysis as if the First Amendment were not involved at all.

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[1] This Court's jurisdiction under § 1292(a)(1) extends to issues "inextricably bound up with the injunction decision" but does not extend to the entire case. 16 Wright, Miller, & Kane, *Federal Practice and Procedure* § 3921.1 (2d ed. 1995). Accordingly, although LSA vigorously disputes the appropriateness of the district court's decision to stay further proceedings on the underlying merits of the case, that question is not before this Court except insofar as it reflects on the question whether this case should be assigned to a different district judge. The City is therefore wrong to argue that LSA "has waived any challenge to the propriety of the district court's stay order" (Answering Br. 18 n.5). *See U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1037-38 (9th Cir. 1986) (issue not properly within scope of § 1292(a)(1) review cannot be waived).

That approach turned the correct legal analysis on its head. The City asserts (Br. 13-19) that the district court did not have to reach LSA's First Amendment challenge because it concluded that LSA had failed to prove irreparable injury "pending a decision in *Dex Media*." ER4.

But the City's argument has two fatal flaws. First, the relevant question is whether the LSA members will be injured before final resolution of the merits of the present case, not before the prospective enforcement date of the offending state action, which could continue to be enforced—likely for many months—before the court resolved any new motion for preliminary or final injunction. Second, under settled law, the violation of LSA's First Amendment rights threatened here itself constitutes irreparable injury. As a consequence, a purported assessment of irreparable injury is meaningless without a concurrent determination of the likely outcome on the merits.

1. In assessing whether to grant a motion for preliminary injunctive relief, a court must examine (1) the likelihood that the movant will ultimately prevail on the merits; (2) the irreparable injury that the movant will sustain if the status quo is not preserved pending the resolution of the merits; (3) the balance of equities between the parties; and (4) the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). The failure of a district court to apply the *Winter* standard

"necessarily" constitutes an abuse of discretion. *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1105 (9th Cir. 2011).

The City responds (Br. 13-14) that the district court *did* apply the *Winter* factors because it found that LSA's members had not demonstrated irreparable harm. But the district court did not apply governing Circuit law to any of the *Winter* factors. First, the district court answered the wrong question, concluding that LSA had not shown that "a stay *pending a decision* in *Dex Media* will be … prejudicial." ER4 (emphasis added). But the correct question is not whether LSA will suffer irreparable harm between now and when *Dex Media* is decided. Rather, "the function of a preliminary injunction to preserve the status quo *pending a determination of the action on the merits.*" *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970) (emphasis added); *see also, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010); *Wash. Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969).[2] Thus, the district court should have determined whether LSA is "likely to suffer irreparable harm *before a decision on*

[2] That is why a refusal to rule promptly on a request for a preliminary injunction—whether by staying proceedings or repeatedly continuing the hearing date—constitutes an effective denial of the injunction that is immediately appealable. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1161-62 (4th Cir. 1977); *United States v. Lynd*, 301 F.2d 818, 822 (5th Cir. 1962).

the merits can be rendered." *Winter*, 555 U.S. at 22 (emphasis added) (quoting 11A Wright, Miller, & Kane, *Federal Practice and Procedure* § 2948.1, at 139 (2d ed. 1995)).

The indefinite suspension of enforcement does not change either the urgency or the result. The City simply said, in effect, that the Ordinance will be effective for practical purposes 30 days after *Dex Media*. But a law that has a future effective date may be challenged well before that date. Just as the Ordinance could have—and should have—been reviewed before its May 2012 effective date, forbearance from enforcement for a few more weeks or months cannot insulate the Ordinance from judicial review simply because the City is reluctant to defend it and the district court is reluctant to rule.

A contrary legal rule would make little sense. Unlike the Ordinance, which is already causing First Amendment injury, *see* pp. 24-27, *infra*, most legislative enactments carry consequences only after they become effective. And most new statutes and ordinances are not effective the day they are enacted.[3] Indeed, the Supreme Court expressly held, in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), that a statute can be challenged on First Amendment grounds prior to its effective date. *Id.* at 393 ("We are not troubled by the pre-enforcement

[3] For example, bills passed by the California Legislature typically become effective on "January 1 next following a 90-day period from the date of enactment of the statute." Cal. Const., art. IV, § 8(c)(1).

nature of this suit."). And *Winter* does not prohibit a pre-enforcement injunction in such circumstances. To the contrary, courts routinely consider requests for preliminary injunctive relief before statutes, ordinances, and administrative rules become effective. *See, e.g.*, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *aff'g Collins v. Brewer*, 727 F. Supp. 2d 797, 799 (D. Ariz. 2010) (enjoining, on July 23, 2010, an Arizona statute set to take effect on January 1, 2011), *petition for cert. filed*, No. 12-23 (U.S. July 2, 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36 (D.D.C. 2011) (granting injunction on November 7, 2011, against FDA regulation requiring graphic warnings on cigarette packaging effective September 22, 2012), *appeal docketed*, No. 11-5332 (D.C. Cir. Nov. 30, 2011); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (enjoining statute before effective date); *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1256 (D. Idaho 2001) (declining to postpone ruling on preliminary injunction at request of United States after Executive Order postponed effective date of agency rule by 60 days), *rev'd on other grounds sub nom. Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). The *Brewer* case is instructive. There, the state repeatedly postponed the effective date of its statute, yet the district court (in a decision this Court affirmed) nonetheless enjoined the statute five months before the latest postponed effective date. *See* 727 F. Supp. 2d at 801.

The City's novel rule would create artificial and unnecessary emergencies, because injunctive relief could be sought only at the last possible moment. It is not sufficient for LSA to have a second chance (once the City actually decides to enforce its Ordinance) to run into court to demand extraordinary relief. Such a requirement (for which the City offers no supporting authority) would force movants to sustain compounded irreparable injury between an unconstitutional statute's effective date and the court's ruling. As this case illustrates, that interim period may be substantial.

In the alternative, the City suggests that LSA's harm is "self-inflicted" because LSA "rejected the City's offer to enter a stipulated order rendering the City's voluntary stay judicially enforceable." Answering Br. 16 (internal quotation marks omitted). But that effort by the City to insulate its facially unconstitutional ordinance from adjudication did not deprive LSA of its right to a preliminary injunction that—like other preliminary injunctions—would remain in effect until a federal court adjudicated the constitutionality of the Ordinance. If the City were sincere, it would have offered to stipulate to a preliminary injunction and joined in LSA's efforts to bring the case to prompt, final adjudication.

But the City offered only to forgo enforcement until 30 days after the date of decision in *Dex Media*, whereupon the City would have sole authority to decide whether and when to begin enforcing the Ordinance. By accepting that offer, LSA

would have acquiesced in still more delay before a court order might maintain the status quo until the final determination of the Ordinance's constitutionality. LSA would have had to begin the motions cycle anew, perhaps waiting another 8 months for an answer from the district court.

2. The district court also failed to recognize that, in a First Amendment case, all four *Winter* factors depend to some extent on the likelihood of a First Amendment violation. Thus, the court could not deny LSA's motion for a preliminary injunction without addressing the likelihood that LSA will prevail on the merits.

As this Court has repeatedly recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (internal quotation marks omitted); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Other circuits similarly "assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005); *accord ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70-71 (2d Cir. 1996). It is unsurprising that the City can muster no support for its contention that a demonstrated threat of unconstitutional

speech-suppression cannot be enjoined in the absence of already-realized economic effects. The City's disregard for First Amendment rights is as breathtaking as it is foreign to the jurisprudence of this Circuit and this Nation.

This Court has likewise held that proof of an imminent First Amendment violation tips the balance of equities in the movant's favor. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1706 (2010); *Starkey v. County of San Diego*, 346 F. App'x 146, 149 (9th Cir. 2009). And "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002).

Accordingly, because the merits of LSA's First Amendment challenge bear on all four *Winter* factors, the district court could not address the trailing three factors out of their legal context. Indeed, the City has not identified a single instance in which a court has denied preliminary injunctive relief even though the movant had established a likelihood of success on the merits of a First Amendment challenge. Instead, the City cites *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011), for the proposition that a movant who has demonstrated a First Amendment violation that affects the movant's own rights must separately establish some other irreparable harm. But relief was denied in *DISH* precisely

because the movant had failed to establish that it was likely to succeed in proving a First Amendment violation. *See id.* at 774. Indeed, the *DISH* court acknowledged that "a First Amendment claim certainly raises the specter of irreparable harm," and cited *Klein* for the proposition that the other three factors must be examined (*id.* at 776 (internal quotation marks omitted)), without suggesting (as the City now contends) that *Klein*'s irreparable harm analysis might not be good law.

When a First Amendment violation *has* been shown to be likely, however, the showing of the other factors tends to follow from the initial showing, if not inexorably. For example, having confirmed that a First Amendment violation was likely, the *Klein* court easily resolved the other factors even though the district court had not addressed them: "Given the free speech protections at issue in this case, however, it is clear that these requirements are satisfied." 584 F.3d at 1207. Following the same line of authority invoked in *Thalheimer*, 645 F.3d at 1128, *Klein* held that the showing of likely success itself was sufficient to show irreparable harm. 584 F.3d at 1207-08. In *Klein*, as in other cases, the balance of equities and public interest also turn in large part, if not exclusively, on the showing of a First Amendment violation. *See id.* at 1208.[4]

[4] In any event, the panel in *DISH* lacked the authority to overrule the holdings in earlier cases such as *Klein* and *Sammartano*; only the court en banc can do that. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

A district court therefore cannot evaluate a motion seeking a preliminary injunction on First Amendment grounds without determining the likelihood that the movant will prevail on the merits. By failing to do so, the district court abused its discretion and committed reversible error.

B. LSA Is Entitled To A Preliminary Injunction.

When the proper standard is applied, LSA demonstrated on this materially undisputed record that it is entitled to injunctive relief. Just as this Court resolved the nonmerits factors of the injunction standard and ordered entry of an injunction in *Klein*, even though the district court had decided only the likelihood of success on the merits, *see* 584 F.3d at 1200, the Court should decide the likelihood of success here. Because LSA's motion presents only questions of law—and because further delay would seriously undermine LSA's interests—this Court should resolve LSA's entitlement to a preliminary injunction.

1. LSA is likely to succeed on the merits.

The City does not dispute that the Ordinance cannot survive the strict scrutiny applicable to restrictions on noncommercial speech. Instead, the City asserts (Br. 5) that the Ordinance "unquestionably" regulates commercial speech and satisfies the intermediate scrutiny applicable to such regulations. Under binding Supreme Court precedent, the Ordinance fails intermediate scrutiny just as

it fails strict scrutiny. Moreover, LSA is likely to succeed on its three other theories of relief.

a. This content-based Ordinance is not a valid regulation of commercial speech.

If evaluated as a restriction solely of commercial speech, the Ordinance exhibits the same flaws as the Cincinnati ordinance invalidated by the Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). *See* Opening Br. 34-35. The City claims that "*Discovery Network* is easily distinguishable" because Cincinnati "believed [commercial speech] to be of lower value while leaving noncommercial speech with the exact same impact untouched," while San Francisco purports to advance an interest in "reducing unwanted waste and blight." Answering Br. 32-33 (internal quotation marks omitted). To the contrary, as we explained in our Opening Brief (at 34-36), Cincinnati asserted an interest strikingly similar to San Francisco's—"ensuring safe streets and regulating visual blight." *Discovery Network*, 507 U.S. at 415. But the Supreme Court rejected that explanation because Cincinnati had not chosen to regulate the offensive attributes of the newsracks—"their size, shape, appearance or number"—and had instead distinguished between commercial and noncommercial speech for a harm that had nothing to do with commerce.

The reasoning of *Discovery Network* applies with precision to the City's Ordinance. As in Cincinnati, San Francisco has not regulated the supposedly

offensive attributes of the publications that might be related to waste or blight, such as their size, shape, bulk, or weight. Instead, as in Cincinnati, San Francisco chose to distinguish between commercial and noncommercial speech for a harm that has nothing to do with the commercial aspects of that speech.[5] Thus, *Discovery Network* establishes that the Ordinance cannot withstand commercial-speech scrutiny.

The City does not meaningfully dispute that the Ordinance regulates publications according to the content they contain, and thus is subject to "heightened judicial scrutiny" as a result. *Sorrell*, 131 S. Ct. at 2664. Nor does it dispute that the Ordinance targets a small handful of speakers, just like the laws struck down in *Sorrell* and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). These factors further tip the balance against constitutionality.

Moreover, the City cannot justify its use of an opt-*in* approach. As we explained in our opening brief (at 41-43), opt-in restrictions on speech are constitutionally suspect because they serve as a prior restraint on speech, making it

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[5] The City's argument that LSA's members are not really harmed because they could "distribut[e] Yellow Pages to every door in a form other than paper, such as on CDs or flash drives" (Br. 31) borders on the absurd. Setting aside the preferences of many consumers for printed reference materials, the notion that the City has the power to identify content not worthy to appear in print contradicts centuries of First Amendment precedent.

difficult (and sometimes impossible) for the speaker to engage in constitutionally protected activities. In response, the City cites *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995), in which this Court affirmed the ban on junk faxes prescribed by the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. But *Destination Ventures* does not stand for the broad propostion that opt-in restrictions are permissible. Rather, it reflects the peculiarities of the TCPA, which Congress enacted "to prevent the shifting of advertising costs" to fax owners at a time when fax paper was expensive. 46 F.3d at 56. In that case, preventing junk faxes was the only way to prevent the commercial harm that Congress was permitted to regulate. The City also cites *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366 (5th Cir. 2005), which involved a challenge to a University of Texas policy regarding "spam" email. But in that case, the University "block[ed] specific incoming commercial spam *after account-holders ha[d] complained about it*," so that case hardly constitutes an endorsement of opt-in requirements for commercial speech. *Id.* at 375 (emphasis added). And both the TCPA and the policy at issue in *White Buffalo* applied to all unsolicited communications rather than resting on content-based distinctions as does the Ordinance here.

That is not to say that all anti-spam laws aimed at limiting the flood of unwanted email are necessarily unconstitutional. Even more than junk faxes in

1995, junk email imposes almost no cost on the sender yet can overwhelm the recipient. By contrast, the cost of producing and distributing paper communications—the form of communications that the Framers of the First Amendment literally had in mind—provides a natural limitation on the burden they may impose on the recipient, whose "short, though regular, journey" to the "trash can ... is an acceptable burden, at least so far as the Constitution is concerned." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (internal quotation marks omitted).

In general, however, requiring a listener to consent to receiving advertisements will needlessly imperil constitutionally protected speech. As this Court recently held, the government may not impose broader bans on "protected speech, even when the speaker seeks access to the recipient's private home, and even when the speech in question is commercial speech." *Klein*, 584 F.3d at 1204 (internal citation omitted).

In the face of substantial adverse authority, it is telling that the City cannot identify any similar restrictions that have been upheld against a commercial speech challenge. Instead, the City tries to give a permissive sheen to the *Central Hudson* factors and to insist (without on-point support) that the Ordinance is narrowly

tailored to achieve the City's interests.[6] But under the City's characterization of the protections for commercial speech, virtually any restriction would be permissible. Yet decisions from the Supreme Court—including the recent decision in *Sorrell*—establish that the First Amendment seriously curtails government authority to limit commercial speech.

Additionally, the City seriously downplays the implications of its speech restriction. The Yellow Pages have existed since 1883. Marcia Biederman, *New Yorkers & Co.: Between the Lines of the Yellow Pages*, N.Y. Times, Oct. 18, 1998, § 14. But we are aware of no circumstance in which a municipality restricted Yellow Pages distribution so aggressively, with the express intent of "ban[ning] these things." ER539. If permitted to become effective, the City's Ordinance

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[6] In support of a permissive approach to the regulation of commercial speech, the City relies (Br. 29-30) in large part on *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). But eight Justices in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), recognized that the Court's commercial speech doctrine has shifted since *Posadas*. 517 U.S. at 509 (plurality opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.) ("[W]e are now persuaded that *Posadas* erroneously performed the First Amendment analysis."); *id.* at 531-32 (O'Connor, J., joined by Rehnquist, C.J., and Souter and Breyer, JJ., concurring in the judgment) ("The closer look that we have required since *Posadas* comports better [than *Posadas* itself] with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored." (citations omitted)). And this Court has recognized that the Supreme Court has "cast severe doubt" on whether *Posadas* remains good law. *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 600 (9th Cir. 2010), *cert. denied sub nom. Coyote Publ'g, Inc. v. Masto*, 131 S. Ct. 1556 (2011).

would usher in an era in which the government can outlaw any paper communications—or those it disliked—as too burdensome on the environment. No speaker could be confident in overcoming the government's claim that its books or pamphlets consumed too many trees and led to blighted doorsteps or litter in the streets. The First Amendment forecloses this approach.

b. The Ordinance regulates noncommerical speech.

In any event, the Ordinance is not simply a restriction on commercial speech. A Yellow Pages directory contains several categories of information: community information, business listings, and paid advertisements. The community information and the listings are not commercial speech. They are free and do not advertise a particular product.[7] *Cf. Bolger*, 463 U.S. at 66-67.[8] And

[7] The City disputes the characterization of Yellow Pages listings as "free" because "[b]usinesses that pay for commercial telephone service … receive listings as part of the bundle of services that they buy." Br. 25. Under that line of reasoning, nothing is free—not even the listing in the White Pages that residential customers sometimes will pay to avoid (with an unlisted number). In any event, the assertion is provably false; Valley Yellow Pages produces a Yellow Pages directory but does not offer telephone services. ER114. And AT&T provides listings to businesses that use other companies for local telephone service. ER39. Those listings are unambiguously "free."

[8] The City claims (Br. 26) that "business listings by name, address, and telephone number can be regulated as commercial speech," citing *Coyote Publishing*, 598 F.3d 592. But the City misreads *Coyote Publishing*. In that case, this Court held that a Nevada statute banning the publication of advertisements for brothels was properly treated as commercial speech. Under that statute, a handbill publishing the address of a brothel was presumed to be an advertisement subject to regulation. And the Court treated the Nevada statute as a regulation of commercial

the addition of advertisements does not make the entire directory commercial speech. Newspapers are largely sold by for-profit companies. And they are financed to a substantial extent through advertising. This has been true since the early days of the Republic: the *Pennsylvania Packet & Daily Advertiser*—the country's first daily newspaper—consisted of well over half advertising in 1789. *See* LSA's Further Excerpts of Record 1-5. Under the City's approach, even newspapers would constitute commercial speech.

The City also makes the curious claim that its regulation of Yellow Pages is a regulation of commercial speech because the *non*commercial aspects of the directories are not regulated. *See* Answering Br. 25. That is incorrect because the business listings are not commercial speech. *See* note 8, *supra*. In any event, this is not a circumstance in which LSA's members have grafted fully protected speech onto an advertisement in search of greater First Amendment protection. As the City well knew when it passed the Ordinance, the paid advertisements and the business listings go hand in hand because the former finances the latter. *Cf.* Answering Br. 27-28. Accordingly, much as the City could not destroy a

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speech. But it does not follow that the *addresses* constituted commercial speech; rather, the court concluded that a newspaper that printed a brothel's address would not be regulated under the statute. Thus, *Coyote Publishing* can be read only as reaching the unremarkable conclusion that *advertisements themselves* can be treated as commercial speech—and that the presence of contact information can be evidence that a publication is an advertisement. But none of that makes Yellow Pages commercial speech.

newspaper by prohibiting its advertisements and then claiming that the regulation addressed only commercial speech, it cannot regulate the Yellow Pages publication by attacking its advertisements.

c. LSA is likely to prevail on its other theories of relief.

The First Amendment is only one of many constitutional provisions that the Ordinance violates.

First, the Ordinance violates the California Constitution's free-speech guarantee (art. I, § 2(a)). The City recognizes that the free speech clause of the California Constitution is no less protective than the First Amendment. *See* Answering Br. 35-36. And it is, in some respects, more protective. *See* Opening Br. 50; *see also Beeman v. Anthem Prescription Mgmt., LLC*, __ F.3d __, 2012 WL 2775005, at *4 (9th Cir. June 6, 2012) (en banc). Accordingly, for reasons similar to those specified above, LSA is likely to prevail on this ground.

Second, the Ordinance violates the Equal Protection Clauses of the Fourteenth Amendment and the California Constitution. *See* Opening Br. 50-52. The City claims that "[i]f the First Amendment is not violated by statute, … then only rational basis review applies to corresponding equal protection claims." Answering Br. 36. But that is wrong. Statutes discriminating between types of speech are subject to heightened scrutiny. *See, e.g., ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 797-98 (9th Cir. 2006) (holding that the district court erred in

failing to recognize that the Equal Protection Clause requires greater scrutiny when speech is involved). The cases cited by the City do not identify a contrary standard for speech-related equal protection challenges. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (addressing equal protection challenge concerning religious discrimination); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (right of association); *Hoffman v. State Bar of Cal.*, 113 Cal. App. 4th 630 (2003) (rights to vote and to stand for election).

Third, the Ordinance is preempted in part by federal law governing the U.S. Postal Service. The Ordinance regulates the manner in which printed materials can be sent and delivered. But the Postal Service has the authority to determine when printed matter is suitable for postal delivery and contrary local rules are preempted.

The City relies (Br. 37) on *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). In that case, the Court considered whether a New York statute prohibiting racial discrimination in labor organizations applied to an association of postal clerks. The association was a "purely private organization" that "in no way acts as an instrumentality of the federal government in performance of its postal functions." *Id.* at 96. Accordingly, the Court concluded that New York's statute did "not impinge on the federal mail service or the power of the government to conduct it" and was therefore not preempted. *Id.* at 95-96. Unlike the statute at issue in *Corsi*, the City's Ordinance implicates the central function of the postal service—

physically delivering the mail—and conflicts with the postal service's determination that access to the mail system cannot depend on the communicative content of advertising matter. *See* Opening Br. 52-55.

The City also identifies (Br. 38) several state statutes that have survived preemption challenges. But those statutes all regulated contraband, fraud, or unlicensed delivery of highly regulated products and services (such as insurance), and thus prohibited the mailing of materials that were themselves illegal in the jurisdiction.[9] Either the material sent was unlawful to possess, the communication was fraudulent, or the sent material invited the recipient to undertake an unlawful act (such as participating in a lottery or buying insurance from an unlicensed vendor).

Here, in contrast, the City does *not* claim (yet) that the Yellow Pages are illegal; it claims only to be regulating the mode of delivery. But its effort to regulate the mode of delivery is precisely what conflicts with the core responsibility of the Postal Service. The City is regulating certain kinds of

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[9] *See Commonwealth v. Nat'l Fed. of the Blind*, 335 A.2d 832 (Pa. Commw. Ct. 1975), *aff'd* 370 A.2d 732 (Pa. 1977) (prohibition of fraud); *State v. McHorse*, 517 P.2d 75 (N.M. Ct. App. 1973) (prohibition of narcotics distribution); *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596 (Mo. 1993) (prohibition of deceptive conduct); *Conte & Co. v. Stephan*, 713 F. Supp. 1382 (D. Kan. 1989) (prohibition of fraud); *State ex rel. Danforth v. Reader's Digest Ass'n*, 527 S.W.2d 355 (Mo. 1975) (prohibition of lotteries); *Ministers Life & Cas. Union v. Haase*, 30 Wis. 2d 339 (1966) (regulation of mail-order insurance).

distribution of paper precisely because it sees the distribution of paper as creating social costs; but distribution of paper is the Postal Service's principal purpose and its primary means of support. The City's asserted power to outlaw sending commercially supported printed matter through the mail strikes at the heart of the Postal Service's statutory duty to "assure adequate revenues, including retained earnings, to maintain financial stability." 39 U.S.C. § 3622(b)(5).

The City has not identified any laws surviving postal preemption that impose limitations on delivery of printed matter based on its bulk or the arrangement of its lawful contents. Regulations of this nature—including the Ordinance—impermissibly abridge the Postal Service's authority to specify the terms under which it will deliver printed matter.

2. LSA's members will suffer irreparable harm absent a preliminary injunction.

As explained above (at p. 9), settled precedent of this Court makes clear that a showing of likely "loss of First Amendment freedoms for even minimal periods of time, unquestionably" carries a plaintiff's burden to demonstrate "irreparable injury." *Otter*, 682 F.3d at 826 (internal quotation marks omitted); *Thalheimer*, 645 F.3d at 1128. Accordingly, LSA was not required to adduce additional evidence demonstrating the likelihood of irreparable injury. But LSA *did* demonstrate that its members likely will sustain irreparable injury absent injunctive relief—both after the Ordinance becomes effective and before.

The City does not dispute that LSA's members will sustain irreparable injury if the Ordinance is enforced. *See* Answering Br. 13-19. The denial of relief here means that LSA members will be subject to the Ordinance's speech restrictions between the time the City chooses to enforce it and whenever the district court gets around to considering preliminary (let alone final) injunctive relief. But LSA members are likely to be injured even during the City's indefinite and uncertain period of forbearance from enforcement. As the City well knows, publishing a new edition of a Yellow Pages directory is a lengthy process. As the City concedes (Br. 4), the Ordinance was enacted in May 2011 but not scheduled to take effect until May 2012 "to give the Yellow Pages industry time to adapt to the new distribution requirements." This transition period was no accident—Supervisor Scott Wiener suggested at the hearing on the Pilot Program that it was unreasonable to expect the Yellow Pages industry "to transform itself quickly and on a dime" and offered an amendment that would have delayed the effective date another year. SER077-78. In light of its previous recognition of the necessary transition period, the City cannot seriously contend that 30 days is enough for Yellow Pages publishers to transform their business.

Facing the prospect that enforcement of the Ordinance could begin any day, LSA's members must prepare for the Ordinance to take effect at an unknown time in the near future. Those costs include the transition to a new distribution

paradigm, as well as the need to address with advertisers the possibility that the next directory editions will have their circulation seriously curtailed. If a publisher of Yellow Pages directories intends to continue publishing directories in spite of the Ordinance, it would need to begin the process of soliciting opt-ins well in advance of the Ordinance's enforcement date. *See*, *e.g.*, ER18, 21. And the costs of soliciting those opt-ins are extraordinary. ER11-13, 21-23. Moreover, uncertainty about the viability of the next edition of the Yellow Pages deters sales of advertisements, and once customers shift their advertising dollars elsewhere, those accounts are difficult to regain. *See* ER32.

The district court dismissed these injuries as "principally financial harms, i.e., loss of advertising revenue and compliance costs." ER5. As the Tenth Circuit has observed, however, "[i]mplicit in [that] argument is the notion that the value of commercial speech is limited to the pecuniary gain that can be secured through its exercise." *Pac. Frontier*, 414 F.3d at 1236. As a matter of constitutional law, "[c]ommercial speech merits First Amendment protection not simply because it enables sellers to hawk their wares and gain a profit, but because it equips consumers with valuable information and because it contributes to the efficiency of a market economy." *Id.* (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364, (1977)). Indeed, "[a] 'consumer's concern for the free flow of commercial speech

often may be far keener than his concern for urgent political dialogue.'" *Sorrell*, 131 S. Ct. at 2664 (quoting *Bates*, 433 U.S. at 364).

Against this demonstration of irreparable injury during the City's voluntary period of non-enforcement, the City insists (Br. 16) that LSA should have come forward with evidence that "harm … ha[d] become manifest" rather than offering "predictions." That is wrong for two reasons. *First*, The City's position would preclude *all* preliminary injunctions based on threatened rather than ongoing harm. To state the proposition is to refute it: LSA is required only to demonstrate that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. "Injuries to First Amendment rights" satisfy the "irreparable injury" requirement whether they are "currently occurring" or merely "being threatened." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 181 (2d Cir. 2006). *Second*, to the extent the City is demanding more up-to-date evidence, LSA cannot proffer new evidence on appeal.

Accordingly, even if the irreparable injury analysis somehow could exclude the likely period of enforcement between now and the indefinitely postponed final adjudication of this matter, and instead could be limited to the period preceding the enforcement of the Ordinance, the district court erred in finding that LSA had not shown that irreparable injury was likely.

3. The balance of equities and the public interest strongly favor a preliminary injunction.

Finally, the City does not meaningfully dispute that, if LSA has demonstrated a likelihood of success, the balance of equities and the public interest strongly favor a preliminary injunction. As explained above, a showing that the Ordinance likely violates the First Amendment is sufficient to satisfy these requirements on this record, where the City's interests are attenuated and their insubstantiality is underscored the City's willingness to forbear enforcing its Ordinance. The City argues (Br. 40) only that the final two *Winter* factors are not satisfied because there is no First Amendment violation. As explained above and in our Opening Brief, the City is mistaken.

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

The City resists reassignment of this matter to a different district judge who might bring this case to final resolution and end the chilling effects of the Ordinance. The procedures for seeking preliminary injunctive relief exist in part to preserve the rights of regulated parties against unconstitutional state action. The district court's failure even to hold a hearing constitutes an "unusual circumstance[]" that calls into question whether the appearance of justice has been compromised. *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 372 (9th Cir. 2005) (internal quotation marks omitted).

In the case of preliminary relief necessary to prevent irreparable injury, justice delayed is truly justice denied. The Supreme Court just last year recognized that, "in a First Amendment case, … plaintiffs have a special interest in obtaining a prompt adjudication of their rights." *Sorrell*, 131 S. Ct. at 2662. In such circumstances, the disinclination of a district court to decide issues before it is every bit as "troubling" (*id.*) as are efforts by a government to use delay to insulate its unconstitutional enactments from meaningful judicial review.

The City offers two responses. First, it claims that this Court has found that a longer, three-year delay did not warrant reassignment. Br. 41 (citing *Myers v. United States*, 652 F.3d 1021, 1037 (9th Cir. 2011)). But *Myers* was a damages action that did not involve a preliminary injunction and the attendant irreparable injury—much less a First Amendment violation with the recognized need for "prompt adjudication." *Sorrell*, 131 S. Ct. at 2662. Second, the City claims that LSA's request would "encourage judge-shopping in the face of any congested calendar or disfavorable ruling, which itself would undermine the appearance of justice." Br. 41. But there are no indications that the district court favors a particular outcome. LSA's interest is only in bringing this action to resolution before the industry has sustained damage from an unconstitutional ordinance. The pursuit of that goal does not undermine the appearance of justice. To the contrary, maintenance of the appearance of justice requires the "prompt adjudication" of

First Amendment rights (*Sorrell*, 131 S. Ct. at 2662) that the district judge has proven unwilling to provide.

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 restraining the enforcement of Ordinance No. 78-11 until its constitutionality is finally adjudicated.

Respectfully submitted.

Dated: July 20, 2012

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6972 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.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply 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 July 20, 2012.

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