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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

MASONRY BUILDING OWNERS OF OREGON, an Oregon mutual benefit nonprofit corporation, FOUNTAIN VILLAGE DEVELOPMENT LLC, an Oregon limited liability company, and JIM A. ATWOOD, in his capacity as trustee of the Jim. A. Atwood Trust dated August 10, 2017,

PLAINTIFFS,

v.

TED WHEELER, in his official capacity as Mayor of the City of Portland and Commissioner in charge of the Bureau of Development Services, JO ANN HARDESTY, in her official capacity as Commissioner in charge of the Fire Bureau, and CITY OF PORTLAND, an Oregon municipal corporation,

DEFENDANTS.

Case No. 3:18-cv-02194-AC

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Masonry Building Owners of Oregon, Fountain Village Development LLC, and Jim A. Atwood have moved for a preliminary injunction enjoining enforcement of the Defendant City of Portland's unconstitutional Ordinance for the duration of this litigation. Now in its fourth iteration since this lawsuit was filed, the current version of the Ordinance impermissibly compels Plaintiffs' speech in three ways: (1) it compels Plaintiffs to post placards on their buildings—which already comply with all building codes and health and safety regulations—stating, "THIS IS AN UNREINFORCED MASONRY BUILDING. UNREINFORCED MASONRY BUILDINGS MAY BE UNSAFE IN THE EVENT OF A MAJOR EARTHQUAKE"; (2) it compels Plaintiffs to include similar statements in the lease application forms they use to gather information from prospective tenants; and (3) it compels Plaintiffs to sign a City-drafted form assuring compliance with the terms of the Ordinance.[1] Each of these provisions violates the First Amendment to the United States Constitution. Moreover, the standards for applying the Ordinance continue to be vague, ambiguous, and overbroad in violation of the Due Process Clause of the Fourteenth Amendment's guarantee of due process. Because Plaintiffs will be irreparably harmed and the public interest will be injured by the enforcement of the Ordinance's unconstitutional terms, Plaintiffs' Motion for a Preliminary Injunction should be granted.

LATEST FACTS

The Court has been apprised of the relevant facts to date. However, the Court very recently permitted Plaintiffs to depose former City Commissioner Dan Saltzman on May 7, 2019 concerning his earlier representations about the purpose of the Ordinance made at the City Council meeting at which the Ordinance was adopted. During that hearing, Comm. Saltzman identified two purposes for the Ordinance: (1) to "build awareness of the seismic risk about what

[1] The latest amendment to the Ordinance adds legal citations to the placards and removes the word "agree" from the adhesion contract provision. As discussed below, neither of these minor changes diminishes the unconstitutionality of the Ordinance's compelled speech mandates.

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to do if you are in an unreinforced masonry building, to duck and cover, not to get out[,]" and (2) to "build[] market demand for seismic improvements to these buildings." Decl. of John DiLorenzo, Jr. ("DiLorenzo Decl."), Ex. 1 ("Saltzman Dep.") at 36:19–21, 39:17–20.

When pressed to elaborate on the first purpose, Comm. Saltzman explained:

> Q. The first part is "helps build awareness of the seismic risk about what to do if you are in an unreinforced masonry building, to duck and cover, not to get out." What did you mean by that?
>
> A. Well, building awareness of the seismic risk that we face in this region of the county and if you are in an unreinforced masonry building at the time of an earthquake, it might not be the best, even though it's the instinctual thing to do is to get out, it may make more sense to stay in place, especially given the nature of the unreinforced masonry buildings that the parapets and walls are going to fall off the building.
>
> . . .
>
> Q. What is it about the placard that tells a person that, that tells them don't run out, duck and cover? Does the placard say that?
>
> A. No.
>
> Q. Then how does the placard further that purpose?
>
> A. I think the placard instills a daily awareness on residents of buildings who are working in a building that's potentially unsafe in an earthquake, and from that dealing with every day I think people begin to think in their minds what—what to do when the event happens.
>
> Q. Okay. So let's assume that because of the placard someone is now aware that they are in a building that could have difficulty in an earthquake. How is it, though, that that awareness educates a person as to now what they should avoid that is instinctual on their part? You said their instinct would be to run out. What is it about the Ordinance that helps them avoid furthering their instinct?
>
> A. Well, as you said, the placard does not do that, but I think there is certainly a lot of public awareness campaigns that the City, Red Cross, others participate in on a regular basis to help people be prepared for an emergency. . . . Which includes a lot of, you know, what to do.
>
> Q. Yeah. I agree that that—that could help. I'm at a loss, though, to try to figure out what is it in this Ordinance that does

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that. So I think you'll acknowledge the placards don't tell people to do that?

A. Right.

Q. Nor did the disclosures in the lease agreements, they didn't tell people to do that?

A. Um-hum (affirmative response).

Q. Is that right?

A. Correct. Correct, yes.

Q. Nor did the notification to tenants tell people to do that?

A. Correct.

Q. Nor did the agreement or the requirement to record in the county records, right?

A. Correct.

Q. So is it fair to say there is really nothing in this Ordinance that furthers that particular purpose, which is to make people aware that they should duck, cover, and not run out? Is that a fair statement?

A. Yeah, that sounds fair.

Id. at 36:18–39:16.

When asked to elaborate on the second purpose, Comm. Saltzman said:

Q. "And it [the Ordinance] also builds market demand for seismic improvements to these buildings." Commissioner, what did you mean by that?

A. That when people are aware of where they are looking to live, that they may take the seismic risk into account, the condition of the building, the type of building they are looking at moving into, and they may elect not to move into an unreinforced masonry building because of the risk to life and safety and, therefore, in my mind helps, you know, if landlords are getting that message, that people are not choosing their buildings because of the URM issue, that they will retrofit.

Q. Okay. But let's talk about the economic connotation of demand. Were you referring to market demand in an economic sense, like supply and demand? Is that what you're talking about?

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> A. I think I'm referring to it in terms of a, you know, consumer choice.
>
> Q. Okay. So if fewer consumers decide to move into a building because of the placard, that then decreases the demand for the services. Is that a fair statement?
>
> A. Yeah, I guess.
>
> Q. Okay. And so this is all to what end? So what is the point of that? In your mind was this then to influence an owner to take action to do something?
>
> A. Well, I think it is what I'm surmising, that that's the market demand, if people are electing not to live in your buildings, then if you are a landlord, you probably want to do something about that.
>
> Q. And what would that something be that you would want to do?
>
> A. It could be doing the seismic retrofits. It could be demolishing the building and building something different.

Id. at 39:18–41:5.

Later in the deposition, Comm. Saltzman acknowledged his agreement with a statement made on his behalf by his then Chief of Staff: "Commissioner Saltzman made it clear in that spring hearing that he feels Council is not being aggressive enough in requiring retrofits of URM buildings but he also knew his council colleagues were not comfortable enacting those regulations so he is now focused on requiring the placards and tenant notification." *Id.* at 28:20-29:9, 30:19-31:10; DiLorenzo Decl., Ex. 3.

It is now apparent that the Ordinance does not further the first purpose at all. As for the second purpose, it is apparent that the Council (which had before it the Final Report of the advisory committee calling for mandatory retrofits) possessed the legal authority but lacked the political will to address retrofitting of URM buildings directly. As a consequence, the Council turned to the placarding Ordinance, which employs compelled speech in an attempt to do indirectly what the Council was unwilling to do directly.

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ARGUMENT

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) ("*ABA*") (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). In the Ninth Circuit, courts will also grant a preliminary injunction where the claims raise "serious legal questions" and the balance of equities tips strongly in favor of the movant. *See Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011)). Under either standard, Plaintiffs' Motion for a Preliminary Injunction should be granted.

A. Plaintiffs' Claims Raise Serious Legal Questions and Are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on the merits of their claims because—despite the City's repeated attempts to salvage it—the Ordinance remains unconstitutional under both the First and Fourteenth Amendments. Each of the Ordinance's three remaining compelled speech mandates are subject to strict scrutiny and each of those provisions fails under that standard.

In order to avoid this result, the City argues that the placard and lease application statements it compels private building owners to make at their own expense actually constitute "government speech." *See* City Defs.' Resp. to Pls.' Am. Mot. for Prelim. Inj. ("Opp.") at 9–17. They do not. More importantly, however, the government speech doctrine allows the government to engage in otherwise impermissible viewpoint discrimination when the government itself is the speaker; it does not allow the government to compel private speech without facing strict scrutiny—as the City's own cited cases demonstrate. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding compelled speech on license plates unconstitutional under strict scrutiny).

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Alternatively, the City contends that the Ordinance's lease application provision is reviewable under the *Zauderer* standard for commercial speech, rather than strict scrutiny. Opp. at 17–23. Yet, the City—relying solely on a vacated Ninth Circuit opinion—fails to show that lease applications constitute commercial speech and, in any event, the provision cannot survive even under the *Zaudererer* standard.

Finally, the City argues that the mere fact that the City Code contains a definition of "unreinforced masonry" renders the Ordinance immune from challenge under the Due Process Clause, no matter how arbitrary the Ordinance's application and enforcement might be. The City is incorrect. As detailed in Plaintiffs' opening memorandum, the Ordinance is too vague in its application and too inconsistent in its enforcement to be permissible under the Due Process Clause of the Fourteenth Amendment. *See* Mem. in Supp. of Am. Mot. for Prelim. Inj. ("Mot.") at 36–38 (Dkt. 45).

1. The Ordinance's compelled speech mandates are subject to—and fail—strict scrutiny.

Laws compelling individuals to speak a particular message necessarily control the content of that speech; as a result, such laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (quoting *Reed v. Town of Gilbert*, 576 U.S. —, —, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015)). Accordingly, each of the Ordinance's three compelled speech mandates is subject to strict scrutiny. None of them satisfy that stringent standard.[2]

[2] With respect to the adhesion contracts required by the Ordinance, the City concedes in a footnote that any requirement for "plaintiffs to 'agree' to anything . . . would violate the First Amendment." *See* Opp. at 27–28 n.8. The City claims to have remedied this infirmity by simply amending the Ordinance to remove the word "agree" from the agreement. *Id.* This semantic change does nothing to change the nature of the unconstitutional agreement. The City's form requires building owners to prospectively promise that "[a]ll applications for lease or rental of the Property will contain a statement that: the building is an unreinforced masonry building, and unreinforced masonry buildings may be unsafe in the event of a major earthquake." DiLorenzo

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a. The Ordinance's compelled speech mandates do not directly advance a compelling government interest.

To survive strict scrutiny, the government must first show the law "would actually advance a compelling government interest to some meaningful degree." *U.S. v. Christie*, 825 F.3d 1048, 1056 (9th Cir. 2016) (citing *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2779 (2014) (holding government must demonstrate that its "marginal interest in enforcing the [statute] *in these cases*" is compelling) (emphasis in original); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 803 n. 9 (2011) ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.")). Abandoning many of the previously offered justifications for the Ordinance, the City repeatedly asserts a generalized interest in public safety, which it variously and nebulously captions as "promoting public safety"; a "compelling life-safety interest[]"; and "significant risk of massive loss of life and physical injuries[.]" Opp. at 29. The City argues that the Ordinance advances that sprawling interest by "ensuring that the people who live, work, or enter [targeted] buildings know of that risk—thereby allowing them, at the very least, to make an informed decision whether to assume it." *Id.* (stating Ordinance also "inform[s] prospective tenants that a building they are considering is a URM building and may be dangerous in the event of a major earthquake"). This stated interest does not suffice for several reasons.

First, the City has admitted that it chose to compel targeted building owners' speech in order to coerce those owners into retrofitting their buildings after failing to obtain political support for directly requiring retrofitting. In other words, the Ordinance seeks to *indirectly* promote its interest in public safety by burdening Plaintiffs' speech. This it may not do. For example, in *Sorrell v. IMS Health Inc.*, the United States Supreme Court held that Vermont could not restrict communications between pharmaceutical manufacturers and physicians with the

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Decl., Ex. 2. As the City concedes, such an agreement is unconstitutional and the City cites no authority to the contrary.

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ultimate goal of promoting public health and lowering the cost of medical services. 564 U.S. 552, 561 (2011).[3] The Court explained:

> ***While Vermont's stated policy goals may be proper, § 4631(d) does not advance them in a permissible way.*** As the Court of Appeals noted, the "state's own explanation of how" § 4631(d) "advances its interests cannot be said to be direct." 630 F.3d, at 277. ***The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers***—that is, by diminishing [pharmaceutical] detailers' ability to influence prescription decisions. . . .
>
> Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. ***The State can express that view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.***

Id. at 577–79 (emphasis added); *see also id.* ("[T]he State may not seek to remove a popular but disfavored product from the marketplace" by restricting speech).

The Court's reasoning in *Sorrell* is directly applicable to the provisions of the Ordinance at issue here. Former Commissioner Saltzman explained in his deposition that because the City Council lacked the political will to mandate URM retrofitting, it settled for the alternative policy of attempting to indirectly coerce buildings on the URM database to either retrofit or be forced out of the rental market. Saltzman Dep. at 78:12–18 ("Commissioner Saltzman . . . feels the council is not being aggressive enough in requiring retrofits of URM buildings, but he also knew

---

[3] *Sorrell* involved restrictions on pharmaceutical "detailers":

> Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." . . . Detailers bring drug samples as well as medical studies that explain the "details" and potential advantages of various prescription drugs. . . . Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician's prescription practices—called " prescriber-identifying information"—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message.

564 U.S. at 557–58.

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his council colleagues were not comfortable enacting those regulations so he is now focused on requiring the placards and tenant notification."). Specifically, Comm. Saltzman acknowledged that this removal from the marketplace would be achieved through targeted building owners being forced to choose between demolishing a building or raising rents to retrofit the building; in either case, the pressure the Ordinance created would indirectly remove these properties from circulation in the residential and commercial leasing markets. *Id.* at 40:24–41:5 ("[I]f people are electing not to live in your buildings, then if you are a landlord, you probably want to do something about that. . . . It could be doing the seismic retrofits. It could be demolishing the building[.]").[4]

But the City's approach is just what the Supreme Court foreclosed in *Sorrell*. Rather than directly mandate retrofitting to achieve its public safety goals, the City "seeks to achieve its policy objectives through the indirect means of [compelling] certain speech by certain speakers[.]" *Id.* at 577. The *Sorrell* Court flatly stated that "the State may not seek to remove a popular but disfavored product from the marketplace" by placing burdens on individuals' speech rights; nor may it "burden the speech of others in order to tilt public debate in a preferred direction." *Id.* at 578–79; *accord Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.") (alterations normalized and internal quotations omitted).

[4] Similarly, the City touts the success of California's URM placarding statute in "providing an incentive to retrofit," increasing tort liability for URM building owners, and almost eliminating the URM housing stock in Berkeley, California—which has become one of the most expensive and inaccessible housing markets in the nation. Opp. at 6, n. 1.

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Second, however compelling the City's interest in preventing loss of life and serious injury might be in the abstract, the Ordinance cannot survive strict scrutiny because it does little, if anything, to actually advance that interest. *See* Mot. (Dkt. 45) at 25-30. Defendants have admitted as much. For example, during her deposition Jonna Papaefthimiou agreed that the placard "*wouldn't save even one life*":

> I think that's true. I mean, we have talked about that a lot internally that in an indirect way placards can save lives if they motivate people to do retrofits or if people pay attention to them and therefore remember to drop, cover and hold on; then that could save lives. But the placard by itself doesn't save any lives and, I mean, I guess I would add that's been a frustration of us working on the project is that placards were a compromise. We really wanted people to retrofit their buildings and save lives. That's still our hope is that ultimately people will.

See Swift Decl., Ex. 4 (Papaefthimiou Dep.) at 81:20–82:10.[5] And, for all its flaws, the URM database accessible on the City's website already allows the public "to make an informed choice whether to assume the risk" of entering, or leasing units in, a URM building. If the City is concerned about the public's awareness of that information, the City can use its *own* speech to create awareness, as discussed below. But it cannot conscript Plaintiffs and other targeted building owners to do so. Finally, the City's sincere concerns about the urgent need to inform and protect the public are undermined by its abundant exemptions, carve-outs, and delays preventing the Ordinance from being implemented for another year and a half (or indefinitely, in some cases). *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547

[5] The City relies on statements from Ms. Papaefthimiou's declaration that contradict statements made during her deposition. Plaintiffs' object to the admission of any portions of declarations made by declarants not present and available for cross examination at the evidentiary hearing on this matter. *See* OEC 611(2). Plaintiffs further object to the admission of the following portions of depositions on relevancy grounds, *see* OEC 402: Perez Decl. ¶¶ 3-5 (stating opinions as to purpose of Ordinance and describing unrelated tenant rights); Papaefthimiou Decl. ¶ 7 (stating opinions as to purpose of Ordinance); Vannier Decl., Ex. 6 at 5-7, 10-11 (stating Mr. McMonies' opinions as to purpose of Ordinance and opinions regarding challenges in obtaining loans and insurance).

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(1993) ("'[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'").

Thus, the Ordinance does not directly—or even appreciably—advance a compelling government interest. Saltzman Dep. at 39:11–16 ("Q. So is it fair to say there is really nothing in this Ordinance that furthers that particular purpose, which is to make people aware that they should duck, cover, and not run out? Is that a fair statement? A. Yeah, that sounds fair."). It therefore cannot survive strict scrutiny."

b. The Ordinance's compelled speech mandates cannot survive strict scrutiny because they are not the least restrictive means of advancing the City's interests.

Yet, even if the City could demonstrate the Ordinance directly advanced a compelling interest, that showing alone does not suffice. "If the government clears that hurdle, it must then show that forcing the [regulated entities] to comply with the [law] is the least restrictive means by which it can achieve its compelling interest." *Christie*, 825 F.3d at 1056. That is, the government must show that it could not further accommodate building owners' free speech rights without undermining its ability to prevent loss of life and serious injury. *Id.* Accordingly, "[t]he least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. Parties challenging a law under strict scrutiny need only identify "a plausible, less restrictive alternative" to defeat it, unless the government can "prove that the alternative will be ineffective to achieve its goals." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Whether a challenged enactment is the "most effective" way to further a government's compelling interest has no bearing on "why the less-restrictive means would be ineffective." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009). While Defendants are correct that a particular statute "need not address all aspects of a problem in one fell swoop," *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015), it is nonetheless true that a law's "[u]nderinclusiveness raises serious doubts about whether the government is in fact

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pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 138 S. Ct. at 2376.

As detailed in Plaintiffs' opening memorandum, the Ordinance is not the least restrictive means of furthering the City's compelling interest in preventing loss of life and serious injury. *See* Mot. at 30–32. The Ordinance fails for two reasons: (1) the City has "plausible, less restrictive" means of preventing loss of life and serious injury from URM buildings, and (2) if the goal of the Ordinance is to prevent loss of life from URM buildings, the Ordinance is "wildly underinclusive." *Brown*, 564 U.S. at 802.

First, the Ordinance is not the least restrictive means of achieving the City's goals because the City has other, "plausible, less restrictive" means of serving its proffered interest. In their original Motion, Plaintiffs raised a number of alternatives the City could employ to that end: the City could magnify its public information campaign through additional public postings, expanded public education programs, direct mailers or emails, or use of the City's Community Emergency Notification System. The City could potential employ additional means not yet raised, including television or radio advertisements, billboards, social media, and "pre-roll" advertising on media sharing websites like YouTube. None of these would require burdening any party's free speech rights, and many of them would likely be more effective than public placards and boilerplate disclosures.

Defendants do not attempt to seriously grapple with the "plausible, less restrictive" means Plaintiffs identify. Yet, it is the City's affirmative obligation at this stage to show why those means would be "ineffective" at preventing the loss of life and serious injury the City seeks to address. *Playboy Entertainment Group, Inc.*, 529 U.S. at 816. Defendants assert that the Ordinance's compelled speech requirement is the "*only* practical way to inform most people who live in, work in, or enter URM buildings of the risks posed by such buildings[.]" Opp. at 30. In support of this, Defendants offer the testimony of a City employee explaining why none of the above "plausible, less restrictive" means are effective: individuals may not know how to look for

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the City website or read English fluently; the City cannot guarantee that mailing lists are complete; and many individuals choose not to attend public meetings, not to read their mail, or not to consume local media. Papaefthimiou Decl., ¶¶ 6–7. From this, the City concludes that requiring building owners to post placards and include boilerplate disclosures is "the only practical way" to prevent loss of life and serious injury by URM buildings. *Id.* ¶ 8.

But the City's evidence is speculative at best. If the City is worried about individuals not reading their mail or lacking fluency in English, why does it assume those same individuals will read placards or boilerplate statements in lease applications—both of which are written in English? The City offers no evidence to support its assumptions that the placards and lease application statements effectively notify the public of the City's opinions, nor does it offer any actual evidence that it would be ineffective for the City itself to distribute pamphlets or mail letters (both of which could provide information in multiple languages). There is little force to the City's argument that it "cannot guarantee that [mailing data] is complete" when it has made no attempt to ensure that the Ordinance even covers all URM buildings, much less the "complete" set of all buildings presenting similar earthquake risks.

If it were motivated to actually promote public safety, the City could engage in a public information campaign to inform the public of earthquake risks wherever they arise. Modern communication methods allow the government to provide information throughout the City—including to those communities traditionally underserved by the City's efforts—without resorting to methods like placarding that have history of harming those very communities. In fact, both Comm. Saltzman and Ms. Papefthimiou have acknowledged as much. Saltzman Dep. at 38:12–16 (explaining that other public awareness campaigns successfully do what placards fail to do); Papaefthimiou Dep. at 53:21–56:12 (explaining that the Bureau of Emergency Management posters are likely to be more effective than placards). But the City would rather take the shortcut of requiring building owners to speak on the City's behalf—speech which is of little utility to begin with, as shown above. That is not what the Supreme Court guaranteed when it held that

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"[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790–91 (1988). For the City to justify its attempt to compel Plaintiffs' speech, it must be able to show that the need is great and there is no better means of addressing that need; that is far from the case here.

Additionally, the City's argument that out-of-area renters must be warned of supposed URM risks through the boilerplate disclosures in lease applications or potentially incur expenses when terminating a lease is unavailing. By targeting lease *applications* instead of commercial advertising, the City provides no information to prospective tenants at the time the transaction is proposed, waiting instead until one of the final steps before the lease is completed and burying the supposedly essential disclosure in a document not used to provide information to prospective tenants. Moreover, the stated purpose of the Ordinance is to prevent loss of life and serious injury, not to lessen the financial burdens faced by out-of-area tenants with an aversion to URM buildings (but not to other forms of construction, or to residing in a liquefaction zone or the district of a URM public school). If a tenant avoids injury or loss of life from a billboard as easily as through compelled speech, the First Amendment requires that the City choose the billboard, regardless of the impact on the tenant's finances.

Second, as the Ordinance remains impermissibly underinclusive and therefore is not the least restrictive means of preventing loss of life and serious injury. Defendants do not respond to Plaintiffs' argument, instead likening the Ordinance's gaping loopholes to the kind of carefully crafted legislation at issue in *Williams-Yulee*. 135 S. Ct. at 1669–70. Yet the Ordinance is nothing like the provisions in *Williams-Yulee*. There, the Court upheld a Florida ban on judicial candidates personally soliciting campaign funds. *Id.* at 1669. The party challenging the law argued that it was underinclusive because Florida does not ban judicial candidates from requesting personal gifts or loans. *Id.* The Court then explained that this was not the kind of underinclusivity that creates a First Amendment concern:

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> Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*. The principal dissent offers no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort. Even under strict scrutiny, the First Amendment does not require States to regulate for problems that do not exist.

Id. at 1670 (emphasis in original). That is not the case here. In fact, the Ordinance does exactly what the *Williams-Yulee* Court warned against by declining to regulate different aspects (soft-story construction, non-ductile concrete, buildings in liquefaction zones, public schools, single- and dual-family homes) of the problem that affects its stated interest (preventing loss of life and serious injury) in a comparable way (by creating equivalent risk). Thus, rather that support Defendants' claims, *Williams-Yulee* further bolsters Plaintiffs' argument that the Ordinance's underinclusiveness is concerning—and, indeed, fatal—under the First Amendment.

Accordingly, Plaintiffs reiterate the concerns expressed in their earlier briefing about why the Ordinance is underinclusive: it targets certain building owners but not owners of other, similarly situated buildings; it exempts owners of at least 1,000 structures of identical construction devoted to single- or dual-family housing; it gives public schools an indeterminate amount of time to comply; and it completely ignores other forms of construction that are equally susceptible to damage in an earthquake, including soft story construction, non-ductile concrete, and buildings located in liquefaction zones. Mot. at 31–32. In these respects, the Ordinance is very much like the provision struck down by the Supreme Court in *NIFLA*, which "excluded from the licensed notice requirement without explanation . . . nearly 1000 community clinics" in California. 138 S. Ct. at 2375–76. That was enough for the Court to consider the provision "wildly underinclusive." *Id.* The same label applies here.

As the foregoing demonstrates, the Ordinance cannot survive strict scrutiny for several reasons: it does not "directly advance" a compelling government interest and it is not the "least restrictive means" of doing so because "plausible, less restrictive" means are available, and the

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Ordinance is "wildly underinclusive." The Ordinance therefore violates the First Amendment and must be enjoined.

2. The Ordinance's compelled speech mandates are not protected by the government speech doctrine.

The government speech doctrine holds that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245, 192 L. Ed.2d 274 (2015). In an attempt to evade strict scrutiny, the City contends that the Ordinance's placarding and lease application obligations constitute government speech: "[P]lacards, even when required to be posted on private property at private expense, are considered to be government speech." Opp. at 9, 15. The City fails to cite any cases supporting this proposition. More importantly, the City fails to cite any cases establishing that the government speech doctrine creates an exception to strict scrutiny. Far from being an exception to the standard compelled speech analysis, the government speech doctrine is the *mirror image* of that analysis: just as the government cannot compel the speech of private parties, so too are private parties barred from compelling the government's own speech.

a. The government speech doctrine does not provide an exception from strict scrutiny for compelled speech.

Failing to recognize that the government speech doctrine does not authorize the government to compel private speech, the City relies on two United States Supreme Court cases holding that *private parties* could not force the government to express the plaintiffs' preferred viewpoint. In *Pleasant Grove City, Utah v. Summum*, the United States Supreme Court held that the First Amendment did not "entitle[] a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected," because "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." 555 U.S. 460, 464, 172 L. Ed.2d 853 (2009). Similarly, in *Walker*, the Court ruled that

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the Texas Department of Motor Vehicles Board had the right to refuse to issue specialty license plates designed by private parties because "specialty license plates issued pursuant to Texas's statutory scheme convey government speech." 135 S. Ct. at 2243.

But the fact that government speech is exempt from First Amendment limitations on content or viewpoint discrimination does not mean that the government may rely on the doctrine to compel private parties to speak. Indeed, *all* compelled speech is government speech in the sense that the government is forcing a private party to express the government's chosen viewpoint—that is precisely why compelled speech is so pernicious. The exception urged by the City would therefore swallow the rule, leaving no room for decades of cases developing the standards for scrutinizing compelled speech. Accordingly, regardless of the applicability of the government speech doctrine in other contexts, compelled speech remains subject to strict scrutiny, as the Court clearly states in *Walker*:

> Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley v. Maynard,* 430 U.S. 705, 717, n. 15, 715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message"). **And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees.** See *id.,* at 715, 97 S.Ct. 1428; *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). But here, compelled private speech is not at issue. **And just as Texas cannot require SCV to convey "the State's ideological message," *Wooley, supra,* at 715, 97 S.Ct. 1428, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.**

Walker, 135 S. Ct. at 2252–53 (emphasis added); *see also id.* at 2246 ("That is not to say that a government's ability to express itself is without restriction. . . . [T]he Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private

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persons to convey the government's speech.").[6] Thus, even if the City could establish that the Ordinance involves government speech—and it cannot—the fact that the City is attempting to affix that speech to private buildings and insert it into private lease applications means that the government is still compelling private speech and is subject to strict scrutiny.

Therefore, the City's assertion that "[n]either the Supreme Court nor any other federal court appears to have defined the level of scrutiny that applies to government speech posted on private property," is simply false.[7] Opp. at 10. As is the City's claim that "the Supreme Court's analysis in *Wooley* . . . suggest[s] that rational-basis scrutiny applies in that context." Opp. at 11 (citing *Wooley*, 430 U.S. at 717). To the contrary, in *Wooley*, the United States Supreme Court held that New Hampshire could not require the plaintiffs to display the state motto, "Live Free or Die," on their vehicle license plates, because the compelled speech was not justified by "sufficiently compelling" government interests. *Wooley*, 430 U.S. at 715–16. Thus, *Wooley* squarely addressed the issue of government speech—a government-issued license plate—posted on private property—the plaintiffs' vehicle—and found that this compelled speech violated the First Amendment under a strict scrutiny standard. *Id.*; *see also Walker*, 135 S. Ct. at 2252–53 (describing *Wooley* as "recogniz[ing] that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees"); *PSEG Long Island LLC v. Town of N. Hempstead*, 158 F. Supp.3d 149, 166-167 (E.D.N.Y.

[6] A separate line of government speech cases establishes that the government may "impose[] an excise tax on private citizens and then use[] the money to speak in the name of the government itself." *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917 (9th Cir. 2005). However, "the First Amendment does not permit the government to force citizens to express beliefs that are not their own. As an extension of this principle, . . . the First Amendment also does not permit the government to force citizens to contribute to a private association when the funds are used primarily to support expression from a certain viewpoint." *Id.*

[7] However, if it were true that "this issue appear[ed] to be one of first impression," Opp. at 10-11, that fact alone would establish sufficiently serious legal questions to justify the issuance of a preliminary injunction. *Farris*, 677 F.3d at 864.

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2016) (applying strict scrutiny to placarding ordinance). The City's suggestion that *Wooley* applied a rational basis standard or a "reasonable government purpose" test is therefore highly misleading. Opp. at 10-11.

Just as New Hampshire could not "require[] that appellees use their private property as a 'mobile billboard' for the State's ideological message," the City cannot compel Plaintiffs to use their private property as billboards for the City's misleading placards. *Wooley*, 430 U.S. at 715.

b. The Ordinance's compelled speech mandates are not government speech.

In any event, the Ordinance's placarding and lease application mandates do not constitute government speech. The City likens the Ordinance to the license plates in *Walker* and claims that case provides the applicable test for government speech. Opp. at 11. This is technically true—although not in the manner the City intends—since *Walker* states license plates and other government speech that compel private expression are subject to strict scrutiny. But the City's argument fails even on its own terms because the Ordinance's compelled speech mandates do not constitute government speech under the standard articulated in *Walker*.

As the United States Supreme Court recently warned, the government speech doctrine "is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758, 198 L. Ed.2d 366 (2017). As such, *Walker* "likely marks the outer bounds of the government-speech doctrine." *Id.* at 1760. The City must therefore show that signs posted by private parties on private property and landlords' statements in rental applications are at least as attributable to the government as license plates. The City cannot make that showing.

First, the City fails to show that governments have a long history of expressing their own opinions on private buildings or in private lease application documents—much less a long

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history of *compelling private parties* to express the government's opinion at their own expense. In *Walker*, the Court showed that, for a century, "insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States," including symbols and "slogans to urge action, to promote tourism, and to tout local industries." 135 S. Ct. at 2247. Likewise, in *Summum*, the Court invoked millennia of inherently expressive government monuments:

> Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.

555 U.S. at 470. The City can cite no similar examples of government expression on placards affixed to private property, relying instead on non-expressive exit and "no smoking" signs that are more akin to "state names and vehicle identification numbers" than "[t]riumphal arches." Needless to say, this case does not involve government expression on government property, nor does it challenge exit signs or even "certificates stating that the building complies with various local laws." Opp. at 12. Rather, this case involves the government compelling some private building owners to express the government's disapproval of some private URM buildings. The fact that California passed a similar mandate in 1992—the constitutionality of which has not been determined—does not establish a long history of government expression within the outer limit set by *Walker*.

Second, the City fails to show that signs on private buildings and statements in private lease applications are "closely identified in the public mind with the government," rather than the private building owner. *Summum*, 555 U.S. at 472. In fact, the Court in *Summum* stated just the opposite:

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> It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. . . . This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

Id. at 471. Similarly, in *Walker*, the Court determined that "Texas license plates are, essentially, government IDs. And issuers of ID 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated.'" 135 S. Ct. at 2249; *see also id.* at 2248 ("Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification."). The City contends that "any possible ambiguity" will be removed by the most recent amendment to the ordinance, which adds to the end of the statement on the mandatory placards "P.C.C. 24.85.065." Opp. at 13 n.7. But, as the Supreme Court recently stated, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal*, 137 S. Ct. at 1758. A bare reference to the City Code does not transform impermissible compelled private speech into permissible government speech.

Finally, the fact that the government "maintains direct control over the messages conveyed" by the placards and lease application statements is precisely the problem with compelled speech. By definition, wherever the government compels private speech, it controls the message conveyed by the private speaker. This factor merely highlights the flawed attempt to refashion the government speech doctrine into an exemption to strict scrutiny for compelled speech. As shown by *Walker* and *Wooley*, the government cannot escape strict scrutiny by claiming ownership of the speech it is compelling others to make on its behalf. The Ordinance's placard and lease application requirements are therefore subject to—and cannot survive—strict scrutiny.

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3. The Ordinance's compelled speech mandates are not commercial speech, but would fail even under the *Zauderer* standard.

Finally, the City contends that the Ordinance's lease application mandate is permissible under the *Zauderer* standard for commercial speech. Under the *Zauderer* standard, the government may compel speech related to "commercial advertising" in order to require "disclosure of 'purely factual and uncontroversial information about the terms under which . . . services will be available," unless "such requirements . . . are 'unjustified or unduly burdensome.'" *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985)); *see also Hilton v. Hallmark Cards*, 599 F.3d 894, 905 n. 7 (9th Cir. 2010) ("[C]ommercial speech is best understand as speech that merely advertises a product or service for business purposes.") (internal citations and quotation marks omitted); *ABA*, 916 F.3d at 753 (applying *Zauderer* standard regarding ordinance covering "any advertisement . . . that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use," and reversing denial of preliminary injunction).

a. The *Zauderer* standard does not apply because lease applications are not commercial speech.

When determining whether speech constitutes commercial advertising, Ninth Circuit courts consider the factors identified in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012). The *Bolger* factors include (i) whether the publication is in an "advertising format," (ii) whether it references "a specific product," and (iii) "the underlying economic motive of the speaker." *Id.* The presence of one or even two factors is not dispositive, but the presence of all three "provides strong support for the conclusion that the publication at issue is properly characterized as commercial speech." *Dex*, 696 F.3d at 958 (alterations normalized); *accord Association of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728 (9th Cir. 1994) (speech at issue must have all three *Bolger* characteristics "in combination" to support conclusion that speech is commercial).

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As Plaintiffs explained in detail in their opening Motion, lease applications do not constitute commercial speech under the *Bolger* factors because they are not advertising materials related to specific products; rather, they are used by landlords to obtain information about potential tenants. *See* Mot. at 21–23 (Dkt. 45). Thus, under the Ninth Circuit's precedents and the Supreme Court's holding in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983), the Ordinance regulates speech which is "made in a context other than advertising" and is therefore "fully protected" by strict scrutiny. *NIFLA*, 138 S. Ct. at 2374.

The City simply ignores this entire analysis, relying solely on the vacated ruling in *CTIA-The Wireless Ass'n v. City of Berkeley, California*, to establish its claim to commercial speech. 854 F.3d 1105, 1116 (9th Cir. 2017), *judgment vacated*, 138 S. Ct. 2708 (2018). But that ruling was vacated and has no precedential value. Nor does the Ninth Circuit's reliance on specific portions of *CTIA* in *ABA* revive it in its entirety, as Defendants suggest. To the contrary, the court limited its reconsideration of CTIA to "those aspects of *CTIA* with which we agree in this opinion." *ABA*, 916 F3d at 755. Those aspects were *CTIA*'s conclusions that *Zauderer* provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech—even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers." *ABA*, 916 F3d at 756. Most importantly, however, the parties in *CTIA stipulated* that the compelled speech was commercial and the Ninth Circuit did not examine the issue: "The parties agree that Berkeley's ordinance is a regulation of commercial speech." *CTIA-The Wireless Ass'n v. City of Berkeley, California*, 854 F.3d at 1114 (citing *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (stating, "Commercial speech is defined as speech that does no more than propose a commercial transaction," and applying *Bolger* factors). Accordingly, *CTIA* provides no basis for deviating from the established standard for commercial speech. The Ordinance fails to meet that standard.

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b. The Ordinance's lease application mandate impermissibly compels speech even under the *Zauderer* standard.

Yet, even if the City could show that *Zauderer* provided the appropriate standard, the Ordinance's lease application provision would still violate the First Amendment. As noted above, *Zauderer* permits the government to compel some "truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest." *ABA*, 916 F.3d at 755. "The *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome." *Id.* (citing *NIFLA*, 138 S. Ct. at 2372).

First, for the reasons discussed above, the City cannot show the Ordinance directly advances a *substantial* government interest. At best, the stated purposes of the Ordinance address "purely hypothetical" problems—like whether the public knows basic earthquake safety tips; at worst, the Ordinance seeks to compel building owners' speech as a means of coercing retrofitting that the City lacked the political will to directly require. Not only are these ends insufficient, but the City cannot even establish that the Ordinance's compelled speech mandates actually advance those interests, given that they are applied inconsistently, are misleading in many cases, and are less effective than less constitutionally burdensome alternatives.

Second, the Ordinance does not compel speech that is "purely factual" and uncontroversial. As Plaintiffs' explained previously, the Ordinance requires building owners to represent that the targeted buildings are "unreinforced" and "may be unsafe," regardless of whether those buildings have been retrofitted or whether they are actually less safe in a major earthquake than buildings without a placard. *See* Mot. at 35 (Dkt. 45) (citing *Video Software Dealers Ass'n*, 556 F.3d at 967 ("[The government] "has no legitimate reason to force [the targeted building owners] to affix false information on their products.").

The City contends that the existence of non-URM or otherwise exempt buildings on the URM list "is beside the point," because there is an appeals process and the notice is "purely factual" regardless of whether it is accurate as applied to all of the buildings erroneously

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included on the URM list. Opp. at 21. The City also argues that "uncontroversial" refers only "to the factual accuracy of the compelled disclosure not to its subjective impact on the audience," relying once again on the vacated *CTIA* decision. *Id.* at 22 (quoting *CTIA*, 854 F.3d at 1117). But the lease application statements are *not* factually accurate with respect to many of the buildings covered by the Ordinance, such as buildings incorrectly included on the URM list and the many retrofitted URMs that cannot be removed through the appeals process. Moreover, it ignores that the lease application statements are inherently misleading to consumers because they imply to the public that the targeted buildings are less safe than uncovered buildings that are not, in fact, less safe, such as exempted URM buildings, other forms of construction, buildings in the liquefaction zone.

Finally, the Ordinance is both unjustified and unduly burdensome. As explained above, the lease application mandate cannot be justified by the City's cited purposes. Furthermore, the Ordinance's compelled speech provisions are far more intrusive and burdensome than alternative methods of advancing the City's goals. Rather than directly defend the burdens imposed by the Ordinance, the City argues the Ordinance is less burdensome than the one enjoined in *ABA* because the ordinance there applied to "all sugary drink labels—essentially an endless number of labels," whereas the Ordinance here does not sweep so broadly. Opp. at 25. But the relative number of sugary drinks sold in San Francisco as compared to the number of targeted URM buildings in Portland says nothing about whether the Ordinance's compelled speech is unduly burdensome. Indeed, the extensive exceptions and carve-outs from the Ordinance *undermine* the constitutionality of the Ordinance, rather than enhance it. Additionally, the City contends that there is no problem of "drown[ing] out plaintiffs' message" because the City's compelled statements "do not compete with [Plaintiffs'] own advertisements or other messages." Opp. at 23. Of course, that is because Plaintiffs' lease applications *do not contain* any advertisements, which is why the *Zauderer* standard does not apply in the first instance. Rather than attempting to correct misleading or incomplete advertisements, the City seeks to compel Plaintiffs to express

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the City's views when Plaintiffs do not even offer any commercial speech of their own. As a result, the Ordinance's compelled speech mandate is unjustifiable and unduly burdensome.

Accordingly, even under the *Zauderer* standard, the lease application provision violates the First Amendment.

4. The Ordinance is void for vagueness because it fails to give actual notice of proscribed acts and does not establish minimal guidelines to control enforcement.

The Due Process Clause of the Fourteenth Amendment guarantees that no state or local government shall deprive any person of life, liberty, or property without due process of law. U.S. CONST., AMEND. XIV, § 1. "[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a [penal] law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. U.S.*, 135 S. Ct. 2551 (2015). While the twin elements of the vagueness doctrine "focus[] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that [legislation] establish minimal guidelines to govern [the law's] enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (internal quotations omitted); *accord F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (vagueness doctrine "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way"); *U.S. v. Williams*, 553 U.S. 285, 304 (2008) (a state is void for vagueness if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement"); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.").

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Defendants respond to only half of Plaintiff's vagueness concerns. The Supreme Court has explained that the vagueness doctrine has two elements: (1) actual notice to citizens and (2) minimal standards governing enforcement. Defendants attempt to address the first element by arguing that the presence of a definition in the Ordinance rescues it from vagueness concerns. But Defendants overstate the value of the Ordinance's definitions. As Plaintiffs raised in their opening Motion, even with the "great detail" included in the definition of "Reinforced Masonry," the Ordinance can still result in two identical buildings facing different placarding obligations. Mot. at 39, n. 16 ("[A] building retrofitted to the specifications of the 1993 Oregon Structural Specialty Code before January 1, 2018 is exempt from the [O]rdinance, but an identical building retrofitted to the same—or even a somewhat higher—standard after that date must post the placard."). The mere fact that terms are defined does not insulate them from vagueness challenges. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 77 (holding that the defined terms "contributions" and "expenditures" were impermissibly vague because their definitions did not put individuals on actual notice of the proscribed conduct); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018) (holding that the defined term "aggravated felony" was impermissibly vague for the same reason).

However, the City wholly ignores that portion of the vagueness doctrine which the Supreme Court described as "the more important" of the doctrine's twin elements: that a statute must provide sufficient guidance to avoid arbitrary or discriminatory enforcement. *Kolender*, 461 U.S. at 357–58. And the Ordinance fails spectacularly in that regard. From its first passage in 2018, the Ordinance has been rife with special allowances, carve-outs, exemptions, and other arbitrary and discriminatory enforcement efforts. As Plaintiffs explained in their opening Motion:

> [B]y administratively decreeing that public schools may have an indeterminate amount of time in which to comply with the mandates, by sometimes limiting the placarding requirements at public schools to only their gymnasiums, and by administratively proclaiming that identical URM buildings used as single and dual-

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> family residences are exempt, the City has *already* begun enforcing the Ordinance in a discriminatory manner.[8]

Mot. at 37. Indeed, penalties under the Ordinance are subject to the same gamesmanship and manipulation as liability. The Ordinance's ambiguous language permits the City to arbitrarily decide whether to assess fees on a per-unit or a per-building basis, allowing for discrepancies in penalties varying by factors of tens or even hundreds. Such a result is precisely what the Supreme Court warned of in *Kolender* when it described statutes that would preserve citizens' liberties "only at the whim" of those charged with enforcement. 461 U.S. at 358.

Moreover, despite the City's insistence on its precise definitions of reinforced and unreinforced masonry, the City did not apply such exacting standards to its initial identification of buildings subject to the Ordinance. The City uses an unreliable database of URM buildings—the veracity of which the City itself disclaims—to target owners for enforcement. On top of that, the Ordinance fails to establish clear standards for removal from the URM database, although it does provide for a costly and burdensome appeals process.

Thus, regardless of the definitions contained in the Ordinance purporting to grant some clarity to those subject to and enforcing its provisions, the Ordinance remains impermissibly vague both on its face and in its enforcement, and it should be declared void.

B. Plaintiffs Will Suffer Imminent and Irreparable Harm Absent an Injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) *see also Doe v. Harris*, 772

[8] *See also* Saltzman Dep. at 60:9–61:8 ("Q. Did you say administratively that they [Portland Public Schools] could just have the time without going back to the City Council? A. Yes. I mean, that's what I did.")

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F.3d 563, 583 ("A colorable First Amendment claim is irreparable injury sufficient to merit grant of relief."); *accord* 11A C. Wright & A. Miller, *Fed. Prac. & Proc.*, § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech . . . most courts hold that no further showing of irreparable injury is necessary."). This is true regardless of the presence of reparable, economic harm; the existence of economic injury alongside other, intangible injury does not prevent a finding of irreparable harm. *See, e.g., Roe v. Anderson*, 966 F.Supp. 977, 985 (E.D. Cal. June 4, 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998); *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

Defendants point to the substantial economic injuries Plaintiffs may suffer in the event an injunction is not issued as evidence that Plaintiffs' alleged harm is reparable and not irreparable. However, case after case from federal district courts to the U.S. Supreme Court has affirmed that raising a serious constitutional claim is a sufficient showing of irreparable harm to warrant a preliminary injunction. No further showing is needed, nor does a showing of any additional, reparable harm to Plaintiffs distract from that ironclad rule. Defendants also claim that Plaintiffs' harm is not sufficiently imminent because Defendants have delayed enforcement of the Ordinance's most onerous provisions—a delay occasioned by Plaintiffs' challenges. Defendants argue that this case could potentially be "litigated to completion" before those requirements take effect, so no preliminary injunction should issue. That is nonsensical. This Court should enjoin enforcement of the entire Ordinance now, not six or twelve or eighteen months from now depending on the progress of this litigation. Where the movant challenging an unconstitutional statute has shown "the possibility of irreparable harm" and the non-movant government fails to argue "that it would be unduly harmed by the preliminary injunction[,]" the threat of constitutional harm controls, and the statute's enforcement should be enjoined. *Roe*, 134 F.3d at 1405.

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C. The Balance of Equities and Public Interest Strongly Favor a Preliminary Injunction.

That Plaintiffs "have raised serious First Amendment questions compels a finding that the balance of hardships tips sharply in Plaintiffs' favor." *ABA*, 916 F.3d at 758 (alterations normalized); *see also Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007); *Sammartano*, 303 F.3d at 973. Likewise, the Ninth Circuit has "'consistently recognized the significant public interest in upholding First Amendment principles." *ABA*, 916 F.3d at 758 (citing *Doe*, 772 F.3d at 583). Therefore, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *Sammartano*, 303 F.3d at 974); *accord Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) ("[I]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law[.]"); *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("[T]he public interest favors applying federal law correctly."); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

Defendants do not seriously reckon with Plaintiffs' arguments regarding the balance of equities or the public interest here, all but ignoring the considerable volume of authority in this circuit holding that both considerations nearly always favor remedying a colorable constitutional violation. Instead, Defendants assert, without support, a hyperbolic disaster scenario: "there is a compelling public interest in preventing large-scale deaths or injuries and allowing the public to make an informed choice whether to reside in, do business in, work in, or enter buildings at risk of collapse in an earthquake." Opp. at 36. Yet that claim is belied by Defendants' earlier statements. Mot. at 27 (admitting that the Ordinance "wouldn't save even one life," and that "the placard by itself doesn't save any lives"). Moreover, due to the online availability of the City's URM database, the Ordinance is not needed for the public "to make an informed choice about" whether to inhabit URM buildings; the public already has information necessary to make that

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choice. Finally, the City's sincere concerns about "preventing large-scale deaths or injuries" are undermined by its profligate exemptions, carve-outs, and its decision to voluntarily delay implementation of the Ordinance until November 2020. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("'[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"). Against such diffuse and nebulous assertions is weighed Plaintiffs' concrete and particular injuries to their First Amendment rights; the latter must prevail.

Similarly, the vacated decision in *CTIA* does not establish that the public interest favors burdening targeted building owners' First Amendment rights, as the City contends. *See* Opp. at 37. To the contrary, the public interest almost always favors vindication of Constitutional rights, which remain the foundation of public life in this county. Federal courts have affirmed time and again that protection and preservation of those rights will almost always benefit the public and will frequently outweigh any interest to the contrary. Nor do Plaintiff seek to impede "the free flow of accurate information" by moving to enjoin the Ordinance. Plaintiffs have raised serious doubts about the accuracy of the compelled speech the Ordinance mandates—indeed, that inaccuracy was a substantial impetus for Plaintiffs' challenge. Mot. at 35 ("[T]he Ordinance will force many targeted building owners whose buildings have undergone significant seismic retrofitting to misrepresent to their tenants and to the public at large that their buildings are totally unreinforced. The accuracy and efficacy of the speech compelled by the Ordinance are both hotly contested."). Defendants cannot distract from the very real constitutional harm the Ordinance creates by claiming—without showing—that merely by mandating particular statements the Ordinance automatically benefits the public. Defendants' circular logic—that violating Plaintiffs' First Amendment rights bolsters First Amendment values—is unavailing. By Defendants' logic, governments could compel any amount of speech without fear of injunction because any disclosure, no matter how speculative or imprecise, is always in the public interest since it contributes to the "robust and free flow" of information.

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Defendants' arguments concerning the remaining *Winter* factors cannot prevail. At every turn, Defendants ignore the gravity of the constitutional violations the Ordinance occasions and attempt to distract this Court by elevating other, inferior (or irrelevant) interests. The precedents in this circuit make clear that a plaintiff's colorable claim of a First Amendment violation is an irreparable harm and the balance of equities and the public interest nearly always tip in favor of remedying that violation. *Sammartano*, 303 F.3d at 973–74. Defendants raise no cognizable reason why that should not be the outcome here.

CONCLUSION

For the foregoing reasons, Plaintiffs' Amended Motion for Preliminary Injunction should be granted.

DATED this 10th day of May, 2019.

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