THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PEACE ACTION OF WASHINGTON, UNITED STATES MISSION OF SEATTLE,

Plaintiffs,

v.

CITY OF MEDINA; HARWOOD T. EDVALSON, in his official capacity as City Clerk for the City of Medina,

Defendants.

NO. C00-1811C

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOTED FOR A HEARING:
THURSDAY, OCTOBER 26, 2000



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

**CONTENTS**






PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

## I. INTRODUCTION

The City of Medina has enacted an ordinance that bars citizens from expounding political or religious beliefs, gathering signatures on political petitions, or distributing political or religious literature within the Medina city limits unless those wishing to engage in such activities first register with the city, disclose their identity and a variety of personal information, undergo a criminal background check by the Medina police, and renew the registration every 14 days. The ordinance directly targets and severely restricts speech afforded the highest levels of protection by the First Amendment. Courts have routinely rejected governmental efforts to impose this sort of sweeping prior restraint on speech, and particularly so when the speech, as here, lies at the very core of our constitutional system. Plaintiffs urge this Court to do the same here.

For these reasons, in this lawsuit, plaintiffs seek a declaratory judgment and injunctive relief barring the City of Medina from enforcing the ordinance and declaring the ordinance unconstitutional on its face.

## II. STATEMENT OF FACTS

In late 1999, the City of Medina imposed time limits on solicitation, restricting door-to-door appeals to the hours of 10:00 a.m. to 7:00 p.m. In response to concerns raised by the American Civil Liberties Union of Washington ("ACLU-WA") and others, and after receiving at least one legal opinion that the time limitations were not constitutionally defensible, the Medina City Council amended the Ordinance to allow solicitation between the hours of 9:00 a.m. and 9:00 p.m. MMC § 5.12.040. At the same time, however, Medina enacted a sweeping licensing scheme for a broad range of political, religious, and charitable speech. MMC §§ 5.12.003(B) and 5.12.060-5.12.110. A violation of any provision of the Ordinance is a misdemeanor, punishable with up to a $500 fine and 90 days imprisonment. MMC § 5.12.020.



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

## A. THE MEDINA SOLICITATION ORDINANCE

In chilling terms, Medina's ordinance directly imposes restraints on any individual or group engaged in political, religious, or charitable speech virtually anywhere within the city limits. Chapter 5.12 of the Medina Municipal Code ("MMC" or the "Ordinance") defines as a "solicitor" all citizens who "seek to disseminate information" or "expound beliefs" or "seek signatures on a petition" or "seek new members of any political, religious or charitable organization" or "seek to distribute written or printed materials." Id. at 5.12.002(B). Such activities are regulated by Medina whether engaged in by going door to door, or place to place, "or by standing in a doorway" or—indeed—"in *any other place* not used by such a person as [a] permanent place of business, or by approaching individuals." Id. (emphasis added).

Solicitors are prohibited from entering property whose owners or occupants have "requested to be placed on a list, to be maintained by the city," of people who do not wish to receive solicitors. MMC § 5.12.003(B)-(C). Citizens of Medina may also request to be placed on a list to receive solicitors only between 9:00 a.m. and 5:00 p.m. MMC § 5.12.003(C).

No person may "solicit" as defined by the Ordinance without a city-issued license. MMC § 5.12.060. In order to receive a license, a solicitor must fill out a detailed application form. The application requires the solicitor's name, address, telephone number, date of birth, description, the nature of the solicitor's business in Medina, and whether the solicitor has been convicted of a crime within the past ten years (including a description of the offense and the punishment, if applicable). MMC § 5.12.070. If a vehicle is to be used, the applicant must provide the vehicle's description and license number. Id. If employed or acting as an agent, the name and address of the solicitor's employer or principal and a description of the relationship must be provided. Id. Applicants must apply in person, establish proof of identification, and be photographed. Id. The Medina police department is then to conduct "a criminal history background investigation of the applicant." MMC § 5.12.080. The City of Medina will issue or deny the license within one business day after the application is completed. MMC § 5.12.060.



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

The Ordinance sets out five reasons a license will be denied or revoked:

(1) any felony conviction in the past ten years;
(2) a misdemeanor conviction "relating to the occupation of a peddler or solicitor" within the last ten years, including any conviction involving moral turpitude, fraud, dishonesty or false statement;
(3) any false or misleading statement on the application;
(4) violation of any provision of chapter 5.12 of the MMC; or,
(5) failure to provide all information requested on the application.

MMC §§ 5.12.080-5.12.110. The Ordinance does not state whether this list is exclusive. If a license is denied or revoked, the applicant may appeal to the Medina city manager or a designee within fourteen days. MMC § 5.12.120. The Ordinance does not specify the procedures or standards for the city manager to determine the validity of the denial or revocation. See id.

If a license is issued, the city will prepare photo identification, which the solicitor is required to "prominently display on [his or her] person." MMC § 5.12.090. The Ordinance does not specify whether the license will display the photo or other personal information about the solicitor. Solicitors must also carry at all times the list of property owners compiled by the city who have requested that solicitors not enter their property. MMC § 5.12.003(D). The solicitation license is valid for fourteen days, and a solicitor must reapply in person after the expiration. MMC § 5.12.060.

The stated purpose of the Ordinance is "to establish reasonable time, place and manner restrictions on peddlers and solicitors to protect and promote the public health, safety and welfare." MMC § 5.12.001. The Ordinance does not specify any other governmental interest advanced by the restrictions.

## B. PLAINTIFFS' SOLICITATION ACTIVITIES IN MEDINA

### 1. Plaintiff Peace Action of Washington

Plaintiff Peace Action of Washington ("Peace Action") is a nonprofit membership organization that engages in grassroots organizing and advocates for peace, justice, and reduction of violence. During election years, Peace Action's members draft and distribute voter guides door-to-door to educate the public



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

on candidates' positions and voting records. Peace Action is currently focused on distributing information to the public on the positions of candidates for federal office prior to the November 7, 2000 elections. To obtain funds necessary to sustain its educational and lobbying activities, Peace Action occasionally hires a canvasser to disseminate information and canvass door-to-door in various localities including Medina. Peace Action has a strong interest in educating voters in Medina before the upcoming November elections. See Carpenter Decl. ¶¶ 3, 6.

**2. United States Mission of Seattle**

Plaintiff United States Mission of Seattle ("Mission") is a 501(c)(3) nonprofit religious corporation and an interdenominational Christian-based organization. The Mission operates residential facilities as a transitional program for homeless persons who are willing and able to work. Residents of the Mission engage in door-to-door religious solicitation on behalf of the Mission to practice the "Social Gospel," inspired by Chapter 25 of the Bible's Book of Matthew. Door-to-door fundraising by its residents is the Mission's primary means of support for its social programs.

**C. DEFENDANTS HAVE BEEN GIVEN ADEQUATE NOTICE OF THIS MOTION**

Defendants have been notified of this motion prior to filing in accordance with Fed. R. Civ. P. 65(a)(1). A copy of this motion and its supporting memorandum and declarations were served on defendants prior to their filing with this Court. Declaration of Sarah K. Morehead, ¶ 2. In addition, counsel notified the Medina City Attorney by letter transmitted by facsimile and by telephone of the filing of this lawsuit, the nature of this motion, and of plaintiffs' request that the Court consider this motion on Thursday, October 26, 2000. Id. ¶ 2.

The lawsuit and plaintiffs' objections to the Ordinance are in any event most assuredly of no surprise to the City. The ACLU-WA has lobbied the City of Medina on numerous occasions to revoke or amend the various unconstitutional versions of this Ordinance. See Sheehan Decl. ¶ 2. ACLU-WA has called and sent several letters to the Mayor of Medina, the City Council, and the City Attorney outlining the



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

constitutional deficiencies of the Ordinance. See Sheehan Decl. ¶¶ 3-10 & Exs. B-F. The ACLU-WA has also specifically informed the City in person at the City Council meeting in October 2000 that the ACLU-WA is "preparing to challenge Medina's unconstitutional law" on behalf of its clients. Id. ¶¶ 7, 10.

## III. ARGUMENT

The city's Ordinance is facially invalid under the First Amendment and similar provisions of the Washington State Constitution as an unconstitutional prior restraint on speech. It is indeed hard to imagine an ordinance more directly aimed at speech more highly valued and more jealously protected by our Constitution than speech designed to "expound beliefs" or "seek signatures on a petition" or "seek new members of any political, religious, or charitable organization." Prior restraints on such protected speech face formidable constitutional obstacles, strict scrutiny, and "a heavy presumption against . . . constitutional validity." Southeastern Promotions v. Conrad, 420 U.S. 546, 558 (1975) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70). The reason for this, as the Supreme Court has explained, is "deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." Id. at 559. The Ordinance is not by any stretch of the imagination a narrowly tailored time, place and manner restriction, and constitutes nothing less than a blatant and impermissible prior restraint on speech. The Ordinance also violates procedural due process, because of its vagueness and the undue discretion given to public officials. Accordingly, plaintiffs urge this Court to enter an Order restraining enforcement of the Ordinance and scheduling a hearing for a preliminary injunction.

### A. STANDARDS FOR GRANTING PRELIMINARY INJUNCTIVE RELIEF

To obtain preliminary injunctive relief, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor. See Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998). These are not separate tests, but rather



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

"opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir. 1997), cert. denied, 118 S. Ct. 1795 (1998) (quotation and citation omitted). A temporary restraining order and preliminary injunction are necessary in this case as "a device for preserving the status quo and preventing the irreparable loss of rights before judgment." See Barahona-Gomez v. Reno, 167 F.3d 1228, 1234 (9th Cir. 1999).

## B. MEDINA'S SOLICITATION ORDINANCE CAUSES IRREPARABLE HARM TO PLAINTIFFS FREE SPEECH RIGHTS, AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF AN INJUNCTION

### 1. Medina's Solicitation Ordinance Causes Irreparable Harm to Plaintiffs' First Amendment Rights

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." International Soc'y for Krishna Consciousness v. Kearnes, 454 F. Supp. 116, 125 (E.D. Cal. 1978). By requiring Plaintiffs to obtain a City-issued license under threat of criminal sanctions and imprisonment prior to "seek[ing] signatures on a petition," or "expound[ing] beliefs" in a public forum within the City of Medina, the disputed Ordinance denies Plaintiffs their right to speak freely regarding politics and religion, subjects undeniably protected by the full power of the First Amendment. See, e.g., McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334, 347 (1995) (noting that any burden on political speech will be subject to the "exacting scrutiny"); Meyer v. Grant, 486 U.S. 414, 422 (1988) (noting that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes" and is therefore fully protected speech).

The regulated activity is the very core of protected First Amendment activity, traditional political speech, for which "the importance of First Amendment protections is 'at its zenith.'" Meyer v. Grant, 486 U.S. 414, 425 (1988). Indeed, Medina's list of regulated activity is a virtual catalog of the most stringently



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

protected speech activity. See, e.g., Buckley v. American Constitutional Law Found., Inc., 119 S. Ct. 636, 639 (1999) (petition circulation); McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334, 347 (1995) (literature distribution); Riley v. National Fed'n of the Blind, 487 U.S. 781, 788-89 (1988) (charitable solicitation).

Moreover, the Ordinance does not just burden the plaintiffs' free speech rights for "minimal" periods of time. The Ordinance contains no procedural safeguards to ensure that appeals from denials or revocations of licenses will be promptly addressed. In the meantime, an applicant's speech rights are suspended, perhaps indefinitely.

Plaintiffs have an interest in speaking in Medina year-round, but the need for protection of their free speech rights is especially critical right now, as the November elections and the holiday season approach. It has been Plaintiff Mission's experience that solicitation activities are most effective during the holiday season. See Jones Decl. ¶ 6. Plaintiffs rely heavily on charitable contributions for their very existence. See Jones Decl. ¶ 3. Peace Action has a strong interest in educating voters in Medina in the few weeks remaining before the November elections. See Carpenter Decl. ¶¶ 3, 6. Without injunctive relief, plaintiffs may be precluded from or severely limited in their ability to conduct these activities in any public forum in Medina during the time that their speech will have the greatest impact. See Grossman v. City of Portland, 33 F.3d 1200, 1206 (9th Cir. 1994) (finding permit requirement unconstitutional in part because it chilled speech and, by imposing a "procedural hurdle" and delay in waiting for approval of permit application, it restricted speakers' ability to "'respond to immediate issues"' which is necessary for effective political speech) (internal citations omitted).

Finally, plaintiffs' free speech interests will be severely burdened in the event their request for a license is denied and they are unable to engage in petitioning, canvassing, or other public educational activities in any public forum in Medina. Peace Action will be precluded from educating voters in Medina on candidates' records prior to the upcoming elections, and the Mission will be unable to practice the social gospel or solicit necessary contributions in Medina. See Jones Decl. ¶¶ 4-6; Carpenter Decl. ¶¶ 5, 6. By



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

restricting both the speakers from plaintiffs' organizations and the audience the plaintiffs are able to reach, the Ordinance severely restricts plaintiffs' free speech rights. See, e.g., Meyer, 486 U.S. 422-23.

**2. The Public Interest Tips the Balance of Hardships in Favor of an Injunction**

The public interest overwhelmingly supports issuance of a preliminary injunction in these circumstances. In disputes involving the exercise of First Amendment rights, injunctive relief is liberally granted. The Supreme Court has held that cases involving First Amendment rights, "which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate."' Elrod v. Burns, 427 U.S. 347, 373 (1976). Where the public interest is involved, as it clearly is in this case, the court must also take the public's interest into account. Miller v. California Pac. Med. Ctr., 991 F.2d 536, 540 (9th Cir. 1993), vacated on other grounds Miller ex rel NLRB v. California Pac. Medical Ctr., 19 F.3d 449 (9th Cir. 1994); International Soc'y for Krishna Consciousness v. Kearnes, 454 F. Supp. 116, 125 (E.D. Cal. 1978) ("The protection of constitutional rights is always in the public interest."). The balance of interests clearly favors granting the proposed injunctive relief to allow the Plaintiffs to express their views, and the community to hear them, without excessive burdens on those rights. Although the City maintains that the Ordinance "will promote the public health, safety and welfare," it offers no support for its bald assertion—no legislative findings, no detailed description of the interests supposedly served. Even if this sort of licensing scheme could be constitutionally defended—which plaintiffs dispute—the record on this Ordinance is decidedly barren of any compelling city interests that would warrant such a blanket prior restraint on constitutional speech. The Ordinance is not narrowly tailored, nor does it serve any compelling interest. The public interest, in short, tips the balance of hardships sharply in favor of an injunction.

**C. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

Plaintiffs assert, in this lawsuit, a claim for injunctive relief pursuant to 42 U.S.C. § 1983. Section 1983 provides a cause of action for the deprivation of any federally protected right by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U.S.C. §



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

1983. To prove a violation of Section 1983, Plaintiffs must show that Medina's Ordinance (1) deprives them of a right secured by the Constitution, and (2) Medina and its officials acted under color of law. See West v. Atkins, 487 U.S. 42, 48 (1988); see also Collins v. Womancare, 878 F.2d 1145, 1147 (9th Cir. 1989). Medina unquestionably acted under color of law in enacting its ordinance. The Ordinance also unquestionably deprives plaintiffs of their rights.

**1. The Ordinance Is Facially Unconstitutional**

The Medina Ordinance infringes speech that lies at the center of our constitutional values. On its face, the Ordinance prohibits a broad range of speech, including political and religious speech, that has historically been afforded the highest level of Constitutional protection. See, e.g., Buckley, 525 U.S. at 205 (striking down restrictions that unjustifiably inhibited the circulation of ballot-initiative petitions); McIntyre, 514 U.S. at 347 (noting that law burdening distribution of pamphlets burdens "core" political speech must meet "exacting scrutiny," requiring narrow tailoring to serve an overriding state interest); Riley, 487 U.S. at 796 (protecting charitable solicitation as "fully protected speech" because commercial and advocacy purposes are "inextricably intertwined."); Meyer v. Grant, 486 U.S. 414, 422, 424-25 (1988) (holding that circulation of petition involves "core political speech" and falls squarely within the protections of the First Amendment).

The Ninth Circuit approves of facial constitutional challenges to those statutes or ordinances "directed narrowly and specifically at expression or conduct commonly associated with expression." See Roulette v. City of Seattle, 97 F.3d 300, 305 (9th Cir. 1996). Plaintiffs hence can entertain a facial challenge to the Medina solicitation ordinance because the ordinance is directed at expression or conduct commonly associated with expression. See MMC §§ 5.12.001, 5.12.002; Perry v. Los Angeles Police Dep't, 121 F.3d 1365 (9th Cir. 1997) (permitting facial challenge to ordinance banning sales and solicitation of donations), cert. denied, 140 L. Ed. 2d 511, 118 S. Ct. 1362 (1998). Further, "because plaintiffs'



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

claims are rooted in the First Amendment, they may argue the impact of the ordinance on their own expressive conduct, as well as the expressive activities of others." Perry, 121 F.3d at 1368.

Free speech is granted even more protections under Article I, § 5 of the Washington Constitution. State v. Reece, 110 Wn.2d 766, 778 (1988); Collier v. City of Tacoma, 121 Wn.2d 737, 748 (1993). For statutes that impinge on speech, Washington courts apply a stricter standard under the state constitution that is fully justified by its broad language. Id.

**2. The Ordinance Is Unconstitutional as Applied to the Plaintiffs**

The Ordinance dramatically and impermissibly restricts Plaintiffs' free speech rights. The Plaintiffs are organizations dedicated to educating the public on their religious and/or political messages, and the Ordinance severely limits their ability and opportunity to communicate those messages to the citizens of Medina. The Mission, for example, has not sought a license to solicit in Medina because many of its members have some type of criminal history. See Jones Decl. ¶ 3. Peace Action is concerned that Medina's intrusive and time-consuming licensing requirement will reduce the number of individuals willing to volunteer to solicit and educate in Medina, severely limiting Peace Actions' efforts to educate voters in Medina and obtain contributions necessary to continue these efforts. See Carpenter Decl. ¶¶ 5, 6.

Furthermore, the Ordinance sharply restricts the plaintiffs' ability to canvass and solicit charitable contributions within City limits, which, as detailed above, are fully-protected activities. Because the Ordinance is so overbroad, it prevents the plaintiffs from seeking contributions and expressing their beliefs in virtually every public forum within the City limits without a City-issued permit. MMC § 5.12.002(B). Even if the Ordinance allowed the Plaintiffs alternate forums to express their beliefs, plaintiffs have the right to advocate their cause and select the most effective forum for doing so. Meyer v. Grant, 486 U.S. 414, 424 (1988) (even if individuals "remain free to employ other means to disseminate their ideas[, it] does not take their speech . . . outside the bounds of First Amendment protection.").



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

### 3. The Ordinance Is an Improper Prior Restraint

By requiring all "solicitors" to obtain a City-issued license prior to expounding beliefs, or seeking new members for a political or religious group, or doorbelling, or distributing political or religious literature within the City of Medina—and even in traditional public forums—the Ordinance impermissibly imposes a prior restraint on the exercise of free speech. Because of their powerful chilling effect, prior restraints are *presumptively* unconstitutional. Carroll v. President of Princess Anne, 393 U.S. 175, 180-81 (1968).

A prior restraint exists when public officials exercise "the power to deny use of a forum in advance of actual expression." Southeastern Promotions v. Conrad, 420 U.S. 546, 553 (1975). A prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Although prior restraints are not *per se* unconstitutional, a prior restraint bears '"a heavy presumption against its constitutional validity."' Southeastern Promotions, 420 U.S. at 558 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). In reviewing—and striking down—pre-registration requirements for solicitors, the Ninth Circuit wrote that "[a]ny 'prior restraint' . . . must be held unconstitutional, unless no other choice exists." Rosen v. Portland, 641 F.2d 1243, 1250 (9th Cir. 1981) (holding that one-day advance notice requirement for demonstrating or leafleting in airport terminal was unconstitutional prior restraint); Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1289-90 (D.C. Cir. 1990) (invalidating permit requirement for persons wanting to engage in free speech activities in Washington subway as prior restraint).

The Ordinance's licensing requirement constitutes a prior restraint on the speech of any person fitting Medina's sweeping definition of "solicitor." The Ordinance regulates all forms of communication with the public by groups and individuals. Any person who wishes to expound beliefs, by uttering a few words or by silently distributing literature, is subject to advance registration or arrest, and incarceration, for failing to do so. The public park, the street corner, and even private doorsteps are not exempted. Those who do not



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

apply for a permit, or whose application is denied or revoked, are prohibited from exercising their speech rights virtually anywhere within the City limits.

The burdens of this prior restraint are amplified by the short duration of the license and the onerous application process. Medina's solicitation license is only valid for 14 days and the application must be made individually, in person. MMC § 5.12.060. This requires every speaker to reapply for a license every two weeks just to continue speaking. In Rosen, the Ninth Circuit found that similar advance registration requirements were an unconstitutional burden on speech in an airport context. Rosen, 641 F.2d at 1249 ("[Registration requirements] drastically burden free speech. They stifle spontaneous expression. They prevent speech that is intended to deal with immediate issues."). The prior restraint imposed by the Ordinance is even more egregious than that in Rosen because the Ordinance does not limit speech in a single public forum, but attempts to eliminate unlicensed speech from the every part of the City except for the speaker's "permanent place of business," if he or she has one. See MMC § 5.12.002(B).

The Ordinance's licensing scheme also fails to provide adequate procedural safeguards that could limit the potential harm of a prior restraint on speech. See Southeastern Promotions, 420 U.S. at 559 (citing Bantam Books, 372 U.S. at 71). To license speech, the censor bears the burden of proving that the expression is unprotected, the censor's decision is appealable, and the censor must either issue a license or obtain a court order restraining publication within a specific and brief period of time. See, e.g., Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); see also Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1101 (9th Cir. 1998); Adult Entm't v. Pierce County, 57 Wn. App. 435, 444 (1990).

The Ordinance's procedural protections for individuals whose license requests are denied or revoked are insufficient to pass constitutional muster. Although the applicant must file an appeal within fourteen days, the City provides no guarantee that it will respond at any time, much less expeditiously. MMC § 5.12.120. In the meantime, the applicant's speech rights are suspended, violating the requirement that "an administrative licensing scheme must provide a stay of [license revocation or suspension] pending



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

judicial review." JJR Inc. v. City of Seattle, 126 Wn.2d 1, 10-11 (1995). As "[a] scheme that fails to set reasonable time limits on the decision-maker," the Ordinance's licensing process "creates the risk of indefinitely suppressing permissible speech." FW/PBS v. City of Dallas, 493 U.S. 215, 227 (1990). Lack of procedural protections in this licensing system permits the City to terminate the exercise of free speech rights for substantial periods of time before adequate review.

**4. The Ordinance's Identification Requirement Is Unconstitutional**

The Ordinance demands that all applicants for a license to speak on behalf of political, religious or charitable organizations identify themselves in their application. Applicants must supply the City with name, date of birth, description, address, telephone number, and the nature of their business. Such a requirement has a chilling effect and is unconstitutional. See Talley v. California, 362 U.S. 60, 63-64 (1960); Rosen, 641 F.2d at 1250. In Talley, the Supreme Court invalidated an ordinance that prohibited the distribution of pamphlets unless they contained the names of the persons who prepared, distributed, and sponsored them. The Court held the ordinance unconstitutional on the ground that "identification and the fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Talley, 362 U.S. at 65. Similarly in Rosen, the Court invalidated an ordinance requiring speakers in an airport to identify themselves and their sponsors to State authorities, noting "the realities of 'chill and harassment' inherent in [such] an ordinance." Rosen, 641 F.2d at 1251-52. ("The right of those expressing political, religious, social or economic views to maintain their anonymity is historic, fundamental, and all too often necessary. The advocacy of unpopular causes may lead to reprisals not only by the government, but by . . . society in general."). Here, the identification requirement similarly tends to restrict freedom of expression in Medina, particularly among groups like plaintiffs who have historically taken to public forums to promote their causes. The requirement violates the federal and Washington constitutions and should be enjoined.



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

### 5. The Ordinance Is an Improper Time, Place and Manner Restriction

The Medina Ordinance implicates our most protected speech activities: communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes and religious beliefs. Furthermore, the Ordinance regulates speech in a public forum based on the content of the speech. Although the government may impose reasonable restrictions on the time, place, and manner of protected speech, see, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986), the restrictions must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Under the broad language of Article 1, § 5 of the Washington Constitution, the state must show that its interest in the restriction on speech is *compelling*. Collier v.City of Tacoma, 121 Wn.2d 737, 748-49 (1993); Bering v. Share, 106 Wn.2d 212, 234 (1986), cert. dismissed, 479 U.S. 1050 (1987). The Medina ordinance fails under any level of scrutiny.

#### (a) The Ordinance Is a Content-Based Restriction on Protected Speech

First, Medina's Ordinance restricts speech based on its content. "Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech.'" Ward, 491 U.S. at 791. Ordinarily, the Ninth Circuit reviews "regulations of solicitation [for money] . . . as content-neutral restraints of speech." Los Angeles Alliance for Survival v. City of Los Angeles, 157 F.3d 1162, 1164 (9th Cir. 1998) (reviewing ordinance that regulated only harassment and "aggressive" solicitation); see also United States v. Kokinda, 497 U.S. 720, 730 (1990). The Medina Ordinance, however, directly targets speech seeking "charitable contributions," "signatures on a petition," or "new members of any political, religious, or charitable organization." The Ordinance's overly broad definition of solicitation affects a vast range of communication based on the content of that speech.



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

The Ordinance is also content-based under Washington law "in that [it] classif[ies] permissible speech in terms of subject matter." See Collier, 121 Wn.2d at 753. In Medina, one is not free to expound on matters of politics, religion, or charity without a license. Arguably, those who wish to speak about other matters—such as sports, the stock market, the weather—may do so without first obtaining a license. The Ordinance, accordingly, impermissibly discriminates on the basis of the subject matter of a speaker's message. See, e.g., Collier, 121 Wn.2d at 753 ("Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny") (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) and Burson v. Freeman, 504 U.S. 191 (1992)). Moreover, determining whether a solicitation is for charitable, religious, or political purposes necessarily turns on the content of the message. See Association of Cmty. Orgs. For Reform Now, ("ACORN") v. Municipality of Golden, 744 F.2d 739, 750 & n.9 (1984) (citing Bolger v. Youngs Drug Prods., Corp., 463 U.S. 60 (1983)); Cantwell v. Connecticut, 310 U.S. 296 (1940)). There is no rational basis, much less a significant or compelling one, for the City to selectively regulate speech related to charitable, religious, and political organizations.

**(b) The Ordinance Is Not Narrowly Tailored to Serve a Compelling State Interest**

Although Medina has asserted benign justifications for its regulation of "solicitors" and "peddlers," the city cannot show a reasonable fit between its interests and the scope of the Ordinance as required under the state and federal constitutions. See, e.g., Ward, 491 U.S. at 791; Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980); Collier, 121 Wn.2d at 753-54; Bering, 106 Wn.2d at 233-34. First Amendment freedoms are not to be sacrificed in the pursuit of a legitimate governmental objective. Hynes v. Mayor of Oradell, 425 U.S. 610, 616-17 (1976). Even accepting that "protect[ing] and promot[ing] the public health, safety and welfare" can be a legitimate government interest, the Ordinance is not sufficiently tailored to further that objective. See NAACP v. Button, 371 U.S. 415, 438



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

& n.8 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citations omitted).

The Medina Ordinance is not narrowly tailored because it fails to provide adequately for both speakers' and listeners' speech rights. It is patently over-inclusive, sweeping too wide in its regulation of individuals and organizations. Narrow tailoring requires that the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward, 491 U.S. at 799. Put another way, "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." Project 80's v. City of Pocatello, 942 F.2d 635, 638 (9th Cir. 1991).

The city's broad objective of protecting its residents can be achieved by much less restrictive means. The relationship between crime and solicitation is tenuous at best. See, e.g., id. at 638 ("[T]here is little evidence that the ordinances [prohibiting door-to-door solicitation] protect residences from crime."); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1256-58 (1986) (finding no evidence to support a correlation between evening hours solicitation and crime); City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1556 (7th Cir. 1986), aff'd without opinion, 479 U.S. 1048 (1987). While protecting people from crime is a significant governmental interest, "mere speculation about danger" is not significant enough to justify limits on free speech. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1228 (9th Cir. 1990); see also Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969).

Where, as here, a regulation is neither content neutral nor narrowly tailored, it cannot be justified as a proper time, place or manner restriction, regardless of whether alternate channels of communication are left open. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430 (1993).

**6. The Ordinance Allows Public Officials Excessive Discretion**

The burdens of the prior restraint and overly broad time, place, manner restriction of the Ordinance are exacerbated by the excessive discretion given to City officials to deny licenses and appeals. Whether



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

the Ordinance is viewed as a prior restraint or a time, place, and manner restriction, the decision of whether to grant or deny a license must always be content-neutral and rule-based, never vesting discretionary authority in an official. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) (every license scheme must contain "narrow, objective, and definite standards" and not the "appraisal of facts, the exercise of judgment, and the formation of an opinion," because "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted") (internal quotations and citations omitted). The success of a facial challenge to the Ordinance on the grounds that it "delegates overly broad discretion to the decision-maker rests not on whether the administrator has exercised his discretion in a content-based manner, *but whether there is anything in the ordinance preventing him from doing so*." Id. at 133 (emphasis added).

There is nothing in the Ordinance that prevents City officials from exercising their discretion in a content-based manner because the Ordinance contains inadequate standards to guide officials in deciding whether to grant a license. The Ordinance mandates denial of a license if one of five listed factors is found to exist but does not state that the listed reasons are exclusive. Thus, a City official may choose to deny a license based on other, subjective factors. Without clear, objective guidelines to direct City officials, the Ordinance cannot pass constitutional muster. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (holding that, even if content-neutral, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

And, although the Ordinance lists five reasons that a license "shall be denied," the licensure process grants City officials discretion in interpreting the vague reasons and deciding whether to deny an application. MMC § 5.12.080. For example, MMC § 5.12.080(B) allows a license application to be denied if the applicant has, in the past ten years, been convicted of "a misdemeanor relating to the occupation of a peddler or solicitor" or "misdemeanors involving moral turpitude." Such nebulous standards provide



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

insufficient guidance to an official to determine whether to deny free speech rights. In Shuttlesworth v. City of Birmingham, the Supreme Court invalidated a municipal ordinance that empowered a public official to deny a parade permit if the proposed parade would be detrimental to the "public welfare, peace, safety, health, decency, good order, morals or convenience." Shuttlesworth, 394 U.S. at 149. The Supreme Court held that the use of a public forum cannot be conditioned upon an official's opinion as to the harmful consequences that might result. Id. at 153; accord Kunz v. New York, 340 U.S. 290, 293-94 (1951). Discretion in public officials must be circumscribed rather than unfettered as it in this Ordinance. Shuttlesworth, 394 U.S. at 153 (explaining that a "municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak . . . or parade, according to their own opinions regarding the potential effect of the activity in question.").

In addition, the Ordinance gives Medina officials the power to deny or revoke a license to a speaker who has committed a crime. MMC § 5.12.080(B), (D). The courts have repeatedly rejected attempts to deny speech permits based on past misconduct. See, e.g., Kunz, 340 U.S. at 315 (denial of permit application for public worship based on disorders caused by applicant's prior worship meetings constituted improper prior restraint); see also Fernandes v. Limmer, 663 F.2d 619, 629-30 (5th Cir. 1981) (striking down ordinance which denied permit to speak in airport to an individual who had been convicted of an offense involving "moral turpitude" because the mere fact that "the applicant has been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the future"). Washington's Supreme Court has held that the state "constitution does not permit a licensing agency to deny any citizen the right to exercise one of his fundamental freedoms on the grounds that he has abused that freedom in the past." Seattle v. Bittner, 81 Wn.2d 747, 756 (1973) (holding that denial of license to show movies because of previous violation of obscenity law was unconstitutional).

Finally, the potential for bias on the part of the decisionmaker under this Ordinance is great. See MMC § 5.12.110. The city clerk or its designee, faced with the decision of whether or not to revoke a



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

license, could favor some speech or some speakers. Allowing a public official the discretion to favor certain speech based on its content and/or the speaker violates the First Amendment. See, e.g., Gaudiya Vaishnava Soc'y v. San Francisco, 952 F.2d 1059, 1065-66 (9th Cir. 1991) (a law cannot "condition the free exercise of First Amendment rights on the 'unbridled discretion' of government officials" because "such discretion grants officials the power to discriminate and raises the specter of selective enforcement on the basis of the content of speech.") (quoting NAACP Western Region v. City of Richmond, 743 F.2d 1346, 1357 (9th Cir. 1984)). This Ordinance has an enormous potential for abuse and discrimination by state actors.

**7. The Ordinance Violates Procedural Due Process**

The Ordinance violates procedural due process because it is impermissibly vague and lacks adequate procedural safeguards. To sustain a procedural due process claim, Plaintiffs must show that the City's Ordinance deprives Plaintiffs of their liberty interests without adequate procedures.

**(a) The Ordinance Is Too Vague and Impinges on Protected Speech**

Medina's solicitation Ordinance is written in terms so vague that ordinary people would not be able to determine what conduct is prohibited. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (defining the test for vagueness). While the void-for-vagueness doctrine was originally developed in the criminal context, courts have imported this due process principle into the First Amendment setting. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1266 (3d Cir. 1992).

Courts require even greater precision when laws define criminal offenses or impinge on protected speech. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); see also Marks v. United States, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values."). The precision is necessary to prevent the chilling effect of uncertain language. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked"' Grayned, 408 U.S. at 109 (quoting



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). Thus, if an ordinance "interferes with the right of free speech. . ., a more stringent vagueness test should apply." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); see also Hynes, 425 U.S. at 620 ("The general test of vagueness applies with particular force in review of laws dealing with speech."); Belle Maer Harbor v. Charter Township of Harrison, 170 F.3d 553, 557 (6th Cir. 1999) ("An enactment . . . reaching a substantial amount of constitutionally protected conduct may withstand facial constitutional scrutiny only if it incorporates a high level of definiteness.").

The two goals of the vagueness doctrine are to: (1) ensure fair notice to citizens and (2) provide clear standards for law enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983); Belle Maer Harbor, 170 F.3d at 556. The first goal requires that citizens understand what a law means. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Medina's Solicitation Ordinance violates the first goal of the vagueness doctrine because it does not clearly specify what activities require a license and what grounds are sufficient for denial of a license.

The second goal of the vagueness doctrine is to require precise standards for enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). The Ordinance does not ensure that the City will grant the solicitation licenses in a fair and non-discriminatory manner. Medina officials have broad discretion to approve, deny, or revoke the solicitation licenses. This Court should strike down regulations that grant officials undue discretion to determine whether a given activity contravenes the law's mandates. See Kreimer, 958 F.2d at 1266; City of Chicago v. Morales, 527 U.S. 41 (1999) (holding loitering



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

ordinance void for vagueness because it allowed virtually untrammeled discretion by the police in enforcement); Kolender v. Lawson, 461 U.S. 352 (1983) (striking down ordinance that requires persons to identify themselves and their purpose to police on demand); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (rejecting ordinance in part because of its "obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens").

Vague laws that impinge on protected speech are especially dangerous because they fail to provide precise standards for enforcement:

> The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors. . . . We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness "doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." Thus, a statute or ordinance offends the First Amendment when it grants a public official "unbridled discretion" such that the official's decision to limit speech is not constrained by objective criteria, but may rest on "ambiguous and subjective reasons."

United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 359 (9th Cir. 1998) (citations omitted). This vague and ambiguous Ordinance should be enjoined because it gives unbridled discretion to Medina City officials to restrict speech.

**(b) The Ordinance Does Not Specify Adequate Procedures for Protecting First Amendment Rights**

The Ordinance's licensing system also denies plaintiffs procedural due process. Procedural due process requires that the government provide a fair process before depriving a person of a constitutionally protected property or liberty interest. See, e.g., Santosky v. Kramer, 455 U.S. 745, 758-59 (1982). "We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

protection of 'life, liberty or property'; if protected interests are implicated, we must then decide what procedures constitute 'due process of law.'" Ingram v. Wright, 430 U.S. 651, 672 (1977) (citations omitted). The Plaintiffs' rights to free speech and association are protected rights under the Constitution. The procedures established by the Medina City Council are not sufficient to meet the stringent requirements for the denial of these fundamental rights.

The test for due process is determined by balancing: (1) the private interest that will be affected by the state action; (2) the risk of erroneous deprivation through the procedures used; and (3) the governmental interest, including additional cost and administrative burdens that additional procedures would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner." Roley v. Pierce Co. Fire Prot. Dist. No. 4, 869 F.2d 491, 494 (9th Cir. 1989) (citation omitted). Because free speech rights are a "significant" interest, the process due plaintiffs is the opportunity to be heard prior to the determination. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

Medina's Ordinance does not provide for a pre-deprivation hearing. In fact, the Ordinance does not provide for a hearing even after a license is denied or revoked. Appeals of these decisions must be made to the city manager, without guidance as to how the manager will decide these appeals. The lack of any fair and impartial process to protect plaintiffs' free speech rights denies procedural due process.

**D. WAIVER OF BOND OR A MINIMAL BOND IS APPROPRIATE**

Federal Rule of Civil Procedure 65(c) provides that "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The City will not suffer any loss or damages if this Court enjoins the enforcement of this Ordinance. The Ninth Circuit has approved waivers of the bond requirement or imposition of only a minimal bond where public interest organizations seek to enforce rights in matters of



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

public interest. See Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999); People ex. rel. Van de Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985); Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 325 (9th Cir. 1975). Plaintiffs request that the Court set the bond amount at zero, or at most a minimal bond of no more than $100.

## IV. CONCLUSION

For all of these reasons, plaintiffs respectfully urge this Court to enter an order enjoining the enforcement or threatened enforcement of the Ordinance and to immediately schedule a hearing on plaintiffs' motion for a preliminary injunction.

DATED: October 24, 2006.

**PERKINS COIE LLP**

By _____

Kevin J. Hamilton, WSBA #15648
Sarah K. Morehead, WSBA #29680
Kim Barry, WSBA #30215

Attorneys for Plaintiffs Peace Action of Washington and United States Mission of Seattle

On behalf of the American Civil Liberties Union of Washington Foundation



PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888