Nos. 11-35399 and 11-35787

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Appellees.

On Appeal from the United States District Court
for the Western District of Washington at Seattle

PETITION FOR REHEARING EN BANC

Date of Decision: October 15, 2012
Judges: Clifton, Smith and Korman

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I. RULE 35(B) STATEMENT

Responding to complaints from citizens who received as much as thirteen pounds of unwanted yellow pages annually, the City of Seattle (the "City") enacted Ordinance 123427 (the "Ordinance") permitting households and businesses to opt out of receiving directories and requiring yellow pages companies to respect that election. Holding that yellow pages are ***not*** commercial speech and the Ordinance is content-based because "it regulates only yellow pages directories," the panel applied strict scrutiny and invalidated the Ordinance as a violation of the First Amendment. *Dex Media West, Inc., v. City of Seattle*, __ F.3d __ (9th Cir. Oct. 15, 2012) (Clifton and Smith, N.R., JJ., and Korman, Sr. Dist. J.) (Appendix A at 12323). The panel reversed the United States District Court for the Western District of Washington (Robart, J.) which held the Ordinance was subject to, and satisfied, intermediate commercial speech review. *Dex Media West, Inc. v. City of Seattle*, 793 F. Supp. 2d 1213 (W.D. Wash. 2011) (Appendix B).

Under the panel's analysis, restrictions on hybrid speech (containing commercial and noncommercial content) must survive strict scrutiny ***whether or not*** the noncommercial speech is severable from the commercial speech to which it is appended. The conclusion that yellow pages are not commercial speech is contrary to the long-standing law of the Supreme Court, this Court and sister circuits requiring that hybrid speech be regulated as commercial speech ***unless*** the

two types of speech are actually "inextricably intertwined."[1] Furthermore, the panel's conclusion threatens important consumer protections. Federal, state, and local governments have legitimate interests in regulating abusive business practices and have enacted numerous restrictions protecting consumers from unwanted solicitation. The panel's decision provides a ready blueprint for commercial entities to evade those legitimate restrictions.

The panel also applied a concept of content neutrality which contravenes the governing standard and renders virtually all regulations content-based. The Ordinance is a content-neutral time, place and manner restriction. The City does not care what message the yellow pages communicate. The City's purposes are indisputably divorced from content. App. A at 12319. The Ordinance provides an effective mechanism to ensure that those who opt not to receive yellow pages will not be forced to bear the burden of receiving and disposing of them.

Appellees the City and Ray Hoffman request rehearing en banc.

[1] *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Hunt v. City of L.A.*, 638 F.3d 703 (9th Cir. 2011); *U.S. v. Schiff*, 379 F.3d 621 (9th Cir. 2004); *Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108 (6th Cir. 1995); *Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854 (3rd Cir. 1984).

II. STATEMENT OF FACTS

The Washington Utilities and Transportation Commission ("UTC") requires local exchange carriers ("LECs") to publish the names, addresses and phone numbers of local exchange customers and customer service information. WASH. ADMIN. CODE § 480-120-251 (2012). Appellants are ***not*** LECs. They earn lucrative profits by combining information purchased from the LECs with paid advertising and listings of businesses by category, product or service, none of which need be published by LECs. ER 206; SER 92, 154.[2]

Before filing suit, Appellant Yellow Pages Association acknowledged that "[t]here is no doubt that Yellow Pages directories are commercial speech …." SER 248. The purpose of yellow pages – both for the yellow pages companies and users – is advertising. SER 403, 408. CRM Associates, the "leading world expert on Yellow Pages," explains the difference between "traditional media" and yellow pages:

> The goal of traditional media was to reach and intrude upon the consciousness of people that are otherwise occupied in some non-shopping activity, such as entertainment or news gathering…. [P]eople generally do not go to most media to seek ads out …. **By contrast, the ONLY reason people use the Yellow Pages is to seek out the ads and the information in those ads.** This sets Yellow Pages apart from every other advertising medium.

[2] The Excerpts of Record ("ER") and Supplemental Excerpts of Record ("SER") were filed with the merits briefing.

SER 412, 344 (emphasis original). Every section of the directory has advertising; few pages do not contain ads. SER 408-10, 492-534; ER 53-54.

Competing companies deliver ***four*** yellow pages annually to each household and business;[3] ***five to thirteen pounds*** per residence. Yellow pages generate approximately 26,000 pounds of waste annually in Seattle at a cost of $190,000 to the City. SER 59.

Facing numerous resident protests and to avoid regulation, Appellant Dex Media created a proprietary opt-out system. In 2010, Dex surveyed a miniscule 542 of the 11,000 Seattle-area residents who opted out through the Dex system and 13% said Dex disobeyed resident opt-out directives. SER 56.

In response, the City Council held seven hearings at which residents complained about the delivery of unwanted yellow pages. SER 399, 358-87, 82-87. The Ordinance established an opt-out registry where residents can elect not to receive yellow pages. It does not apply to the delivery of the unadorned LEC information. Seattle Municipal Code ("SMC") § 6.255.035. Although the Ordinance requires that yellow pages companies obtain a license, *id.* § 6.255.030, the City ***must*** grant it within 20 days unless the applicant fails to comply with the Ordinance. *Id.*§§ 6.255.130, 6.255.050. Each company must pay $0.14 per

[3] *See* https://www.catalogchoice.org/catalogs/search_results?query=98119&commit=Search (last visited Oct. 23, 2012).

directory distributed in Seattle to cover its share of the registry's cost. *Id.* § 6.255.100. The Ordinance requires display on the yellow pages and corresponding websites of information regarding the City's registry. *Id.* § 6.255.110; ER 155.

The City's system has been "wildly more popular among City residents" than Appellants' ineffective ones. ER 83. It is monitored by an independent, non-profit which ensures advertisers comply with consumer directives. It includes meaningful audits and enforcement tools. SER 34, 58-60. The City enforces the Ordinance only when wrongful distribution exceeds 0.5% of opt outs, a threshold which has ***yet*** to trigger enforcement action. SER 31. Thus, the Ordinance has resulted in a distribution error rate 12.5% ***lower*** than Dex's self-reported 2010 error rate.

Granting the City summary judgment, Judge Robart held the Ordinance must be tested as a commercial speech regulation. He ruled that yellow pages have key indicia of commercial speech: they contain many advertisements for many different products; they reference specific products; and the distributors are driven by economic motive. ER 52-54 (citing *Bolger*). He held the noncommercial speech inserted in yellow pages is not "inextricably intertwined" with the directories' commercial speech and, hence, regulation of yellow pages is subject to commercial speech review. ER 58. Judge Robart held the Ordinance satisfied

intermediate scrutiny because the City's interests in waste reduction and enforcing resident privacy were substantial and the Ordinance was a reasonable means of achieving both. ER 61, 63-68.

The panel reversed, concluding the commercial and noncommercial content in yellow pages must be treated as noncommercial speech, subject to strict scrutiny. First, the panel held yellow pages are not akin to the eight-page pamphlet about venereal disease in *Bolger* which the Supreme Court held was commercial speech, despite the fact that, aside from ***one*** mention of the advertiser's name, the entire pamphlet contained noncommercial speech regarding "important public issues." *Bolger*, 463 U.S. 60, 66-68 & n.13. Second, without explanation, the panel ruled that the ads and public service information in yellow pages cannot functionally be separated so yellow pages may only be regulated as noncommercial speech. Third, the panel held the Ordinance content-based because it regulates only yellow pages. Finally, the panel held no part of the Ordinance satisfied strict scrutiny and the panel would not even hold that its hypothetical less restrictive regulation would "necessarily be lawful." App. A at 12339 n.4.[4]

[4] The panel devoted one scant paragraph to ***applying*** strict scrutiny. Without discussing its provisions, the panel simply dismissed the Ordinance as not being the least restrictive means because the City could have used the industry's opt-out program instead. App. A at 12338. Aside from the fact that the panel's alternative is a proven failure, the panel ignored the Supreme Court's directive that strict scrutiny ***does not*** require "that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the

III. ARGUMENT

A. The Panel's Test for Hybrid Speech Fundamentally Conflicts with Commercial Speech Law.

Rehearing en banc is warranted because the panel discerned and then applied an untenable test for regulations impacting hybrid speech which radically diminishes the government's ability to regulate when noncommercial content is mingled with commercial speech. According to the panel, the Supreme Court "seemed" to have utilized a two-part test in *Bolger*, *Riley* and *Fox*. App. A at 12325. The panel held courts must determine "as a threshold matter" if the speech "as a whole constitutes commercial speech" under *Bolger*. *Id.* at 12324, 12331. If the court concludes the speech "as a whole" is not commercial, then the inquiry is concluded and the regulation must satisfy ordinarily fatal strict scrutiny. *Id.* at 12331. Circularly, only if hybrid speech is "as a whole commercial" would the panel ***even consider*** whether its commercial and noncommercial portions are inextricably intertwined. *Id.* at 12325.[5]

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government's legitimate interests," *Fox*, 492 U.S. at 478, a standard the Ordinance readily satisfies.

[5] The panel derived its first prong from a patently wrong interpretation of *Riley*. According to the panel, the *Riley* Court "assumed without deciding that the speech was merely commercial ***as a whole***." App. A at 12325 (quotation marks & citation omitted; emphasis added). The panel continued: "the speech at issue must have already gained commercial character before an 'inextricable intertwin[ing]' analysis is necessary to determine if the speech 'retain[s] its commercial character,' to *retain* some character, speech must have held that character initially." *Id.* at 12326 (citing *Riley*). However, in *Riley* the speech the Court

The panel's approach contravenes the Supreme Court's functional test because the *Bolger* facts do not state a threshold litmus test ***and*** inextricable intertwining requires that the commercial and noncommercial speech ***cannot*** be severed. In *Riley*, the hybrid speech case which first articulated the inextricable intertwining test, the Court did not even mention *Bolger*. 487 U.S. 781. In *Fox*, the most recent Supreme Court hybrid speech case, the Court's test was the opposite of the panel's. ***First***, the Court determined whether at "Tupperware" parties the commercial content (housewares sales) and noncommercial content (discussion of financial responsibility) were "inextricably intertwined." 492 U.S. at 474. In contrast to *Riley*, which concerned inextricably intertwined noncommercial charitable solicitations with a "*required*" commercial statement of the percentage of contributions the solicitors retained as commissions, *id.* (emphasis original), the Court in *Fox* held that

> [b]y contrast, there is nothing whatever "inextricably intertwined" about the noncommercial aspects of these presentations. ***No law of man or of nature makes it impossible to sell housewares without***

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assumed was "merely 'commercial,'" and which "retained its commercial character," was ***not*** the combined commercial and noncommercial speech, but only the speech which "relates to [the solicitor's] financial motivation for speaking." *Riley*, 487 U.S. at 795-96. The Court considered whether this exclusively commercial speech "retains ***its*** commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796 (emphasis added). The panel circularly considered, first, whether the hybrid speech "as a whole" is commercial and then, second, whether the combined speech retains its commercial nature upon the ***addition*** of the ***already-included*** noncommercial speech.

> ***teaching home economics, or to teach home economics without selling housewares***. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Id. (emphasis added).

Only ***after*** the inextricable intertwining analysis did the Court consider *Bolger*'s overall holding, without discussing (let alone applying as a rigid litmus test) the specific facts which were determinative in *Bolger*.

> Including these home economics elements no more converted AFS' presentation into educational speech, than opening sales presentations ***with a prayer or a Pledge of Allegiance*** would convert them into religious or political speech. As we said in *Bolger v. Youngs Drug Products Corp.* …, communications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues…. We have made clear that advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech.

Id. at 474-75 (quotation marks & citation omitted; emphasis added).[6] Hence, the Court pragmatically held "commercial speech is at issue" and tested the regulation under intermediate scrutiny. *Id.* at 475. Judge Robart, but not the panel, did the same in considering the *Bolger* facts. He recognized that yellow pages "contain many advertisements for many different products" and "reference specific products," making yellow pages equivalent to the venereal disease pamphlet in

[6] The Court made plain in *Fox* that courts must look to the speech as a whole, not the isolated ***noncommercial*** content, in considering the *Bolger* facts.

Bolger. ER 53-54. Incredibly, the panel looked only at yellow pages' ***noncommercial*** content to conclude the directory is not "an advertisement" and "it does not refer to a specific product." App. A at 12327 (quotation marks omitted).

The panel also claimed to derive its test from this Court's decision in *Hunt* which the panel mistakenly surmised "appeared to utilize this two-step approach." *Id.* at 12326. But this Court ***did not*** "determine that the ***mixed-content speech*** at issue was commercial as a threshold matter." *Id.* at 12327 (emphasis added). Rather, this Court looked first only at the dominant commercial ***part*** of the hybrid speech: "Plaintiffs clearly propose a commercial transaction. Indeed, ***the core of Plaintiffs' speech*** is directed to their products and why a consumer should buy them." *Hunt*, 638 F.3d at 716 (emphasis added). The panel incorrectly described as the second step in *Hunt*, the conclusion that the "mixed-content speech … did not shed this commercial nature through inextricable intertwining." App. A at 12327. Rather, this Court in *Hunt* looked next to see whether the "core" commercial speech – ***not*** the mixed-content speech – shed its commercial nature through inextricable intertwining ***with*** noncommercial speech: "Further, any ***noncommercial aspect*** of Plaintiffs' speech is not inextricably intertwined with ***commercial speech***." *Hunt*, 638 F.3d at 716 (emphasis added).

So, the panel's notion of a rigid two-part test conflicts with the functional test mandated by the Supreme Court in *Fox* and by this Court in *Hunt*, which asks

whether the "the core of Plaintiff's speech is directed to their products and why a consumer should buy them" and whether that commercial content is inextricably intertwined with noncommercial content. *Id.* Neither of these cases required, as a threshold matter – or at any point – that hybrid speech must satisfy each of the *Bolger* facts before the determinative inextricable intertwining analysis is conducted.

Rather than being a litmus test, the *Bolger* analysis compliments the inextricable intertwining test to determine whether hybrid speech may escape the less restrictive intermediate scrutiny of commercial speech. While "[t]he combination of *all* these characteristics … provides strong support for the … conclusion that the informational pamphlets are properly characterized as commercial speech," the Court emphasized that it did not "mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial." *Bolger*, 463 U.S. at 67 & n.14.

In *Bolger*, the Supreme Court recognized as ***commercial*** "an eight-page pamphlet discussing at length the problem of venereal disease" – a "discussion of [an] important public issue[]" – which contained ***one*** reference to the condom company which sponsored the pamphlet. *Id.* at 62 n.4, 67-68. *Bolger* cannot countenance the panel's opposite conclusion here where ***much less*** public service information is combined with ***much more*** commercial content. The panel

recognized that the regulation in *Bolger* "regulated the [pamphlet] as a whole, not simply the individual advertisement[] contained therein," and the speech "serve[d] more than a commercial purpose," App. A at 12323-24, precisely the same as the Ordinance.

The panel also erred by flipping the *Fox* and *Hunt* inextricable intertwining analysis on its head. According to the panel, "[t]here is certainly no clear link between the yellow pages' noncommercial speech (community information and phone listings) and the yellow pages' commercial speech (a wide array of advertisements) …." *Id.* at 12327. Precisely on this basis, this Court in *Hunt* held the speech was ***not*** inextricably intertwined: "there is simply no meaningful nexus between the products sold (the commercial content) and the information provided (the noncommercial content) that would support a determination that the two are inextricably intertwined." *Hunt*, 638 F.3d at 716.

> As Judge Robart recognized, yellow pages are no different.
>
> > Unlike *Riley* – where the protected charitable solicitation could not be made without the compelled commercial disclosures – and like *Fox* – where housewares could be sold without teaching economics – nothing in the City's Ordinance nor in the nature of these directories requires that their noncommercial aspects, such as maps, listings, and street guides, be combined with advertising. The two aspects of these directories – the commercial and the noncommercial – are therefore not inextricably intertwined.

ER 58. Indeed, at oral argument Appellants conceded that it is "entirely possible" to publish yellow pages' noncommercial content without advertising. FOA at

3:11;[7] *see Hunt*, 638 F.3d at 716 (vendors "could easily sell their wares without reference to any religious, philosophical, and/or ideological element, and they could also express any noncommercial message without selling these wares").

But the panel could not accept this conclusion. Despite its failure to state which "law of man or of nature makes it impossible to sell [everything in yellow pages] without [providing maps of Seattle]," *Fox*, 492 U.S. at 474, the panel could "not see a principled reason to treat telephone directories differently from newspapers." App. A at 12338. The inextricable intertwining of *Riley*, *Fox*, *Hunt* and *Schiff*, to which Judge Robart hewed, and consideration of the essence of the speech at issue, supply the mechanisms for making the principled distinctions the panel failed to make.

Courts have not shied away from testing for inextricable intertwining in mediums of core First Amendment speech such as books and magazines. In *Schiff*, which the panel ignored, this Court concluded that an ***entire book*** could be regulated as commercial speech because its noncommercial parts were not "inextricably intertwined" with its commercial elements. 379 F.3d at 629.[8] This Court held the author could not use the noncommercial part to "piggy back" the commercial part "into full First Amendment protection." *Id.*; *see also Semco*, 52

[7] The first oral argument ("FOA") is available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000007798.

[8] As in *Riley*, this Court in *Schiff* did not even mention *Bolger*.

F.3d at 112 (article in trade publication regulated as commercial speech because there was no inextricable intertwining).

Moreover, while products are advertised in most newspapers, "[t]he *Bolger* criteria are employed to discern whether speech is, in its essence, part and parcel of a proposed commercial transaction." *Am. Future Sys.*, 752 F.2d at 862; *accord Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994) (the Court "has treated disparate situations involving mixed commercial and noncommercial speech in disparate ways, looking to the essential nature of the speech in question."). The essence of newspaper speech is noncommercial notwithstanding that it is financed by advertising, SER 62-64, and the opposite is the case with yellow pages. *Hunt*, 638 F.3d at 717 (when viewed as a whole, "the focus of Plaintiffs' speech is to sell their products as opposed to communicate a particular message to the public"). Unlike newspapers, the yellow pages companies' ***only*** purpose is commercial. SER 80, 84. While newspapers undisputedly include advertising to fund the noncommercial speech which is their primary purpose (thus, inextricable intertwining), yellow pages are not required – by law, business purpose, or financial imperative – to publish any noncommercial

content. *Hunt*, 638 F.3d at 716 ("Nothing in the nature of Plaintiff's products requires their sales to be combined with a noncommercial message.").[9]

The panel did not merely depart from precedent. Its analysis threatens important consumer protections. The panel held that where an advertiser combines commercial and noncommercial content, and the inclusion of the noncommercial content makes the commercial solicitation more profitable, the advertiser will avoid regulation due to strict scrutiny. This approach to hybrid speech jeopardizes, for example, the CAN-SPAM Act which enforces do-not-email directives regarding a "commercial electronic mail message"[10] which means "any electronic mail message the primary purpose of which is the commercial advertisement,"[11] and includes an email containing both advertisements ***and noncommercial speech***.[12] The panel's test also imperils laws like the federal "do-not-call" registry which apply to commercial sales calls which could be combined with noncommercial speech to immunize them from intermediate scrutiny.[13]

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[9] *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) ("Each method of communicating ideas is a 'law unto itself' and that law must reflect the differing natures, values, abuses and dangers of each method.") (quotation marks & citation omitted).

[10] 15 U.S.C. § 7704(4)(i) (2012).

[11] 15 U.S.C. § 7702(2)(A).

[12] 16 C.F.R. § 316.3(a)(3) (2012).

[13] *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228 (10th Cir. 2004).

Yellow pages' noncommercial content is "severable" from its advertising and the Ordinance should be subjected to intermediate scrutiny. *Lungren*, 44 F.3d at 730.[14]

B. The Panel's Treatment of the Ordinance as Content-Based Conflicts with Binding Precedent.

Rehearing en banc also is warranted because the panel wrongly concluded the Ordinance is content-based and thus must satisfy strict scrutiny and "[n]either party disputes" as much. App. A at 12323. Rather, it is content-neutral, triggering intermediate scrutiny, and the City has never wavered on that point. *See, e.g.*, No. 11-35399, Docket Entry 2-10 at 18-20 ("The Ordinance Is Content Neutral"); FOA at 36:00 ("[W]e're not trying to regulate content here. We are trying to regulate secondary effects …."); *id.* at 54:00 (Clifton, J.) ("the content is more form than substance, that is, this isn't viewpoint discrimination"; "there isn't an editorial point of view, … the listings are bland information"); SOA at 41:32 ("the exceptions to this ordinance prove that it's not content based because the

[14] On the same day the panel held that a publication which is overwhelmingly commercial in nature is fully protected speech, another panel of this Court acknowledged the test for commercial speech must be applied with "nuance" and reiterated that the inextricable intertwining test determines the scrutiny level for hybrid speech. In *Charles v. City of Los Angeles*, __ F.3d __, 2012 WL 4857194 (9th Cir. Oct. 15, 2012), this Court reaffirmed that there is a difference between mere intertwining and ***inextricable*** intertwining and that absent ***actual*** inextricable intertwining, strict scrutiny does not apply.

exceptions to this ordinance are publications that are tiny compared to the three-pound yellow pages, but they contain the same type of information").[15]

"The principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of the disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).[16] There is no suggestion that the City cares about the messages the yellow pages communicate. The City's purposes have nothing to do with the yellow pages' content. App. A at 12319; *U.S. v. Chi Mak*, 683 F.3d 1126, 1134 (9th Cir. 2012) (statute is not content-based where its purpose "does not rest upon disagreement with the message conveyed").[17] The City's purposes are similar to those behind laws restricting telephone solicitation which courts deem content-neutral. *See, e.g., Nat'l Fed'n of the Blind v. Fed. Trade Comm'n.*, 420 F.3d 331, 350 (4th Cir. 2005).

The panel nonetheless held the Ordinance was content-based because it "regulates only yellow pages directories." App. A at 12323. But that is just

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[15] The second oral argument ("SOA") is available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000008678.

[16] *Hill v. Colorado*, 530 U.S. 703, 720 (2000) ("government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech").

[17] *Sorrell v. IMS Health, Inc.*, ___ U.S. ___, 131 S. Ct. 2653, 2664 (2011) ("the First Amendment does not prevent restrictions directed at … conduct from imposing incidental burdens on speech").

another way of saying the Ordinance applies to a particular ***medium*** of speech. That a regulation applies only to some modes of speech does not make it content-based. *Reed v. Town of Gilbert*, 587 F.3d 966, 976 (9th Cir. 2009) (application of regulation to only some modes of speech does not make it content-based). The panel's contrary test, moreover, renders virtually all regulation content-based and subject to strict scrutiny: Almost all laws are addressed to some modes of speech, but not others (television but not magazines; radio but not mail). The panel's analysis thus does not merely run directly contrary to settled principles of content neutrality. It subjects almost any time, place, and manner restriction to strict scrutiny as content-based.

IV. CONCLUSION

The City respectfully requests that its petition be granted.

RESPECTFULLY SUBMITTED this 13th day of November, 2012.

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