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**Applying To Appear Pro Hac Vice*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ERIC WOLLOD, Plaintiff, vs. CITY OF WILDWOOD, NEW JERSEY, Defendant.	)))))))))))	Case No. 09cv297(JEI) **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION.**

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Background

The City of Wildwood, New Jersey is a beach town on the Jersey Shore that has a speech policy with so many constitutional holes it is a wonder that the town hasn't been washed away in a torrent of First Amendment litigation. The City's speech policy requires that anyone who wishes to distribute religious or political literature—even individuals—pay a fee, submit a detailed application letter, and wait for a permit to be issued before speaking. The permit is required even when the speech is on a traditional public forum like a sidewalk, where the plaintiff Eric Wollod wanted to distribute religious literature. Since Wildwood enacted its policy in the sixties, the Supreme Court and courts of appeal have struck almost identical speech restrictions in half a dozen ways, whether because they were content-based, not narrowly tailored, failed to leave open alternative means of speech, or left too much discretion to public officials. But Wildwood has evidently ignored these developments of the modern constitutional world; chances are it has been chasing away would-be First Amendment speakers like Eric Wollod with its musty speech policy for decades.

Mr. Wollod was chased away the first time by a Wildwood police officer, Sean Yuhas, who told him he could not distribute religious literature on a public sidewalk without the speech permit. Complaint, ¶¶ 20-26. Wollod is from Pennsylvania but visits Wildwood 10-15 times a year. Wollod Declaration, ¶ 2.

Beyond simply enjoying vacation time in his retirement, he uses these trips as an opportunity to distribute religious "tracts," which are informative brochures that describe his Christian faith and invite others to consider adopting it. Complaint, ¶¶ 17-18. Sometimes he plans his trips with a day or two's notice, and other times he decides to go the same day. Wollod Declaration, ¶ 3. Wollod will typically stand on the public sidewalk and offer the tracts to passersby. Occasionally people stop to read the tract and discuss its contents with him. The conversations are always cordial. Complaint, ¶ 19.

That is why Wollod was confused by Officer Yuhas' directive. Although he thought that it was an odd that the City would require a fee payment and permit for *free* speech in a public forum, he complied with the officer's command and left the area. Complaint, ¶ 25. A few days later he visited the city mayor's office to determine what the policy allowed and what he had to do to get a permit. *Id.* at ¶ 27. An official at the mayor's office confirmed that he would need a speech permit, and that even then Mr. Wollod could distribute his literature only within five areas on the Boardwalk. To get a permit he would have to submit a detailed letter describing personal information about himself and his speech, and then wait for it to be issued. The official also admonished that even if he obtained a permit, he could only give his literature to passersby if they asked for it. *Id.* at ¶¶ 28.

Liking this answer even less than Officer Yuhas', Wollod researched First Amendment law and determined that the City officials were either mistaken in their description of the policies or that the policies were unconstitutional. Wollod gave the City the benefit of the doubt and made one more trip to the Mayor's office. He spoke with yet another official who confirmed that he had to submit a detailed letter and obtain a permit to distribute his religious tracts. *Id.* at ¶ 29. This official told him that he would then be able to speak only in four locations on the boardwalk (rather than five). *Id.*

These officials' descriptions of the policy appear to be somewhat accurate, although not entirely. Wildwood does require a permit for distribution of religious or political literature, but does not limit speech to only four or five areas. The ordinance reads:

> Any religious organization which desires to peddle and/or solicit, and any individual, association, or organization which desires to disseminate religious and/or political information, in areas other than those enumerated in subsection 7-3.4b.2 shall not be required to pay a fee therefor, but shall otherwise comply with all other applicable provisions of this revision, including, but not limited to, the procedure for applications as set forth in subsection 7-3.5 and shall be required to possess a special permit which permit shall be issued or approved by the city clerk upon presentation of the proper identification as proof of their status. The fee for said permit shall be set forth in subsection 7-1.7 of the Revised General Ordinances.

Section 7-3.4(c). The fee is presumably the identification permit under Section 7-1.7, which costs $13.00. Although it is a little unclear, it appears that the

application letter must include a host of detailed information including the name and address of the person distributing literature, a description of the literature, photographs of the applicant, and the specific time and place the literature will be distributed. *See* Sections 7-3.5, 7-3.6. The applicant is then investigated by the chief of police, who has ten days to submit his findings and recommendation to the board of commissioners. Section 7-3.7.

After the chief submits his findings, the board of commissioners considers the application at its next regular meeting. *Id.* The application is to be approved unless the board believes the applicant's "character, ability or business responsibility is unsatisfactory, or that the products, services or activity are not free from fraud . . . ." *Id.* If the application is approved, the speaker can only distribute literature between the hours of 11:00 a.m. and 11:00 p.m. Section 7-3.5(c). The areas enumerated in subsection 7-3.4b(2) are six areas on or near the boardwalk (not four or five) that require payment of a fee but do not require registration with the city clerk's office. It is unclear whether speech in those areas requires the detailed application letter. Oddly, "Members of Jehovah's Witnesses who are performing public ministry with regard to their religion" are exempted from the licensing requirements. Section 7-3.3. The penalty for violating the law is a fine between $100 and $1,000, imprisonment not to exceed 90 days, or community service not to exceed 90 days. Section 7-3.15(j); Section 3-12.1.

Having run out of other options, Wollod filed this suit. He asks the Court to enter a preliminary injunction to prevent the City from enforcing its speech restrictions until the case can be finally decided.

Argument

I. Wollod Satisfies the Requirements for a Preliminary Injunction.

"Four factors govern a district court's decision whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 (3d Cir. 1996) (en banc).

A. Wollod Has a Reasonable Likelihood of Success Because the City Cannot Meet Its Burden to Overcome the Ordinances' Presumptive Unconstitutionality.

The key factor is whether Mr. Wollod has a reasonable likelihood of success on the merits. Here Wollod has several routes to success, not least of which is the policy's blatant content-based application to religious literature. But even before that, the City's speech permit scheme is presumed unconstitutional for two

reasons: It is (1) a prior restraint (2) against a classic form of speech in a traditional public forum.

A prior restraint gags speech before it actually happens and is contrary to the normal rule of punishing illegal speech *after* the infraction. An ordinance like Wildwood's that requires individuals or groups to obtain a permit *before* engaging in protected speech is a classic example of a prior restraint that is seldom—if ever—upheld. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Although a prior restraint "is not per se unconstitutional" it "comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (citation omitted). And the City always bears the burden of proving its constitutionality. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). So it is no surprise that the Supreme Court has repeatedly admonished that "prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975).

The second strike against Wildwood's policy is that it requires a permit for a classic form of speech—religious literature distribution—in a classic traditional public forum—a city sidewalk. "Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the pubic and, time out of mind, have been used for purposes of assembly, communicating thoughts between

citizens, and discussing public questions." *Shuttlesworth*, 394 U.S. at 152 (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939)). As the Ninth Circuit notes, "public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." *Grossman, M.D. v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (citation omitted); *see also American-Arab Anti-Discrimination Committee v. City of* Dearborn, 418 F.3d 600, 605 (6th Cir. 2005) (finding that constitutional concerns are heightened where permit scheme applies to public forum). Making matters worse for the City, Wollod's speech gets even more protection than most because "hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. . . .This form of activity occupies the same high estate under the First Amendment as do worship in churches and preaching from pulpits." *Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. 150, 161 (2002) (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943)); *see also U.S. v. Kokinda*, 497 U.S. 720, 734 (1990) (noting the low government interest in regulating handbills because they are reasonably unobtrusive to the recipient). As the Third Circuit notes, literature distribution "enjoys the highest level of First Amendment Protection." *Service Employees International Union v. Municipality of Mt. Lebanon*, 446 F.3d 419, 429 (3d Cir. 2006).

Another reason that speech permit schemes almost always fail is that they are, simply speaking, un-American. This is what the Supreme Court was getting at when it struck down an Ohio town's ordinance that required canvassers and solicitors to get a permit before they went door-to-door.

> 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. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Watchtower, 536 U.S. at 166.

Wildwood's policy could possibly survive if it were drafted with laser-like precision as a reasonable time, place and manner restriction. The City's shotgun approach to speech regulation does not even come close to passing the test.

1. Wildwood's Policy Does Not Qualify As a Valid Time, Place, and Manner Restriction.

Under certain conditions a city may constitutionally regulate the time, place, and manner of free speech, even in a public forum. This is because the government holds these public fora in trust by regulating competing uses and ensuring that they remain open and freely accessible to all. *Shuttlesworth*, 394 U.S. at 152. But the City's authority as public fora referee is not unlimited.

Rather, the restrictions must be reasonable and not "based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). And even if these conditions are met, a speech permit scheme will still be struck if it lacks definite, non-discretionary guidelines for officials administering the permits. *Id.*

i. Wildwood's ordinance is content based.

Wildwood's speech permit stumbles at the first hurdle because it is unambiguously content based. "The principal inquiry in determining content neutrality is whether the government has regulated speech without reference to its content." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 754 (1994) (citation omitted). If the City has to look at the content of Mr. Wollod's speech to determine if it falls within the regulation, the law is content based. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992). Here, the ordinance applies to two forms of literature distribution: religious or political. *See* Section 7-3.4(c) (requiring a permit for "any individual, association, or organization which desires to disseminate religious and/or political information . . . ."). The City must look at whether Mr. Wollod's literature is religious to determine whether it falls within the ordinance's scope. That is paradigmatic content-based discrimination.

The Supreme Court struck down a Georgia county's permit ordinance that was even less blatantly content-based in *Forsyth County v. Nationalist Movement*. There, the county assessed a fee for a parade permit, the amount of which depended on the degree of police protection that public officials thought that the speech would require. 505 U.S. at 134. The Court found content-based discrimination because "to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed." *Id.* (citation omitted). Here the question is even easier because the Supreme Court has always held that restricting religious speech because it is religious is an improper content-based decision. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (prohibiting classroom use for religious worship or instruction unconstitutional content-based discrimination); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995) (excluding religious newspaper from forum was content-based discrimination).

The Third Circuit held as much when it found that an ordinance that required a permit for canvassing involving "'issues of public or religious interest' arguably renders that segment of the ordinance 'content based.'" *Service Employees International Union*, 446 F.3d at 421 (quoting ordinance).[1] But the Court found it

[1] "Canvassing" is when a group spreads throughout a community to go door-to-door to distribute literature or otherwise communicate with community members. *Service Employees International Union*, 446 F.3d at 421.

unnecessary to invalidate the ordinance on those grounds because the city failed so miserably on the narrow tailoring prong because it restricted even individuals and small groups. *Id.* at 427-28.

Wildwood's speech permit suffers the same defect, which we turn to next.

ii. Wildwood's ordinance is not narrowly tailored.

A narrowly tailored ordinance does not "burden more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Put another way, a restriction is narrowly tailored only if it eliminates no more "evil" than it seeks to remedy. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). "Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring." *American-Arab Anti-Discrimination Committee*, 418 F.3d at 608. While a city like Wildwood may have sufficient interest in public safety and avoiding traffic congestion to require large groups to get a permit before parading down the street, those interests simply do not apply to individuals and small groups.

This is only logical. Individuals and small groups do not create traffic congestion or safety hazards:

> [T]he significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups

> of people travel together on streets and sidewalks. . . .Without a provision limiting the permitting requirements to larger groups, or some other provision tailoring the regulation to events that realistically present serious traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks, a permitting ordinance is insufficiently narrowly tailored to withstand time, place, and manner scrutiny.

Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1039 (9th Cir. 2006).

That is essentially what the Third Circuit found in *Service Employees International* when it struck down Mt. Lebanon, Pennsylvania's canvassing permit scheme. 446 F.3d at 428-29. The Court found that the city failed to show that the "benefit to be gained from its ordinance provides reasonable justification for its considerable burden on First Amendment values" and that it was "not tailored to serve Mt. Lebanon's legitimate interest in preventing crime and fraud." *Id.* The Court was also quick to remind the city that "the Supreme Court has 'never accepted mere conjecture as adequate to carry a First Amendment burden.'" *Id.* (quoting *Watchtower*, 536 U.S. at 170).

The Third Circuit's holding is hardly unique. Every case we could find on this issue struck down permit schemes applied to individuals and small groups

because they were not narrowly tailored.[2] *See, e.g.*, *American-Arab Anti-Discrimination Committee,* 418 F.3d at 608 (striking parade ordinance for small groups and finding that in "most circumstances, the activity of a few people peaceably using a public right of way for a common purpose or goal does not trigger the City of Dearborn's interest in safety and traffic control.")[3]; *Cox v. City of Charleston,*416 F.3d 281, 286 (4th Cir. 2005) (striking ordinance that criminalized even "a small meeting of individuals who gather on the sidewalk in [town] to hand out religious tracts without first obtaining a permit, even if their expression does nothing to disturb or disrupt the flow of sidewalk traffic."); *Grossman*, 33 F.3d at 1205-08 (permit requirement not narrowly tailored when it applied to groups as small as "six to eight") *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (permit requirement not narrowly tailored when it applied to groups as small as two); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (expressing doubt that permit requirement was narrowly tailored because it applied to groups as small as ten).

[2] There seems little difference between the analysis for lack of narrow tailoring and overbreadth, and a finding of one usually necessarily leads to a finding of the other. *American-Arab Anti-Discrimination Committee,* 418 F.3d 606, n. 3.

[3] This Court also found that the ordinance was not narrowly tailored because it required a notice period of 30 days. *Id.* at 606-07. Wildwood's ordinance lacks narrow tailoring for the same reason, although it is unclear how long it takes to issue the permit.

These circuits agree that in balancing the government's interests with the burdens on individual and small group speech, the city's interests are almost always left wanting. There are much better ways to meet a city's traffic or safety concerns than enacting a speech permit scheme for individuals and small groups. Perhaps the Fourth Circuit said it best:

> The relevant legislative body (the city council here) is the proper forum for balancing the multitude of factors to be considered in determining how to keep the streets and sidewalks of a city safe, orderly, and accessible in a manner consistent with the first Amendment. We emphasize, however, that cities have a number of tools at their disposal to meet that goal. Rather than enforcing a prior restraint on protected expression, cities can enforce ordinances prohibiting and punishing conduct that disturbs the peace, blocks the sidewalks, or impedes the flow of traffic.

Cox, 416 F.3d at 286; *see also Parks v. Finan*, 385 F.3d 694, 703-04 (6th Cir. 2004) (same).

Although the City's interests are nil, the burden on speakers is considerable, as courts have repeatedly recognized. "Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers." *Grossman*, 33 F.3d at 1206. If a speaker has to apply for and receive government permission before he or she speaks (and even pay cash for the permit), how can it be said that it is *free* speech? After Mr. Wollod jumps through all the hoops required of him just to

hand out a few tracts on a public sidewalk, he will have paid for the right with considerable time and effort.

And worse, he has to go to that effort every time he wants to speak in Wildwood, which is 10-15 times a year. Wollod Declaration, ¶ 2. Each time he must apply for a permit and wait patiently for the City to approve or deny it. "Spontaneous expression, which is often the most effective kind of expression, is prohibited by the ordinance." *Grossman*, 33 F.3d at 1206 (*citing Shuttlesworth*, 394 U.S. at 16). As the Supreme Court recently explained, permit schemes ban "a significant amount of spontaneous speech. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit." *Watchtower*, 536 U.S. at 167.

Wildwood's speech permit scheme poses the same problem for Mr. Wollod. He often plans his trips with only a day or two notice. Wollod Declaration, ¶ 3. Sometimes he decides to travel to Wildwood on the same day. *Id.* But the permit scheme—aside from being a temporal, procedural, and financial burden—effectively prohibits any of Wollod's speech that is not planned far enough in advance to get a permit.[4]

[4] The permit scheme also prohibits anonymous speech, which the Court in *Watchtower* noted is additional constitutional harm. 536 U.S. at 166-67.

In sum, the City's interests in requiring individuals to get a speech permit, whatever those are, wither when compared to the burden on Wollod and other First Amendment speakers. The City's speech permit is no more narrowly tailored than the many other cities whose policies have been struck down; Wildwood's should fare no better.

iii. Wildwood does not leave open ample alternative channels of communication.

Because Wildwood's scheme already fails so miserably on the first two prongs of the time, place and manner test by being content based and not narrowly tailored, it seems almost unnecessary to address the third prong—whether it leaves open ample alternative means of communication. But even assuming it could pass the first two prongs, it would fail this one. It is plain that a permit scheme like Wildwood's that does not allow speech without a permit fails to leave open ample alternative means of communication. *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 244 (D.C. Cir. 1990). A total ban on speech in a public forum without a permit leaves no alternative means open.

2. The Permit Scheme Grants Unbridled Discretion to City Officials to Determine When It Can Be Issued.

Even if the City had adopted time, place, and manner regulations that could pass the three-prong test, it would still fail because the city must adopt "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*,

394 U.S. at 151. Here, the board of commissioners can decline the permit application simply by finding that speaker's "character, ability or business responsibility is unsatisfactory . . . ." Section 7-3.7. The scheme is unconstitutional because it fails to give any guidance to officials determining when a speaker's character, ability, or business responsibility is "unsatisfactory." The official is left to grant or deny the permit application at his whim.

"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth*, 394 U.S. at 151 (citation omitted). "And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id*. 939; *see also Forsyth County*, 505 U.S. at 132-33 (striking parade ordinance because it did not give definite standards to city administrator).

Wildwood's speech permit ordinance gives public officials the same sort of discretion that was condemned by the Supreme Court in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769 (1988). There the city required a permit to

place newspaper racks on public property. The permit could be denied under "such other terms and conditions deemed necessary and reasonable by the Mayor." *Id.*

> It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement "it is not in the public interest" when denying a permit application. . . .To allow these illusory "constraints" to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal.

Id. at 769-70. Here, Wildwood officials can simply declare in cursory fashion that the applicant's "character, ability or business responsibility is unsatisfactory . . . ." Section 7-3.7. The ordinance requires no more explanation than that and has nothing that would give the decision maker any guidelines to follow in making the determination.

But Wildwood delegates unbridled discretion to the officials in yet another way. There is no time limit on when applications must be granted or denied. The Eleventh Circuit recognized this as just one more way the government can frustrate Free Speech rights with boundless discretion:

> [N]o section of the sign code specifies any time period within which the building official must make this determination. . . . The absence of any decision making deadline effectively vests building officials with unbridled discretion to pick and choose which signs may be displayed by enabling them to pocket veto the permit applications for those bearing disfavored messages. The sign code's permitting requirement is therefore precisely the type of prior restraint on speech that the First Amendment will not bear.

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1272 (11th Cir. 2005).

Without restraints on official discretion, Wildwood's speech permit scheme is unconstitutional for yet another reason.

3. The Policy is Unconstitutional Because It Favors Jehovah's Witnesses.

Even when Wildwood appears to have responded proactively to a Supreme Court decision by revising its ordinances, it rendered them even more unconstitutional by exempting Jehovah's Witnesses, and only Jehovah's Witnesses. Section 7-3.3. The exemption was perhaps in response to the Supreme Courts' decision in *Watchtower Bible and Tract Society v. Stratton*. That was the case where Jehovah's Witnesses successfully challenged an ordinance that required a permit for canvassing. 536 U.S. at 153-54. Or the exemption could have been responding to the dozen other Jehovah's Witness cases in the last fifty years, which the Court noted have been plentiful because of the group's penchant for distributing religious leaflets. *Id.* at 160-61. For whatever reason, the City must have believed that application of the Court's decisions was limited to Jehovah's Witnesses. But far from correcting a constitutional defect, the City just made it worse.

That is because government cannot constitutionally favor one religious group over another without violating the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 245-46 (1982) (a law that favored established churches was unconstitutional). On the flip side, playing religious favorites also violates the Free Exercise Clause. *Id.* ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practices that is not neutral or not of general application must undergo the most rigorous scrutiny.").

Mr. Wollod does not have to rely on conjecture that Wildwood favors certain denominations; it's clear from the face of the policy. If only Mr. Wollod were a Jehovah's Witness, he would be readily exempted. This exemption is indefensible and clearly violates the Free Exercise and Establishment clauses of the First Amendment. It is impossible to fathom any reason—much less a compelling reason—to justify it.

4. Wildwood's Policy is Unconstitutional Because It Is A Strict Liability Penalty that Chills Free Speech.

The City's speech permit scheme suffers one more defect that we mention briefly. An ordinance that chills First Amendment speech cannot impose strict liability. *Smith v. California*, 361 U.S. 147, 151-53 (1960). Wildwood punishes

failure to get a speech permit without requiring any knowledge element. Section 3-12.1 ("Any person violating any of the provisions of this chapter . . . shall, upon conviction be subject to one or more of the following . . . .").

The Sixth Circuit found that Dearborn, Michigan's strict liability parade permit ordinance "is unconstitutional because 'any statute that chills the exercise of First Amendment rights must contain a knowledge element.'" *American-Arab Anti-Discrimination Committee*, 418 F.3d at 611 (quoting *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992)). Mr. Wollod's speech has clearly been chilled by the ordinance. Wollod Declaration, ¶ 4. He no longer distributes his tracks for fear of being arrested. *Id.* Although strict liability schemes may be fine in limited contexts—like traffic laws and food and drug regulation to ensure public safety—they are too harsh a penalty in free speech cases, especially in a public forum. *Id.* at 611-13.

B. Mr. Wollod Has Been Irreparably Harmed

"In a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *ACLU v. Reno*, 217 F.3d 162, 172 (3d. Cir. 2000). The Supreme Court has repeatedly reaffirmed that "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).

Mr. Wollod has been prohibited from freely distributing his religious brochures on Wildwood's public sidewalks for months now. That irreparable harm easily meets the second prong for a preliminary injunction.

C. The Injury to Mr. Wollod Outweighs the Harm to the City in Granting the Preliminary Injunction.

Mr. Wollod also meets the third prong—balancing the City's interest in enforcement of the law with his constitutional injury. As explained, Wildwood's policy is grossly overbroad and several circuits have already held that municipalities have little to no interest in enforcing speech permit policies against individuals. "[T]o the extent that the ordinance 'is not tailored to the municipality's stated interest,' there is a commensurate reduction in the municipality's interest in its enforcement." *Service Employees International Union*, 446 F.3d at 425 (quoting *Watchtower*, 536 U.S. at 168).

Enjoining enforcement of that policy against Wollod will result in no harm to the Wildwood. But the longer the City's unconstitutional policy persists increases the harm to Mr. Wollod.

D. The City Has No Interest In An Unconstitutional Law.

"Curtailing constitutionally protected speech will not advance the public interests, and neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Reno*, 217 F.3d at 181. Because Wildwood can claim no interest that trumps Wollod's constitutional rights, this final prong for the preliminary injunction is met.

CONCLUSION

Wildwood's speech permit ordinance needs a major overhaul. It has such extensive constitutional problems—from being content based, to not narrowly tailored, to favoring certain religions—that the City would probably be better off starting from scratch. Since the ordinance was originally adopted, federal courts have given plenty of guidance to help the redraft.

Until then, Mr. Wollod should be awarded a preliminary injunction to allow him to distribute his religious tracts on Wildwood's public sidewalks. The policy has such extensive defects that it should also be enjoined as facially unconstitutional as well.

Respectfully submitted,

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