THE HONORABLE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES MISSION CORPORATION, d/b/a/ UNITED STATES MISSION,

Plaintiff,

v.

CITY OF PUYALLUP; BARBARA J. PRICE, in her official capacity as City Clerk for the City of Puyallup,

Defendants.

No. C09 5465 BHS

MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
August 21, 2009

Oral Argument Requested.

09-CV-05465-M

68142-0002/LEGAL16483489.12

ORIGINAL

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

The City of Puyallup has imposed broad and unconstitutional restrictions on plaintiff United States Mission Corporation's ability to exercise its well-established rights of free speech and religious exercise. Chapter 5.64 of the Puyallup Municipal Code ("Chapter 5.64" or the "Ordinance") criminalizes religious solicitation, both on public property and on the doorsteps of private residences, except in one narrow circumstance: where the individuals seeking religious solicitations have first registered with the City, disclosed their identities and a wide array of personal information, undergone intrusive criminal background checks, and regularly renewed the registrations.[1] In many circumstances, even these intrusive and burdensome steps are not enough to avoid prosecution for exercising one's constitutional rights. If, for example, an individual wishes to solicit on public property, or has been convicted of a crime and recently released from probation, then Puyallup simply prohibits that speaker from speaking. Puyallup's restrictions on speech are abhorrent under both the First Amendment of the United States Constitution and Article I, Section 5 of the Washington State Constitution as unconstitutional prior restraints on speech. Both provisions jealously guard individuals' right to engage in religious and charitable solicitation of others, both provide robust protections when free speech is exercised on private doorsteps, and both preclude any law that, like Chapter 5.64, so directly targets and restricts speech that has been afforded the highest levels of protection by the First Amendment. Courts routinely reject efforts to impose these sorts of sweeping restraints on speech. Puyallup's refusal to respect this precedent is causing plaintiff irreparable harm. As a result, plaintiff seeks a declaratory judgment and injunctive relief declaring the Ordinance unconstitutional on its face and barring its enforcement.

[1] Complete copies of Chapter 5.64 are attached to the Complaint and to the Declaration of Harry Williams IV.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

II. STATEMENT OF FACTS

A. THE PUYALLUP SOLICITATION ORDINANCE

Chapter 5.64, which codifies Ordinance 2792 of the Puyallup City Council, restricts speech in numerous, overlapping respects. On the most general level, it imposes licensing requirements on door-to-door religious and charitable solicitation; it forbids religious and charitable solicitation on public property; and it exempts from its scope certain favored forms of solicitation, including solicitation by farmers, gardeners, and campaign workers. Failure to comply with Chapter 5.64 constitutes a civil violation punishable by a fine of $100. A second violation constitutes a criminal offense, and it is punishable by fines and jail time.

The Ordinance directly imposes restraints on any individual or group engaged in solicitation-based speech virtually anywhere within the City limits. Chapter 5.64 defines "soliciting" as, among other things, "seeking to obtain gifts or contributions of money, clothing, or other valuable thing for the support or benefit of any charitable or nonprofit organization, association, or corporation." PMC § 5.64.010(3). Under Puyallup's scheme, one needs a City-issued "license" to solicit from "persons in residences or businesses within the city." *Id.* § 5.64.020.

Chapter 5.64 creates two kinds of licenses. To receive an individual license, a solicitor must fill out an application form and disclose a wide array of information, including (1) the solicitor's name, date of birth, social security number, and "[p]hysical description"; (2) his or her residential address, current business address, and all other addresses at which he or she has resided in the past two years; (3) a statement of whether the solicitor has "ever" been convicted of a felony; and (4) the name and address of any person, firm, or corporation for whom the solicitor works. *Id.* § 5.64.050. The solicitor must provide a copy of a driver's license or picture identification and complete a release allowing the City to conduct "necessary" background checks. *Id.* At the discretion of the police department, the solicitor "may" be required to submit to fingerprinting or palm scanning. *Id.*

Chapter 5.64 also authorizes the city clerk to issue "organizational certificates" to "bona fide community-based organizations." *Id.* § 5.64.030. It does not clarify what makes an organization

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

"bona fide" or "community-based." The appropriate official of such an organization must comply with the application procedure described above for individuals and provide the city clerk with the names and addresses of the solicitors. Organizational certificates are limited in time and cannot be valid for more than 30 days in any calendar year. The chief of police must conduct a background check of both the principal applicant and any individual applicants listed by the organization. *Id.* § 5.64.060(1)(b).

In addition to a license fee of $50.00 per year, a solicitor must pay the cost of conducting a background investigation. The chief of police "shall endeavor to complete" the investigation within seven to ten working days after receipt of the application. *Id.* § 5.64.060(2). There is no deadline by which the investigation must be completed. *Id.* § 5.64.070.

The Ordinance establishes a few circumstances in which a license *must* be denied. "No license shall be issued" if (1) the facts set forth in the application are not true; (2) the applicant has been convicted of a felony and a period of less than five years has passed from the termination of any court-ordered time served (including any probationary period); or (3) the applicant previously has had a license revoked. *Id.* § 5.64.060(2).[2] The Ordinance also gives City officials discretion to deny or revoke licenses in other circumstances. The chief of police "has the authority" to deny licenses for larceny, assault, domestic violence, fraud, sex crimes, drug-related crimes or crimes against children or vulnerable adults. *Id.* § 5.64.060(2). A license "may" be denied if (1) it was procured by fraud or "material" omission of fact; (2) the solicitor fails to comply with any provision of Chapter 5.64; (3) the licensee "violates *any* applicable city, state or federal law"; (4) "the purpose for which the license was issued is being abused to the detriment of the public"; or (5) the license "is being used for a purpose different from that for which it was issued." *Id.* § 5.64.080 (emphasis added).

[2] *But see id.* § 5.64.080(3) (suggesting, in apparent contradiction to PMC § 5.64.060(2), that an individual may receive a license 90 days after a prior application has been revoked).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Upon the denial or revocation of a license, the applicant may appeal to the City Council. No procedures or standards are specified for the appeal other than the requirement that an applicant whose application is *denied* must be given written notice of the basis for the action and an appeal must be filed within 10 days. *Id.* §§ 5.64.060(2), .090. No provision governs the deadlines by which the City Council must rule on an appeal, the procedures for that appeal, or the judicial review, if any, of the City Council's decision.

Chapter 5.64 imposes additional restrictions once a license is approved. A solicitor, for example, must carry the license and photo identification at all times when "soliciting" in Puyallup, and he can only solicit during certain hours. *Id.* §§ 5.64.120, .150.

Notwithstanding the breadth of these restrictions, Puyallup has identified a wide array of favored speech that is exempt from Chapter 5.64. Favored speech includes that of certain political advocates, farmers, newspaper couriers, gardeners, and lawn-care service providers. *Id.* § 5.64.160. Through these exceptions, Puyallup chills the speech of religious solicitors but not that of "bona fide" political candidates, the speech of mechanics but not that of farmers, and the speech of charitable organizations that need to raise funds through door-to-door solicitation but not the speech of charitable organizations that do not. While Chapter 5.64 itself has no stated purpose, Ordinance 2792 indicates that it is "necessary to promote the public health, safety and welfare." Declaration of Harry Williams IV ("Williams Decl."), Ex. D. The Ordinance does not specify why or how Chapter 5.64 furthers that government interest.

B. PLAINTIFF'S SOLICITATION ACTIVITIES IN PUYALLUP

Plaintiff United States Mission Corporation (the "Mission") is a 501(c)(3) nonprofit 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 engage in door-to-door religious solicitation on the Mission's behalf 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. It also is one of

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

the essential means by which members of the Mission evangelize and practice the Social Gospel and thereby advance their personal and spiritual growth. *See* Declaration of Brian Jones ("Jones Decl."), ¶¶ 1-5.

The Mission planned and prepared to begin its work in Puyallup earlier this year. However, due to the restrictions that Puyallup has imposed, the Mission has not been able to engage in door-to-door solicitation in the City. The Mission cannot comply, for example, with Puyallup's restrictions on individuals with criminal backgrounds. Although the Mission strives to be highly selective in whom it admits to its program, many of the Mission's residents are in the process of rehabilitation and so it is likely that they have some type of disqualifying criminal record. Moreover, the Mission cannot comply with the application schedule imposed by the City. Logistical realities, including those relating to the Mission's own extensive screening processes, mean that the decision to begin solicitations in a particular area, as well as the selection of residents to conduct those solicitations, is often made on a day-to-day basis. On a more general level, the Mission objects to Puyallup's assumption that individuals can be forced to obtain a City-issued license prior to engaging in religious solicitation, and it objects to the requirement that it provide extensive personal information about its members. It is concerned that by making these disclosures, it will chill the speech and religious activities of its members. *See id.* ¶¶ 6-13.

As a result of Chapter 5.64, the Mission and its members have been prohibited from engaging in solicitation-based speech in Puyallup and generally have been chilled in their efforts to evangelize and practice the Social Gospel. In addition, the Mission has been unable to collect funds it otherwise would have been able to collect, and, as a result, the organization's efforts to advance its central purpose have been compromised. *See id.* ¶¶ 24-25

C. PUYALLUP'S DISCRETIONARY TREATMENT OF PLAINTIFF

The Mission has tried on repeated occasions to convince the City that the restrictions imposed by Chapter 5.64 are inappropriate and unconstitutional. In response, City officials have offered a series of inconsistent promises to relax certain requirements while enforcing others, all

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

apparently at the discretion of the local officials. On April 16, 2009, a City representative stated that while the Mission was "clearly subject to the full permit requirements of PMC 5.64," the City was "waiving its application fee and otherwise allowing [the Mission] to avoid the full permit and application requirements of PMC 5.64." Jones Decl. ¶ 21 & Ex. D; *see generally id.* ¶¶ 14-23 & Exs. A-D. The City nevertheless indicated that it would impose certain requirements the Mission could not meet. Later, the City explained that it would process an application if the Mission provided some, but not all, of the information required by Chapter 5.64. Williams Decl. ¶ 7 & Ex. B. Again, the Mission could not comply with the conditions. On May 20, 2009, the Mission explained to the City that either the City needed to relax its restrictions or the Mission would pursue available legal remedies. The City never agreed to relax its provisions. *Id.* ¶¶ 9-10.

III. ARGUMENT

"It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible & Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 165-66 (2002); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (protecting charitable solicitation as "fully protected speech" because commercial and advocacy purposes are "inextricably intertwined"); *Berger v. City of Seattle*, ___ F.3d ___, 2009 WL 1773200, at *14 (9th Cir. June 24, 2009) (reaffirming the importance of these protections in an en banc decision striking down restrictions on street performances that, among other things, imposed a permit requirement and allowed only "passive" solicitations).

The Mission is entitled to injunctive relief because Chapter 5.64 is unconstitutional and the Mission is being harmed irreparably by Puyallup's insistence on enforcing its provisions. Under both the United States and Washington States Constitutions, Chapter 5.64 is facially invalid as an unconstitutional prior restraint on speech. It likewise fails as an improper time, place, and manner restriction; as an impermissibly vague statute; as a violation of procedural due process; and as an

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

unconstitutional restriction on plaintiff's rights of religious exercise. In addition to its facial deficiencies, Chapter 5.64 fails as it has been applied.

A. STANDARDS FOR GRANTING PRELIMINARY INJUNCTIVE RELIEF

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). A preliminary injunction is necessary in this case to prevent "the irreparable loss of rights before judgment." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999).

B. CHAPTER 5.64 CAUSES IRREPARABLE HARM TO PLAINTIFF'S FREE SPEECH RIGHTS AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF AN INJUNCTION

1. Chapter 5.64 Causes Irreparable Harm to Plaintiff's Free Speech Rights

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005). Puyallup absolutely forbids religious and charitable solicitation "upon the city street, sidewalk or public right-of-way or any other public property." PMC § 5.64.110(3). It requires organizations to obtain a City-issued license under threat of criminal sanctions and imprisonment prior to soliciting persons in residences or businesses within Puyallup. By barring the Mission's speech in nearly the entire City, and then imposing strict licensing requirements before it can operate in the one forum left to it, Chapter 5.64 denies the Mission its right to speak freely regarding religion, a subject undeniably protected by the full power of the First Amendment.

Moreover, Chapter 5.64 does not just burden the Mission's free speech rights for "minimal" periods of time. It contains no procedural safeguards to ensure that appeals from denials or revocations of licenses will be promptly or adequately addressed. In the meantime, an applicant's free speech rights are suspended for an indefinite period of time.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The Mission relies on contributions obtained through religious solicitation for its very existence. It receives no government assistance. In addition, the Mission and its members rely on religious solicitation as an essential means by which to evangelize and practice their religion. *See* Section II.B, *supra*; *see also* Jones Decl. ¶¶ 3-4. The Ordinance, in short, restricts plaintiff's First Amendment rights and thereby causes it irreparable injury. *See, e.g.*, *Watchtower*, 536 U.S. at 165; *Meyer v. Grant*, 486 U.S. 414, 425 (1998).

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 disputes involving the exercise of First Amendment rights, injunctive relief is liberally granted. *See Warsoldier*, 418 F.3d at 1002 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)). Where the public interest is involved, as it clearly is in this case, the court must take the public's interest into account. *Miller ex. rel. NLRB* v. *Cal. Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993); *Int'l Soc'y for Krishna Consciousness, Inc. v. Kearnes*, 454 F. Supp. 116, 125 (E.D. Cal. 1978) ("[T]he protection of constitutional rights is always in the public interest.").

The balance of interests favors granting the proposed injunctive relief to allow the Mission to express its views, and the community to hear them, without excessive burdens on those rights. While the City states that the Ordinance will "promote the public health, safety and welfare," it offers no support for that assertion—no legislative findings and no detailed description of the interests supposedly served. *See* Williams Decl. Ex. D. The balance of hardships therefore tips sharply in favor of an injunction.

C. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

Plaintiff is entitled to relief pursuant to 42 U.S.C. § 1983, the First Amendment of the United States Constitution, and Article I, Section 5 of the Washington State Constitution.

To prove liability pursuant to 42 U.S.C. § 1983, plaintiff must show, first, that the Ordinance deprives it of a right secured by the United States Constitution and, second, that Puyallup and its

Perkins Cole LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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).

To prove a violation of the mandate imposed by Article I, Section 5 of the Washington State Constitution (which provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right"), plaintiff need not necessarily show a violation of the federal constitution. *Collier v. City of Tacoma*, 121 Wn.2d 737, 748 (1993); *State v. Reece*, 110 Wn.2d 766, 778 (1988). Rather, the Washington State Constitution grants even more protections to free speech than does the federal constitution. *Id.*

Chapter 5.64 fails on multiple grounds. It is facially invalid under both the First Amendment and Article I, Section 5 as an unconstitutional prior restraint on speech. It similarly fails as an improper time, place, and manner restriction; as an impermissibly vague statute; as a violation of procedural due process; and as an unconstitutional restriction on plaintiff's rights of religious exercise. In addition to its facial deficiencies, Chapter 5.64 fails as it has been applied to plaintiff.

1. Chapter 5.64's Restrictions Trigger the Highest Level of Scrutiny

At the very outset, Chapter 5.64 contains restrictions that strike at the heart of the First Amendment, and, as a result, it triggers the highest level of judicial scrutiny. The Ordinance prohibits religious and charitable speech, which has been afforded the most rigorous level of protection; it regulates speech in traditional public fora, which likewise requires heightened scrutiny; it draws content-based distinctions, which courts are loath to tolerate; and it accords officials wide discretion, which is impermissible in the context of restrictions on speech. For multiple reasons, therefore, Chapter 5.64 is presumptively invalid under well-established constitutional law.

a. The Ordinance Prohibits Protected Religious and Charitable Speech

The Ordinance prohibits speech that has historically been afforded the most rigorous level of protection. It restricts "soliciting," which it defines as, among other things, "seeking to obtain gifts

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

or contributions of money, clothing, or other valuable thing for the support or benefit of any charitable or nonprofit organization, association, or corporation." PMC § 5.64.010(3). Yet as the Supreme Court has recognized, where commercial and advocacy purposes are "inextricably intertwined," as with religious and charitable solicitations, the activity constitutes "fully protected speech." *Riley*, 487 U.S. at 796; *see also Meyer*, 486 U.S. at 422 n.5 ("'Prior authorities . . . clearly establish 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—that are within the protection of the First Amendment.'") (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1550 (7th Cir. 1986) ("The Supreme Court has recognized substantial First Amendment protection for door-to-door solicitors."), *aff'd*, 479 U.S. 1048 (1987). As a result, "even when pure canvassing is intertwined with solicitation for funds, those activities remain a form of protected speech." *N.J. Envtl. Fed'n v. Wayne Twp.*, 310 F. Supp. 2d 681, 690 (D.N.J. 2004). *See also City of Bellevue v. Lorang*, 140 Wn.2d 19 (2000) (acknowledging the heavy presumption of unconstitutionality where legislation burdens religious speech). By restricting religious and charitable speech, therefore, Chapter 5.64 triggers a rigorous level of judicial review.

b. The Ordinance Regulates Speech in Traditional Public Fora

Chapter 5.64 regulates speech in traditional public fora and their private equivalents. Solicitation for disfavored subject matters is entirely banned on "the city street, sidewalk, or public right-of-way or any other public property." PMC § 5.64.110(3). A license is required for solicitation directed to persons "in residences or businesses." *Id.* § 5.64.020.

The public streets, right-of-ways, and open spaces are among the most quintessential of public fora. *See Cox v. City of Charleston*, 416 F.3d 281 (4th Cir. 2005); *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994); *see also Boardley v. U.S. Dep't of Interior*, 605 F. Supp. 2d 8, 18 (D.D.C. 2009). Further, "a person's doorstep, although residential in nature, [has]

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

been traditionally devoted to various expressive activities" and is therefore treated as akin to a public forum for purposes of evaluating restrictions on speech. *Distrib. Sys. of Am., Inc. v. Vill. of Old Westbury*, 862 F. Supp. 950, 957 (E.D.N.Y. 1994); *see also Martin v. City of Struthers*, 319 U.S. 141 (1943) ("For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants."); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553 n.11 (8th Cir. 1995) (stating that a residence or office is akin to a public forum because "these fora are presumptively the province of those who own and occupy them, and the choice of what speech to permit and what to reject is the private property owner's, not the government's").

On a second ground, therefore, Chapter 5.64 requires rigorous review. "[R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

c. The Ordinance Draws Impermissible Content-Based Distinctions

There is no question that Chapter 5.64 is content-based. Puyallup's restrictions on solicitation-based speech necessarily turn on the content of the message, and, as a result, certain forms of solicitation-based speech are granted special treatment in Puyallup. For example, candidates and political workers campaigning on behalf of "candidates or ballot issues" are entirely exempt from Chapter 5.64, while political party representatives soliciting on behalf of party-building initiatives are not. PMC § 5.64.160(1). Likewise, a person seeking to sell eggs can solicit anywhere he or she pleases, but a person selling firewood must obtain a license. *Id.* § 5.64.160(2). When it comes to religious and charitable solicitation, Puyallup imposes strict limitations on who can solicit, where they can solicit, and when they can solicit. The applicability of the licensing scheme, in other words, depends on the content of the speech. Such a scheme always triggers strict scrutiny.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Picking and choosing among favored subject matters is the essence of content-based discrimination, which "classif[ies] permissible speech in terms of subject matter." *Collier*, 121 Wn.2d at 752-53; *see also Ass'n of Cmty. Orgs. for Reform Now v. Municipality of Golden*, 744 F.2d 739, 750 & n.9 (10th Cir. 1984) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)). While "[the] distinction may be innocuous or eminently reasonable, it is still a content-based distinction because it singles out certain speech for differential treatment based on the idea expressed." *Berger*, 2009 WL 1773200, at *15 (internal quotation marks and citation omitted).

"Restrictions on speech based on its content are presumptively invalid and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (internal quotation marks and citation omitted); *see also Collier*, 121 Wn.2d at 753. The presumption is particularly strong when a "content-based regulation extends . . . to prohibition of public discussion of an entire topic," *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of NY*, 447 U.S. 530, 538 (1980), or it imposes a financial burden on speakers because of the content of their speech, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Chapter 5.64 suffers from each of these defects and therefore is subject to strict scrutiny.

d. The Ordinance Allows Public Officials Excessive Discretion

Chapter 5.64 also grants excessive discretion to City officials. For example, it accords City officials nearly unbridled discretion to decide whether and when to deny and revoke licenses. There is nothing in the Ordinance to prevent City officials from exercising this discretion in a content-based manner. *See* PMC § 5.64.060-.080. To the contrary, PMC § 5.64.070 states that the chief of police "may" approve an application after determining that the facts set forth in the application are true. Likewise, City officials "may" revoke a license "if the purpose for which the license was issued is being abused to the detriment of the public." *Id.* § 5.64.080(2). Such ill-defined language provides City officials free rein to discriminate against speech, organizations, and causes with which they disagree.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

When free speech is at issue, the decision whether to grant or deny a license must be strictly rule-based; it cannot vest discretionary authority in an official. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). The critical issue for a facial challenge, moreover, is not whether the administrator, as a factual matter, "*has* exercised his discretion in a content-based manner, *but whether there is anything in the ordinance preventing him from doing so*." *Forsyth County*, 505 U.S. at 133 n.10 (emphasis added).

In *Shuttlesworth*, 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." 394 U.S. at 149. The Supreme Court held that the use of a public forum cannot be conditioned on 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). In short, official discretion must be far more circumscribed than it is in Chapter 5.64. *See Shuttlesworth*, 394 U.S. at 153; *see also Gaudiya Vaishnava Soc'y v. San Francisco*, 952 F.2d 1059, 1065-66 (9th Cir. 1990) (granting "unbridled discretion of government officials" is inconsistent with the First Amendment because "[s]uch discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the content of speech") (internal quotation marks and citations omitted)).

Chapter 5.64, moreover, presents a particularly egregious example of discretion as applied to plaintiff. For the last several months, Puyallup has expressed a willingness to bend certain requirements, but not others, in response to plaintiff's repeated objections. *See* Jones Decl. ¶ 21 & Ex. D (letter from Puyallup explained that the Mission was "clearly subject to the full permit requirements of PMC 5.64" but that the City was "waiving its application fee and otherwise allowing [the Mission] to avoid the full permit and application requirements of PMC 5.64" if the Mission would agree to certain terms); *see also id.* ¶¶ 14-24 (providing further detail). In short, Chapter 5.64 accords excessive discretion both on its face and as applied to plaintiff.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

2. The Ordinance Fails as an Improper Prior Restraint

As explained above, Chapter 5.64 necessarily triggers the most rigorous standard of review because it restricts religious and charitable speech; it regulates speech in traditional public fora; it imposes content-based restrictions; and it permits officials to exercise excessive discretion. It comes as little surprise, therefore, that regardless of which analytical model this Court adopts—judging the restriction as "prior restraint" or as a "time, place, and manner restriction"—the Ordinance clearly fails. *See, e.g.*, *Berger*, 2009 WL 1773200, at *5 ("It is . . . not surprising that we and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.").

Chapter 5.64 is most appropriately classified as a prior restraint. A prior restraint exists when public officials exercise "the power to deny use of a forum in advance of actual expression." *See Se. Promotions, Inc. v. Conrad*, 420 U.S. 546, 553 (1975). By requiring all "solicitors" to obtain a City-issued license prior to engaging in a religious or charitable mission, the Ordinance imposes a prior restraint on the exercise of free speech. *See Berger*, 2009 WL 1773200, at *3 ("A permitting requirement is a prior restraint on speech.").

Because of their powerful chilling effect, prior restraints are presumptively unconstitutional under both the United States and Washington State Constitutions. *Carroll v. President of Princess Anne*, 393 U.S. 175, 180-81 (1968); *State v. Noah*, 103 Wn. App. 29, 41 (2000); *see also DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 670 (1998) ("A governmental attempt to restrict the content of future speech [is] unconstitutional per se under Article I, Section 5."). It is "the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and it bears "a heavy presumption against its constitutional validity," *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. Port of Portland*, 641 F.2d 1243, 1250 (9th Cir. 1981).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The prior restraint imposed by Chapter 5.64 is particularly egregious because it demands such extensive and intrusive personal information about potential speakers. In *Watchtower*, the Supreme Court reemphasized the historical importance of anonymous speech in America, noting that "there are a significant number of persons who support causes anonymously." 536 U.S. at 166. In *Talley v. California*, 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. 362 U.S. 60, 63-64 (1960). The Court held the ordinance unconstitutional on the ground that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65. Similarly, in *Rosen*, the Ninth Circuit invalidated an ordinance requiring speakers in an airport (then viewed as a public forum) to identify themselves and their sponsors to state authorities, noting "the realities of 'chill and harassment' inherent in [such] an ordinance." 641 F.2d at 1251-52. As the court explained, "[t]he 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." *Id.* at 1251; *see also Ohio Citizen Action v. City of Mentor-on-the-Lake*, 272 F. Supp. 2d 671, 681-85 (N.D. Ohio 2003) (striking down ordinance governing door-to-door solicitation); *N.J. Envtl. Fed'n*, 310 F. Supp. 2d at 698-99 (same).

Chapter 5.64, moreover, gives the chief of police the authority to deny or revoke licenses upon finding that a person has committed certain crimes, PMC § 5.64.060, or for "*any* violations of city ordinances or any state or federal law," *id.* § 5.64.090 (emphasis added). Yet people who have been convicted of a crime "are not 'First Amendment outcasts,'" *United Youth Careers, Inc. v. City of Ames*, 412 F. Supp. 2d 994, 1007 (S.D. Iowa 2006), and courts have repeatedly rejected attempts to deny speech permits based on past misconduct, *see, e.g.*, *Kunz*, 340 U.S. at 315 (finding improper prior restraint where permit was denied based on prior disorders); *see also Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981) (striking down ordinance because the fact that "the applicant has been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

future"). Likewise, the Washington State Constitution "does not permit a licensing agency to deny to 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). Indeed, in rejecting as unconstitutional a similar ordinance enacted by the City of Medina, *see* Jones Decl. Exs. B & C, this Court (through Judge Coughenour) emphasized at oral argument that a particularly troubling aspect of the Medina ordinance was that it imposed a presumption against granting a license to any individual convicted of a crime. Puyallup's restrictions, in short, clearly fail pursuant to the powerful and well-established presumption against prior restraints.

If it even were possible for such a provision to survive constitutional scrutiny, it could do so only if the government somehow provided adequate procedural safeguards. *See Se. Promotions*, 420 U.S. at 559 (citing *Bantam Books*, 372 U.S. at 71). On this independent ground, Chapter 5.64 similarly falls far short. To license speech, a censor bears the burden of proving that the expression is unprotected, that the censor's decision is appealable, and that 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 City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004) ("prompt judicial review" requires both prompt access to a court and a prompt decision). *Adult Entm't Ctr., Inc. v. Pierce County*, 57 Wn. App. 435, 444 (1990) ("Licensing ordinances must provide that the licensor will, within a specified brief period, either issue a license or go to court.").

Chapter 5.64's procedural protections do not even come close to meeting these criteria. First, it requires only that the chief of police "*endeavor* to complete such investigation within seven to 10 working days" of an application. PMC § 5.64.060(2) (emphasis added). Second, while an applicant or licensee may appeal to the City Council within 10 days of the denial or revocation of a license, the Ordinance is silent as to the timeline for the City Council's decision and the criteria under which it is to judge the appeal. *Id.* §§ 5.64.060(2), .090. Moreover, the Ordinance does not

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

provide for *any* judicial review. In the meantime, the applicant's speech rights are suspended—notwithstanding the requirement that a licensing scheme provide a stay of license revocation or suspension pending 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, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990). This is simply impermissible.

On multiple grounds, therefore, Chapter 5.64 fails as an improper prior restraint.

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

Chapter 56.4 independently fails as an improper time, place, and manner restriction. A government may enforce "regulations of the time, place, and manner of expression" only if the regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Under the broad language of article 1, section 5 of the Washington State Constitution, the State must show that its interest in the restriction on speech is *compelling*. *Collier*, 121 Wn.2d at 748-49; *Bering v. SHARE*, 106 Wn.2d 212, 234 (1986). Chapter 5.64 cannot survive either well-established test.

a. The Ordinance Is a Content-Based Restriction on Protected Speech

As discussed above, Chapter 5.64 imposes content-based restrictions on speech. When, where, and whether one requires a license to solicit within Puyallup turns entirely on the subject matter of the message being conveyed. *See* Section III.C.1.c, *supra*; *see also Ass'n of Cmty. Orgs.*, 744 F.2d at 750 n.9. As a result, the Ordinance is not content-neutral, and it cannot survive as a proper time, place, and manner restriction. *Perry Educ. Ass'n*, 460 U.S. at 45.

b. The Ordinance Is Not Narrowly Tailored

Although Puyallup offers a justification for its regulation of solicitors—that it is "necessary to promote the public health, safety and welfare"—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,*

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Village of Schaumburg*, 444 U.S. at 637; *Collier*, 121 Wn.2d at 753-54; *Bering*, 106 Wn.2d at 233-34. Certainly, the Ordinance is not sufficiently tailored to further the broad objectives of promoting "the public health, safety and welfare." *See NAACP v. Button*, 371 U.S. 415, 438 (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).

To the contrary, Chapter 5.64 is patently overinclusive, sweeping too wide in its regulation of individuals and organizations. Narrow tailoring prohibits the government from "regulat[ing] 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, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991).

Setting aside the failure of Chapter 5.64 to make clear its exact purpose, it is clear that its restrictions are not narrowly tailored. As the Ninth Circuit recently explained,

> the government interests asserted in these door-to-door solicitation cases—the prevention of crime and fraud, and the protection of residential privacy—are weighty. . . . Nonetheless, [the Court] has repeatedly concluded that single-speaker permitting requirements are not a constitutionally valid means of advancing those interests because, typically, (1) they sweep too broadly . . . ; (2) they only marginally advance the government's asserted interests . . . , and (3) the government's interests can be achieved by less intrusive means.

Berger, 2009 WL 1773200, at *4 (citations omitted). *See also, e.g.*, *Project 80's*, 942 F.2d at 638 ("[T]here is little evidence that the ordinances [prohibiting door-to-door solicitation] protect residences from crime."); *Watchtower*, 536 U.S. at 169 ("[I]t seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance."); *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1256-58 (3d Cir. 1986) (finding no evidence to support a correlation between evening-hours solicitation and crime). While protecting people from crime is a significant governmental interest, "mere speculation about

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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).

The temporal restrictions placed on disfavored solicitation are similarly defective. Solicitors, as defined by the Ordinance, may only operate during certain hours. PMC § 5.64.150. Those excluded from the Ordinance's reach, on the other hand, may solicit whenever they please. *Id.* § 5.64.160. A religious canvasser who does not fundraise as part of his or her door-to-door outreach may constitute just as much of an intrusion on a resident's privacy as one who raises money concurrently with that outreach. A criminal or fraudster may pose as a person peddling a "handmade gift article[]" just as easily as he may pose as a religious or charitable solicitor. *Id.* In any event, the City has made no showing that its interests in preventing solicitation increase after the sun goes down. Yet Puyallup's time restrictions, including that which prohibits solicitation activities after "dusk," *see* PMC § 5.64.150, significantly interfere with the Mission's ability to reach the public in the winter months, given that the Mission regularly engages in its activities between the hours of 2 p.m. and 8 p.m., when more people are at home. *See* Jones Decl. ¶ 10; *see also N.J. Envtl. Fed'n*, 310 F. Supp. 2d at 695-97 (striking down similar restrictions).

c. The Ordinance Does Not Leave Open Sufficient Alternative Channels

The sweeping breadth of Chapter 5.64 leaves plaintiff with no effective venue in which to preach the Social Gospel and solicit the religious donations on which it relies. Jones Decl. ¶ __; *see also N.J. Envtl. Fed'n*, 310 F. Supp. 2d at 698 (confirming inadequacy of alternative channel where speaker's ability to communicate effectively is threatened). Of course, where, as here, a regulation is neither content-neutral nor narrowly tailored, it cannot be justified as a proper time, place, and manner restriction, regardless of whether alternative channels of communication are left open. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993).

In sum, Chapter 5.64 fails as an improper time, place, and manner restriction, just as it fails as an impermissible prior restraint.

Perkins Cole LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

4. The Ordinance Is Too Vague and Impinges on Protected Speech

Chapter 5.64 fails on a third independent ground: it is unconstitutionally vague. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *see also Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1266 (3d Cir. 1992) ("Although [this due process principle] was originally constructed to invalidate penal statutes, . . . [it has been] transplanted . . . into the First Amendment setting.").

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 v. City of Rockford*, 408 U.S. 104, 109 (1995) (internal quotation marks and citation omitted). Thus, if an ordinance "interferes with the right of free speech . . . , a more stringent vagueness test should apply." *Vill. 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.").

The two goals of the vagueness doctrine are (1) to ensure fair notice to citizens and (2) to provide clear standards for law enforcement. *Kolender*, 461 U.S. at 357; *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (11th Cir. 1999). The first goal requires that citizens understand what a law means. *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995). The Ordinance violates the first goal of the vagueness doctrine because it does not clearly specify what grounds are sufficient for denial or revocation of a license.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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*, 408 U.S. at 108-09. Chapter 5.64 does not ensure that the City will grant the solicitation licenses in a fair and nondiscriminatory manner. Puyallup officials have broad discretion to approve, deny, or revoke the solicitation licenses. *Compare* PMC § 5.64.060(2) (giving chief of police authority to deny or revoke licenses for certain vaguely enumerated crimes) *with* PMC § 5.64.080(2) (granting authority to deny or revoke licenses for violations of *any* "applicable city, state or federal law"); *see also* PMC § 5.64.080(2) (authority to revoke license where the "purpose for which the license was issued" is being abused to the "detriment of the public").

Pursuant to this well-established precedent, Chapter 5.64 is far too vague and ambiguous to survive constitutional scrutiny, and it should be rejected as such. *See Kreimer*, 958 F.2d at 1266; *City of Chicago v. Morales*, 527 U.S. 41 (1999) (holding loitering ordinance void for vagueness because it allowed virtually untrammeled discretion by the police in enforcement); *Kolender*, 461 U.S. 352 (striking down ordinance that required persons to identify themselves and their purpose to police on demand); *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (rejecting ordinance in part because of its "obvious invitation to discriminatory enforcement").

5. The Ordinance Violates Procedural Due Process

Finally, Chapter 5.64 fails because it does not provide 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). Plaintiff's rights to free speech and association are rights protected under the United States Constitution. The procedures established by the Puyallup 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

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

(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 County Fire Prot. Dist. No. 4*, 869 F.2d 491, 494 (9th Cir. 1989). Because free speech rights are a "significant" interest, the affected individual is entitled to be heard prior to the relevant determination. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

Chapter 5.64 does not provide for a predeprivation 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 Council, without guidance as to how or when the City Council will decide these appeals. The lack of any fair and impartial process to protect plaintiff's free speech rights deprives it of the procedural due process to which it is entitled.

In sum, Chapter 5.64 fails for at least four independent reasons. It is an impermissible prior restraint; it is an invalid time, place, and manner restriction; it is unconstitutionally vague; and it violates plaintiff's procedural due process rights.

6. The Ordinance Violates Plaintiff's Right of Religious Exercise

For the Mission and its members, religious solicitation is one of the essential means by which to evangelize and practice the Social Gospel and thereby advance their personal and spiritual growth. Chapter 5.64's restrictions drastically interfere with the ability of plaintiff and its members to exercise their religion within Puyallup.

The Supreme Court has long protected the rights of groups practicing their religion through door-to-door solicitation. "For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion." *Watchtower*, 536 U.S. at 160 (citation omitted); *id.* at 161 (["[Financial restraints mean that] the ability of the [members of religious groups such as Jehovah's Witnesses] to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.");

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

see also, e.g., Follett v. Town of McCormick, 321 U.S. 573 (1944) (striking down as unconstitutional a license tax applied to individuals soliciting funds door-to-door on behalf of their religion); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same).

Even if it were somehow possible for a restriction on door-to-door canvassing to overcome such precedent, Chapter 5.64 would fall far short. For the reasons discussed above, Chapter 5.64's restrictions on plaintiff's religious rights are both overbroad and unnecessary.

7. Plaintiff's Likelihood of Success Extends to Both Its Facial and As-Applied Challenges

Plaintiff has brought both facial and as-applied challenges to Chapter 5.64. As explained above, plaintiff is likely to prevail as to both. Plaintiff can entertain a facial challenge to Chapter 5.64 because the Ordinance is directed at expression or conduct commonly associated with expression. *See* PMC §§ 5.64.010-.020; *see also Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996); *Perry v. L.A. Police Dep't*, 121 F.3d 1365 (9th Cir. 1997). Further, plaintiff "may argue the impact of the ordinance on [its] own expressive conduct, as well as the expressive activities of others." *Perry*, 121 F.3d at 1368.

Plaintiff likewise can bring an as-applied challenge to Chapter 5.64. The manner in which Puyallup has applied Chapter 5.64 to plaintiff has interfered severely with plaintiff's ability to exercise its rights of free speech and religious exercise. *See* Jones Decl. ¶¶ 3-13, 24-25.

8. Plaintiff's Likelihood of Success Extends to Every Provision in Chapter 5.64

Many discrete provisions of Chapter 5.64 are unconstitutional. *See, e.g.*, PMC §§ 5.64.080 (unconstitutionally vague); 5.64.150 (insufficiently tailored); 5.64.060 (procedurally inadequate). Above and beyond the deficiencies in these individual provisions, however, Chapter 5.64 is unconstitutional *in toto* because it sets forth a regulatory regime that is dependent on content-based distinctions. *See id.* §§ 5.64.010 ("Definitions"); 5.64.160 ("Exemptions"). As a result, Chapter 5.64 necessarily fails not only as to particular provisions, but also in its entirety.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

D. WAIVER OF BOND OR A MINIMAL BOND IS APPROPRIATE

Federal Rule of Civil Procedure 65(c) provides that a preliminary injunction may issue "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The City will not suffer any loss or damages if this Court enjoins the enforcement of the Ordinance. Where public interest organizations seek to enforce rights in matters of public interest, the Ninth Circuit has approved minimal bonds or waivers of the bond requirement. *See Barahona-Gomez*, 167 F.3d at 1237; *Cal. 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). Moreover, when this Court (through Judge Coughenour) issued a preliminary injunction with respect to a similar ordinance enacted by the City of Medina, *see* Jones Decl. Exs. B & C, no bond was required. Plaintiff requests that the Court set the bond amount at zero or, at most, a nominal sum of $100.

IV. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court enter an order enjoining the City of Puyallup and its officers, agents, servants, and employees, including Barbara J. Price, acting in her official capacity as City Clerk, from enforcing or threatening to enforce Chapter 5.64 of the Puyallup Municipal Code.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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s/ Lisa Manheim #40198

KHamilton@perkinscoie.com
William B. Stafford, WSBA No. 39849
WStafford@perkinscoie.com
Lisa Marshall Manheim, WSBA No. 40198
LManheim@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Cooperating Attorneys for ACLU of Washington Foundation

Sarah A. Dunne, WSBA #34869
dunne@aclu-wa.org
Harry Williams IV, WSBA No. 41020
hwilliams@aclu-wa.org
ACLU of Washington Foundation
705 2nd Avenue, 3rd Floor
Seattle, WA 98104
Telephone: 206.624.2184
Facsimile: 206.624.2190

Attorneys for Plaintiff