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

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

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CONTENTS

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I. INTRODUCTION

The City of Medina concedes (a) that its ordinance restricts "all manner of" protected speech, including "all who seek to disseminate information or to expound beliefs" virtually anywhere in Medina at any time on any political, religious, or charitable topic, and (b) that the standards for assessing the constitutionality of the ordinance are correctly stated in plaintiffs' papers. The city then proceeds to defend not the broad sweeping terms of the ordinance but only the advance registration and licensing requirement for door-to-door solicitation.

But even after retreating to this relatively small corner of the ordinance, the city's argument fails. Courts have repeatedly condemned registration and licensing schemes and the constitutional flaw is exponentially magnified when the ordinance indiscriminately sweeps across an entire city – resulting in an ordinance that either flatly bars unlicensed political, religious, or charitable organization speech in traditional public fora such as parks, streets or doorways, or vests impermissible discretion in the city to determine when to enforce the ordinance and when to ignore it. The handful of cases from other circuits cited by the city are all either distinguishable, cited for out-of-context dicta, or simply wrongly decided. The Ninth Circuit and Washington Supreme Court have made plain their abhorrence of precisely this sort of overbroad prior restraint. Moreover, the Ninth Circuit has unequivocally rejected state licensing schemes with virtually identical judicial review provisions as constitutionally insufficient. For all of these reasons, plaintiffs respectfully request the Court to issue a temporary restraining order and set a preliminary injunction hearing or, in the alternative, simply issue a preliminary injunction.

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II. ISSUES NOT IN DISPUTE

A. THE ORDINANCE IS BROAD

The city does not dispute that the ordinance on its face broadly and directly imposes restraints on any individual or group engaged in political, religious, or charitable organization speech virtually anywhere within the city limits. The city, indeed, candidly admits that it intended such a wholesale restriction of expression. "The ordinance . . . seeks to regulate all manner of speech. The ordinance regulates all who seek to disseminate information or to expound beliefs . . . ." Memorandum in Opposition to Plaintiffs' Motion For a Temporary Restraining Order and Preliminary Injunction ("City's Opp."), at 6.

B. NO EVIDENCE THAT THE ORDINANCE WILL REDUCE CRIME

The justification for such a frontal assault on the First Amendment, according to the city, is the protection of its citizens from the threat of criminal activity thought to be presented by criminals posing as unlicensed political, religious, or charitable organization solicitors.[1] But the city's opposition is devoid of any factual support for this contention. The city offers not a single example of such a crime *ever* occurring within Medina's city limits or anywhere else—no statistical or comparative studies of convictions, no anecdotal evidence of egregious misdeeds of such poseurs, not even a legislative finding from the City Council.

C. THE ORDINANCE IS BOTH OVER- AND UNDER-INCLUSIVE

Nor does the city attempt to explain how its ordinance is narrowly tailored to address a concern with crime, when the language of the ordinance is patently both overinclusive and

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[1] The city does suggest the danger of fraudulent commercial solicitation but this argument may be dispatched at the outset: this lawsuit does not challenge that portion of the ordinance that seeks to regulate commercial activities, defined as "peddling" in the terms of the ordinance.

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underinclusive. It is overinclusive as it restricts those peaceably assembling in city parks—the very paradigm of a public forum—or standing on a street corner, or leafletting outside the city hall, none of whom are going door to door and none of whom pose any threat at all to the safety or repose of individual homes.

The ordinance is also underinclusive: the ordinance does not restrict convicted felons (or any one else) from renting a home and living in Medina, driving to Medina on a Friday night, loitering on Medina streets for hours, or even going door to door to say hello at any hour of the day or night. It is only when such individuals pick up a Bible and express their beliefs; only when they champion a cause and speak out for a political purpose; only when they act to build grass-roots organizations for change, that the ordinance restricts speech. With all due respect, this has things exactly backwards.

III. ARGUMENT

The city's ordinance is facially invalid under the First Amendment and Article I, Section 5 of the Washington State Constitution as an unconstitutional prior restraint on speech. The ordinance directly targets the speech afforded the highest levels of constitutional protection. Moreover, it does so in the broadest, most indiscriminate way possible, applicable by its own terms at any time, at virtually any place, in the entire city, in violation of long-settled principles. See NAACP v. Button, 371 U.S. 415, 438 (1963) ("precision of regulation is the touchstone" where First Amendment rights are at stake). The city does not dispute that prior restraints on such protected speech face formidable constitutional obstacles, strict scrutiny, and "a heavy presumption against . . . constitutional validity." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (prior restraints are "the most serious and the least tolerable infringement on First Amendment rights."). These standards, applied to the Medina ordinance, are fatal.

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Because plaintiffs challenge the ordinance on the grounds of undue official discretion and procedural infirmities, a facial challenge is entirely appropriate. Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) (upholding a facial challenge to a license restriction where restriction lacked mandatory, prompt judicial review).

A. THE ORDINANCE IS FACIALLY UNCONSTITUTIONAL

1. The Advance Notice and Registration Requirements Are Unconstitutional

The Ninth Circuit directly addressed and rejected advance notice and registration requirements in Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981). Rosen involved an effort by the Port of Portland to require those seeking to communicate political, religious, or charitable messages at the Portland Airport to register and to obtain a license first. The city defended its broad ordinance on grounds similar to those claimed by Medina: to minimize potential disruption, to preserve the peace, and to minimize fraudulent activities.

The Ninth Circuit emphatically rejected the licensing and advance notice requirement: "We find the requirement of advance registration as a condition to peaceful pamphleteering, picketing, or communicating with the public to be unconstitutional. The United States Supreme Court held more than thirty-five years ago that persons desiring to exercise their free speech rights may not be required to give advance notice to the state." Id. at 1247 (citing Thomas v. Collins, 323 U.S. 516 (1945)). The court declared, "[w]e think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." Id. (quoting Thomas, 323 U.S. at 540). The court specifically rejected the rationales for the ordinance in unmistakable—and strikingly apt—terms:

> Advance notice or registration requirements drastically burden free speech. They stifle spontaneous expression. They prevent speech that is intended to deal with immediate issues. In addition, the ordinance before us requires every person who

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> wishes to exercise his or her free speech rights to make a trip to the airport at least one business day in advance; it requires the person to obtain a copy of the regulations and fill out the requisite forms with the Port before the advance notice deadline. The overall effect of the advance notice requirement is seriously to discourage "political, religious, social (and) economic" speech. The Port's interest in knowing in advance what type of free speech activities may occur at the airport is insufficient to justify an ordinance so broad in its application and with so chilling an impact on the exercise of first amendment rights.

Id. at 1249. The city, however, brushes Rosen aside, barely mentioning the case and offering precious few reasons why it does not control the case at hand.[2]

Moreover, the ordinance at issue here is far broader than that considered in Rosen. Any person who wishes to expound beliefs, by uttering a few words or by silently distributing literature, is subject to arrest and incarceration for failing to register in advance – at any time, at virtually any place, in the entire city. Like the ordinance rejected in Rosen, the burdens of this

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[2] The city's argument that Association of Cmty. Org. for Reform Now v. City of Frontenac, 714 F.2d 813, 817 (8th Cir. 1983), and City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd without op., 479 U.S. 1048 (1987), approved of application and identification requirements similar to its own are misplaced. In Frontenac, the Eighth Circuit found unconstitutional part of the city's ordinance which prohibited residential door-to-door canvassing after 6 p.m. Frontenac, 714 F.2d at 820 ("[I]n its effort to protect the security and privacy of its residents, [Frontenac] has unduly intruded upon the rights of the plaintiffs and of Frontenac's residents to engage in a free exchange of ideas on topics of social and political import."). In Watseka the Seventh Circuit found that an ordinance which limited door-to-door solicitation in the name of residents' peace and safety "constitutionally overreached." Watseka, 796 F.2d at 1551. The constitutionality of the ordinances' application and identification requirements--while cited by the courts among several less restrictive means of protecting residents' safety--was simply not before either court. The Ninth Circuit, by contrast, *has* squarely addressed such registration requirements, and found them to be a "drastic burden" on free speech and an impermissible prior restraint. See, e.g., Rosen, 641 F.2d at 1249; Grossman v. City of Portland, 33 F.3d 1200, 1204-08 (9th Cir. 1994) (rejecting permit requirement for speakers and demonstrators in public parks unconstitutional; advance notice provisions "drastically burden free speech" and procedural and temporal hurdles may discourage potential speakers).

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prior restraint are amplified by the short duration of the license (14 days) and the onerous individual, in-person application process. Medina Municipal Code § 5.12.060.[3]

2. The 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 their name, date of birth, description, address, telephone number, and the nature of their business. As noted in plaintiffs' opening papers, such a requirement has a decidedly chilling effect and is unconstitutional. See Talley v. California, 362 U.S. 60, 63-64 (1960); Rosen, 641 F.2d at 1250 (rejecting identification requirement in Portland ordinance).

The city notes that the Rosen court "pointed out that the Supreme Court [in Hynes v. Oradell, 425 U.S. 610 (1976)] had suggested that prior identification of door-to-door solicitors could be appropriate. . . ." City's Opp., at 7. Of course, the passing suggestion in Hynes was certainly dicta and Rosen explicitly refused to address that question. Rosen emphatically rejected as unconstitutional the only identification requirement before it, noting that "[a]nonymous pamphlets have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize

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[3] As support for its position that the licensing provision is not unduly burdensome, the city states only that licenses must be issued within one business day, and "licenses are issued within an hour to an hour and one half." City's Opp., at 5. As a practical matter, however, these facts do little to lessen the burden on individuals who wish to speak in Medina. Peace Action, for example, typically utilizes volunteers to disseminate ideas for limited periods in their spare time. Declaration of Scott Carpenter, ¶ 4. For such individuals, the burden of waiting an hour to an hour and a half, or possibly as long as a full day, or longer if a weekend or holiday intervenes, plus travel time both ways, *every fourteen days*, is likely prohibitively burdensome. The city offers no explanation whatsoever, and certainly no supporting authority, as to why requiring speakers to obtain a license every fourteen days furthers the city's goals.

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oppressive practices and laws either anonymously or not at all." Id. at 1250 (quoting Talley, 362 U.S. at 64). Rosen's recognition that identification requirements are unconstitutional has been emphatically underscored by the Supreme Court:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.

McIntyre, 514 U.S. at 357.

3. The Cases Cited by the City to Support its Ordinance Are Inapt

The city cites to Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir. 1985), for the proposition that protecting the peace and security of the home is a legitimate government objective. Plaintiffs entirely agree. However, a municipality's right to regulate the time, place and manner of communication necessarily incorporates the duty to balance the right of expression against the homeowner's right to privacy. The delicacy of that balance can never justify the simple solution of regulating "all manner of speech" and "all who seek to disseminate information or to expound beliefs." City's Opp., at 6.[4]

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[4] This is particularly true where, as here, the city has presented no evidence at all that the ordinance would further the city's legitimate interests in protecting privacy and peaceful enjoyment of the home. "When a city . . . wants to pass an ordinance that will substantially limit First Amendment rights, the city must produce more than a few conclusory affidavits of city leaders which primarily contain unsubstantiated opinions and allegations." Watseka, 796 F.2d 1547, 1555 (7th Cir. 1986); see Kenosha, 767 F.2d at 1257-59 (striking challenged section of an anti-solicitation ordinance "because of the city's complete failure to present evidence (other than an affidavit [of its purpose and interpretation]) in support of the ordinance.").

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Moreover, this Circuit has previously found that there is little evidence that anti-solicitation ordinances protect residences from crime, and has struck regulations like Medina's that sweep far more broadly than necessary to protect the governmental interests. See Project 80's, Inc. v. City of Pocatello, 942 F.2d 635, 638 (9th Cir. 1991) ("Pocatello has not shown that door-to-door solicitation resulted in overreaching, or that consumers were more susceptible to unfair sales pitches when approached at their residence.").[5] The city has less restrictive means available to achieve its stated objectives, as numerous courts have noted, including enforcement of trespassing laws or posting of no trespassing signs. See, e.g., Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 962 n.10 (1984); Village of Schaumburg v. Citizens for Better Env't, 444 U.S. 620, 638-39 (1980); Martin v. City of Struthers, 319 U.S. 141, 148 (1943); Project 80's, 942 F.2d at 638; Frontenac, 714 F.2d at 819.[6]

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[5] The city offers only two others cases to justify its ordinance: one from the Fifth Circuit, International Soc'y for Krishna Consciousness v. City of Houston, 689 F.2d 541, 543 (5th Cir. 1982), and another from the Southern District of Ohio. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 61 F. Supp. 2d 734 (S.D. Ohio 1999). Neither case is controlling, of course, and neither is persuasive. While in Watchtower, the Southern District of Ohio approved a registration and permitting requirement, the cursory analysis of the relevant ordinance provision did not cite a single case under either state or federal law. Later in the opinion, however, when the court did apply First Amendment principles, it not surprisingly found the remainder of the ordinance unconstitutional. The court noted, as the city itself points out, that less restrictive means are available to a village to protect its citizens, such as posting "no trespassing" signs. Id. at 739. Northeast Ohio Coalition for Homeless v. City of Cleveland, 105 F.3d 1107 (6th Cir. 1997), examined the constitutionality of a license fee in a peddling ordinance. As the city's licensing scheme does not impose a fee requirement, Northeast Ohio is irrelevant to the case at bar.

[6] Nor is Houston any more convincing. There, the Fifth Circuit upheld an ordinance requiring solicitors for charitable organization or welfare purposes to obtain licenses and wear identification badges. First, it is decidedly uncertain whether Houston remains good

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4. The Denial of Constitutionally Protected Speech Rights to Citizens Convicted of a Crime in the Past Is Unconstitutional

The ordinance mandates that citizens convicted of any felony and specified misdemeanors will be denied a license and thus precluded entirely from "expounding beliefs" or "seeking signatures on a petition" or otherwise engaging in protected speech at any time, any where in the city. This is constitutionally intolerable.

First, since the right to travel is subsumed within the First Amendment freedom of association, recognition of the city's right to strip citizens once convicted of selected crimes of speech rights also necessarily implies the city's (and therefore the state's) right to preclude such citizens from even entering the city (or the state) or traveling within it. Presumably such a restriction would be defended on the same grounds: the fear of future criminal conduct. But no court of which counsel is aware has ever recognized or sanctioned such an extreme restriction based on such a broad and indefensible generalization. It is no more permissible in the form before the Court.

Second, courts considering efforts to generalize from past criminal conduct and thus to deprive citizens – even those convicted of crimes for which they have paid their just punishment – of constitutionally guaranteed rights, have soundly rejected them.[7]

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law in *any* circuit in light of its virtual absence of supportive reasoning and--more importantly--the intervening decision of the United States Supreme Court in McIntyre, 514 U.S. at 357. But even if it were still viable in the Fifth Circuit, it is directly inconsistent with the law of the Ninth Circuit . Rosen rejected *both* a license *and* an identification requirement. The city can find no solace in Houston.

[7] See, e.g., Kunz v. New York, 340 U.S. 290, 315 (1951) (denial of permit application for public worship based on disorders caused by applicant's prior worship meetings constituted improper prior restraint); 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

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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." City of 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).

The city instead cites three cases to support its contention that it may deny individuals their constitutionally protected right to free speech based on a prior criminal conviction. None of the three can withstand scrutiny. For example, the ordinance at issue in Houston, 689 F.2d at 541, listed specific reasons why a license might be denied and none of them was a prior criminal conviction. Although the applicant was required to disclose convictions, they were not grounds for denying the license, and the court never even discussed the prior convictions section of the ordinance. Id. at 560.[8]

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reason for his blanket exclusion in the future"); Genusa v. Peoria, 619 F.2d 1203 (7th Cir. 1980) (invalidating provisions of ordinance concerning police investigation into the background of applicants for a license to use land for an "adult use" and denial or revocation of license on the basis of applicant's past criminal history); International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 832 (5th Cir. 1979) (invalidating a city ordinance that rescinded, upon conviction of certain violations in the ordinance, a permit required to distribute literature or solicit funds in the Atlanta airport, because the rescission provision was "simply a recipe for an unlawful prior restraint").

[8] Ohio Citizen Action v. City of Avon Lake, 986 F. Supp. 454 (N.D. Ohio 1997), is likewise inapt. Although the ordinance at issue in Avon Lake allowed government officials to deny an application to solicit if the applicant "has been convicted, during the five years preceding the date of the application, of a felony or of a misdemeanor involving moral turpitude or violence," the plaintiff did not even challenge, and the court most certainly did not address, the prior conviction issue. Id. at 457. Finally, in Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1487 (6th Cir. 1995), the City of Dayton prohibited solicitation by any professional solicitor convicted within the past five years of a felony or of a prior violation of the state Charitable Solicitations Act. In upholding this section of the ordinance, the court stressed the narrowness of the provision, which only prohibited an individual with a prior conviction from serving as a paid solicitor, and it "does not

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5. The Ordinance Fails to Provide Adequate Procedural Protections

Finally, the ordinance fails to provide prompt judicial review – a defect that is fatal from the outset under the law of this circuit. The Ninth Circuit addressed judicial review requirements for licensing restrictions in Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998). In that case, an adult bookstore was denied a license to operate and sued for injunctive relief, arguing that the failure of the city's licensing ordinance to provide for prompt judicial review made the statute unconstitutional. Although the district court denied the application for a preliminary injunction, on appeal the Ninth Circuit promptly and abruptly reversed and entered a permanent injunction. Baby Tam rejected out of hand the city's argument that a license applicant could always file a petition for a writ of mandamus in a Nevada state court: "[B]ecause the City's ordinance fails to provide for a prompt hearing and prompt decision by a judicial officer, it fails to provide for prompt judicial review and violates the First and Fourteenth Amendments." Id. at 1102.[9]

In this case, the city makes precisely the same argument: that judicial review is available because a license applicant can always file for a writ of certiorari in the King County Superior Court pursuant to Chapter 7.16 RCW. City's Opp., at 9. But the statutory language in Washington is virtually identical to the Nevada statute flatly rejected as insufficient in Baby

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completely bar an individual from exercising protected First Amendment freedoms." Id. 1487. The city's ordinance, in sharp contrast, does not just prohibit professional solicitors with prior convictions from soliciting for charitable organization contributions. It completely bars individuals with prior convictions from exercising protected First Amendment freedoms.

[9] Accord 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108, 1111, 1115 (9th Cir. 1999) (finding ordinance unconstitutional for lack of prompt judicial review); Burbridge v. Sampson, 74 F. Supp. 2d 940, 953 (C.D. Cal. 1999) (finding "approval and denial" provisions of school speech policy unconstitutional because of failure to provide prompt judicial review).

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Tam. RCW 7.16.330 (once a writ of certiori is filed in Washington, a writ may, "in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time"). It is just as constitutionally infirm as the statute summarily dispatched in Baby Tam, and should suffer the same swift, sure fate.

IV. CONCLUSION

For all of these reasons, plaintiffs respectfully ask the Court to immediately enter a Temporary Restraining Order or preliminary injunction.

DATED: October 24, 2006.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 2, 2000, I caused to be served by hand-delivery by legal messenger a copy of the Reply Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction on:

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