No. B260074

IN THE COURT OF APPEAL STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 8

LAMAR CENTRAL OUTDOOR, LLC,
a Delaware Limited Liability Company,
Petitioner,

vs.

CITY OF LOS ANGELES,
Respondent.

APPEAL FROM SUPERIOR COURT COUNTY OF LOS ANGELES
Los Angeles County Superior Court Case No. BS142238
The Honorable Luis A. Lavin

APPLICATION BY THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT CITY OF LOS ANGELES; PROPOSED BRIEF

Deborah J. Fox (SBN 110929)
Margaret Rosequist (SBN 203790)
MEYERS, NAVE, RIBACK, SILVER & WILSON
707 Wilshire Boulevard, 24th Floor
Los Angeles, California 90017
Telephone: (213) 626-2906
Facsimile: (213) 626-0215

Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The League of California Cities, California State Association of Counties and American Planning Association California Chapter know of no person or entity that has an interest in the outcome of this proceeding within the meaning of Rule 8.208(e) of the California Rules of Court.

DATED: November 19, 2015

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: M. W. Rosequist

DEBORAH J. FOX
MARGARET W. ROSEQUIST
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATE CASES **Page(s)**

TABLE OF AUTHORITIES (Cont'd)

STATE CASES (Cont'd) **Page(s)**

FEDERAL CASES

TABLE OF AUTHORITIES (Cont'd)

FEDERAL CASES (Cont'd) **Page(s)**

STATUTES

STATE STATUTES

FEDERAL STATUTES

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200(c), the League of California Cities, the California State Association of Counties, and the American Planning Association California Chapter (collectively "the Amici") hereby submit this Application to file an *amicus curiae* brief in support of Respondent City of Los Angeles ("the City" or "Los Angeles").

The League of California Cities ("the League") is an association of 484 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from various regions throughout California. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide or nationwide significance – such as this case.

The California State Association of Counties' ("CSAC") primary purpose is to represent county government before the California Legislature, administrative agencies and the federal government. California's 58 counties range from Alpine with little more than 1,200 residents, to Los Angeles County with a population in excess of 10 million. CSAC sponsors a Litigation Coordination Program that is administered by

the County Counsels' Association. The program consists of county counsels representing all areas of the State. The program monitors litigation of concern to counties statewide, coordinates the defense of major multi-county litigation and provides amicus support where appropriate.

The American Planning Association California Chapter ("APA California"), the largest of the 47 chapters of the American Planning Association, is an organization of more than 5,000 professional planners, planning commissioners, and elected officials in California whose mission is to foster better planning by providing vision and leadership in addressing important planning issues. To that end, the APA California's Amicus Curiae Committee, made up of experienced planners and land use attorneys, monitors litigation of concern to California planners and participates in cases of statewide or nationwide significance that raise issues affecting land use planning in California.

The League, CSAC and APA California have identified this case as being of statewide significance and concern and appropriate for amicus support. Cities and counties throughout California are confronted with a continual and growing onslaught of commercial signage in the form of traditional billboards, supergraphics and -- most recently -- digital signs with bright eye-catching electronic messages that rapidly cycle through every few seconds. The use of onsite/offsite and commercial/noncommercial distinctions in local sign ordinances are a mainstay of effective sign

regulation. The onsite/offsite and commercial/noncommercial sign distinctions at issue in Los Angeles' sign regulations are routinely and extensively embedded in the regulatory frameworks utilized by cities and counties across the State. (*See Metromedia, Inc. v. City of San Diego* [*"Metromedia I"*] (1980) 26 Cal.3d 848, 869; *see also* Appellant's Opening Brief, p. 14 n.1.) The lower court's erroneous ruling that such distinctions are content-based, and the court's misapplication of the intermediate scrutiny standard of review, should be reversed. If upheld, the lower court's decision will have a tremendous negative impact on all California cities and counties. It could strip them of the power to ban offsite billboards, the cornerstone of effective regulatory control of commercial signage.

Jurisdictions throughout California and the nation are reexamining sign regulations in light of this case and the recent United States Supreme Court case regarding noncommercial sign regulation in *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218. Failure to reverse the lower court's erroneous ruling (and/or misapplication of *Reed v. Town of Gilbert* in this case) will eviscerate the ability of cities and counties to adequately address the issues of safety and aesthetics presented by the unrelenting proliferation of billboards, supergraphics and digital signage throughout the State. The League, CSAC and APA California therefore have a vital interest in the

outcome of the appeal in this case as well as ensuring that *Reed v. Town of Gilbert* is not misapplied here.

The Amici respectfully submit that their views on these issues are critically important and that they have a unique perspective to contribute on behalf of their member cities and counties. Accordingly, the Amici respectfully request leave to file the accompanied *amicus curiae* brief.

DATED: November 19, 2015

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: M. W. Rosequist

DEBORAH J. FOX
MARGARET W. ROSEQUIST
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

BRIEF OF AMICUS CURIAE

I. *INTRODUCTION*

The lower court's erroneous ruling in this case could impede the ability of California cities and counties to adequately address the problems associated with outdoor advertising signs in their communities. These signs include traditional billboards, supergraphics (vinyl signs plastered on building walls) and most recently digital billboards with their intensely lighted messages that change every few seconds. These signs have been dubbed "ambush media" as their large frames often dominate the urban landscape and cannot be avoided by motorists, pedestrians or anyone who enters the public realm. The signs loom over intersections, beam their images into bedroom windows and rise above the freeways, urging us at all turns to buy a product or service. Cities and counties throughout the State face a sustained waive of commercial signage and confront the safety concerns and visual blight caused by these signs on a local planning level. Not all communities will make the same planning and zoning decisions as appetites and tolerances for such signage differ. All, however, need access to effective regulatory tools. The onsite/offsite sign distinction with an accompanying exemption for noncommercial messages is such a tool. The lower court's decision in this case – finding the onsite/offsite and commercial/noncommercial regulatory framework unconstitutional under the California Constitution – is erroneous and if not reversed could set in motion the demise of effective sign control throughout the State.

The courts and case law have consistently recognized that billboards create a unique set of problems for land use planning and development and have approved the onsite/offsite distinction, with an exemption from an

offsite sign ban for noncommercial speech, as a constitutionally sound method for regulating commercial outdoor advertising. At issue in this case are regulations enacted by the City of Los Angeles ("the City" or "Los Angeles") that typify this widely-used regulatory framework. Specifically, Los Angeles' regulations allow onsite signs (also known as on-premises signs) that identify the owner of property or the primary business activity that is conducted on that property. Offsite signs (also referred to as off-premises signs) are signs unrelated to products or activities located on the site where the sign is located. Los Angeles' regulations also have a wholesale exemption from the offsite sign ban for noncommercial speech. Not only do cities and counties throughout the State use similar onsite/offsite distinctions, with an accompanying exemption for noncommercial speech, these distinctions are also used in the Federal Highway Beautification Act and the California Outdoor Advertising Act. (*See* 23 U.S.C. § 131 (2007); *see also* Cal. Bus. & Prof. Code §§ 5405, 5440, 5442.)

The size of the profits and revenues at stake with outdoor advertising has led to broad-scale battles over billboard ordinances.[1] The City's regulations in particular have been targeted for sustained attack by the billboard companies. Having failed to defeat Los Angeles' restrictions in the federal arena, Petitioner Lamar Central Outdoor, LLC ("Lamar") now

[1] In 1981 the United States Supreme Court noted that individual billboards had a fair market value of between $2,500 and $25,000. (*See Metromedia, Inc. v. City of San Diego ["Metromedia II"]* (1981) 453 U.S. 490, 495.) More recently, court submitted expert testimony notes that a well-placed urban billboard can be worth $3 million to $4 million for each sign face. (*See Regency Outdoor Advertising v. City of Los Angeles* (2006) 39 Cal.4th 507, 514.)

challenges the well vetted and approved regulatory framework in the State courts on California constitutional grounds. Lamar's challenge should fail. While the California Constitution is an independent document from the federal Constitution, interpretation of the State Constitution and the federal Constitution should lead to the same conclusion here. Left to stand, the trial court's erroneous ruling will hamper the ability of cities and counties throughout California to adequately address issues and concerns related to the proliferation of signage in their communities – including static billboards, electronic and digital signs, supergraphics and more.

II. *ARGUMENT*

As discussed in detail below, prior controlling California Supreme Court precedent, the California content-neutrality test, and the criteria evaluated by the California courts for adopting federal jurisprudence require a finding that the onsite/offsite and commercial/noncommercial distinctions are content-neutral under a California constitutional analysis. (*See* Section II(A)-(C) *infra.*) The lower court failed to follow this controlling precedent and its decision should be reversed. The lower court's decision should also be reversed because it failed to apply the proper intermediate scrutiny standard of review for commercial speech regulations. (*See* Section II(D) *infra.*)

A. *Controlling California Precedent Establishes That The Onsite/Offsite Distinction And The Exemption For Noncommercial Signs Are Constitutional.*

The issues in this case have already been resolved by previous California Supreme Court decisions. Specifically, the California Supreme Court has upheld the constitutionality of the onsite/offsite distinction in

sign codes and has adopted the commercial/noncommercial distinction articulated by the federal courts. The trial court misunderstood and misapplied this prior controlling precedent and its ruling should be reversed.

Both the California Supreme Court and the United States Supreme Court penned opinions regarding the constitutionality of a San Diego sign ordinance enacted to control the proliferation of billboards in the early 1980s. (*See Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848 ["*Metromedia I*"]; *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490 ["*Metromedia II*"]; *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180 ["*Metromedia III*"].) The *Metromedia* decisions addressing San Diego's sign regulations are commonly acknowledged to be the foundation of modern sign regulation. The San Diego ordinance permitted only onsite commercial speech, while noncommercial speech was not considered to be onsite and so it was prohibited by the city's ban (except for a few limited exceptions). (*Metromedia I*, 26 Cal.3d at 857.) The San Diego ordinance prohibiting offsite signs defined such signs as those that did not identify any use, facility or service located on the premises or a product which is produced, sold or manufactured on the premises. (*Id.*)

The California Supreme Court found the ordinance to be constitutional, explaining (among other things) that the restrictions did not seek to suppress the content of an advertiser's message but only barred a particularly unsightly and intrusive mode of communication for offsite advertising. (*Id.* at 868.) The State high court specifically rejected the notion that the onsite/offsite distinction was subject to a strict scrutiny test under the California Constitution. (*Id.* at 869-871 [explaining that

commercial uses of property are subject to a lesser degree of constitutional protection especially where, as with billboards, they represent permanent intrusive uses of land].) Accordingly, the California Supreme Court upheld the facial validity of the sign restrictions under both the California and federal Constitutions. (*Id.*) While the United States Supreme Court subsequently overruled one portion of the State court's First Amendment analysis, it did not consider, analyze or comment on the State law claims. The reasoning and statements of law regarding the constitutionality of the onsite/offsite distinction under the State Constitution in *Metromedia I* therefore remains valid and controlling precedent. (*See City of Salinas v. Ryan Outdoor Advertising, Inc.* (1987) 189 Cal.App.3d 416, 423 [applying the reasoning of *Metromedia I*, apart from the First Amendment analysis].)

In *Metromedia II* the United States Supreme Court found that while an onsite/offsite distinction may pass muster, it failed to do so in the case before it because San Diego's restrictions impermissibly favored commercial speech over noncommercial speech in violation of the First Amendment. The United States Supreme Court remanded the case to the California Supreme Court to consider whether the ordinance at issue could be saved by a judicial construction of its terms limiting the offsite ban to commercial messages alone. (*Metromedia II*, 453 U.S. at 521-522; *Metromedia III*, 32 Cal.3d 180, 182.)

On remand, the California Supreme Court found the ordinance was not salvageable. It reached that conclusion not because it found a commercial/noncommercial distinction to be invalid but because such a distinction was not consistent with the original language and intent of the ordinance – which was to prohibit all offsite signs including

noncommercial signs. (*Metromedia III*, 32 Cal.3d at 183.) In *Metromedia III*, the California Supreme Court expressed concern about distinguishing between commercial and noncommercial speech, believing it presented constitutional difficulties. (*Id.* at 191.) This initial concern, however, has since been alleviated by subsequent case law and replaced by the California Supreme Court's embracement of the commercial/noncommercial distinction.

In particular, within a few years of the *Metromedia III* decision, the California courts began adopting and applying a definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience" – mirroring the definition supplied by the United States Supreme Court in *Central Hudson Gas & Electric v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561. (*See City of Salinas*, 189 Cal.App.3d at 429-430 [finding that the *Central Hudson* standard provided city officials with sufficient guidance for distinguishing between commercial speech and noncommercial speech in implementing restrictions regarding onsite/offsite signs].)

The California Supreme Court has now expressly endorsed using federal jurisprudence for determining the boundary between commercial and noncommercial speech under Article 1 of the California Constitution stating that the test is the same under both the federal and the State Constitutions. (*See Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 353; *see also Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 959, 969.) In contrast to the hesitation it expressed nearly 35 years ago in *Metromedia III*, the California Supreme Court in the intervening years has endorsed the commercial/noncommercial distinction. (*See id.*)

The State courts (like the federal courts) engage in both a "context- and content-based" evaluation. (*See Leoni v. State Bar of California* (1985) 39 Cal.3d 609, 624.) A distinction which excludes noncommercial speech from the reach of a city's billboard restrictions goes to context and not content.[2] Specifically, the noncommercial exemption does not address the specific content of any commercial or noncommercial speech but merely excludes all noncommercial speech from the restriction. This establishes that the context of the regulatory framework is a commercial one triggering the more lenient standard of review.

In short, California Supreme Court jurisprudence establishes that both the onsite/offsite and commercial/noncommercial distinctions used in sign regulations are constitutionally sound under Article 1 Section 2(a) of the California Constitution. As a result, the lower court's contrary holding is in error and should be reversed.

B. *The Onsite/Offsite And Commercial/Noncommercial Distinctions Comply With The Content-Neutrality Test Under The California Constitution.*

The lower court also committed reversible error when it failed to use the correct standard for evaluating the content-neutrality of the City's sign regulations under the California Constitution.

---

[2] Los Angeles' noncommercial exemption provides that all ideological, political or other noncommercial messages are exempt from its offsite sign prohibition. The language of the exemption provides a partial, non-exhaustive list of noncommercial speech rather than content-based distinctions. The City's exemption (and the exemption the Amici advocate for) is a wholesale exemption for noncommercial speech which acts to place all noncommercial speech beyond the reach of a ban on commercial signage.

As articulated by the California Supreme Court, a restriction is content-neutral under the California Constitution if it is justified without reference to the content of the regulation or if the regulation is justified by legitimate concerns that are unrelated to any disagreement with the message conveyed by the speech. (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 368; *International Society for Krishna Consciousness v. City of Los Angeles* (2010) 48 Cal.4th 446, 457.) The California Supreme Court has explicitly explained that the content-neutrality test under the California Constitution does not require literal or absolute content neutrality. (*Los Angeles Alliance for Survival*, 22 Cal.4th at 368.) Rather, the literal approach to a content-based analysis ignores the theoretical underpinnings of the doctrine and the reasons content-based distinctions are constitutionally suspect under the California Constitution. (*Id.* at 376.) Specifically, under Article 1 of the California Constitution "the kind of content-based distinctions that are suspect are those that involve government censorship of subject matter or government favoritism among different viewpoints." (*Id.* at 337.) Moreover, the California Supreme Court has noted that the literal approach to content-neutrality is suspect, because it is at odds with the State constitutional requirement of narrow tailoring.[3] (*Id.* at 378.)

[3] The United States Supreme Court's recent articulation of the federal test for content-neutrality under the First Amendment in *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, does not impact the test under a California constitutional analysis. Rather, respect for the State Constitution forestalls the California courts from abandoning settled application of a California constitutional standard every time changes are announced in the interpretation of the federal Constitution. (*See People v. Teresinski* (1982) 30 Cal.3d 822, 836.) Moreover, as discussed in Section III(C) below, *Reed* does not disrupt the opinions of the multitude of federal courts that have found the onsite/offsite and noncommercial/commercial distinctions in sign (Footnote cont'd)

Using the content-neutrality test under the California Constitution, the California Supreme Court found that a regulation that prohibited solicitation for the immediate exchange of money (but allowed other forms of speech) was content-neutral. (*Los Angeles Alliance for Survival*, 22 Cal.4th at 365.) The high court explained that the regulation was directed at the conduct (*i.e.* the exchange of money) and was not motivated by government censorship or favoritism. The high court also took note of the fact that restricting solicitation has long been recognized as being within the government's police powers and that the federal courts had found similarly worded solicitation restrictions to be content-neutral. (*Id.* at 368.) The California Supreme Court also found a regulation restricting the immediate receipt of funds at the Los Angeles airport was content-neutral under the California Constitution as the restriction was justified by legitimate concerns unrelated to any disagreement with the message conveyed by the speech. (*International Society for Krishna Consciousness*, 48 Cal.4th at 457.) By contrast, a rule implemented by a shopping center prohibiting speech that urged customers to boycott a store in the mall was an invalid content-based restriction under the California Constitution. (*Fashion Valley Mall v. National Labor Relations* (2007) 42 Cal.4th 850, 854-855.) Unlike the solicitation restrictions, the restriction regarding boycott speech was not justified by a legitimate concern unrelated to any disagreement with the message conveyed. (*Id.* at 868.)

---

codes to be constitutional and content-neutral under a First Amendment analysis.

Here, application of the California Supreme Court's articulated standard (rather than the misguided analysis undertaken by the lower court) results in a finding of content-neutrality. Specifically, the onsite/offsite distinction is a locational restriction on a permanent and intrusive mode of communication; it does not seek to bar or suppress the content of an advertiser's message.[4] The offsite prohibition applies not because of the topic discussed but because of the location of the sign.[5] Likewise, the distinction between commercial and noncommercial speech merely excepts noncommercial speech from a ban on offsite signs. The exception for noncommercial signs is not triggered because of the idea or message expressed (*i.e.* "save the whales," "vote for Ralph Nadar," or "God saves"). Such a distinction does not suppress speech or act as government censorship but rather, merely ensures that noncommercial speech is allowed (at a minimum) to the same extent commercial speech is allowed as required by federal law. (*See Metromedia II*, 453 U.S. 490.)

Moreover, under a California constitutional analysis, literal or absolute content neutrality is not required and the type of distinctions that are suspect are those that involve government censorship of subject matter

---

[4] Moreover, advertisers have many other avenues for posting their messages, such as newspapers, magazines, radio, television and the internet.

[5] Lamar's argument that certain offsite signs, such as those advertising Netflix or Amazon, may not qualify as onsite signs anywhere within the City limits has no constitutional relevance and does not change the analysis. The courts have explained that even if an onsite/offsite distinction favors property owners or lessees over non-property owners, such is not unconstitutional. (*City of Salinas*, 189 Cal.App.3d at 430 [explaining that in regards to commercial speech, property owners or lessees may receive preferential treatment without violating the Constitution].)

or government favoritism among different viewpoints. The onsite/offsite distinction accompanied by an exemption for noncommercial speech does not involve government censorship or government favoritism among viewpoints and does not reflect any disagreement with the message conveyed by the prohibited speech. Rather, this regulatory framework, prevalent in city and county sign regulations throughout the State (and found in the California Outdoor Advertising Act, Cal. Bus. & Prof. Code § 5405, and the federal Highway Beautification Act, 23 U.S.C. § 131) is a commercial land use regulation that falls within the scope of the long-recognized police and zoning powers of cities and counties to address traffic safety and the visual impacts on their citizenry caused by billboards. How communities address traffic safety and aesthetic concerns caused by signage is a local planning issue and should remain so. The onsite/offsite and commercial/noncommercial distinctions do not shut down the marketplace of ideas nor are they based on government censorship or favoritism. Cities and counties should not be stripped of this effective regulatory framework as such restrictions are not content-based and are not constitutionally suspect under a California constitutional analysis.

C. *Federal Jurisprudence Also Establishes The Constitutionality Of The Onsite/Offsite And Commercial/Noncommercial Distinctions.*

The lower court also committed an error when it failed to follow the federal precedent upholding the City's sign regulations at issue. While the California courts are not bound by this federal law, the federal precedent provides persuasive guidance and should not be disregarded lightly. (*See Beeman*, 58 Cal.4th at 346; *see also Edelstein v. City of County of San*

Francisco (2002) 29 Cal.4th 164, 168; *Gonzales v. Superior Court (City of Santa Paula)* (1986) 180 Cal.App.3d 1116, 1123.) Specifically, when evaluating whether to reject clearly established federal jurisprudence, the California courts consider at least four criteria (discussed below), none of which were considered by the lower court in this case and none of which support rejection of the established federal precedent. (*See Gerawan Farming v. Lyons* [*"Gerawan I"*] (2000) 24 Cal.4th at 468, 511; *see also Kaye v. Board of Trustees* (2009) 179 Cal.App.4th 48, 58; *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 959.)

As discussed in part III(A) above, the United States Supreme Court's decision in *Metromedia II* explains that it is permissible for a sign ordinance to distinguish between onsite and offsite signs so long as the reach of an offsite sign ban is limited to commercial speech. (*See Metromedia II*, 453 U.S. at 512, 521 & n.26.) Following the *Metromedia II* decision, the Ninth Circuit and its sister circuits have consistently upheld the constitutionality of the onsite/offsite distinction along with an exemption for noncommercial speech in sign regulations. (*See Clear Channel Outdoor, Inc. v. City of Los Angeles* (9th Cir. 2003) 340 F.3d 810, 814; *Outdoor Systems, Inc., v. City of Mesa* (9th Cir. 1993) 997 F.3d 604, 610-611; *Clear Channel Outdoor, Inc. v. City of New York* (2nd Cir. 2010) 594 F.3d 94, 106-107; *RTM Media v. City of Houston* (5th Cir. 2009) 584 F.3d 220.) Moreover, the Ninth Circuit has upheld (in three separate cases) the constitutionality of the City's sign regulations. (*See Vanguard Outdoor, LLC v. City of Los Angeles* (9th Cir. 2011) 648 F.3d 737; *see also World Wide Rush, LLC v. City of Los Angeles* (9th Cir. 2010) 606 F.3d 676; *Metro Lights, LLC v. City of Los Angeles* (9th Cir. 2009) 551 F.3d 898.) The

Ninth Circuit has also expressly found that the City's regulations pass muster under the California Constitution. (*See Vanguard*, 648 F.3d at 746-748.)

The United States Supreme Court's recent *Reed v. Town of Gilbert*, 135 S.Ct. 2218 ruling does not abrogate the extensive federal case law upholding the onsite/offsite and commercial/noncommercial distinctions in sign regulations.[6] Rather, as explained by the federal courts, *Reed* is inapposite in commercial speech cases and does not disturb the commercial speech framework set forth by the *Metromedia* and *Central Hudson* cases. (*See Contest Promotions, LLC v. City and County of San Francisco* (N.D. Cal. 2015) 2015 WL 4571564, *3-4 [finding that "*Reed* does not abrogate prior case law holding that laws which distinguish between onsite and off-site commercial speech survive intermediate scrutiny"]; *see also California Outdoor Equity Partners v. City of Corona* (C.D. Cal. 2015) 2015 WL 4163346, *10 [explaining that "*Reed* does not concern commercial speech, let alone bans on off-site billboards"]; *Citizens for Free Speech v. County of*

[6] The *Reed* case considered distinctions between different categories of noncommercial speech. Justice Thomas wrote the majority opinion striking down the Town of Gilbert, Arizona's sign regulations explaining that the exemptions distinguishing between different categories of noncommercial speech were content-based. (*Reed*, 135 S.Ct. at 2224.) Justice Alito, joined by two other Justices, took part in the majority opinion but wrote separately to "add a few words of further explanation" in particular noting (among other things) that rules distinguishing between on-premises and off-premises signs are not content-based and do not trigger strict scrutiny. (*Id.* at 2233.) Justice Kagan's concurrence, joined by two other Justices, rejected the notion of a rigid test for determining content-based distinctions in sign regulations or that such necessarily triggers strict scrutiny and concurred only in the judgment. (*Id.* at 2236.) Thus, at least six Justices (the three in the Alito concurrence and the three in the Kagan concurrence) support the continued constitutionality of the onsite/offsite distinction. (*See Contest Promotions*, 2015 WL 4571564 at *4.)

Alameda (N.D. Cal. 2015) 2015 WL 4365439, *13 [holding that "*Reed* does not apply" to an analysis of laws regulating offsite commercial speech]; *CTIA-The Wireless Association v. City of Berkeley* (N.D. Cal. 2015) WL 5569072, *10 [explaining that *Reed* does not suggest that the well-established distinction between commercial and noncommercial speech is no longer valid].)

As explained by the post-*Reed* decisions, the distinction between onsite and offsite types of signage is concerned with the location of the sign relative to the product and therefore (unlike the restriction at issue in *Reed*) does not single out specific subject matter or specific speakers for disfavored treatment. (*See Contest Promotions*, 2015 WL 4571564 at *4; *Citizens for Free Speech*, 2015 WL 4365439, *12-13 [finding that exemptions for onsite commercial signs were not content-based distinctions].) Likewise, a general exemption for noncommercial speech from a commercial regulation does not render the regulation a content-based restriction nor does it bring the regulation within the framework of a noncommercial speech analysis. (*Citizens for Free Speech*, 2015 WL 4365439, *12-13.) One post-*Reed* federal district court has also specifically rejected the claim that the onsite/offsite distinction and exemption for noncommercial speech becomes content-based when analyzed under the California constitutional framework. (*Id.* at *15-16 [finding that onsite/offsite and commercial/noncommercial distinctions are content-neutral under the California Constitution and applying, and finding that they meet with, the intermediate scrutiny test].)

In this case, the lower court inexplicably rejected the overwhelming federal authority upholding the constitutionality of the onsite/offsite and

commercial/noncommercial distinctions, instead relying on one opposing opinion from an Oregon state court. (*See* Order, p. 13.) The lower court's decision is contrary to the outcome that should be reached when the proper criteria for determining whether to follow federal precedent are considered. (*See Kaye*, 179 Cal.App.4th at 58; *see also Gallo Cattle Co.*, 159 Cal.App.4th at 959.) First, there is nothing in the language or history of the California liberty of speech clause suggesting that the issue should be resolved differently than under the federal Constitution. (*See id.*) Second, the federal case law upholding the onsite/offsite and commercial/ noncommercial distinctions is not inconsistent with earlier California court decisions. (*See id.*) Indeed, as discussed in Section III(A) & (B) above, California jurisprudence (including *Metromedia I*) instruct a finding that, as with a federal constitutional analysis, the onsite/offsite and commercial/noncommercial distinction are constitutional content-neutral restrictions under California law. The third criteria also favors following federal precedent as there is no persuasive or vigorous United States Supreme Court dissenting opinion supporting a finding that the onsite/offsite and commercial/noncommercial distinctions are unconstitutional or content-based. (*See id.*) Rather, while the original Supreme Court *Metromedia II* decision was accompanied by dissents, in the intervening years the federal circuits have consistently followed the majority opinion upholding onsite/offsite and commercial/noncommercial distinctions in sign codes. Finally (considering the fourth criteria), following the federal rule would not overturn established California doctrine affording greater rights to commercial signage than under the First Amendment. (*See id.*) In short, in the context of commercial sign

regulations, the federal and State constitutional rights are coextensive and dictate similar findings of constitutionality.

D. *The City's Sign Regulations Comply With The Intermediate Scrutiny Standard Of Review.*

In addition to making erroneous content-based findings regarding the onsite/offsite and commercial/noncommercial distinctions, the trial court also misapplied the proper standard of review applicable to commercial speech under the California Constitution.

The California courts have made it clear that commercial speech does not receive the same protection as noncommercial speech under the California constitution. (*Gerawan Farming v. Kawamura* [*"Gerawan II"*] (2004) 33 Cal.4th 1, 7, 22; *The U.D. Registry, Inc. v. State of California* (2006) 144 Cal.App.4th 405, 421.) For non-misleading commercial speech, the California Supreme Court has adopted the intermediate scrutiny standard of review set forth by the United States Supreme Court in *Central Hudson*. (*Gerawan II*, 33 Cal.4th at 7, 22; *The U.D. Registry*, 144 Cal.App.4th at 418, 422-423 [explaining that there is no separate test from the federal test for commercial speech under the State Constitution].) Contrary to the trial court's finding, the deferential standard for evaluating restrictions on commercial speech under *Metromedia II* and *Central Hudson* has not been modified by *Sorrell v. IMS Health, Inc.* (2011) 131 S.Ct. 2653. Rather, in *Sorrell* the United States Supreme Court considered a complete ban on commercial speech which was also considered to be content-based by the majority opinion. (*Sorrell*, 131 S.Ct. 2653.) The *Sorrell* majority opinion applied the *Central Hudson* test (which does not require content-neutrality) but noted that a content-based restriction, such

as the one before it, may require a type of heightened review. (*See id.* at 2664.) The majority opinion did not define what type of heightened review might be required. (*See id.*) The *Sorrell* dissent explained that the majority opinion suggested, but does not hold, that a standard stricter than the traditional *Central Hudson* test might be applied to content-based restrictions of commercial speech. (*See id.* at 2677, Breyer, J., dissenting; *see also Retail Digital Network, LLC v. Applesmith* (C.D. Cal. 2013) 945 F.Supp.2d 1119.)

Here, the onsite/offsite and commercial/noncommercial distinctions are content-neutral and *Sorrell* (even if it does articulate a modified standard which is questionable) has no application. (*See 1-800-411-Pain Referral Service, Inc. v. Otto* (8th Cir. 2014) 744 F.3d 1045, 1055.) The lower court committed reversible error by applying *Sorrell.* In particular, the Amici note that (contrary to the lower court's approach) courts employ a deferential standard when evaluating whether a commercial sign regulation actually advances its stated purpose of aesthetics and safety. (*See Metromedia II*, 453 U.S. at 508, 510; *see also Metro Lights*, 551 F.3d at 910; *Citizens for Free Speech*, 2015 WL 4365439, *14.) The lower court erred when it failed to follow this deferential approach and found that the City's exceptions to its sign ban unconstitutionally undercut the City's asserted interest in safety and aesthetics. (*See Metromedia II*, 453 U.S. at 510 [rejecting the argument that the distinction between onsite and offsite commercial signs unconstitutionally undermined the city's interest in safety and aesthetics]; *see also World Wide Rush*, 606 F.3d at 741 [urging judicial deference to a municipality's "reasonable, graduated response" to different aspects of the problems addressed by sign restriction].)

The Ninth Circuit has found that the City's sign code at issue here (including the exemption for thousands of transit stops from the offsite ban) is a reasonably graduated response to advance the City's interest in safety and reducing visual blight. (*See Metro Lights*, 551 F.3d at 910; *see also Vanguard*, 648 F.3d at 743.) The California courts apply the same *Central Hudson* test as the federal courts and should reach the same conclusion as the federal courts that the sign regulation here passes muster. Adopting the federal precedent is consistent with the California Constitution and California jurisprudence, warranting a similar conclusion under the California constitution. (*See Kaye*, 179 Cal.App.4th at 58; *see also Gallo Cattle Co.*, 159 Cal.App.4th at 959.) If the lower court's contrary finding is sustained, it could cripple the ability of cities and counties throughout California to address the proliferation of billboards, super graphics and/or other commercial signage in their communities.

III. *CONCLUSION*

For the reasons discussed above, the Amici urge this Court to reverse the lower court's decision. Specifically, this Court should find that the onsite/offsite and commercial/noncommercial distinctions are content-neutral under a California constitutional analysis. This Court should also reverse the lower court's ruling on the grounds that it did not apply the correct intermediate scrutiny standard of review and deference to legislative judgment when evaluating the constitutionality of restrictions on commercial speech.

DATED: November 19 2015

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: M. W. Rosequist

DEBORAH J. FOX
MARGARET W. ROSEQUIST
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to California Rules of Court, Rule 8.204(c)(1), the attached *AMICUS CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER is proportionately spaced and contains 4,822 words counted by Microsoft Word.

DATED: November 19, 2015

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: M. W. Rosequist

DEBORAH J. FOX
MARGARET W. ROSEQUIST
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

Attachment "1"

(California Outdoor Equity Partners v. City of Corona (C.D. Cal. 2015) 2015 WL 4163346)

2015 WL 4163346
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

CALIFORNIA OUTDOOR EQUITY PARTNERS; and Amg Outdoor Advertising, Inc., Plaintiffs,
v.
CITY OF CORONA, a California Municipal Corporation, Defendants.

No. CV 15–03172 MMM (AGRx). | Signed July 9, 2015.

Attorneys and Law Firms

Raymond N. Haynes, Jr., Law Offices of Raymond Haynes, Temecula, CA, for Plaintiffs.

John D. Higginbotham, Corona, CA, for Defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS/STAY; DENYING MOTION FOR PRELIMINARY INJUNCTION

MARGARET M. MORROW, District Judge.

*1 On April 28, 2015, California Outdoor Equity Partners ("COEP") and AMG Outdoor Advertising, Inc. ("AMG") (collectively, "plaintiffs") filed this action against the City of Corona ("the City") and various fictitious defendants. [1] The claims concern allegedly unequal enforcement of a ban on off-site commercial billboards in the City that is purportedly unconstitutional on its face.

On April 30, 2015, plaintiffs filed a motion for preliminary injunction, which they noticed for hearing on July 6, 2015. [2] On May 21, 2015, plaintiffs filed an *ex parte* application for temporary restraining order, [3] which the court denied, finding that plaintiffs had failed to show a likelihood of success on the merits of their claims. [4] Also on May 21, 2015, the City filed a motion to dismiss. [5] Both the motion to dismiss and the motion for preliminary injunction are opposed. [6]

I. FACTUAL BACKGROUND

A. Facts Alleged in the Complaint

The City of Corona Municipal Code § 17.74.160 prohibits the construction or operation of outdoor, off-site, commercial signs, i.e., billboards. [7] The ban does not apply to on-site commercial billboards, or to noncommercial billboards. [8] Section 17.74.070(H) provides for the relocation of previously existing off-site, commercial billboards. Specifically, it states: "[N]ew off-premises advertising displays ... may be considered and constructed as part of a relocation agreement requested by the city or redevelopment agency and entered into between the city or redevelopment agency and a billboard and/or property owner.... Such agreements may be approved by the City Council upon terms that are agreeable to the city and/or redevelopment agency in their sole and absolute discretion." [9]

Plaintiffs allege that the City's ban on off-site, commercial billboards violates the First Amendment and the free speech clause of the California constitution because it is an impermissible content-based regulation of free speech. [10] They also contend that § 17.74.070(H) is invalid as a prior restraint on free speech, given that it vests the City Council with unfettered discretion to approve relocation of preexisting off-site commercial billboards. Finally, they assert that even if the ban is constitutional, it is being applied in a discriminatory manner in violation of the equal protection clause set forth in Article I, Section 7 of the California constitution, because the City is permitting Lamar Advertising Company ("Lamar") to build new billboards while denying them the right to do so. [11]

B. The State Court Proceedings

On December 30, 2014, the City filed a nuisance abatement action in Riverside Superior Court against AMG and other non-parties, alleging, *inter alia*, claims for public nuisance arising out of the state court defendants' violation of the City's ban on off-site commercial billboards. [12] On January 7, 2015, the superior court granted the City's application for temporary restraining order. The state court defendants sought a writ of mandate vacating the temporary restraining order; their petition was summarily denied by the California Court of Appeal. [13] On January 23, 2015, the superior court issued a preliminary injunction in favor of the City, [14] which is the

subject of a pending appeal. [15] Although the initial complaint named only AMG and various other individuals and entities that are not parties to this action, COEP was added as a party in the first amended complaint, filed May 18, 2015. [16]

II. DISCUSSION

A. The City's Request for Judicial Notice

*2 The City asks the court to take judicial notice of certain portions of its Municipal Code, as well as the docket and various court filings in the pending state court action against plaintiffs. [17] Plaintiffs do not oppose the request. Because Rule 12(b)(6) review is confined to the complaint, the court typically does not consider material outside the pleadings (e.g., facts presented in briefs, affidavits, or discovery materials) in deciding such a motion. *In re American Continental Corp./Lincoln Sav. & Loan Securities Litig.*, 102 F.3d 1524, 1537 (9th Cir.1996). It may, however, properly consider exhibits attached to the complaint and documents whose contents are alleged in the complaint but not attached, if their authenticity is not questioned. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.2001).

In addition, the court can consider matters that are proper subjects of judicial notice under Rule 201 of the Federal Rules of Evidence. *Id.* at 688–89; *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002); *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"). [18] The court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998).

The City asks that the court take judicial notice of six documents filed in the state court action, as well as the docket in that case. [19] These documents bear directly on whether the court can properly exercise jurisdiction in this case. It is well established that federal courts may take judicial notice of state court orders and proceedings when they bear on the federal action. *See Dawson v. Mahoney*, 451 F.3d 550, 551 (9th Cir.2006) (taking judicial notice of state court orders and proceedings); see also *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir.2007) (stating that an appellate court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue"); *ScripsAmerica, Inc. v. Ironridge Global LLC*, 56 F.Supp.3d 1121, 1136 (C.D.Cal.2014) ("It is well established that federal courts may take judicial notice of related state court orders and proceedings.").

The City also requests that the court notice certain relevant portions of the municipal code. Under Rule 201, municipal ordinances are proper subjects of judicial notice because they are not subject to reasonable dispute. *See Tollis, Inc. v. County of San Diego*, 505 F.3d 935, 938 n. 1 (9th Cir.2007) ("Municipal ordinances are proper subjects for judicial notice"); *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1039 n. 2 (9th Cir.2007) (taking judicial notice of a municipal ordinance and stating that "[m]unicipal ordinances are proper subjects for judicial notice"); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n. 2 (9th Cir.2006) (taking judicial notice of Santa Monica Ordinances Nos. 2116 and 2117). The court accordingly takes judicial notice of the various sections of the Corona Municipal Code that are the subject of the City's judicial notice request.

B. Legal Standard Governing Motions to Dismiss under Rule 12(b)(6)

*3 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory," or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988). The court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir.1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir.1995).

The court need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to

relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). Thus, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'...A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); see also *Twombly,* 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citations omitted)); *Moss v. United States Secret Service,* 572 F.3d 962, 969 (9th Cir.2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief," citing *Iqbal* and *Twombly*).

C. Whether the Court Should Abstain from Deciding Plaintiffs' Claims under *Younger v. Harris*

1. Legal Standard Governing Abstention under *Younger*

Under the doctrine first articulated in *Younger v. Harris,* 401 U.S. 37 (1971), federal courts must abstain from hearing cases that would interfere with pending state court proceedings that implicate important state interests.*Potrero Hills Landfill, Inc. v. County of Solano,* 657 F.3d 876, 881 (9th Cir.2011) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)). The doctrine is justified by considerations of comity —"a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways ."*Younger,* 401 U.S. at 44.

***4** "Absent 'extraordinary circumstances,' abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims."*Hirsh v. Justices of Supreme Court of California,* 67 F.3d 708, 712 (9th Cir.1995) (citing *Middlesex County Ethics Commission,* 457 U.S. at 437). Even then, abstention is appropriate only where the federal action enjoins the state court proceedings or has the practical effect of doing so. *AmerisourceBergen Corp. v. Roden,* 495 F.3d 1143, 1149 (9th Cir.2007); *Gilbertson v. Albright,* 381 F.3d 965, 978 (9th Cir.2004) (en banc) ("*If* a state-initiated proceeding is ongoing, and *if* it implicates important state interests ..., and *if* the federal litigant is not barred from litigating federal constitutional issues in that proceeding, *then* a federal court action that would enjoin the proceeding, or have the practical effect of doing so, would interfere in a way that *Younger* disapproves" (emphasis original)).

While the Supreme Court has never directly addressed the subject, the Ninth Circuit has held "that *Younge* r principles apply to actions at law as well as for injunctive or declaratory relief."*Gilbertson,* 381 F.3d at 968 (reasoning that "a determination that the federal plaintiff's constitutional rights have been violated would have the same practical effect as a declaration or injunction on pending state proceedings")."If, in a case in which the plaintiff seeks damages, the court determines that the *Younger* abstention is appropriate, it should stay the matter until the state court proceedings are concluded, rather than dismissing the action."*ScripsAmerica, Inc.,* 56 F.Supp.3d at 1143 (citing *Gilbertson,* 381 F.3d at 981–82).

2. Application of *Younger* to the Facts of this Case

i. Whether State Court Proceedings Are Ongoing

The City argues that it filed a state court action in the name of the People of the State of California against both COEP and AMG, and that the case is ongoing for purposes of *Younger.*[20] The state action was filed on December 30, 2014,[21] and there is no dispute that it is presently pending.[22] Initially, the state court complaint named only AMG and various other individuals and entities that are not parties to this action. COEP was added as a party in the first amended complaint, filed May 18, 2015.[23] The fact that COEP was added as a state court defendant after plaintiffs filed this action does not affect the court's conclusion that the state court action is ongoing. "Whether the state proceedings are 'pending' is not determined by comparing the commencement dates of the federal and state proceedings. Rather, abstention under *Younger* may be required if the state proceedings have been initiated 'before any proceedings of substance on the merits have taken place in the federal court.' "*M & A Gabaee v. Community Redevelopment Agency of City of Los Angeles,* 419 F.3d 1036, 1041 (9th Cir.2005) (quoting *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir.1987)); see also *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) ("[W]e now hold that where state criminal proceedings are begun against the federal plaintiffs

after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force").

*5 State court proceedings against AMG commenced months before this action was filed in federal court on April 28, 2015. COEP was added as a defendant approximately one month after the state case was filed; prior to COEP's addition as a party, however, there were no proceedings in the federal action. Although plaintiffs in this action filed a motion for preliminary injunction on April 30, 2015, they noticed it for hearing on July 7. Meanwhile, there have been significant developments in the state court action. The superior court has entered a temporary restraining order in favor of the City; [24] additionally, the state court defendants sought a writ of mandate vacating the temporary restraining order, which was summarily denied by the California Court of Appeal. [25] The superior court also issued a preliminary injunction in favor of the City, [26] which is the subject of a pending appeal. [27] *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 369, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) ("For *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign.... [Thus, a] 'necessary concomitant of *Younger* is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court,' " quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975)). Accordingly, the court concludes that state proceedings were initiated before any proceedings of substance on the merits had taken place in this case, and that the state proceedings are ongoing for *Younger* purposes. *See Hicks*, 422 U.S. at 349; *M & A Gabaee*, 419 F.3d at 1041.

In their opposition, and again at the hearing, plaintiffs disputed this conclusion. They argued that COEP is not a proper party to the state court proceedings because it did not build any signs on the locations there at issue. The first amended state court complaint alleges that COEP was "created in November of 2014 by [plaintiffs'] counsel, [and that its] primary purpose [is] to assist AMG [in its] illegal attempts to acquire sites for, erect, operate and/or own illegal billboards." [28] It also pleads that "there is such a unity of interest, ownership, and control between AMG[ ] and [COEP], and such a complete disregard of the corporate form and formalities, that the separate personalities of these entities no longer exist, and that if the acts of one or more of them are treated as those of that entity alone, it would sanction a fraud or promote injustice." [29] The City asserts that such practices are common among billboard companies and that they are undertaken "to create additional procedural hurdles for public agencies and courts to jump through and to avoid effective judicial relief." [30] It is thus clear not only that COEP is a party to the state court action, but that the first amended state court complaint alleges a basis for imposing liability on it, i.e., that it is an alter ego of AMG. *See D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230 (10th Cir.2004) ("when in essence only one claim is at stake and the legally distinct party to the federal proceeding is merely an alter ego of a party in state court, *Younger* applies"); *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 882 (8th Cir.2002) (corporation could not avoid *Younger* by having subsidiaries sue in federal court when federal relief could obstruct enforcement of state-court remedy); cf. *Spargo v. N.Y. State Com'n on Jud. Conduct*, 351 F.3d 65, 81–84 (2d Cir.2003) (*Younger* applies to persons not parties in state proceedings when the free-speech right asserted in the federal action is purely derivative of the free-speech rights of the defendant in the state proceeding).

*6 Plaintiffs ask the court to conclude that COEP is a sham party in state court, and permit it to prosecute this action on that basis. To the extent plaintiffs dispute the existence of an alter ego relationship, and dispute that COEP violated the municipal code, the proper forum to litigate those questions is the state court. *See Burlington Ins. Co. v. Panacorp, Inc.*, 758 F.Supp.2d 1121, 1134–35 (D.Haw.2010) (finding that *Younger* abstention was warranted where Hawaii state law was unsettled regarding as to whether an insurance policy afforded coverage for a solely-owned corporation that was allegedly an alter ego of the individual named insured because the alter ego issue "was best resolved in the first instance by state court"). To hold otherwise would eviscerate the underlying purpose of *Younger* abstention, i.e., to ensure "a proper respect for state functions," *Younger*, 401 U.S. at 44, and "would both unduly interfere with the legitimate activities of the state and readily be interpreted as reflecting negatively upon the state courts' ability to enforce [legal and] constitutional principles," *Gilbertson*, 381 F.3d at 972 (internal quotation marks and citation omitted). Plaintiffs' argument that *Younger* is inapplicable because COEP is not a proper party in the state court action is therefore unavailing.

ii. Important State Interest

"Circumstances fitting within the *Younger* doctrine, [the Supreme Court has] stressed, are 'exceptional'; they include, ... 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.' " *Sprint Communications, Inc. v. Jacobs,* ——U.S. ——, ——, 134 S.Ct. 584, 588, 187 L.Ed.2d 505 (2013). In state court, the City has alleged, *inter alia,* a cause of action for public nuisance based on purported violations of its municipal ban on off-site, commercial billboards.[31] *See*CORONA MUNICIPAL CODE, § 17.74.160 ("Except as provided in § 17.74.070(H), outdoor advertising signs (billboards) are prohibited in the City of Corona. The city shall comply with all provisions of the California Business & Professions Code regarding amortization and removal of existing off-premise and outdoor advertising displays and billboard signs").[32] The state court action is thus an enforcement action by the City to abate a purported public nuisance.

In *Huffman,* 420 U.S. at 604, the Supreme Court held that abstention was appropriate where the state filed a civil action against a theater displaying obscene movies in violation of state nuisance law because "an offense to the State's interest in ... nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding."*Id.* Plaintiffs maintain that the *state* is not a party to the state court action, and hence *Huffman* is inapposite.[33] There is no merit to this assertion. The Ninth Circuit has repeatedly held that "[c]ivil actions brought by a *government entity* to enforce nuisance laws have been held to justify *Younger* abstention."*Woodfeathers, Inc. v. Washington County, Or.,* 180 F.3d 1017, 1021 (9th Cir.1999) (emphasis added). Indeed, in *World Famous Drinking Emporium, Inc. v. City of Tempe,* 820 F.2d 1079, 1082 (9th Cir.1987), the Ninth Circuit held that a civil action brought by a municipality "to obtain compliance with [a municipal zoning] ordinance which aime[ed] at avoidance of public nuisances" implicated important state interests justifying abstention.

*7 Plaintiffs also assert that *Younger* does not apply because there is no *criminal* action pending against them.[34] As the Supreme Court recently reiterated, however, " 'civil enforcement proceedings' " can trigger *Younger* abstention. *See Sprint Communications, Inc.,* 134 S.Ct. at 588; see also *Woodfeathers, Inc.,* 180 F.3d at1021 ("[c]ivil actions brought by a government entity to enforce nuisance laws have been held to justify *Younger* abstention"); *World Famous Drinking Emporium,* 820 F.2d at 1082 (a civil action filed by a municipality "to obtain compliance with [a municipal zoning] ordinance which aime[ed] at avoidance of public nuisances" qualified for *Younger* abstention).

Here, the City has filed a civil action to enjoin a public nuisance. *Younger* is therefore properly invoked. In fact, the interest at stake is essentially as great as it would be if a criminal proceeding were involved, given that the City has the ability to prosecute violations of the billboard ban as misdemeanors under the Corona Municipal Code. *See*CORONA MUNICIPAL CODE § 1.08.020 ("It shall be unlawful for any person to erect, construct, enlarge, alter, repair, move, use, occupy, or maintain any real or personal property or portion thereof in the city or cause the same to be done contrary to or in violation of any provision of this title.... [A]ny person violating any of the provisions or failing to comply with the requirements of this title, ... is guilty of a misdemeanor or infraction at the discretion of the City Attorney"); *City of Corona v. Naulls,* 166 Cal.App.4th 418, 433, 83 Cal.Rptr.3d 1 (2008) ("Section 1.08.020, subdivision (A), of the City's municipal code provides that, unless a different penalty is prescribed, the violation of any provision of or failure to comply with any of the requirements of the code is punishable as a misdemeanor. Additionally, pursuant to section 1 [.]08.020, subdivision (B), 'any condition caused or permitted to exist in violation of any of the provisions of this code is a public nuisance and may be, by this city, abated as such' "). Under *Huffman* and its progeny, because the state court proceeding is a civil enforcement action seeking to abate a public nuisance, it implicates important state interests for purposes of *Younger* abstention.

iii. Adequate Opportunity to Litigate Federal Claims

To invoke *Younger* abstention, plaintiffs "need be accorded only an *opportunity* to fairly pursue [their] constitutional claims in the ongoing state proceedings."*Juidice v. Vail,* 430 U.S. 327, 337, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (emphasis added). "*Younger* requires only the absence of 'procedural bars' to raising a federal claim in the state proceedings." *Communications Telesystems Int'l v. California Public Utilities Commission,* 196 F.3d 1011, 1020 (9th Cir.1999) (citing *Middlesex County Ethics Commission,* 457 U.S. at 432 ("[A] federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims' ")); see also *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 14, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (holding that a federal plaintiff must show " 'that state procedural law barred presentation of [his] claims' ")."[A] federal court

should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."*Pennzoil Co.*, 481 U.S. at 15; *Meredith v. Oregon*, 321 F.3d 807, 818 (9th Cir.2003) (same). Stated differently, *Younger* abstention "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."*Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973).

*8 Plaintiffs assert claims for violation of the First Amendment to the United States Constitution and violation of the equal protection and free speech clauses of the California constitution. There is no question that they have an opportunity to raise these claims in the state court action. Indeed, AMG filed a counterclaim in state court alleging precisely these claims on January 16, 2015.[35] The fact that plaintiffs allege First Amendment violations does not change this fact. "[T]he mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction."*NOPSI*, 491 U.S. at 365. "Minimal respect for ... state processes ... precludes any presumption that the state courts will not safeguard federal constitutional rights."*Middlesex County Ethics Commission*, 457 U.S. at 431. "*Younger* itself involved a First Amendment challenge to an ongoing criminal prosecution, but even that was insufficient to require the federal court to ignore principles of federalism and interfere with the state's proceedings." *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 619 (9th Cir.2003) (citing *Younger*, 401 U.S. at 43–45). Thus, the importance of the First Amendment rights at stake in this action does not alter the abstention analysis. *See Middlesex County Ethics Commission*, 457 U.S. at 431 (abstaining in a case that sought to enjoin a state ethics proceeding despite plaintiff's claim that the proceeding violated his First Amendment rights); see also *Younger*, 401 U.S. at 54 ("It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief"); *World Famous Drinking Emporium, Inc.*, 820 F.2d at 1082 ("A First Amendment challenge does not alter the propriety of abstention in [an action seeking to enjoin enforcement of a zoning ordinance]"). Accordingly, *Younger*' s third prong is also satisfied in this case.

iv. Whether the Federal Action Would Enjoin or Have the Practical Effect of Enjoining the State Court Proceedings

Having concluded that the *Younger* factors counsel in favor of abstention, the court must next decide whether the "federal court action ... would enjoin the [state court] proceeding, or have the practical effect of doing so."*Gilbertson*, 381 F.3d at 978. The state court enjoined AMG and others from "operating, allowing, using, and advertising on the [ ] billboard located at 3035 Palisades Dr., Corona, California."It further ordered them immediately to "remove the billboard, including the pole, the panels, and the entire structure," and restrained and enjoined them from "constructing or erecting any additional billboards in the City of Corona without first obtaining all required permits."[36] The propriety of the injunction is presently being appealed.

*9 Plaintiffs in this case seek to have the court enjoin the City from (1) "[i]nterfering with the operation or maintenance of billboards at ... 3035 Palisades [Dr.], Corona[, California]"; (2) threatening plaintiffs' lessors or advertisers with enforcement actions or fines; (3) claiming that the billboards are illegal or being operated illegally; (4) attempting to collect fines as a result of the operati[on] of the billboard; and (5) taking any other action adverse to the billboard.[37] Given the relief plaintiffs seek, the court concludes that this action would have the practical effect of enjoining the state court proceedings. Plaintiffs seek to have the court issue an injunction directing the City to cease interfering with the maintenance of their billboards, and the ultimate relief they seek in this action is a declaration that the provision of the Corona Municipal Code that regulates billboards is unconstitutional. This would unquestionably preclude the continued prosecution of the civil enforcement action pending in state court. Like the plaintiff in *Younger*, therefore, they seek to enjoin the City "from [enforcing] California [municipal ordinances], [which is] a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."*See* 401 U.S. at 41; see also *Huffman*, 420 U.S. at 604–05 ("Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws"); *Outdoor Media Dimensions, Inc. v. Warner*, 58 Fed. Appx. 293, 294 (9th Cir. Feb.19, 2003) (Unpub.Disp.) (holding that *Younger* abstention was

warranted in an action challenging the constitutionality of Oregon statutes proscribing the use of billboards due to the pendency of state administrative proceedings).

v. Exceptions to *Younger* Abstention

"In *Younger*, the Supreme Court stated that federal courts may enjoin pending state court proceedings in 'extraordinary circumstances,' such as when the statute involved is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles*, 23 F.3d 218, 225 (9th Cir.1994) (quoting *Younger*, 401 U.S. at 53–54 (in turn quoting *Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 85 L.Ed. 1416 (1941))). In addition, "[b]ad faith prosecution or harassment make abstention inappropriate even where [the *Younger*] requirements are met." *World Famous Drinking Emporium, Inc.*, 820 F.2d at 1082 (citing *Younger*, 401 U.S. at 47–49).

The ordinance at issue here bans off-site, commercial billboards. It is well settled that such bans are constitutional under the Supreme Court's *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), test for government regulation of commercial speech. *SeeMetromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511–14, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (holding that it was permissible to distinguish between on-site and off-site commercial signs, while declaring a San Diego ordinance unconstitutional because of its general ban on noncommercial signs); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 814 (9th Cir.2003) ("The Supreme Court, the Ninth Circuit, and many other courts have held that the on-site/off-site distinction is not an impermissible content-based regulation"); *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 610–11 (9th Cir.1993) ("*Metromedia* remains the leading decision in the field, holding that a city, consistent with the *Central Hudson* test, may ban all offsite commercial signs, even if the city simultaneously allows onsite commercial signs"). This is true even where, as here, they "grandfather" existing billboards and permit them to remain. *See Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir.2009) (holding that the grandfathering clause of the California Outdoor Advertising Act had only to survive "at most, an intermediate level of scrutiny" and holding that "[t]he state's interest is substantial and easily passes the necessary scrutiny to overcome [an] equal protection challenge"). Thus, the billboard bans at issue here are not flagrantly and patently unconstitutional.

***10** The Supreme Court's recent decision in *Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S.Ct. 2218, —— L.Ed.2d ——, 2015 WL 2473374 (U.S. June 18, 2015), does not alter this conclusion. As the City notes in reply, in terms of its application to this case, *Reed* is most notable for what it is not about, and what it does not say. In *Reed*, the Court considered a municipal code that

> "prohibit[ed] the display of outdoor signs without a permit, but exempt[ed] 23 categories of signs, including three relevant [to the case]. 'Ideological Signs,' defined as signs 'communicating a message or ideas' that [did] not fit in any other Sign Code category, [could] be up to 20 square feet and ha[d] no placement or time restrictions. 'Political Signs,' defined as signs 'designed to influence the outcome of an election,' [could] be up to 32 square feet and [could] only be displayed during an election season. 'Temporary Directional Signs,' defined as signs directing the public to a church or other 'qualifying event,' ha[d] even greater restrictions: No more than four of the signs, limited to six square feet, [could] be on a single property at any time, and signs [could] be displayed no more than 12 hours before the "qualifying event" and 1 hour after."*Id.* at *1.

The Court held that the ordinance was a content-based regulation of speech that could not survive strict scrutiny. *See id.* at *6 ("On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny").

Reed does not concern commercial speech, let alone bans on off-site billboards. The fact that Reed has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it. *Metromedia*, 453 U.S. at 511–14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.

Plaintiffs also contend that the City is discriminating against them under the California constitution. To the extent plaintiffs maintain that this amounts to "bad faith" for purposes of *Younger*, they are mistaken. "Three factors that courts have considered in determining whether a prosecution is commenced in bad faith or to harass are: (1) whether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by the defendant's suspect class or in retaliation for the defendant's exercise

of constitutional rights; and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions."*Phelps v. Hamilton,* 59 F.3d 1058, 1065 (10th Cir.1995). Focusing on "[t]hese factors [is] important because the cost, anxiety, and inconvenience of defending against a single prosecution brought in good faith is not enough to establish the 'great and immediate' threat of irreparable injury necessary to justify enjoining pending state proceedings."*Id.*

***11** The complaint contains no allegations suggesting that any of these factors is present. As noted, off-site commercial sign bans have repeatedly and consistently been upheld as constitutional. Plaintiffs are business entities that are not (and do not purport to be) members of a suspect class. Finally, there is no assertion that the City's conduct amounts to harassment or an abuse of prosecutorial discretion. That there is no bad faith here is further reinforced by the fact that bans such as the one at issue here have repeatedly been upheld as valid, and the state court has granted the City's application for temporary restraining order and motion for a preliminary injunction restraining further violations of the off-site sign ban. *See Kugler v. Helfant,* 421 U.S. 117, 126 n. 6, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975) (explaining that a bad faith prosecution "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction"). Moreover, the mere fact that plaintiffs assert an equal protection claim does not preclude a finding that *Younger* abstention applies. See, e.g., *Pennzoil Co.,* 481 U.S. at 10–17 (district court should have abstained in action alleging due process and equal protection violations); *San Remo Hotel v. City & Cnty. of San Francisco,* 145 F.3d 1095, 1103 (9th Cir.1998) ("The amendment of Field's complaint to state an equal protection claim would have been futile because the district court would have had to dismiss the claim under *Younger v. Harris* "). Plaintiffs therefore have failed to demonstrate that any exceptions to *Younger* abstention apply.

vi. Conclusion Regarding *Younger* Abstention

In sum, the court finds that the state court proceedings are ongoing, that they implicate important state interests related to the enforcement of nuisance laws, and that they provide plaintiffs an adequate opportunity to litigate their federal claims. Furthermore, exercising jurisdiction over this case would have the practical effect of enjoining the state court proceedings. In addition, plaintiffs do not argue, and the court does not conclude, that any of the *Younger* exceptions is applicable. Thus, the court concludes that it is appropriate to abstain under *Younger.*

The City requests that the court dismiss the action. In *Gilbertson,* the Ninth Circuit held "that *Younger* principles apply to actions at law as well as for injunctive or declaratory relief because a determination that the federal plaintiff's constitutional rights have been violated would have the same practical effect as a declaration or injunction on pending state proceedings."*See* 381 F.3d at 968. The court held, however, that "federal courts should not dismiss actions where damages are at issue; rather, damages actions should be stayed until the state proceedings are completed."*Id.; ScripsAmerica,* 56 F.Supp.3d at 1143 ("in a case in which the plaintiff seeks damages, the court determines that the *Younger* abstention is appropriate, it should stay the matter until the state court proceedings are concluded, rather than dismissing the action"); *Nichols v. Brown,* 945 F.Supp.2d 1079, 1095 (C.D.Cal.2013) ("While the *Younger* abstention doctrine requires dismissal where declaratory or injunctive relief is sought, and a federal court should abstain from a damages claim where a necessary predicate of the claim for damages undermines a necessary element in the pending state proceeding, the court should stay, not dismiss, damages claims only 'until the state proceedings are completed' ").

***12** Plaintiffs seek declaratory and injunctive relief, as well as damages resulting from enforcement of the City's off-site commercial billboard ban. The court therefore cannot dismiss the action, but instead must "stay its hand until state proceedings are completed."*Gilbertson,* 381 F.3d at 968; *ScripsAmerica,* 56 F.Supp.3d at 1143 ("in a case in which the plaintiff seeks damages, [if] the court determines that the *Younger* abstention is appropriate, it should stay the matter until the state court proceedings are concluded, rather than dismissing the action"); *Ambat v. City & County of San Francisco,* No. C 07 3622 SI, 2007 WL 3101323, *6 (N.D.Cal. Oct.22, 2007) ("Here, because *Younger* applies and plaintiffs seek damages along with injunctive relief, the Court stays the proceeding pending resolution of the state court action").

D. Plaintiffs' Motion for Preliminary Injunction

Given the court's conclusion that it must abstain under *Younger,* it "is required by law to deny [p]laintiff[s'] motion for a preliminary injunction." *Carrick v. Santa Cruz Cnty.,* No. 12–CV–3852 LHK, 2012 WL 6000308, *10 (N.D.Cal. Nov.30, 2012); *Crayton v. Hedgpeth,* No. CV 08 00621 WHA (PR), 2009 WL 3379789, *2 (E.D.Cal. Oct.19, 2009)

("Accordingly, absent some allegation that any exception to *Younger* applies, this court defers to the superior court proceeding and denies plaintiff's motion for preliminary injunction."). Plaintiffs' motion for preliminary injunction is therefore denied.

III. CONCLUSION

For the reasons stated, the court concludes that *Younger* abstention is warranted in this case. Accordingly, it stays plaintiffs' claims until the state court proceedings have concluded. Because *Younger* abstention is appropriate, plaintiffs' motion for a preliminary injunction is denied.

The parties are directed to file joint briefs apprising the court of the status of the state court proceedings every ninety (90) days.

All Citations

Not Reported in F.Supp.3d, 2015 WL 4163346

Footnotes

1 Complaint, Docket No. 1 (Apr. 28, 2015).
2 Motion for Preliminary Injunction, Docket No. 10 (Apr. 30, 2015).
3 *Ex Parte* Application, Docket No.15 (May 21, 2015).
4 Order Denying *Ex Parte* Application for Temporary Restraining Order, Docket No. 28 (May 27, 2015).
5 Motion to Dismiss ("Motion"), Docket No. 17 (May 21, 2015).
6 Opposition to Motion to Dismiss ("Opposition"), Docket No. 30 (June 15, 2015); Opposition to Preliminary Injunction, Docket No. 31 (June 15, 2015).
7 Complaint, ¶ 9. "Off-site billboards display messages directing attention to a business or product not located on the same premises as the sign itself. For example, a billboard promoting the latest blockbuster movie, but attached to a furniture store, is an off-site sign. The same billboard, when attached to a theater playing the movie, is an on-site sign."*World Wide Rush, LLC v. City of Los Angeles,* 606 F.3d 676, 682 (9th Cir.2010).
8 *Id.*
9 *Id.*, ¶ 10.
10 *Id.*, ¶ 8.
11 *Id.*, ¶ 23.
12 Declaration of John D. Higginbotham re: Motion to Dismiss ("Higginbotham Decl."), Docket No. 19 (May 21, 2015), Exh. 3 ("State Court Complaint"). The court takes judicial notice of this and various other state court filings *infra*.
13 *Id.*, Exh. 2 ("State Court Docket") at 8.
14 *Id.*, Exh. 5 ("Preliminary Injunction").
15 *Id.*, Exh. 6 ("Notice of Appeal").
16 *Id.*, Exh. 8 ("State Court FAC") at 1.
17 Request for Judicial Notice ("RJN"), Docket No. 18 (May 21, 2015) at 2–3.
18 Taking judicial notice of matters of public record does not convert a motion to dismiss into a motion for summary judgment. *MGIC Indemnity Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir.1986).
19 RJN at 2–3.
20 See State Court FAC.
21 See "State Court Complaint" at 1
22 See State Court Docket.
23 State Court FAC at 1.
24 State Court Docket at 10.
25 *Id.* at 8.
26 Declaration of John D. Higginbotham in Support of Motion to Dismiss ("Higginbotham Decl."), Docket No. 18 (May 22, 2015), Exh. 5 ("Preliminary Injunction").
27 *Id.*, Exh. 6 (Notice of Appeal).
28 State Court FAC, ¶ 8.
29 *Id.*

30 *Id.*

31 FAC, ¶¶ 14–25.

32 The City supplies the relevant portions of the Corona Municipal Code as attachments to Higginbotham's declaration. (*See* Higginbotham Decl., Exh. 1 at 10.)

33 Opposition at 9–10.

34 *Id.* at 10–11.

35 Higginbotham Decl., Exh 4 (State Court Counterclaim). The allegations supporting the federal complaint and the state court counterclaim are substantially identical.

36 Preliminary Injunction at 2.

37 [Proposed] Order Granting Preliminary Injunction, Docket No. 34–1 (June 22, 2015).

End of Document

Attachment "2"

(Citizens for Free Speech v. County of Alameda
(N.D. Cal. 2015) 2015 WL 4365439)

2015 WL 4365439
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Citizens for Free Speech, LLC, et al., Plaintiffs,
v.
County of Alameda, Defendant.

No. C14–02513 CRB | Signed July 16, 2015

Synopsis

Background: Landowner and sign company brought action against county, alleging that county's zoning ordinances regulating billboards and advertising signs violated the First Amendment and Equal Protection Clause. County moved for summary judgment.

Holdings: The District Court, Charles R. Breyer, J., held that:

[1] ordinances did not violate First Amendment as applied to plaintiffs;

[2] genuine issue of material fact existed as to whether ordinance vested unfettered discretion in county officials to decide whether a proposed structure or use constituted a material change to a land use and development plan;

[3] ordinance setting forth criteria used to grant or deny a conditional use permit (CUP) did not vest planning commission with unfettered discretion, and thus was not facially overbroad; and

[4] ordinance banning billboards displaying offsite commercial messages did not violate First Amendment or liberty of speech clause of California Constitution.

Motion granted in part and denied in part.

West Headnotes (17)

[1] **Constitutional Law**
⇐ Freedom of Speech, Expression, and Press

An as-applied First Amendment challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others; such challenge does not implicate the enforcement of the law against third parties, but instead argues that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**
⇐ As applied challenges

A successful as-applied First Amendment challenge does not render the law itself invalid but only the particular application of the law. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Constitutional Law**
⇐ Signs

Zoning ordinance provisions under which county required landowner and sign company to remove signs did not violate First Amendment right to free speech as applied to landowner and company, since those provisions only examined whether a particular use of land in a planned development district conformed with the specific land use and development plan for the land on which the use occurred. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Constitutional Law**
⇐ Licenses

Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where a licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Overbreadth in General

Under an overbreadth First Amendment challenge, plaintiffs can establish the unconstitutionality of ordinances not applied to plaintiffs by showing that those ordinances could inhibit the First Amendment rights of individuals who were not before the court. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
First Amendment in General

A law cannot condition the free exercise of First Amendment rights on the unbridled discretion of government officials. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Discretion in general

To determine if an ordinance confers unbridled discretion on an official with respect to a permitting process, exceeding requirements of a valid time, place, and manner restriction on speech, a court must examine whether such ordinance contains adequate standards to guide the official's decision and render it subject to effective judicial review. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Licenses and Permits in General

There are three factors courts must consider in analyzing the facial validity of a permitting process under the First Amendment: (1) whether limited and objective criteria sufficiently confine the permitting officials' discretion to grant or deny a permit; (2) whether officials are required to state the reasons for a permitting decision, so as to facilitate effective judicial review; and (3) whether such decision must be made within a reasonable time frame. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Mootness

Amendments to ordinances governing placement of signs, which removed discretionary elements, rendered moot claims that ordinances facially violated First Amendment right to free speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Federal Civil Procedure**
Land and land use, cases involving in general

Genuine issue of material fact existed as to whether zoning ordinance allowing planning commission to grant a conditional use permit (CUP) for any non-conforming use in a planning development district if a CUP does not "materially change" the provisions of the approved land use and development plan vested unfettered discretion in county officials to decide whether a proposed structure or use constituted a material change to a land use and development plan precluded summary judgment on claim alleging such ordinance was facially overbroad in violation of First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Licenses and permits

Zoning and Planning
Signs and billboards

County zoning ordinance setting forth criteria used to grant or deny a conditional use permit (CUP) to allow erection of signs in a planning development district did not vest planning commission with unfettered discretion to determine whether to grant CUP, and thus was not facially overbroad under free speech clause of First Amendment, where CUP applications were subject to a thoroughly documented

process, affected parties could pursue multiple appeal procedures for any decision on a CUP application, and challenged CUP application decisions were reviewed within a reasonable time frame. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Zoning and Planning**
⇐ Construction, Operation, and Effect

District Court has a duty to interpret a zoning ordinance, if fairly possible, in a manner that renders it constitutionally valid.

Cases that cite this headnote

[13] **Constitutional Law**
⇐ Signs

Constitutional Law
⇐ Billboards

County's billboard and advertising sign ordinance, which explicitly regulated only commercial speech, was subject to intermediate scrutiny on First Amendment free speech challenge. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
⇐ Reasonableness; relationship to governmental interest

To survive intermediate scrutiny under First Amendment, an ordinance that restricts commercial speech that is not misleading and concerns lawful activity must (1) seek to implement a substantial governmental interest; (2) directly advance that interest; and (3) reach no further than necessary to accomplish the given objective. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] **Constitutional Law**
⇐ Off-premises billboards

Counties
⇐ Governmental powers in general

County ordinance banning billboards displaying offsite commercial messages was a facially valid regulation of commercial speech under First Amendment; ban was narrowly tailored to advance substantial government interest in community aesthetics, pedestrian and driver safety, and the protection of property values. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
⇐ Relation between state and federal rights

Merely because California Constitution's liberty of speech clause is worded more expansively, and has been interpreted as more protective than the First Amendment, does not mean that it is broader than the First Amendment in all its applications. U.S.C.A. Const.Amend. 1; Cal. Const. art. 1, § 2(a).

Cases that cite this headnote

[17] **Constitutional Law**
⇐ Off-premises billboards

Counties
⇐ Governmental powers in general

County ordinance banning billboards displaying offsite commercial messages did not violate the liberty of speech clause of the California Constitution; ban was narrowly tailored to advance substantial government interest in community aesthetics, pedestrian and driver safety, and the protection of property values, and left open ample alternative avenues of communication. Cal. Const. art. 1, § 2(a).

Cases that cite this headnote

Attorneys and Law Firms

Joshua Reuben Furman, Joshua R. Furman Law Corporation, Sherman Oaks, CA, for Plaintiffs.

Gregory J. Rockwell, Boornazian Jensen & Garthe a Professional Corporation, Oakland, CA, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CHARLES R. BREYER, UNITED STATES DISTRICT JUDGE

*1 Plaintiffs Citizens for Free Speech, LLC ("Citizens") and Michael Shaw ("Shaw") (collectively, "Plaintiffs") brought suit against Defendant County of Alameda (the "County"), alleging that the County's regulation of billboards and advertising signs is unconstitutional. [1] *See generally* Compl. Plaintiffs previously obtained a preliminary injunction in this case to prevent the County from enforcing Title 17 of the Alameda County General Ordinance Code (the "Zoning Ordinance") against Plaintiffs. *SeeCitizens for Free Speech, LLC v. Cnty. of Alameda,* 62 F.Supp.3d 1129 (N.D.Cal.2014).

The County now moves for summary judgment on several grounds, arguing that Plaintiffs' as-applied and facial challenges to the Zoning Ordinance both fail. [2] *See* Mot. at 2. For the reasons discussed below, the Court GRANTS summary judgment as to Plaintiffs' free speech claims, to the extent that those claims are based on: (1) an as-applied challenge; (2) a facial challenge as to the unfettered discretion granted by Zoning Ordinance §§ 17.52.520(Q), 17.52.520(D), [3] and 17.54.130; and (3) a facial challenge as to Section 17.52.515's purported regulation of speech based on its content. The Court DENIES the motion as to Plaintiffs' facial challenge to Zoning Ordinance § 17.18.130 and as to Plaintiffs' equal protection claims. [4]

I. BACKGROUND

*2 The Zoning Ordinance divides the County's unincorporated territory into twenty-five different types of district, within which only certain buildings, structures, or land uses are permitted. Zoning Ordinance § 17.02.050. Shaw owns a parcel of land located at 8555 Dublin Canyon Road (the "Parcel") in the County. Shaw Decl. (dkt. 65–1) ¶ 2. The Parcel is located in an area zoned as a Planned Development ("PD") district. *Id.* Since January 2012, Shaw has maintained a single on-site sign that advertises for his company, Lockaway Storage. *Id.* ¶¶ 3–4.

Shaw and Citizens entered into an agreement with each other that provides for the construction and display of three additional signs (the "Signs") on the Parcel. Herson Decl. (dkt. 64–2) ¶¶ 2–3. They agreed to share in the proceeds earned from displaying the Signs. Shaw Decl. ¶ 7; Herson Decl. ¶ 2. The Signs currently consist entirely of non-commercial messages, but Plaintiffs claim that the Signs will contain commercial messages in the future. Herson Decl. ¶ 3, Ex. E; Compl ¶ 12.

A County official visited the Parcel on June 9, 2014 to inform Shaw that the Signs were prohibited. Shaw Decl. ¶ 4. On June 10, 2014, the County mailed Shaw a "Declaration of Public Nuisance—Notice to Abate," claiming that the Signs violated Zoning Ordinance §§ 17.18.010 and 17.18.120. *Id.* ¶¶ 5–6, Ex. C. The Notice to Abate instructed Shaw to remove the Signs or face an abatement proceeding and an escalating schedule of fines. *Id.* Ex. C.

Plaintiffs sued and moved for a temporary restraining order against the County to stop the abatement proceedings and impending fines. Pls.' Mot. for Temp. Restraining Order (dkt. 11). The Court subsequently granted Plaintiffs a preliminary injunction, finding that they were likely to succeed on the merits of their arguments that the Zoning Ordinance was facially invalid because it (1) gave County officials unfettered discretion to make certain determinations regarding signs and (2) failed to ensure that those decisions would be made in a timely manner. *See Citizens for Free Speech,* 62 F.Supp.3d at 1140–42. Following discovery, the County now moves for summary judgment.

II. LEGAL STANDARD

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, affidavits or declarations, or other materials show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(a), (c)(1)(A). This occurs where either the materials cited do not establish the absence or presence of a genuine dispute, or the nonmoving party cannot produce admissible evidence to support a fact. *Id.* 56(c)(1)(B). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. *SeeAnderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A principal purpose of the summary judgment procedure "is to isolate and dispose of factually unsupported claims ...." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Where the record taken as a

whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotations omitted).

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *SeeCelotex*, 477 U.S. at 323, 106 S.Ct. 2548. If the moving party satisfies its initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348; *see alsoAnderson*, 477 U.S. at 252, 106 S.Ct. 2505 ("The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be *3 insufficient...."). Rather, the nonmoving party must go "beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548 (internal quotations omitted).

III. DISCUSSION

The County argues that summary judgment is warranted as to Plaintiffs' free speech claims for two reasons. First, the County contends that Plaintiffs' as-applied challenge fails because Plaintiffs cannot identify any Zoning Ordinance provision that was improperly applied to them. *See* Memo. (dkt. 59) at 6–11. Second, the County asserts that Plaintiffs' facial challenge fails because (1) the Zoning Ordinance does not give County officials unfettered discretion to make permitting decisions, and (2) Section 17.52.515 is a content-neutral speech restriction that passes intermediate scrutiny. *Seeid.* at 12–21; Reply (dkt. 66) at 10–12. The County also reasons that Plaintiffs' equal protection claims fail because the evidence does not indicate that Plaintiffs were treated differently than any similarly-situated parties. *See* Reply at 12–13. The Court addresses these arguments in order below.

A. Free Speech Claims

1. Plaintiffs' As–Applied Challenge

The County makes two arguments in support of summary judgment on Plaintiffs' as-applied challenge. First, it argues persuasively that the Zoning Ordinance provisions under which the County required Plaintiffs to remove their Signs do not even implicate Plaintiffs' constitutional rights to free speech, since those provisions only examine whether a particular use of land in a PD district conforms with the specific land use and development plan for the land on which the use occurs. *See* Memo. at 6–7. Second, the County argues unpersuasively that Plaintiffs' intention to display commercial messages on the Signs in the future would have allowed the County to properly regulate that speech under Zoning Ordinance § 17.52.515. *Id.* at 7–11.[5]

[1] [2] "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.1998). Such challenge "does not implicate the enforcement of the law against third parties," but instead "argue[s] that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment." *Id.* For that reason, a successful as-applied challenge "does not render the law itself invalid but only the particular application of the law." *Id.*

*4 The County asserts that the Zoning Ordinance is constitutional as applied to Plaintiffs, since the County sought to remove the Signs "without regard to any issue of content ...." *Id.* at 6. The parties do not dispute that the Notice to Abate stated that the County's basis for enforcing the Zoning Ordinance as to the Signs was Plaintiffs' violation of Zoning Ordinance §§ 17.18.010[6] and 17.18.120. *Id.*; Shaw Decl., Ex. C. Section 17.18.120 provides that "[a]ny use of land within the boundaries of a [PD] district adopted in accordance with the provisions of this chapter shall conform to the approved land use and development plan." Zoning Ordinance § 17.18.120.

[3] The Parcel was originally rezoned into a PD district in 1989, and an accompanying land use and development plan (the "Plan") was also adopted at that time. *See* Def.'s Request for Judicial Notice (dkt. 60) ("Def.'s Second RJN"), Ex. A (dkt. 60–1) at 1. The signage that could be built on the Parcel was limited to "one non-electrical unlighted sign with maximum dimensions of two feet by twenty-four feet," and was required to "be approved through Zoning approval." *Id.* The Parcel's owner obtained a conditional use permit ("CUP") for uses of the Parcel in 1990, 1994, 1997, 1999, 2005, 2011, and 2012, but none of those CUPs provided for the construction of additional signage on the Parcel. *See id.*Exs. B–P (dkts. 60–2 to 60–14). Plaintiffs do not argue that the Signs are small enough to be acceptable under the Plan, or

that Plaintiffs sought approval prior to building the signs. *See generally* Opp'n; Herson Decl.; Shaw Decl.

Plaintiffs do not contest *any* of the material facts regarding the substance of the Plan discussed above, nor do they argue that the County improperly applied Sections 17.18.010 and 17.18.120 to them. They only state that the County's arguments fail "because the County expressly prohibited Citizens' speech pursuant to the PD [d]istrict provisions of the [Zoning] Ordinance, which set forth an unconstitutional prior restraint on speech." Opp'n at 2. Plaintiffs are arguing, in essence, that because the Zoning Ordinance is *facially* unconstitutional as a prior restraint on speech, it is also unconstitutional as applied to them. But an "as-applied challenge goes to the nature of the *application* rather than the nature of the law itself,"*Desert Outdoor Adver., Inc. v. City of Oakland,* 506 F.3d 798, 805 (9th Cir.2007) (emphasis added), so whether the Zoning Ordinance is facially unconstitutional is not relevant to the question of whether it is unconstitutional as applied to Plaintiffs. Here, the County has presented substantial evidence that Zoning Ordinances §§ 17.18.010 and 17.18.120 did apply to Plaintiffs' Signs, and that the Plan precluded Plaintiffs from building the Signs on the Parcel. Plaintiffs have failed to rebut the County's evidence or provide any evidence indicating that those provisions were unconstitutionally applied to them. Accordingly, the Court grants summary judgment on both free speech claims to the extent Plaintiffs bring an as-applied challenge to those provisions.

2. Plaintiffs' Facial Challenge

*5 [4] [5] The County next argues that Plaintiffs' facial challenges to the Zoning Ordinance lack merit. "Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). This Court has previously recognized that both of Plaintiffs' arguments "are best characterized as 'overbreadth' challenges." *Citizens for Free Speech,* 62 F.Supp.3d at 1134; *see alsoUnited States v. Linick,* 195 F.3d 538, 542 (9th Cir.1999) (considering overbroad regulations that vested officials with unbridled discretion to deny expressive activity); *S.O.C., Inc. v. Cnty. of Clark,* 152 F.3d 1136, 1144 (9th Cir.1998) (finding overbroad an ordinance that improperly restricted protected noncommercial speech). Under this type of challenge, Plaintiffs can establish the unconstitutionality of provisions of the Zoning Ordinance not applied to Plaintiffs by "showing that [those provisions] may inhibit the First Amendment rights of individuals who are not before the court." *See4805 Convoy, Inc. v. City of San Diego,* 183 F.3d 1108, 1112 (9th Cir.1999).

The County advances two arguments in support of summary judgment on the facial challenge. First, the County asserts that County officials do not have unfettered discretion in applying the Zoning Ordinance, because the criteria guiding those officials' decisions are limited and objective, subject to thorough review, and made within a reasonable period. Memo. at 12–21. Second, the County contends that Zoning Ordinance § 17.52.515 passes intermediate scrutiny. Reply at 10–11. For the reasons discussed below, the Court grants in part and denies in part summary judgment on Plaintiffs' unfettered discretion claim, and grants summary judgment on Plaintiffs' Section 17.52.515 claim.

a. County Officials' Discretion in Permitting Decisions

[6] The County's first argument with respect to the facial challenge is that the provisions of the Zoning Ordinance challenged by Plaintiffs do not give County officials unfettered discretion to make decisions. "[A] law cannot condition the free exercise of First Amendment rights on the 'unbridled discretion' of government officials." *Gaudiya Vaishnava Soc'y v. City and Cnty. of S.F.,* 952 F.2d 1059, 1065 (9th Cir.1990) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 755, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)); *Young v. City of Simi Valley,* 216 F.3d 807, 819 (9th Cir.2000) ("When an approval process lacks procedural safeguards or is completely discretionary, there is a danger that protected speech will be suppressed impermissibly because of the government official's ... distaste for the content of the speech.").

[7] [8] To determine if an ordinance confers "unbridled discretion" on an official with respect to a permitting process, a court must examine whether such ordinance " 'contain[s] adequate standards to guide the official's decision and render it subject to effective judicial review.' " *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle,* 550 F.3d 788, 798 (9th Cir.2008) (quoting *Thomas v. Chi. Park Dist.,* 534 U.S. 316, 323, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002)).

The Ninth Circuit has articulated three factors courts must consider in analyzing the facial validity of a permitting process: (1) whether limited and objective criteria sufficiently confine the permitting officials' discretion to grant or deny a permit; (2) whether officials are required to state the reasons for a permitting decision, so as to facilitate effective judicial review; and (3) whether such decision must be made within a reasonable time frame. *SeeCity of Oakland,* 506 F.3d at 806–07 (citing *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064, 1082–83 (9th Cir.2006)). "None of these factors is itself necessarily determinative of whether a statute confers excess discretion." *Seattle Affiliate,* 550 F.3d at 799. Instead, courts must "look to the totality of the factors...." *Id.*

*6 The County argues that the provisions Plaintiffs challenge all contain sufficient "standards or guidelines to limit County zoning officials' discretion in making decisions regarding certain uses of property." Memo. at 12. The Court previously held that Plaintiffs were likely to succeed on the merits of their argument that certain sections of the Zoning Ordinance granted County officials unfettered discretion: (1) Section 17.52.520(Q),[7] which concerns signs to be placed on bus stop benches or transit shelters, and Section 17.52.520(D),[8] which allowed for display of signs with historical merit; and (2) Section 17.18.130, which allows the planning commission to grant a CUP for any non-conforming use in a PD district if a CUP does not "materially change" the provisions of the approved land use and development plan. *SeeCitizens for Free Speech,* 62 F.Supp.3d at 1140–42.[9] Plaintiffs also elaborate on a fourth challenge raised in their preliminary injunction motion, regarding Sections 17.54.130 and 17.54.135, which concern the process used to grant CUPs. *See* Opp'n at 8–9. This order addresses all four challenges below.

i. Sections 17.52.520(Q) and 17.52.520(D)

[9] The County argues that Plaintiffs' challenges to Sections 17.52.520(Q) and (D) are moot, since an amendment to the Zoning Ordinance has removed the discretionary elements. Memo. at 15. Section 17.52.520(D), which previously permitted the display of signs determined by the historical landmarks committee to have historical merit, was deleted as part of the amendment. *Id.;* Def.'s Second RJN, Ex. S. The language of Section 17.52.520(Q) was amended to, among other things, remove the discretionary phrase "when approved by the director of the public works agency." Memo. at 15; Def.'s Second RJN, Ex. S. Plaintiffs apparently contend that the deletion of Section 17.52.520(D) does not moot their claim that unfettered discretion is available to the Historical Landmarks Commission, citing *Outdoor Media Grp., Inc. v. City of Beaumont,* 506 F.3d 895 (9th Cir.2007) in support of this assertion. Opp'n at 7. Likewise, Plaintiffs argue without elaboration that "the amended [Zoning] Ordinance fails to resolve the 'bus stop' discretion wielded by County officials...." *Id.*

Neither of Plaintiffs' arguments is compelling. As an initial matter, *Outdoor Media* recognized that the repeal of an ordinance can moot a claim for relief where "there is no longer any risk that [a party] will be subject to the challenged ordinance," such that there is no "live issue" for relief. *Outdoor Media,* 506 F.3d at 901. There is no live issue regarding the potential application of Section 17.52.520(D); because that provision no longer exists, it cannot be applied to the detriment of any party. Furthermore, in *Outdoor Media,* the billboard company's claim for damages based on the facial invalidity of the ordinance prior to repeal was only sustained because the company might have suffered damages from application of the ordinance. *Seeid.* at 906–07. Plaintiffs have not presented any evidence that Section 17.52.520(D) was ever applied to them, so damages under Section 1983 are unavailable. *SeeHunt v. City of L.A.,* 638 F.3d 703, 710 (9th Cir.2011) (citing *Outdoor Media,* 506 F.3d at 907). Accordingly, the deletion of Section 17.52.520(D) effectively moots any facial challenge Plaintiffs assert regarding the discretion that provision granted County officials.[10]

*7 The same is true of Section 17.52.520(Q), which has no discretionary elements as currently written. That provision now permits "[s]igns placed on or attached to bus stop benches or transit shelters in the public-right-of-way either sponsored by, or placed pursuant to a contract with, AC Transit or another common carrier." Zoning Ordinance § 17.52.520(Q). The existence of a sponsorship or contract is an objective matter and does not involve any discretion on the part of County officials. Consequently, the guideline effectively eliminates County officials' discretion.

Because Plaintiffs cannot sustain their challenges to Sections 17.52.520(Q) or the now-deleted 17.52.520(D), the Court grants summary judgment as to Plaintiffs' claim that these provisions confer unfettered discretion.

ii. Section 17.18.130

The County next argues that Section 17.18.130 does not vest unfettered discretion in County officials to decide whether a proposed structure or use constitutes a material change to a land use and development plan. Memo. at 17–18. The County further asserts that Section 17.18.130 does not vest officials with the power to grant or deny a permit at their discretion, but only to determine whether a property owner must seek to implement the proposed use through a CUP or an application for rezoning. *Id.* at 17. Plaintiffs argue that nothing in the Zoning Ordinance limits County officials' discretion in deciding what constitutes a material change under Section 17.18.130, but do not respond at all to the County's second point. *See* Opp'n at 8.

[10] The Court does not accept either of the County's arguments. In order to determine whether a proposed use requires pursuit of a CUP or a change to the land use and development plan, County officials must first decide whether that proposed use "materially change[s] the provisions of the approved land use and development plan" for the property in question. Zoning Ordinance § 17.18.130. "[M]aterially change" is not defined anywhere in Section 17.18.130, or in the definitions section of the Zoning Ordinance. *See* Zoning Ordinance § 17.04.010. The County argues that County officials can look at the definitions of "principal use," "use," "accessory use," and "accessory structure" for "[s]ignificant guidance as to what would or would not constitute a 'material change....' " Memo. at 18. The County further asserts that "subsections B and C of § 17.52.515 and § 15.52.226 provide substantial guidance" as to the definition of material change if the proposed use involves a sign. *Id.* But the Zoning Ordinance does not direct County officials to consult these other terms or sections in order to determine if the proposed use constitutes a material change, and the County has not presented any evidence indicating that County officials actually do consult these suggested terms for guidance.[11] Thus, there are no "narrow, objective, and definite standards" to guide officials here, because there are no standards whatsoever. *SeeDesert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir.1996) (internal quotations omitted).

The County's contention that the discretion granted to its officials by Section 17.18.130 is essentially meaningless is also mistaken. Even though County officials' decisions about whether there is a material change do not allow those officials to grant or deny permits, "the complete and explicit denial of any right to speak is not ... the sine qua non of the right to bring a facial challenge." *SeeSeattle Affiliate,* 550 F.3d at 796 n. 4; *see alsoForsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 133, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (striking down a statute on a facial challenge where "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through arbitrary application of fees").

*8 The rezoning process appears to be significantly more intensive and time-consuming than the CUP process, and County officials can affect which process property owners must undergo by deciding, at their discretion, what constitutes a material change. If officials determine that a proposed use does not constitute a material change, then that use will be permitted "subject to securing a [CUP] ...." Zoning Ordinance § 17.18.130. The CUP application process requires submitting a written application with information about the proposed use to a municipal advisory council, which, after conducting a hearing and making an advisory recommendation, then submits it to a zoning board, which either adopts or denies the CUP. *See* Lopez Decl. (dkt. 57) at 3:23–4:4.[12] If, however, officials determine that a proposed use *does* constitute a "material change," then that use will only be permitted "if so indicated on a land use and development plan ...." Zoning Ordinance § 17.18.130. This process requires submission of a land use and development plan and application for rezoning. Memo. at 17. These documents are then submitted to a municipal advisory council, then to the planning commission, then to the board of supervisors, all of which hold public hearings and make advisory recommendations. Lopez Decl. at 2:16–3:5.[13] Planning staff must also create and release a public report prior to the Planning Commission's and Board of Supervisors' review of the submitted documents. *Id.* at 2:26–3:2. The discretion granted to County officials by Zoning Ordinance § 17.18.130 therefore potentially "allow[s] officials ... to burden a group's speech differently depending on its message." *SeeSeattle Affiliate,* 550 F.3d at 796 n. 4. The absence of any definite standards as to the meaning of material change therefore presents serious constitutional concerns.

Unlike with Section 17.54.130, these concerns are not relieved by the availability of thorough and timely review procedures. The County has not identified any provision in the Zoning Ordinance requiring the planning commission to state the basis upon which it determines that a proposed

use is a material change. *See generally* Memo., Reply; Zoning Ordinance § 17.18.130. Consequently, even though an affected party can apparently appeal that determination, *see* Zoning Ordinance § 17.54.670, it is unclear what the board of supervisors could even review. As a result, the Court denies summary judgment as to Plaintiffs' facial challenge to Section 17.18.130, because the "totality of the factors" indicates that County officials have unfettered discretion under that provision. *Seattle Affiliate,* 550 F.3d at 799.

iii. Section 17.54.130

The County finally argues that Section 17.54.130 provides adequate guidelines to decide whether to grant or deny a CUP. The planning commission must consider whether a proposed CUP complies with Section 17.54.130, *see* Zoning Ordinance § 17.54.135, [14] which requires determinations of whether the proposed use:

> A. Is required by the public need;
>
> B. Will be properly related to other land uses and transportation and service facilities in the vicinity;
>
> C. If permitted, will under all the circumstances and conditions of the particular case, materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood; and
>
> D. Will be contrary to the specific intent clauses or performance standards established for the district, in which it is to be located.

Id. § 17.54.130(A)–(D). The County contends that these standards are sufficiently specific to limit County officials' discretion. Reply at 2–3. Plaintiffs respond that these guidelines create "no limitation on what the commission may consider ...." Opp'n at 9. Plaintiffs further argue that the standards under Section 17.54.130 are "indistinguishable" from those held to confer unfettered discretion. *Id.* at 10; *see alsoMoreno Valley,* 103 F.3d at 819.

*9 **[11]** The Court finds that standards in Section 17.54.130(A)–(D) lie somewhere in between those that other courts have deemed permissible and impermissible on the basis of discretion conferred. On the one hand, Section 17.54.130's standards contain many of the same general terms that the Ninth Circuit held in *Moreno Valley* granted too much discretion. *CompareMoreno Valley,* 103 F.3d at 818–19 (holding that ordinance conferred unbridled discretion where issuance of permit was subject to broad findings that proposed use "will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses") (emphasis added) with Zoning Ordinance § 17.54.130(C) (requiring consideration of whether proposed use will "materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood") (emphasis added). Section 17.54.130's insertion of the modifier "materially" does not substantially change the generality of the phrases "affect adversely" and "detrimental to," which are practically identical to the discretionary terms in *Moreno Valley.* Likewise, "injurious" is merely a synonym of "detrimental." The County also fails to identify any other provisions in the Zoning Ordinance that provide guidance as to what "affect adversely," "detrimental to," or "injurious to" mean in the context of CUP review. In addition to these flaws, the phrase "required by the public need" is equally vague and discretionary. Section 17.54.130(A). Thus, these standards might not be sufficiently " 'narrow, objective, and definite ... to guide the licensing authority....' " *SeeMoreno Valley,* 103 F.3d at 818 (quoting *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150–51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)).

Nonetheless, the County is correct that Section 17.54.130 differs in key respects from the *Moreno Valley* ordinance. Whereas the *Moreno Valley* ordinance focused on the effects of proposed uses on the "general public," 103 F.3d at 818, Section 17.54.130 looks instead to the specific consequences of a proposed use "in the vicinity" or "in the neighborhood" of where the use will occur, Zoning Ordinance § 17.54.130(B), (C). These localizing phrases are not as explicit and definite as those upheld in *G.K. Ltd.* or *City of Oakland. SeeG.K. Ltd.,* 436 F.3d at 1083 (permitting decisions were subject to "reasonably specific size and type criteria" and considerations of compatibility "with the surrounding environment," both of which phrases were "explicitly defined" in the city's code); *City of Oakland,* 506 F.3d at 807 (variance decisions were based on "objective inquir [ies]" and specific criteria were defined in city ordinance). But they are more narrowly tailored than those phrases upheld as providing adequate guidance in other prior restraint cases. *See, e.g.,Thomas,* 534 U.S. at 319 n. 1, 122 S.Ct. 775 (officials' discretion

adequately confined where city could deny permit to use park if proposed use "would present an unreasonable danger to the health or safety" of the public or park employees). That the criteria in Section 17.54.130 are "somewhat elastic and require reasonable discretion to be exercised" by the planning commission in granting a CUP does not necessarily mean that the provision grants unfettered discretion. *SeeG.K. Ltd.,* 436 F.3d at 1084.

Even were the Court to find that Section 17.54.130 contains indefinite standards, this conclusion would not be "determinative of whether the provision confers excess discretion." *Seattle Affiliate,* 550 F.3d at 798. Plaintiff contends that, under *Moreno Valley,* the presence of subjective criteria by itself makes Section 17.54.130 an unconstitutional prior restraint. *See* Opp'n at 10 (arguing that *Moreno Valley*"was clearly focused on the lack of objective criteria for decisions allowing or disallowing speech, *not* on ancillary procedural matters") (emphasis added). But numerous cases contradict this assertion. Courts must consider both the criteria themselves *and* whether the permitting process effectively enables judicial review. *See, e.g.,Seattle Affiliate,* 550 F.3d at 799 (requiring consideration of "totality of the factors" to determine if ordinance confers unfettered discretion, including whether officials must provide explanation for decision and whether decision is reviewable); *Thomas,* 534 U.S. at 323, 122 S.Ct. 775 (court must examine whether permitting process "contain[s] adequate standards to guide the official's decision *and* render it subject to effective judicial review") (emphasis added); *G.K. Ltd.,* 436 F.3d at 1083 (considering time frame for officials' decisions and requirement that officials justify their findings in discussing discretion granted to officials). [15]

*10 The Court finds that the review procedures for the CUP process appropriately limit the discretion exercised by County officials pursuant to Zoning Ordinance § 17.54.130, for three reasons. First, CUP applications are subject to a thoroughly documented process. Parties seeking CUPs must submit a written application with information about the proposed use to a municipal advisory council, which, after conducting a hearing and making an advisory recommendation, then submits it to a zoning board, which either adopts or denies the CUP. *See* Lopez Decl. at 3:23–4:4. The relevant zoning board must state its findings in writing as to the CUP's compliance with the standards in Section 17.54.130. *Id.* at 4:5–12. [16] That County officials "must clearly explain [their] reasons" for their decisions regarding CUP applications substantially limits those officials' discretion. *SeeThomas,* 534 U.S. at 324, 122 S.Ct. 775.

Second, affected parties can pursue multiple appeal procedures for any decision on a CUP application. "[A]ny property owner or other person aggrieved" by a decision under Section 17.54.140 can appeal that decision to the board of supervisors. Zoning Ordinance § 17.54.670. If a party is dissatisfied with the administrative appeal, the County further asserts, that party can file a writ of mandate to have a court review the administrative decision. Memo. at 14; *see also*Cal.Civ.Proc.Code § 1094.5(a). Plaintiffs argue that this type of judicial review is in fact unavailable given the legislative nature of the CUP application decision. Opp'n at 12. Although Plaintiffs concede that a party can still pursue traditional mandamus review under Cal.Civ.Proc.Code § 1085, they contend that this review is insufficient because the reviewing court cannot compel the County to issue a previously denied CUP. *Id.* But even assuming that the denial of a CUP is a legislative act subject to traditional mandamus review, Plaintiffs do not cite—and the Court cannot find —any authority holding that the inability of a reviewing court to reverse the denial of a permit requires a finding of unfettered discretion. In fact, any concern as to that limited reviewing power is mitigated by the alternate availability of administrative appeal under Section 17.54.670, which Plaintiffs do not address.

Third, challenged CUP application decisions are reviewed within a reasonable time frame. The Permit Streamlining Act, Cal. Gov't Code § 65920, *et seq.* ("PSA"), provides the requisite timeline for decisions on "development projects," mandating that the agency reviewing the development permit notify the applicant within thirty days if the development application is incomplete. Cal. Gov't Code § 65493. Once the application is complete, the reviewing agency must reach a decision within a specific amount of time, depending on whether an environmental impact report is required. *Id.* § 65950. Plaintiffs contend that the PSA does not apply to CUP applications, because CUPs seek certain "uses" of land, and the PSA only governs the "issuance of ... permit[s] for construction or reconstruction." Opp'n at 13–14; *see also*Cal. Gov't Code § 65928. Plaintiffs further argue that an entirely different title of the Zoning Ordinance, unrelated to Section 17.54.130, deals with approval to build, and so the PSA only applies to decisions under those sections. Opp'n at 14. But the plain language of the Zoning Ordinance indicates that Section 17.54.130 does not govern uses alone. Section 17.18.130 gives the planning commission authority to consider granting

a CUP, pursuant to Section 17.54.135, for any "proposed structure, facility, *or* land use" related to an existing land use and development plan. Zoning Ordinance § 17.18.130 (emphasis added). The proposal of a "structure" or "facility" necessarily involves "construction," which would subject those CUPs involving structures or facilities to the time limits of the PSA.

***11** Plaintiffs assert that even if the PSA applies to CUP applications, the minimum time limit for completing the application process under the PSA—120 days—is too long. *See* Opp'n at 15–16. At the hearing, the County's counsel responded that a longer time period was necessary in light of the nature of the permitting process, which involves seeking approval from various groups prior to making a final decision on a permit application. The Court finds this argument compelling, and accordingly, considers the 120–day time period under the PSA a reasonable time frame to confine the discretion granted by Section 17.54.130.[17]

Based on a review of the "totality of the factors" with respect to Section 17.54.130, *seeSeattle Affiliate,* 550 F.3d at 799, the Court grants summary judgment on Plaintiffs' facial challenge as to that provision. Although the criteria used to grant or deny CUPs are not as definite as in some other cases, any deficiencies are mitigated by the availability of thorough documentation and review procedures.

b. Regulation of Speech Based on Content

The County's second argument as to the facial challenge is that Section 17.52.515 is not a content-based speech restriction, and that the provision passes intermediate scrutiny. Reply at 10–12. Section 17.52.515 provides that "[n]otwithstanding any other provision in [the Zoning Ordinance], no person shall install, move, alter, expand, modify, replace or otherwise maintain or operate any billboard[18] or advertising sign[19] in an unincorporated area of Alameda County." Zoning Ordinance § 17.52.515(A). Plaintiffs contend that this restriction qualifies as content-based under both the First Amendment and the California Constitution. Opp'n at 17–25. The Court addresses those arguments separately below.

i. Federal Claim

Plaintiffs argue that Section 17.52.515 improperly restricts speakers' First Amendment free speech rights by regulating speech based on its content. "[A]n ordinance is invalid if it ... regulates noncommercial billboards based on their content." *Nat'l Adver. Co. v. City of Orange,* 861 F.2d 246, 248 (9th Cir.1988) (citing *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 513, 516, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)).

***12** Plaintiffs do not argue that Section 17.52.515(A) by itself regulates noncommercial billboards based on their content. Nor could they—the plain language of that provision limits its application to "permanent structure[s] or sign[s] used for the display of offsite *commercial* messages...." Zoning Ordinance § 17.52.515(A) (emphasis added). Instead, Plaintiffs assert that because the Zoning Ordinance "includes content-based exemptions to an otherwise content-neutral speech restriction, the restriction is itself content-based." Opp'n at 17.[20] Plaintiffs identify four types of signs referenced in Zoning Ordinance § 17.52.520, the provision describing the categories of permitted signs,[21] as "hav[ing] no content-neutral criteria"—Sections 17.52.520(A), (B), (C), and (Q)—and contend that the remaining categories "are subject to content-neutral criteria only if the signs display certain content." Opp'n at 18.

In arguing that these permitted signs are content-based "exemptions" that preclude summary judgment, Plaintiffs essentially ask the Court to overturn its prior holding on this issue. The Court previously concluded that Section 17.52.515 does not regulate noncommercial speech at all. *SeeCitizens for Free Speech,* 62 F.Supp.3d at 1138. Accordingly, the permitted signs could not be "exemptions" to a noncommercial speech ban,[22] since "exceptions cannot exist without a corresponding general rule...." *Id.*

Plaintiffs attempt to skirt this holding by contending that, even if Zoning Ordinance § 17.52.515 applies only to commercial speech, the reference to some permitted signs that are noncommercial in nature means that Section 17.52.515 must also apply to noncommercial speech "as a matter of statutory construction...." Opp'n at 20. But Plaintiffs' reliance on *National Advertising* and *Metromedia* in support of this argument is mistaken. Those cases both involved ordinances that did not specifically identify the nature of speech regulated. *SeeNat'l Adver.,* 861 F.2d at 247 (ordinance banned "general or billboard advertising signs," defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which such sign is

located, and which may be sold, offered or conducted on such premises only incidentally, if at all") (quotation marks omitted); *Metromedia,* 453 U.S. at 493–94, 101 S.Ct. 2882 (ordinance prohibited "outdoor advertising display signs," including any sign that "directs attention to a product, service or activity, event, person, institution or business") (quotation marks omitted). As a result, those courts needed to confront the threshold issue of whether those ordinances regulated noncommercial speech,[23] and *National Advertising* found the noncommercial nature of the exemptions instructive in light of the facial ambiguity. *See*861 F.2d at 247.

*13 **[12]** Here, by contrast, the Zoning Ordinance's billboard ban is not ambiguous: it explicitly regulates *only* commercial speech. Section 17.52.515 bans "billboard[s]," which are signs "used for the display of offsite *commercial* messages ...." Zoning Ordinance § 17.52.515(A) (emphasis added). "Billboard" must be read as synonymous with "advertising sign," *id.* so even if the definition of "advertising sign" contains a word—"uses"—that bears some similarity to the terms in *National Advertising* and *Metromedia,* that word cannot encompass noncommercial speech, since such an interpretation would make "advertising sign" *not* synonymous with "billboard." The Court is " 'not required to ... adopt an interpretation precluded by the plain language of the Ordinance.' "*S.O.C.,* 152 F.3d at 1144 (quoting *Foti,* 146 F.3d at 639–40). Likewise, the Court has a "duty to interpret [the Zoning Ordinance], if fairly possible, in a manner that renders it constitutionally valid." *Outdoor Sys.,* 997 F.2d at 611. Plaintiffs have not provided any additional evidence supporting its interpretation beyond the argument above, which the Court has already rejected. Consequently, the Court is not inclined to change its earlier holding regarding the scope of the billboard ban in the Zoning Ordinance.

Plaintiffs have alternatively argued, in both a supplemental filing and at the hearing, that the Supreme Court's recent decision in *Reed v. Town of Gilbert,* 576 U.S. ——, 135 S.Ct. 2218, —— L.Ed.2d —— (2015) makes the exemptions in Section 17.52.520 content-based. *See* Pls.' Notice of Suppl. Authority (dkt. 68) at 1. But the Court agrees with the County that *Reed* has "no applicability to the issues before the Court ...." Def.'s Reply to Pls.' Suppl. Filing (dkt. 69) at 1. *Reed* was specifically concerned with a sign code's application of different restrictions—including temporal and geographic restrictions—to permitted signs based on their content. *See*576 U.S. at ——, 135 S.Ct. at 2230 ("Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination."). Plaintiffs have not identified any distinct temporal or geographic restrictions on different categories of permitted signs in Section 17.52.520 based on those signs' content. Consequently, *Reed* does not apply here.

[13] **[14]** Because the Court follows its previous holding that Section 17.52.515 only applies to commercial speech, the Court must examine that provision under intermediate scrutiny, not strict scrutiny. *SeeCent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 561, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). To survive intermediate scrutiny, an ordinance that restricts commercial speech that is not misleading and concerns lawful activity[24] must (1) seek to implement a substantial governmental interest; (2) directly advance that interest; and (3) reach no further than necessary to accomplish the given objective. *Seeid.* at 564, 100 S.Ct. 2343; *Moreno Valley,* 103 F.3d at 819. The Zoning Ordinance meets this test.

[15] First, the County has demonstrated that the billboard ban was enacted in order to implement a substantial government interest. The purpose of the ban is to "advance the County's interests in community aesthetics by the control of visual clutter, pedestrian and driver safety, and the protection of property values ...." Zoning Ordinance § 17.52.515(B)(1).[25] "The burden on the [County] of meeting the first prong of the *Central Hudson* test is not a great one." *Moreno Valley,* 103 F.3d at 819 n. 2. Moreover, the goals of traffic safety and visual appearance have been consistently upheld as substantial government interests. *See, e.g.,Metromedia,* 453 U.S. at 507–08, 101 S.Ct. 2882; *World Wide Rush, LLC v. City of L.A.,* 606 F.3d 676, 685 (9th Cir.2010) ("[T]here is no question that restrictions on billboards advance cities' substantial interests in aesthetics and safety."). In any event, Plaintiffs do not appear to contest that the County has actually shown a substantial interest underlying the billboard restriction. *See* Opp'n at 22.

*14 Second, Plaintiffs' contention that the County has not presented evidence in support of the assertion that Section 17.52.515 "actually advances its stated purpose to support its interests in aesthetics and safety" is inaccurate. *Id.* The Court may grant summary judgment on this issue in the County's favor "without detailed proof that the billboard regulation will in fact advance the [County]'s interests."

Ackerley Commc'ns of Nw. Inc. v. Krochalis, 108 F.3d 1095, 1099–1100 (9th Cir.1997). In *Metromedia,* despite a "meager record" reflecting the ordinance's advancement of its traffic safety goals, the Supreme Court affirmed that " 'as a matter of law ... an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.' " 453 U.S. at 508, 101 S.Ct. 2882 (quoting *Metromedia, Inc. v. City of San Diego,* 26 Cal.3d 848, 164 Cal.Rptr. 510, 610 P.2d 407, 412 (1980) (en banc)). A similarly lenient standard exists for showing advancement of an interest in maintaining visual appearance by banning billboards, since that goal is "necessarily subjective ...." *Id.* at 510, 101 S.Ct. 2882 ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an esthetic harm.") (internal quotations omitted).

In fact, the County has presented evidence that Section 17.52.515 advances the County's interests in traffic safety and aesthetics. The County sought to ban the construction of new billboards in response to concerns about "the proliferation of billboards in the unincorporated areas of the County," which were perceived "as a significant problem for visual blight in some areas...." Dalton Decl. (dkt. 56) at 2:14–16,[26] 2:19–26. Other evidence provided by the County demonstrates that Section 17.52.515 was enacted to advance the County's interest in preventing "visual clutter...." Def.'s First RJN, Ex. A. *Moreno Valley,* in which the ordinance did not even contain a statement of purpose, is inapposite here. *See*103 F.3d at 819. *Metromedia* requires a minimal showing to satisfy this part of the intermediate scrutiny test, and the County meets it. *See*453 U.S. at 508, 510, 101 S.Ct. 2882. As a result, the Court finds that Section 17.52.515 actually advances the County's stated interests.[27] [28]

***15** Third, Section 17.52.515 does not go any further than necessary to maintain the County's visual appearance and promote traffic safety. This "element of the analysis does not require that the regulation be the least-restrictive means to accomplish the government's goal. Rather, what is required is a reasonable fit between the ends and the means, a fit 'that employs not necessarily the least restrictive means, but ... a means narrowly tailored to achieve the desired objective.' " *Outdoor Sys., Inc.,* 997 F.2d at 611 (quoting *Bd. of Trs. of State Univ. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

Notably, the ban does not affect all billboards, but only those displaying "offsite commercial messages...." Zoning Ordinance § 17.52.515(A). Furthermore, the relocation provision exempts existing billboards from the ban, reflecting the County's interest in addressing the specific problem of new billboards without significantly harming the owners of existing billboards. *Id.* § 17.52.515(A)(3); Dalton Decl. at 3:18–20 (discussing relocation provision's goal of reducing impact on surrounding environment "without diminishing [existing billboards'] economic value to the owners"). Other billboard bans with similar exceptions have satisfied the third prong of the *Central Hudson* test. *See, e.g.,Metromedia,* 453 U.S. at 508, 101 S.Ct. 2882 (upholding ordinance in part because it "allow[ed] onsite advertising and some other specifically exempted signs"); *Nat'l Adver.,* 861 F.2d at 248 ("The City may prohibit [commercial] billboards entirely in the interest of traffic safety and aesthetics, and may also prohibit them except where they relate to activity on the premises on which they are located.") (internal citations omitted).

Because Section 17.52.515 passes intermediate scrutiny, the County's regulation of commercial speech is facially valid. Summary judgment as to Plaintiffs' First Amendment free speech claim is therefore appropriate as to the content-regulation issue.

ii. State Claim

Plaintiffs further argue that even if Section 17.52.515 is not a content-based restriction of speech under the First Amendment, the provision still violates Art. I, § 2(a) of the California Constitution. Plaintiffs assert that the protections established by this liberty of speech clause are broader than those created by the First Amendment, so the onsite/offsite and commercial/noncommercial distinctions in Zoning Ordinance § 17.52.515(A)—which are content-neutral under the First Amendment's free speech clause—become content-based under the California Constitution framework, subjecting the provision to strict scrutiny. Opp'n at 23–25. The County contends that no case law supports Plaintiffs' argument. Reply at 11–12.

[16] The Court agrees with the County, as it cannot find any authority suggesting that the distinctions identified by Plaintiffs in Section 17.52.515 violate the liberty of speech clause of the California Constitution. That clause states that "[e]very person may freely speak, write and publish his or her sentiments on all subjects," and "[a] law may not restrain or abridge liberty of speech...." Cal. Const. art I, § 2(a). It

is undisputed that California's liberty of speech clause "is broader and more protective than the free speech clause of the First Amendment." *L.A. Alliance for Survival v. City of L.A.*, 22 Cal.4th 352, 93 Cal.Rptr.2d 1, 993 P.2d 334, 342 (2000) (collecting cases discussing breadth of liberty of speech clause). But "[m]erely because [the liberty of speech clause] is worded more expansively and has been interpreted as more protective than the First Amendment, however, does not mean that it is broader than the First Amendment in all its applications." *Id.* Indeed, courts interpreting free speech claims under the liberty of speech clause "borrow from federal First Amendment jurisprudence to analyze whether a rule is content-based or content-neutral." *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir.2003); *see alsoFashion Valley Mall, LLC v. NLRB*, 42 Cal.4th 850, 69 Cal.Rptr.3d 288, 172 P.3d 742, 753 (2007) (using both Supreme Court and California state authority to determine whether restriction was content-based).

***16** Plaintiffs cite *Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 185 Cal.Rptr. 260, 649 P.2d 902, 908 (1982) ("*Metromedia II* ") to support their assertion that an ordinance that only distinguishes between commercial and noncommercial speech violates the California Constitution. *See* Opp'n at 24. But as the County correctly points out, Plaintiffs disregard the context of that decision. *See* Reply at 11–12. In *Metromedia*, the Supreme Court noted that its facial invalidation of the ordinance in question was "based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance...." 453 U.S. at 521 n.26, 101 S.Ct. 2882. As a result, when discussing the distinction between commercial and noncommercial speech, *Metromedia II* was only determining whether it could sever the unconstitutional provision from the ordinance. *See*185 Cal.Rptr. 260, 649 P.2d at 908–09. The court concluded that it could not do so based on the structure of the ordinance, and consequently invalidated the entire ordinance. *Id.*, 185 Cal.Rptr. 260, 649 P.2d at 909.

But in attempting to reform the ordinance as directed by the Supreme Court, *Metromedia II* explicitly acknowledged that it could " 'sustain the ordinance by *limiting its reach to commercial speech*....' " 185 Cal.Rptr. 260, 649 P.2d at 904 (quoting *Metromedia*, 453 U.S. at 521 n.26, 101 S.Ct. 2882) (emphasis added). Section 17.52.515, of course, *already* limits its application to "offsite commercial messages...." Zoning Ordinance § 17.52.515(A). This provision is, in effect, what *Metromedia II* sought to create.

Plaintiffs have not provided any additional authority suggesting that the prohibition of "commercial messages" violates the liberty of speech clause. Accordingly, the Court finds this construction acceptable under the California Constitution.[29]

[17] Because the Court finds Section 17.52.515 to be content-neutral under the California Constitution, the Court examines that provision under California's intermediate scrutiny test. "A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is '(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication.' " *Fashion Valley Mall*, 69 Cal.Rptr.3d 288, 172 P.3d at 751 (quoting *L.A. Alliance*, 93 Cal.Rptr.2d 1, 993 P.2d at 340). The first two prongs correspond to extremely similar ones in the *Central Hudson* test, and the County has satisfied both of those elements, as discussed *supra* in Section III(A)(2)(b)(i). Thus the sole remaining question is whether Section 17.52.515 "leaves open ample alternative avenues of communication." *Id.* This part of the test "help[s] ensure that a facially neutral restriction is not used as a subterfuge to suppress a particular message." *L.A. Alliance*, 93 Cal.Rptr.2d 1, 993 P.2d at 357. The evidence shows that the County is not using Section 17.52.515 to suppress a particular message; rather, it is primarily interested in curtailing the growth of billboards in unincorporated areas of the County. *See* Dalton Decl. at 2:22–23. Nor are persons or entities interested in displaying particular speech precluded from doing so in a different area or in a different form elsewhere in the County. Because Section 17:52.515 leaves open ample alternative avenues of communication, it passes intermediate scrutiny. The Court therefore grants summary judgment on the content-regulation aspect of Plaintiffs' free speech claim under the California Constitution.

B. Equal Protection Claims

***17** Plaintiffs contend that summary judgment is inappropriate as to both of their equal protection claims because the Zoning Ordinance allows the County to prevent the display of Plaintiffs' Signs, even though the Signs would be permissible if either of two groups—(1) CBS Outdoor and Clear Channel Communications, whose billboards are subject to the County's relocation program, and (2) government speakers—sought to display the Signs. Opp'n at 5. The County has not responded to the comparison to the government speakers, but argues in its Reply that CBS and Clear Channel are not subject to the same Zoning Ordinance

provisions as Plaintiffs, because those companies owned legally permitted billboards in the County's unincorporated areas prior to the enactment of Zoning Ordinance § 17.52.515. Reply at 13; Dalton Decl. at 3:1–7, 3:17–27.

But as Plaintiffs point out, the County did not address Plaintiffs' equal protection claims at all in their opening brief on this motion. *See generally* Memo.; *see also* Opp'n at 5. The Court does not consider arguments raised for the first time in a reply brief. *SeeUnited States v. Romm*, 455 F.3d 990, 997 (9th Cir.2006) (citing *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999)); *United States ex rel. Giles v. Sardie*, 191 F.Supp.2d 1117, 1127 (C.D.Cal.2000). In addition, the County did not provide in its Reply any reason to grant summary judgment as to the equal protection claims with respect to the government speakers. *See* Reply at 12–13. The County therefore either has not provided any basis for summary judgment or has prevented Plaintiffs from adequately responding to the County's arguments in favor of summary judgment. As a result, the Court does not grant summary judgment on either of Plaintiffs' equal protection claims.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS summary judgment for the County as to Plaintiffs' free speech claims, to the extent that those claims are based on: (1) an as-applied challenge; (2) a facial challenge as to the unfettered discretion granted by Zoning Ordinance §§ 17.52.520(Q), 17.52.520(D), and 17.54.130; and (3) a facial challenge as to Section 17.52.515's purported regulation of speech based on its content. The Court DENIES the County's motion as to Plaintiffs' facial challenge regarding the unfettered discretion granted by Zoning Ordinance § 17.18.130, and as to Plaintiffs' equal protection claims.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2015 WL 4365439

Footnotes

1 Plaintiffs assert four claims, for (1) violation of their rights to free speech under the First Amendment; (2) violation of their rights to equal protection under the Fourteenth Amendment; (3) violation of their rights to free speech under Art. I, § 2 of the California Constitution; and (4) violation of their rights to equal protection under Art. I, § 7 of the California Constitution. Compl. (dkt. 1) ¶¶ 34–39, 43–48. Because Plaintiffs' fifth claim is merely a request for attorneys' fees pursuant to 42 U.S.C. § 1988, *id.* ¶¶ 40–42, the Court does not consider it a separate claim for purposes of the motion.

2 The County does not identify the specific claims on which it is seeking summary judgment, at it is required to do. *See*Fed.R.Civ.P. 56(a) (party moving for summary judgment must "identify[ ] each claim or defense ... on which summary judgment is sought"). It appears to request summary judgment on all of Plaintiffs' claims. *See* Mot. (dkt. 55) at 1. Accordingly, the Court interprets the motion as seeking summary judgment on all of Plaintiffs' claims.

3 As discussed *infra* in Section III(A)(2)(a)(i), the version of Section 17.52.520(D) that Plaintiffs challenge no longer exists.

4 Plaintiffs also request partial summary judgment on their free speech claims pursuant to Fed.R.Civ.P. 56(f)(1). Opp'n (dkt. 63) at 25. To the extent that those claims remain following this motion, the Court does not grant this request. In addition to its being procedurally improper, Plaintiffs might have created a genuine issue of material fact sufficient to defeat summary judgment on some of their claims, but they have not shown an absence of a genuine issue of material fact in their favor on those claims.

5 Even assuming *arguendo* that the Court should analyze this speculative as-applied challenge, the County's broad interpretation of Section 17.52.515 fails. The Zoning Ordinance defines billboard as "a permanent structure or sign used for the display of offsite *commercial* messages...." Zoning Ordinance § 17.52.515(A) (emphasis added). The County argues that this provision prevents construction of signs currently displaying commercial messages as well as "signs displaying noncommercial messages when constructed, but which are intended by the owner to also display commercial messages.... " Memo. at 8. But courts generally must look at the text of the statute to " 'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' " *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir.2001) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). Section 17.52.515 does not include any reference to the future intentions of parties using the signs, and a logical understanding of "used" would preclude speech that might be displayed at some indeterminate point in the future.

6 Section 17.18.010 states that the purpose of the PD districts is "to encourage the arrangement of a compatible variety of uses ... in such a manner that the resulting development will":

A. Be in accord with the policies of the general plan of the [C]ounty;

B. Provide efficient use of the land that includes preservation of significant open areas and natural and topographic landscape features with minimum alteration of natural land forms;

C. Provide an environment that will encourage the use of common open areas for neighborhood or community activities and other amenities;

D. Be compatible with and enhance the development of the general area;

E. Create an attractive, efficient and safe environment.

7 The same provision existed as Section 17.52.520(R) at the time the Court decided Plaintiffs' preliminary injunction motion. *SeeCitizens for Free Speech*, 62 F.Supp.3d at 1140. The County amended the Zoning Ordinance in November 2014, and this change affected the sections' numbering. *See* Def.'s Second RJN, Ex. S (dkt. 60–19).

8 The amendment to the Zoning Ordinance in November 2014 deleted this section. *See id.*

9 The Court also found that Plaintiffs were unlikely to succeed on the merits of their unfettered discretion argument as to another provision, Section 17.54.080, regarding permissible variances from the Zoning Ordinance. *Citizens for Free Speech*, 62 F.Supp.3d at 1141. Given this holding, Plaintiffs concede that the provision is not at issue here, *see* Opp'n at 6 n.2, and the Court does not address it further.

10 At the hearing, Plaintiffs' counsel claimed for the first time that despite the deletion of Section 17.52.520(D), Section 17.52.520(C) still confers unfettered discretion on County officials to determine what constitutes "a location of historic interest...." Zoning Ordinance § 17.52.520(C). But Plaintiffs have not provided any evidence beyond those cursory remarks to show that that determination involves the exercise of unfettered discretion.

11 This practice would need to rise to the level of a "well-established practice" for the purposes of an unbridled discretion analysis. *See Seattle Affiliate*, 550 F.3d at 799 (declining "to elevate any of the various decisional principles offered by [city] officials to the realm of 'well-established practice,' when no consistent set of factors was ever articulated") (quoting *Plain Dealer*, 486 U.S. at 770, 108 S.Ct. 2138).

12 Plaintiffs object to this portion of the Lopez Declaration as opinion. Opp'n at 4. The Court denies this objection. The statements in lines 3:23–4:4 about the substance of the CUP process are admissible. Lopez has worked as the Planning Director for the County for seven years, so he appears to have firsthand knowledge of the CUP process, to which his statements in lines 3:23–4:4 pertain. Lopez Decl. at 1:23–24; *see alsoBoyd v. City of Oakland*, 458 F.Supp.2d 1015, 1024 (N.D.Cal.2006) (distinguishing matters "known to the declarant personally" from opinion).

13 Plaintiffs object to this portion of the Lopez Declaration as opinion. Opp'n at 4. The Court denies this objection for the reasons stated in footnote 12.

14 Although Plaintiffs' discussion of the CUP process centers on Section 17.54.135, *see* Opp'n at 9, the CUP process is normally governed by Section 17.54.140, which gives the relevant zoning board the authority to rule on the CUP. The presiding zoning board will only delegate authority to the planning commission pursuant to Section 17.54.135 in the event that the zoning board is unable to take action on a CUP application. Zoning Ordinance § 17.54.140. For purposes of this motion, it does not appear that there is any difference between the deliberative processes of the planning commission and zoning board under Sections 17.54.135 and 17.54.140, respectively, so the Court considers the two provisions in the same manner.

15 At the hearing, Plaintiffs' counsel asserted that the standards in the *Moreno Valley* ordinance are more appropriate guidelines to judge the breadth of the discretion granted by Section 17.54.130 than the criteria in other cases cited by the County because those cases were not concerned with permit applications involving billboards. See, e.g., *Seattle Affiliate*, 550 F.3d at 800–01; *Thomas*, 534 U.S. at 319 n. 1, 122 S.Ct. 775. But the Court may still rely on the permitting criteria discussed in those cases for guidance as to Section 17.54.130's standards, just as other cases have considered different types of permit processes to determine the amount of discretion conferred. See, e.g., *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1028 (9th Cir.2009) (comparing standards for "special event" permit process to standards in cases regarding permits to (1) place newsracks on public property and (2) gather in national forests) (citing *Plain Dealer*, 486 U.S. at 753–54, 108 S.Ct. 2138 & *Linick*, 195 F.3d at 538).

16 Plaintiffs object to this portion of the Lopez Declaration as opinion. Opp'n at 4. The Court denies this objection for the reasons stated in footnote 12.

17 Even assuming that the PSA does not apply to some or even any CUP applications, the absence of a definite time period to grant or deny the CUP does not necessitate a finding of unfettered discretion. "That the [Zoning Ordinance] lack[s] a time limit for the processing of applications is not fatal." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th

Cir.1993). The cases to the contrary cited by Plaintiffs all concern *content-based* speech restrictions. *SeeCity of Littleton, Colo. v. Z.J. Gifts D–4, LLC,* 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004); *FW/PBS,* 493 U.S. at 215, 110 S.Ct. 596; *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968); *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Gospel Missions of Am. v. Bennett,* 951 F.Supp. 1429 (C.D.Cal.1997). But as discussed *infra* in Section III(A)(2)(b)(i), the Zoning Ordinance is content-*neutral,* and the same procedural requirements do not apply to content-neutral permit schemes. *SeeThomas,* 534 U.S. at 322, 122 S.Ct. 775.

18 "Billboard" is defined as "a permanent structure or sign used for the display of offsite commercial messages and shall include and be synonymous with 'advertising sign ....' " Zoning Ordinance § 17.52.515(A).

19 "Advertising sign" is defined as "any lettered or pictorial matter or device which advertises or informs about a business organization or event, goods, products, services or uses, not available on the property upon which the sign is located and does not include directional tract sign or community identification sign." *Id.* § 17.04.010.

20 Plaintiffs also argue that Zoning Ordinance § 17.52.520(A), allowing signs by public officials, is itself unconstitutional because it is content-based and discriminates based on the speaker. Opp'n at 19. Because this argument is more appropriately discussed with respect to Plaintiffs' equal protection claims—which are considered *infra* in Section III(B)—the Court does not address it further in this section.

21 Permitted signs include, among others, the following: sale or lease signs; official public signs; no trespass signs; warnings; house and mailbox identifiers; street names; signs identifying a benefactor; signs identifying a location of historic interest; signs identifying statues or monuments; pedestrian and traffic signs; temporary political signs; and announcements related to meetings held at schools, churches, or other places of public assembly. Zoning Ordinance § 17.52.520.

22 Plaintiffs also request that the Court reconsider its earlier discussion regarding the blanket noncommercial nature of the permitted signs. *See* Opp'n at 20 n.8; *Citizens for Free Speech,* 62 F.Supp.3d at 1138. Upon further review of Zoning Ordinance § 17.52.520, the Court observes that some of the permitted signs (for example, signs for apartment rentals and for sales, rentals, or leases of buildings or lots in subdivision developments) could be characterized as commercial in nature. *See* Zoning Ordinance § 17.52.520(J), (K). Nonetheless, their commercial nature does not change the Court's analysis, since regulation of commercial speech does not invalidate a billboard ordinance. *See, e.g.,Nat'l Adver.,* 861 F.2d at 248 (" '[T]he city may distinguish between the relative value of different categories of commercial speech ....' ") (quoting *Metromedia,* 453 U.S. at 514, 101 S.Ct. 2882).

23 The other cases cited by Plaintiffs in which content-based noncommercial exemptions to an otherwise content-neutral sign ban made that provision content-based involved bans that explicitly regulated *all* speech, including noncommercial speech. *SeeFoti,* 146 F.3d at 634 (ordinance banned "*all* signs on *all* public property") (emphasis in original); *Moreno Valley,* 103 F.3d at 816 (ordinance regulated all signs, which included both commercial and noncommercial messages). As discussed below, Plaintiffs cannot show that same breadth in Section 17.52.515.

24 Plaintiffs do not contend that the commercial speech restricted by Section 17.52.515 is misleading or does not concern lawful activity. *See generally* Opp'n.

25 This purpose statement is not included in the version of the Zoning Ordinance attached to Plaintiffs' Request for Judicial Notice because, due to the publisher's error, Section 17.52.515(B)–(G) did not become part of the published version of the Zoning Ordinance. *SeeCitizens for Free Speech,* 62 F.Supp.3d at 1135. But the Court took judicial notice of those subsections because the County properly published them pursuant to Cal. Gov.Code § 25124. *Id.* at 1136. Accordingly, the Court considers those provisions, which were attached as Exhibit A (dkt. 20–1) to the County's Request for Judicial Notice ("Def.'s First RJN") (dkt. 20) filed in opposition to Plaintiffs' motion for a preliminary injunction, in deciding this motion.

26 Plaintiffs object to this portion of the Dalton Declaration as hearsay. Opp'n at 4. The Court denies this objection for two reasons. First, Plaintiffs' "attempt to assert th[is] objection[ ] without providing any individualized discussion is procedurally defective," because the objection itself is "unduly vague." *SeeDukes v. Wal–Mart, Inc.,* 222 F.R.D. 189, 199 (N.D.Cal.2004). Because the part of the declaration objected to contains multiple statements, it is impossible to tell which specific statements Plaintiffs consider hearsay. Second, the statement in lines 14–16 is admissible. Dalton worked with the Castro Valley Community Advisory Committee ("CAC") as part of her role at the County's Redevelopment Agency, so she appears to have firsthand knowledge of the CAC's actions, to which her statement in lines 14–16 pertains. Dalton Decl. at 2:10–13; *see alsoBoyd,* 458 F.Supp.2d at 1024 (distinguishing matters "known to the declarant personally" from hearsay).

27 Plaintiffs also cannot argue that the relocation exception in Section 17.52.515(A)(3), which permits owners of existing billboards to construct billboards in new locations, " 'undermine[s] and counteract[s]' the interest the government claims," such that the provision does not " 'directly and materially advance' " those interests. *SeeMetro Lights, L.L.C. v. City of*

L.A., 551 F.3d 898, 905 (9th Cir.2009) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995)). The relocation provision is entirely consistent with the County's interests in enacting the billboard ban: "mov[ing] billboards to more appropriate locations and reduc[ing] the overall number of billboards in the community." *See* Dalton Decl. at 4:1–2 (see footnote 28 regarding Plaintiffs' objection to this statement). The relocation provision does not undermine the County's interests as expressed in Zoning Ordinance § 17.52.515(B). *SeeWorld Wide Rush*, 606 F.3d at 685 (exceptions did not undermine interests where exceptions were "made for the express purpose of advancing those very interests").

28 Plaintiffs object to this portion of the Dalton Declaration as irrelevant. Opp'n at 4. Because this statement is relevant to understanding the purpose of the relocation provision with respect to the broader interests of Section 17.52.515, the Court denies this objection.

29 Plaintiffs also cite a single case from the Oregon Supreme Court to argue that the onsite/offsite distinction in Section 17.52.515 runs afoul of the liberty of speech clause. Opp'n at 24 (citing *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 340 Or. 275, 132 P.3d 5, 18 (2006)). The Court does not consider this case persuasive. The Ninth Circuit has rejected the approach suggested by *Outdoor Media Dimensions*, explicitly recognizing that the onsite/offsite distinction is *not* content-based under the California Constitution. *SeeVanguard Outdoor, LLC v. City of L.A.*, 648 F.3d 737, 747–48 (9th Cir.2011) (holding that offsite sign ban was a content-neutral restriction that was not facially invalid under California Constitution). In the absence of any authority to the contrary, the Court does not consider the prohibition of "offsite commercial messages" to be content-neutral under the California Constitution.

End of Document

Attachment "3"

(Contest Promotions, LLC v. City and County of San Francisco (N.D. Cal. 2015) 2015 WL 4571564)

2015 WL 4571564

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Contest Promotions, LLC, Plaintiff,
v.
City and County of San Francisco, Defendant.

Case No. 15–cv–00093–SI | Signed 07/28/2015

Attorneys and Law Firms

Matthew David Hinks, Talya Goldfinger, Jeffer Mangels Butler and Mitchell LLP, Los Angeles, CA, for Plaintiff.

James Moxon Emery, Thomas Spencer Lakritz, Office of the City Attorney, San Francisco, CA, for Defendant.

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION TO SEAL

Re: Dkt. No. 33, 34, 35

SUSAN ILLSTON, United States District Judge

***1** A motion to dismiss filed by the defendant City and County of San Francisco ("the City"), seeking dismissal of plaintiff Contest Promotions, LLC's first amended complaint ("FAC") for failure to state a claim, is currently set for argument on July 31, 2015. Pursuant to Civil Local Rule 7–1(b), the Court finds this matter appropriate for resolution without oral argument and hereby **VACATES** the hearing. For the reasons stated below, the Court **GRANTS** the City's motion as to Contest Promotions' federal law claims *with prejudice*, and **DISMISSES** plaintiff's state law claims *without prejudice*.

BACKGROUND

This is the second lawsuit plaintiff has brought against the City to challenge the legality of its signage ordinances. Plaintiff is a corporation that organizes and operates contests and raffles whereby individuals are invited to enter stores for the purpose of filling out an application to enter a contest. FAC ¶ 12. Plaintiff leases signage space from the stores in order to promote its contests to passersby. *Id.* ¶ 13. The business model drives increased foot traffic to the stores, while also promoting the product or event which is the subject of the raffle or contest. *Id* ¶ 12. Plaintiff operates in many cities across the United States including San Francisco, Los Angeles, New York, Seattle, and Houston. *Id.* ¶ 14.

I. First Law Suit

In early 2007, Contest Promotions approached the City to discuss its business model in light of the City's restriction on certain types of signage. FAC ¶ 19. At the time, as is still the case today, the City banned the use of "off-site" signage, known as General Advertising Signs, but permitted "on-site" signage, known as Business Signs. The primary distinction between the two types of signage pertains to where they are located. Broadly speaking, a Business Sign advertises the business to which it is affixed, while a General Advertising Sign advertises for a third-party product or service which is not sold on the premises to which the sign is affixed. [1] The paradigmatic example of an off-site (or General Advertising) sign would be a billboard.

Beginning in December of 2007, the City began citing all of Contest Promotions' signs with Notices of Violation ("NOVs"), contending that they were General Advertising Signs in violation of the Planning Code. In all, over 50 NOVs were issued, each ordering that the signage be removed under penalty of potentially thousands of dollars in fines per sign. FAC ¶ 20.

***2** In response, on September 22, 2009, Contest Promotions filed its first lawsuit in this Court, challenging—both facially and as applied—the constitutionality of the City's ordinance prohibiting its signage. Case No. 09–cv–4434, Docket No. 1. On May 18, 2010, the Court granted in part and denied in part the City's motion to dismiss. Case No. 09–04434, Docket No. 32. In its order, the Court reasoned that Contest Promotions had adequately alleged that the "incidentally" language employed in the ordinance was unduly broad, vague, and could potentially invite unbridled discretion on the part of City officials. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. C 09–04434 SI, 2010 WL 1998780 (N.D.Cal.

May 18, 2010). The Court denied defendant's motion as to all of Contest Promotions' First Amendment Claims, but granted with leave to amend as to its Equal Protection claim. *Id.* On February 1, 2013, the parties reached a settlement. The terms of the settlement required the following actions: (1) the City would construe plaintiff's signs as Business Signs, as the Planning Code defined them at the time; (2) Contest Promotions would re-permit its entire inventory of signs to ensure compliance with the Planning Code and the settlement agreement, despite the fact that plaintiff already had previously received permits for these signs; (3) Contest Promotions would dismiss its lawsuit against the City; and (4) Contest Promotions would pay the City $375,000. FAC ¶¶ 26–29. On July 8, 2014, the City's Board of Supervisors approved the settlement and Contest Promotions made an initial payment of $150,000. *Id.* ¶ 31.

II. The Present Lawsuit

Soon after approving the settlement, on July 29, 2014, the Board of Supervisors passed legislation to amend the definition of Business Sign under Planning Code § 602.3. *Id.* ¶¶ 32–35. Section 602.3 now defines a Business Sign as "[a] sign which directs attention to a *the primary* business[2], commodity, service, industry or other activity which is sold, offered, or conducted, ~~other than incidentally~~, on the premises upon which such sign is located, or to which it is affixed." (amendments emphasized). When Contest Promotions submitted its signs for re-permitting pursuant to the Settlement Agreement, the City denied its applications for failure to comply with the Planning Code as amended. FAC ¶ 37–38. Plaintiff alleges that the Planning Code was amended "for the specific purpose of targeting Plaintiff and denying Plaintiff the benefit of its bargain under the Settlement Agreement and to prevent Plaintiff from both permitting new signs and obtaining permits for its existing inventory as it is required to do under the Settlement Agreement." *Id.* ¶ 35. The City contends that the ordinance was amended to address the concerns the Court expressed in its 2010 order. Docket No. 33, Def. Mot. at 10.

On January 8, 2015, Contest Promotions filed the present action alleging a number of constitutional and state law claims. Docket No. 1. The Complaint alleged causes of action for (1) violation of the First Amendment, (2) denial of Due Process, (3) inverse condemnation, (4) denial of Equal Protection, (5) breach of contract, (6) breach of implied covenant of good faith and fair dealing, (7) fraud in the inducement, (8) promissory estoppel, and (9) declaratory relief. *Id.* ¶¶ 36116. On March 13, 2015, the City filed a motion to dismiss the complaint for failure to state a claim. Docket No. 15. On April 22, 2015, the Court granted the City's motion to dismiss as to all of plaintiff's federal constitutional claims with leave to amend, and deferred ruling on its state law claims. Docket No. 25. On May 22, 2015, plaintiff filed the FAC which abandons the claim for inverse condemnation, but otherwise alleges the same causes of action as the original complaint. Docket No. 29. Now before the Court is the City's motion to dismiss the FAC for failure to state a claim.

DISCUSSION

I. First Amendment

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. States and local governments are bound by this prohibition through the Fourteenth Amendment to the Constitution. *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."). Although commercial speech is afforded First Amendment protections, it has a subordinate position to noncommercial forms of expression. *United States v. Edge Broadcasting Co.,* 509 U.S. 418, 430 (1993). Accordingly, it is afforded "somewhat less extensive" protection than is afforded noncommercial speech. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 637 (1985); *see also In re Doser,* 412 F.3d 1056, 1063 (9th Cir.2005).

*3 First Amendment protections apply to commercial speech only if the speech concerns a lawful activity and is not misleading. Once it has been established that the speech is entitled to protection, any government restriction on that speech must satisfy a three-part test: (1) the restriction must seek to further a substantial government interest, (2) the restriction must directly advance the government's interest, and (3) the restriction must reach no further than necessary to accomplish the given objective. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 563–66 (1980).

Citing controlling Supreme Court and Ninth Circuit precedent, the Court explained in its prior order that Section 602.3 survives intermediate scrutiny as a ban on off-site commercial speech. *Contest Promotions, LLC v. City & Cnty. of San Francisco,* No. 15–CV–00093–SI, 2015 WL 1849525, at *4 (N.D.Cal. Apr. 22, 2015). However Contest Promotions

argues that this conclusion warrants reconsideration in light of a recently decided Supreme Court case.

Reed v. Town of Gilbert, Arizona, 135 S.Ct. 2218 (2015) [3] concerned a law which banned outdoor signs without a permit, and created 23 exemptions for specific types of signage, placing varying restrictions on the signage depending on which exemption it fell into. 135 S.Ct. 2218 (2015). For example, the law exempted "ideological signs" or "political signs" from the outright ban. Plaintiffs, a local church, challenged the law after the Town of Gilbert repeatedly cited them for failure to comply with the requirements imposed by the "Temporal Directional Signs Relating to a Qualifying Event" exemption. The exemption encompassed signs directed at motorists or other passersby, which advertised for events sponsored by a non-profit. *Id.* at 2225. The law required that these signs be "no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward." *Id.* (internal citations omitted). These restrictions were more severe than those placed on ideological signs or political signs.

Justice Thomas, joined by five other Justices, struck down the law, finding that the exemptions were content-based, and could not withstand strict scrutiny. In arriving at this conclusion, the Court emphasized three guiding principles which compelled the result. First, a content-based restriction on speech is subject to strict scrutiny regardless of the government's motive; therefore "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2222. Second, " '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537 (1980)). Therefore, the mere fact that a law is viewpoint neutral does not necessarily insulate it from strict scrutiny. Third, whether a law is speaker-based or event-based makes no difference for purposes of determining whether it is content-based. *Id.* at 2231 ("A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea."). Justice Alito, joined by Justices Sotomayor and Kennedy, took part in the majority opinion but wrote separately to "add a few words of further explanation." *Id.* at 2233 (Alito, J., concurring). Therein, Justice Alito outlined a non-exhaustive list of signage regulations that would not trigger strict scrutiny, which included, *inter alia,* "[r]ules distinguishing between on-premises and off-premises signs." *Id.* Justices Ginsburg, Breyer, and Kagan rejected the notion that a content-based regulation must necessarily trigger strict scrutiny, and concurred only in the judgment. *Id.* at 2234–39.

*4 Contest Promotions now argues, in light of *Reed,* that Section 602.3's distinction between primary and non-primary business uses is a content-based regulation of speech subject to strict scrutiny. However, *Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test. Furthermore, as noted above, at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny.

The distinction between primary versus non-primary activities is fundamentally concerned with the location of the sign relative to the location of the product which it advertises. Therefore unlike the law in *Reed,* Section 602.3 does not "single[ ] out specific subject matter [or specific speakers] for disfavored treatment." *Reed* 135 S.Ct. at 2230; *see also id.* at 2233 (Alito, J., concurring) (holding that "[r]ules regulating the locations in which signs may be placed" do not trigger strict scrutiny). Indeed, one store's non-primary use will be another store's primary use, and there is thus no danger that the challenged law will work as a "prohibition of public discussion of an entire topic." *Id.*

Because *Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny, the Court holds that its prior analysis continues to control the fate of plaintiff's First Amendment claim. The few courts that have had occasion to address this question since *Reed* was handed down are in accord. *See California Outdoor Equity Partners v. City of Corona,* No. CV 15–03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D.Cal. July 9, 2015) ("*Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson,* let alone apply it.")(emphasis in original); *Citizens for Free Speech, LLC v. Cnty. of Alameda,* No. NO. C14–02513 CRB, 2015 WL 4365439, at *13 (N.D.Cal. July 16, 2015) (holding that *Reed* does not alter the analysis for

laws regulating off-site commercial speech). Accordingly, the Court **GRANTS** the City's motion to dismiss plaintiff's cause of action for violation of the First Amendment, *with prejudice*.[4]

II. Due Process

A. Substantive Due Process

In its prior order, the Court dismissed plaintiff's cause of action for violation of substantive due process, explaining that its claim was merely duplicative of other alleged constitutional violations. The Court noted:

> [P]laintiff has merely rehashed the allegations supporting its other constitutional claims—under the Equal Protection Clause, First Amendment, and Fifth Amendment—to support a claim for violation of substantive due process ... "[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendments, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (discussing *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

***5** *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15–CV–00093–SI, 2015 WL 1849525, at *7 (N.D.Cal. Apr. 22, 2015).

Plaintiff has done nothing to remedy these defects.[5] Accordingly, the Court **GRANTS** the City's motion to dismiss plaintiff's claim for violation of substantive due process *with prejudice*.

B. Procedural Due Process

Contest Promotions' theory of violation of procedural due process appears to be supported by allegations that (1) the City denied its permit applications without "adequate process for appeal or review," and (2) the City failed to give Contest Promotions notice and an opportunity to be heard prior to introducing legislation to amend Section 602.3. FAC ¶ 121.

The first issue raised by Contest Promotions is contradicted by the language of the Planning Code which provides a process for administrative appeal and judicial review for reconsideration of NOVs or administrative penalties. S.F. Planning Code § 610(d)(1). A hearing must be scheduled within 60 days of a request for reconsideration. *Id.* The administrative law judge must issue a written decision[6] within 30 days of the hearing, and the ordinance provides a non-exhaustive list of criteria that the administrative law judge "shall" consider. *Id.* Furthermore, on November 18, 2014, the City sent plaintiff a letter responding to specific concerns it articulated about the permitting process, and requesting additional information from plaintiff. Docket No. 16, RJN Exh. F.

Next plaintiff argues that it was deprived of notice and an opportunity to be heard during the legislative enactment of Section 602.3. Plaintiff points to the fact that the amendments to Section 602.3 were originally enacted as an "interim zoning control," which obviated the need for the public hearings which are typically a part of the legislative process. Pl. Opp'n at 17. It further contends that the City did not properly comply with the procedural requirements necessary to pass an interim zoning law. However, as the City correctly notes, any harm inflicted by the interim process was mooted by the fact that Section 602.3 was subsequently amended through the normal legislative process. Plaintiff fails to explain why the four public hearings held on Section 602.3 provided an insufficient forum for it to be heard. *See* Pl. RJN Exh C. at 128–129 (listing hearings held on October 22, 2012, January 26, 2015, February 3, 2015, February 10, 2015).

***6** In any event, the concept of procedural due process has limited vitality as applied to laws of general applicability. Justice Holmes explained long ago what is now axiomatic:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi–Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

Therefore, the checks inherent in a democratically elected representative government are typically all that is required to ensure compliance with procedural due process. *Samson v. City of Bainbridge Island,* 683 F.3d 1051, 1060 (9th Cir.2012) ("Procedural due process entitles citizens to a legislative body that 'performs its responsibilities in the normal manner prescribed by law.' ") (internal citations omitted); *see also 75 Acres, LLC v. Miami–Dade Cnty., Fla.*, 338 F.3d 1288, 1294 (11th Cir.2003) ("if government action is viewed as legislative in nature, property owners generally are not entitled to procedural due process."); *Aiuto v. San Francisco's Mayor's Office of Housing,* No. C 09–2093 CW, 2010 WL 1532319, at *8 (N.D.Cal. Apr. 16, 2010).

Plaintiff has therefore failed to state a claim for violation of procedural due process. Accordingly, the Court **GRANTS** the City's motion to dismiss this cause of action, *with prejudice*.

III. Equal Protection

Courts afford heightened review to cases in which a classification jeopardizes a fundamental right, or where the government has categorized on the basis of an inherently suspect characteristic. *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). Where a fundamental right is not implicated, and no suspect class is identified, a government ordinance or action is reviewed under the rational basis test. *Id.* An ordinance satisfies the rational basis test if it is "rationally related to a legitimate state interest." *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). "[S]trict scrutiny under the Equal Protection Clause is inappropriate where a law regulating speech is content-neutral, even where the speech at issue [is] non-commercial." *Maldonado v. Morales,* 556 F.3d 1037, 1048 (9th Cir.2009). Here, the Court will apply rational basis review. *See Outdoor Media Group v. City of Beaumont,* 506 F.3d 895, 907 (9th Cir.2007) (applying rational basis review to equal protection claim against an ordinance distinguishing between on-site and off-site speech).

Plaintiff alleges that it has been singled out by the City for disfavored treatment relative to other similarly situated signage permit-applicants—otherwise known as a "class of one" claim. FAC ¶ 131. "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.' ' " *Gerhart v. Lake Cnty., Mont.,* 637 F.3d 1013, 1021 (9th Cir.2011) (quoting *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 601 (2008)). The Equal Protection Clause protects individuals constituting a class of one if the plaintiff demonstrates that there has been irrational and intentional differential treatment. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). "A 'class of one' claim requires a showing that the government '(1) intentionally (2) treated [plaintiffs] differently than other similarly situated [businesses], (3) without a rational basis.' " *Net Connection LLC v. Cnty. of Alameda,* No. C 13–1467 SI, 2013 WL 3200640, at *4 (N.D. Cal. June 24, 2013) (quoting *Gerhart* 637 F.3d at 1022).

*7 "We have recognized that the rational basis prong of a 'class of one' claim turns on whether there is a rational basis for the *distinction,* rather than the underlying government *action.*" *Gerhart* 637 F.3d at 1023 (citing *SeaRiver Maritime Financial Holdings, Inc. v. Mineta,* 309 F.3d 662 (9th Cir.2002)) (emphasis in original). In *Gerhart,* the plaintiff was required to apply for a permit, and was ultimately denied a permit to build an approach to a county road; meanwhile, ten other landowners on his block were allowed to build approaches to the same road without the county even requiring a permit.

In its prior order in this case, the Court granted the City's motion to dismiss, noting that plaintiff had "failed to make any non-conclusory allegations tending to show that the City treated it differently than other applicants applying for signage permits." *Contest Promotions,* 2015 WL 1849525, at *9. Plaintiff has attempted to remedy this defect by amending its complaint to include a litany of similarly situated businesses which were granted permits for Business Signs.

However, upon closer inspection, these other businesses share little in common with Contest Promotions. Namely, not a single one of the stores that have allegedly received permits for Business Signs applied for signage which advertises off-premises activities—the defining feature of Contest Promotions' business model. FAC ¶¶ 92–98. "Parties allegedly treated differently in violation of the Equal Protection Clause are similarly situated only when they are 'arguably indistinguishable.' " *Erickson v. Cnty. of Nevada ex rel. Bd. of Supervisors,* No. 1315624, 2015 WL 3541865, at *1 (9th Cir. June 8, 2015) (citing *Engquist* 553 U.S. at 601). Plaintiff has failed to plead any facts which meet this high bar. Viewed in the most generous light, plaintiff has alleged that the City may have granted permits to businesses that have failed to meet the standards set forth in Section

602.3. However, we must take care not to constitutionalize simple violations of municipal law. *See Olech,* 528 U.S. at 565 (Breyer, J., concurring). Having failed to properly allege that any similarly situated business was treated differently, plaintiff has failed to state a claim under the Equal Protection Clause. Accordingly, the Court **GRANTS** the City's motion to dismiss plaintiff's cause of action for violation of equal protection, *with prejudice.*

IV. State Law Causes of Action

Contest Promotions has filed its suit in a federal forum pursuant to 28 U.S.C. § 1331, which provides for federal question jurisdiction. As the litigants to this action are non-diverse, § 1331 is the only plausible basis for federal jurisdiction. In addition to the federal law causes of action discussed above, Contest Promotions has also alleged a number of causes of action based in state law, including (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) fraud in the inducement, and (4) promissory estoppel. Federal courts may take supplemental jurisdiction over such state law claims when they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). However, a district court may decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988).

***8** Having dismissed all of Contest Promotions' federal claims from this action with prejudice, the Court hereby **DISMISSES** this action *without prejudice* so that a state court may decide the state law claims in the first instance.

V. Motions to Seal

With the exception of a narrow range of documents that are "traditionally kept secret," courts begin their sealing analysis with "a strong presumption in favor of access." *Foltz v. State Farm Mut. Auto. Ins.,* 331 F.3d 1122, 1135 (9th Cir.2003). "A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal." Civ. L.R. 79–5(a). When applying to file documents under seal in connection with a dispositive motion, the party seeking to seal must articulate "compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana v. City and County of Honolulu,* 447 F.3d 1172, 1178–79 (9th Cir.2006) (internal quotations and citations omitted). Where a party seeks to seal documents attached to a non-dispositive motion, a showing of "good cause" under Federal Rule of Civil Procedure 26(c) is sufficient. *Id.* at 1179–80; *see also* Fed.R.Civ.P. 26(c). In addition, all requests to file under seal must be "narrowly tailored," such that only sealable information is sought to be redacted from public access. Civ. L.R. 79–5(b). Because a motion to dismiss is a dispositive motion, the "compelling reasons" standard applies here. *See Koninklijke Philips N.V. v. Elec–Tech Int'l Co.,* No. 14–CV–02737–BLF, 2015 WL 581574, at *1 (N.D.Cal. Feb. 10, 2015).

The City wishes to redact certain applications for business signs which contain architectural plans maintained by the City's Department of Building Inspection. The City relies on Section 19851 of California's Health and Safety Code which prohibits dissemination of such plans unless the party that wishes to obtain them certifies that the drawings will be "used for the maintenance, operation, and use of the building." Cal. Health & Safety Code § 19851(c)(1).

While styled as a motion to seal, the City makes no attempt to explain why public filing of the documents in question would cause harm to itself or third parties, or otherwise meet the "compelling reasons" standard. Rather, the City appears to argue that it is statutorily prohibited from publicly filing these documents. However, as the City readily admits, these plans may also be disseminated pursuant to a Court order, which the City never requested. *See* Cal. Health & Safety Code § 19851(a)(2). Accordingly, the Court **DENIES** the City's motion to seal. These documents were not considered by the Court for purposes of ruling on the City's motion to dismiss. *See* Civil Local Rule 79–5(f)(2).

IT IS SO ORDERED.

All Citations

Slip Copy, 2015 WL 4571564

Footnotes

1 In 2007, a General Advertising Sign was defined under Planning Code § 602.7 as a sign "which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the sign is located, or to which it is affixed, and which is sold offered or conducted on such premises *only incidentally if at all*." (emphasis added). A Business Sign was defined under Planning Code § 602.3 as "[a] sign which directs attention to a business, commodity, service, industry, or other activity which is sold, offered, or conducted, *other than incidentally,* on the premises upon which such sign is located, or to which it is affixed." (emphasis added).

2 The section was also amended to clarify that "[t]he primary business, commodity, service, industry, or other activity on the premises shall mean the use which occupies the greatest area on the premises upon which the business sign is located, or to which it is affixed." S.F. Planning Code § 602.3.

3 *Reed* was decided after the City filed the motion to dismiss presently under consideration, but before plaintiff filed its opposition.

4 Plaintiff also supports its claim for violation of the First Amendment under the theory that Section 602.3 is impermissibly vague and grants unbridled discretion to City officials. These allegations do nothing more than repeat arguments that the Court found unavailing in its previous order, and therefore cannot serve to evade dismissal of its First Amendment challenge. *See Contest Promotions*, No. 15–CV–00093–SI, 2015 WL 1849525, at *5–6.

5 "The Fifth Amendment does not invariably preempt a claim" for violation of substantive due process, but "[t]o the extent a property owner's complaint [constitutes a Taking] ... the claim must be analyzed under the Fifth Amendment." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855–56 (9th Cir.2007). The FAC no longer alleges a cause of action under the Takings Clause; however, plaintiff's theory of constitutional harm continues to be supported by allegations that the City's actions "infringe[d] upon a constitutionally protected property interest," which would be cognizable under the Takings Clause. FAC ¶ 118.

6 The written decision must inform the plaintiff "of its right to seek judicial review pursuant to the timelines set forth in Section 1094.6 of the California Code of Civil Procedure." S.F. Planning Code § 610(d)(1)(B).

End of Document

Attachment "4"

(CTIA-The Wireless Association v. City of Berkeley
(N.D. Cal. 2015) WL 5569072)

2015 WL 5569072

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

CTIA—The Wireless Association®, Plaintiff,
v.
The City of Berkeley, California, et al., Defendants.

No. C-15-2529 EMC | Signed 09/21/2015

Synopsis

Background: Non-profit corporation representing wireless industry brought action against city, challenging ordinance requiring cell phone retailers provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone. Corporation moved for preliminary injunction.

Holdings: The District Court, Edward M. Chen, J., held that:

[1] ordinance was not conflict preempted to the extent it required advisement of minimum spacing between body and cell phone;

[2] portion of ordinance warning that risk from RF emissions was greater in children was likely conflict preempted;

[3] corporation was not likely to succeed on its claim that ordinance violated First Amendment.

Motion granted in part and denied in part.

West Headnotes (12)

[1] **Injunction**
⇦ Grounds in general; multiple factors

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Cases that cite this headnote

[2] **States**
⇦ Conflicting or conforming laws or regulations

Conflict preemption, the implicit preemption of state law that occurs where there is an actual conflict between state and federal law, arises when (1) compliance with both federal and state regulations is a physical impossibility, or (2) when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Cases that cite this headnote

[3] **States**
⇦ Conflicting or conforming laws or regulations

What is a sufficient obstacle, for purposes of conflict preemption, is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects; if the purpose of the federal act cannot otherwise be accomplished, if its operation within its chosen field must be frustrated and its provisions be refused their natural effect, the state law must yield to the regulation of Congress within the sphere of its delegated power.

Cases that cite this headnote

[4] **Municipal Corporations**
⇦ Political Status and Relations

Telecommunications
⇦ Preemption; interplay of federal, state and local laws

City ordinance requiring cell phone retailers to provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone, advising them of Federal Communications Commission (FCC) standards assuming minimum spacing of cell phone away from body, did not impose an obstacle to Congress's objectives in

enacting Federal Communications Act (FCA) provision barring state or local regulation of personal wireless service facilities based on environmental effects of radio frequency (RF) emissions, and thus ordinance was not conflict-preempted; disclosure mandated by ordinance was consistent with FCC statements and testing procedures regarding spacing between body and a cell phone, and ordinance did not threaten national uniformity. 47 C.F.R. § 2.1093.

Cases that cite this headnote

[5] **Municipal Corporations**
Political Status and Relations

Telecommunications
Preemption; interplay of federal, state and local laws

City ordinance requiring cell phone retailers to provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone, advising them that potential risk from RF emissions was greater in children, could impose an obstacle to Congress's objectives in enacting Federal Communications Act (FCA) provision barring state or local regulation of personal wireless service facilities based on environmental effects of radio frequency (RF) emissions, and thus such portion of ordinance was likely conflict-preempted; Federal Communications Commission (FCC) had not imposed different exposure limits for children nor did it mandate special warnings regarding children's exposure to RF radiation from cell phones, and ordinance threatened to upset the balance struck by the FCC between encouraging commercial development of all phones and public safety, since warning as worded could materially deter sales on an assumption about safety risks which the FCC has refused to adopt or endorse. 47 C.F.R. § 2.1093.

Cases that cite this headnote

[6] **Constitutional Law**
Reasonableness; relationship to governmental interest

If a commercial communication is neither misleading nor related to unlawful activity, the government's power to restrict such communication is circumscribed and must be supported by a substantial interest.

Cases that cite this headnote

[7] **Constitutional Law**
Reasonableness; relationship to governmental interest

If the government seeks to restrict commercial communications that are neither misleading nor related to unlawful activity, the regulatory technique used must be in proportion to the interest to be served by the restriction and the limitation on expression must be designed carefully to achieve the state's goal.

Cases that cite this headnote

[8] **Constitutional Law**
Reasonableness; relationship to governmental interest

A restriction on commercial speech that is neither misleading nor related to unlawful activity must directly advance the governmental interest involved and may not be sustained if it provides only ineffective or remote support for the government's purpose; additionally, if the governmental interest could be served as well by a more limited restriction on the commercial speech, excessive restrictions cannot survive. U.S. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
False, untruthful, deceptive, or misleading speech

Mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests; indeed, disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to

the efficiency of the marketplace of ideas. U.S. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Telephones
Telecommunications
Validity

Ordinance requiring cell phone retailers provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone compelled disclosure of commercial speech attributable to someone other than the retailer, and was subject to general rational basis review under First Amendment. U.S. Const.Amend. 1.

Cases that cite this headnote

[11] **Telecommunications**
Judicial review or intervention

Non-profit corporation representing wireless industry was not likely to succeed on its claim that ordinance requiring cell phone retailers provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone violated First Amendment, and thus was not entitled to preliminary injunction barring enforcement of ordinance; compelled commercial speech attributable to government was rationally related to city's legitimate governmental interest in promoting consumer awareness of the federal government's RF testing procedures and guidelines. U.S. Const.Amend. 1.

Cases that cite this headnote

[12] **Telecommunications**
Judicial review or intervention

Non-profit corporation representing wireless industry was not likely to succeed on its claim that ordinance requiring cell phone retailers provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone violated First Amendment, and thus was not entitled to preliminary injunction barring enforcement of ordinance, even if more exacting rational basis test requiring speech be factual and uncontroversial applied; notice contained accurate and uncontroversial information consistent with Federal Communications Commission's (FCC) findings and directives regarding minimum spacing to be maintained between the body and a cell phone. U.S. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

Helgi C. Walker, Jacob T. Spencer, Michael R. Huston, Theodore B. Olson, Gibson, Dunn and Crutcher LLP, Washington, DC, Joshua David Dick, Joshua Seth Lipshutz, Gibson, Dunn and Crutcher LLP, San Francisco, CA, for Plaintiff.

Zachary Cowan, Berkeley City Attorney's Office, Berkeley, CA, Amanda Shanor, Yale Law School, New Haven, CT, Lester Lawrence Lessig, III, Harvard Law School, Cambridge, MA, for Defendants, City of Berkeley California, Christine Daniel City Manager of Berkeley, California, in her official capacity, Lester Lawrence Lessig, III.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; AND GRANTING NRDC'S MOTION FOR LEAVE TO FILE AMICUS BRIEF

EDWARD M. CHEN, United States District Judge

*1 As alleged in its complaint, Plaintiff CTIA—The Wireless Association ("CTIA") is a not-for-profit corporation that "represents all sectors of the wireless industry, including but not limited to manufacturers of cell phones and accessories, providers of wireless services, and sellers of wireless services, handsets, and accessories." Compl. ¶ 18. Included among CTIA's members are cell phone retailers. *See* Compl. ¶ 19. CTIA has filed suit against the City of Berkeley and its City Manager in her official capacity (collectively "City" or "Berkeley"), challenging a City ordinance that requires cell phone retailers to provide a certain notice regarding radiofrequency ("RF") energy emitted by cell phones to any customer who buys or leases a cell

phone. According to CTIA, the ordinance is preempted by federal law and further violates the First Amendment. Currently pending before the Court is CTIA's motion for a preliminary injunction in which it seeks to enjoin enforcement of the ordinance. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part the motion. [1]

I. FACTUAL & PROCEDURAL BACKGROUND

A. City Ordinance

RF energy is " 'a form of electromagnetic radiation that is emitted by cell phones.' " *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3585 (Mar. 29, 2013) [hereinafter "2013 FCC Reassessment"]. The City ordinance at issue concerns RF energy emitted by cell phones.

The ordinance at issue is found in Chapter 9.96 of the Berkeley Municipal Code. It provides in relevant part as follows:

> A. A Cell phone retailer shall provide to each customer who buys or leases a Cell phone a notice containing the following language:
>
> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. This potential risk is greater for children. Refer to the instructions in your phone or user manual for information about how to use your phone safely.
>
> B. The notice required by this Section shall either be provided to each customer who buys or leases a Cell phone or shall be prominently displayed at any point of sale where Cell phones are purchased or leased. If provided to the customer, the notice shall include the City's logo, shall be printed on paper that is no less than 5 inches by 8 inches in size, and shall be printed in no smaller than a 18-point font. The paper on which the notice is printed may contain other information in the discretion of the Cell phone retailer, as long as that information is distinct from the notice language required by subdivision (A) of this Section. If prominently displayed at a point of sale, the notice shall include the City's logo, be printed on a poster no less than 8-1/2 by 11 inches in size, and shall be printed in no small than a 28-point font. The City shall make its logo available to be incorporated in such notices.

*2 Berkeley Mun. Code § 9.96.030.

The stated findings and purpose behind the notice requirement are as follows:

> A. Requirements for the testing of cell phones were established by the federal government [*i.e.*, the Federal Communications Commission ("FCC")] in 1996.
>
> B. These requirements established "Specific Absorption Rates" (SAR [2]) for cell phones. [3]
>
> C. The protocols for testing the SAR for cell phones carried on a person's body assumed that they would be carried a small distance away from the body, e.g., in a holster or belt clip, which was the common practice at that time. Testing of cell phones under these protocols has generally been conducted based on an assumed separation of 10-15 millimeters.
>
> D. To protect the safety of their consumers, manufacturers recommend that their cell phones be carried away from the body, or be used in conjunction with hands-free devices.
>
> E. Consumers are not generally aware of these safety recommendations.
>
> F. Currently, it is much more common for cell phones to be carried in pockets or other locations rather than holsters or belt clips, resulting in much smaller separation distances than the safety recommendations specify.
>
> G. Some consumers may change their behavior to better protect themselves and their children if they were aware of these safety recommendations.
>
> H. While the disclosures and warnings that accompany cell phones generally advise consumers not to wear them against their bodies, e.g., in pockets, waistbands, etc., these disclosures and warnings are often buried in fine print, are not written in easily understood language, or

are accessible only by looking for the information on the device itself.

I. The purpose of this Chapter is to assure that consumers have the information they need to make their own choices about the extent and nature of their exposure to radio frequency radiation.

Berkeley Mun. Code § 9.96.010.

Prior to issuing the ordinance, the City conducted a telephone survey on the topic of cell phones. Data was collected from 459 Berkeley registered voters. *See* Jensen Decl. ¶ 6. Seventy percent of those surveyed were not "aware that the government's radiation tests to assure the safety of cell phones assume that a cell phone would not be carried against your body, but would instead be held at least 1- to 15 millimeters from your body." Jensen Decl., Ex. A (survey and results).

B. FCC Pronouncements

As indicated by the above, the FCC has set RF energy exposure standards for cell phones. The present RF energy exposure limits were established in 1996. *See generally* FCC Consumer Guide, Wireless Devices and Health Concerns, *available at* https://www.fcc.gov/guides/wireless-devices-and-health-concerns (last visited September 17, 2015) [hereinafter "FCC Consumer Guide"]. This was done pursuant to a provision in the Telecommunications Act of 1996 ("TCA") that instructed the agency "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." 104 P.L. 104 (1996).

*3 The FCC has also issued some pronouncements regarding RF energy emission and cell phones, three of which are discussed briefly below.

1. FCC KDB Guidelines

First, as CTIA alleges in its complaint,

> [t]he FCC's Office of Engineering and Technology Knowledge Database ("KDB") advises cell phone manufacturers [as opposed to cell phone retailers] to include in their user manual a description of how the user can operate the phone under the same conditions for which its SAR was measured. *See* FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4).

Compl. ¶ 75; *see also* 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498, 3587 (stating that "[m]anufacturers have been encouraged since 2001 to include information in device manuals to make consumers aware of the need to maintain the body-worn distance—by using appropriate accessories if they want to ensure that their actual exposure does not exceed the SAR measurement obtained during testing").

The relevant guideline from the FCC's KDB Office provides as follows:

> Specific information must be included in the operating manuals to enable users to select body-worn accessories that meet the minimum test separation distance requirements. Users must be fully informed of the operating requirements and restrictions, to the extent that the typical user can easily understand the information, to acquire the required body-worn accessories to maintain compliance. Instructions on how to place and orient a device in body-worn accessories, in accordance with the test results, should also be included in the user instructions. All supported body-worn accessory operating configurations must be clearly disclosed to users through conspicuous instructions in the user guide and user manual to ensure unsupported operations are avoided....

FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4), *available at* https://apps.fcc.gov/oetcf/kdb/forms/FTSSearchResultPage.cfm?switch=P& id=20676 (last visited September 17, 2015).

2. FCC Consumer Guide

The FCC currently has a FCC Consumer Guide regarding wireless devices and health concerns. In the FCC Consumer Guide, the agency states, *inter alia*, as follows:

- "Several US government agencies and international organizations work cooperatively to monitor research on the health effects of RF exposure. According to the FDA and the World Health Organization (WHO), among other organizations, to date, the weight of scientific evidence has not effectively linked exposure to radio frequency energy from mobile devices with any known health problems." FCC Consumer Guide.

- "Some health and safety interest groups have interpreted certain reports to suggest that wireless device use may

be linked to cancer and other illnesses, posing potentially greater risks for children than adults. While these assertions have gained increased public attention, currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses. Those evaluating the potential risks of using wireless devices agree that more and longer-term studies should explore whether there is a better basis for RF safety standards than is currently used. The FCC closely monitors all of these study results. However, at this time, there is no basis on which to establish a different safety threshold than our current requirements." *Id.*

*4 • "Even though no scientific evidence currently establishes a definite link between wireless device use and cancer or other illnesses, and even though all cell phones must meet established federal standards for exposure to RF energy, some consumers are skeptical of the science and/or the analysis that underlies the FCC's RF exposure guidelines. Accordingly, some parties recommend taking measures to further reduce exposure to RF energy. **The FCC does not endorse the need for these practices,** but provides information on some simple steps that you can take to reduce your exposure to RF energy from cell phones. **For example**, wireless devices only emit RF energy when you are using them and, the closer the device is to you, the more energy you will absorb." *Id.* (emphasis in original).

• "Some parties recommend that you consider the reported SAR value of wireless devices. However, comparing the SAR of different devices may be misleading. First, the actual SAR varies considerably depending upon the conditions of use. The SAR value used for FCC approval does not account for the multitude of measurements taken during the testing. Moreover, cell phones constantly vary their power to operate at the minimum power necessary for communications; operation at maximum power occurs infrequently. Second, the reported highest SAR values of wireless devices do not necessarily indicate that a user is exposed to more or less RF energy from one cell phone than from another during normal use (see our guide on SAR and cell phones). Third, the variation in SAR from one mobile device to the next is relatively small compared to the reduction that can be achieved by the measures described above. Consumers should remember that all wireless devices are certified to meet the FCC maximum SAR standards, which incorporate a considerable safety margin." *Id.*

3. 2013 FCC Reassessment

Finally, in 2013, the FCC issued its Reassessment. *See generally* 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498. One of the components of the Reassessment was a Notice of Inquiry, "request[ing] comment to determine whether our RF exposure limits and policies need to be reassessed." *Id.* at 3500.

> We adopted our present exposure limits in 1996, based on guidance from federal safety, health, and environmental agencies using recommendations published separately by the National Council on Radiation Protection and Measurements (NCRP) and the Institute of Electrical and Electronics Engineers, Inc. (IEEE). Since 1996, the International Commission on Non-Ionizing Radiation Protection (ICNIRP) has developed a recommendation supported by the World Health Organization (WHO), and the IEEE has revised its recommendations several times, while the NCRP has continued to support its recommendation as we use it in our current rules. In the Inquiry, we ask whether our exposure limits remain appropriate given the differences in the various recommendations that have developed and recognizing additional progress in research subsequent to the adoption of our existing exposure limits.

Id. at 3501.

The FCC included the following comments in its Reassessment:

• "Since the Commission is not a health and safety agency, we defer to other organizations and agencies with respect to interpreting the biological research necessary to determine what levels are safe. As such, the Commission invites health and safety agencies and the public to comment on the propriety of our general present limits and whether additional precautions may be appropriate in some cases, for example with respect to children. We recognize our responsibility to both protect the public from established

adverse effects due to exposure to RF energy and allow industry to provide telecommunications services to the public in the most efficient and practical manner possible. In the Inquiry we ask whether any precautionary action would be either useful or counterproductive, given that there is a lack of scientific consensus about the possibility of adverse health effects at exposure levels at or below our existing limits. Further, if any action is found to be useful, we inquire whether it could be efficient and practical." *Id.* at 3501-02.

*5 • "In the Inquiry we ask questions about several other issues related to public information, precautionary measures, and evaluation procedures. Specifically, we seek comment on the feasibility of evaluating portable RF sources without a separation distance when worn on the body to ensure compliance with our limits under present-day usage conditions. We ask whether the Commission should consistently require either disclosure of the maximum SAR value or other more reliable exposure data in a standard format—perhaps in manuals, at point-of-sale, or on a website." *Id.* at 3502.

• "The Commission has a responsibility to 'provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.' The intent of our exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services. The present Commission exposure limit is a 'bright-line rule.' That is, so long as exposure levels are below a specified limit value, there is no requirement to further reduce exposure. The limit is readily justified when it is based on known adverse health effects having a well-defined threshold, and the limit includes prudent additional safety factors (e.g., setting the limit significantly below the threshold where known adverse health effects may begin to occur). Our current RF exposure guidelines are an example of such regulation, including a significant 'safety' factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure. This 'safety' factor can well accommodate a variety of variables such as different physical characteristics and individual sensitivities—and even the potential for exposures to occur in excess of our limits without posing a health hazard to humans." [4] *Id.* at 3582.

• "Despite this conservative bright-line limit, there has been discussion of going even further to guard against the possibility of risks from non-thermal biological effects, even though such risks have not been established by scientific research. As such, some parties have suggested measures of 'prudent avoidance'—undertaking only those avoidance activities which carry modest costs." *Id.* at 3582–83 (emphasis added).

• "Given the complexity of the information on research regarding non-thermal biological effects, taking extra precautions in this area may fundamentally be qualitative and may not be well-served by the adoption of lower specific exposure limits without any known, underlying biological mechanism. Additionally, adoption of extra precautionary measures may have the unintended consequence of 'opposition to progress and the refusal of innovation, ever greater bureaucracy,...[and] increased anxiety in the population.' Nevertheless, we invite comment as to whether precautionary measures may be appropriate for certain locations which would not affect the enforceability of our existing exposure limits, as well as any analytical justification for such measures." *Id.* at 3583.

• "We significantly note that extra precautionary efforts by national authorities to reduce exposure below recognized scientifically-based limits is considered by the WHO to be unnecessary but acceptable so long as such efforts do not undermine exposure limits based on known adverse effects. Along these lines, we note that although the Commission supplies information to consumers on methods to reduce exposure from cell phones, it has also stated that it does not endorse the need for nor set a target value for exposure reduction, and we seek comment on whether these policies are appropriate. We also observe that the FDA has stated that, 'available scientific evidence—including World Health Organization (WHO) findings released May 17, 2010—shows no increased health risk due to radiofrequency (RF) energy, a form of electromagnetic radiation that is emitted by cell phones.' At the same time, the FDA has stated that '[a]lthough the existing scientific data do not justify FDA regulatory actions, FDA has urged the cell phone industry to take a number of steps, including ... [d]esign[ing] cell phones in a way that minimizes any RF exposure to the user.' We seek information on other similar hortatory efforts and comment

on the utility and propriety of such messaging as part of this Commission's regulatory regime." *Id.* at 3584–85.

*6 • "Commission calculations similar to those in Appendix D suggest that some devices may not be compliant with our exposure limits without the use of some spacer to maintain a separation distance when body-worn, although this conclusion is not verifiable for individual devices since a test without a spacer has not been routinely performed during the body-worn testing for equipment authorization. Yet, we have no evidence that this poses any significant health risk. Commission rules specify a pass/fail criterion for SAR evaluation and equipment authorization. However, exceeding the SAR limit does not necessarily imply unsafe operation, nor do lower SAR quantities imply 'safer' operation. The limits were set with a large safety factor, to be well below a threshold for unacceptable rises in tissue temperature. As a result, exposure well above the specified SAR limit should not create an unsafe condition. We note that, even if a device is tested without a spacer, there are already certain separations built into the SAR test setup, such as the thickness of the mannequin shell, the thickness of the device exterior case, etc., so we seek comment on the implementation of evaluation procedures without a spacer for the body-worn testing configuration. We also realize that SAR measurements are performed while the device is operating at its maximum capable power, so that given typical operating conditions, the SAR of the device during normal use would be less than tested. In sum, using a device against the body without a spacer will generally result in actual SAR below the maximum SAR tested; moreover, a use that possibly results in non-compliance with the SAR limit should not be viewed with significantly greater concern than compliant use." *Id.* at 3588.

II. DISCUSSION

A. Legal Standard

[1] " 'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' " *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir.2011) (quoting *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (rejecting the position that, "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm")). The Ninth Circuit has held that the "serious questions" approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met. *See Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir.2011).

B. Likelihood of Success on the Merits

As noted above, the thrust of CTIA's complaint is twofold: (1) the Berkeley ordinance is preempted by federal law and (2) the ordinance violates the First Amendment. Thus, the Court must evaluate the likelihood of success as to each contention.

1. Preemption

[2] The specific preemption argument raised by CTIA is conflict preemption.[5] "Conflict preemption is implicit preemption of state law that occurs where 'there is an actual conflict between state and federal law.' Conflict preemption 'arises when [1] 'compliance with both federal and state regulations is a physical impossibility,' ... or [2] when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *McClellan v. I–Flow Corp.*, 776 F.3d 1035, 1040 (9th Cir.2015).

[3] Here, CTIA puts at issue only obstacle preemption, not impossibility preemption. Under Supreme Court law, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). " 'If the purpose of the [federal] act cannot otherwise be accomplished—if its operation within its chosen field must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.' " *Id.*

*7 In the case at bar, the federal statute at issue is the TCA, "which [*inter alia*] directed the FCC to 'make effective rules regarding the environmental effects of [RF] emissions' within 180 days of the TCA's enactment [in 1996]." *Farina*, 625 F.3d at 106; *see also* 47 C.F.R. § 2.1093 (setting exposure limits). CTIA argues that the purposes underlying the statute are twofold: (1) to achieve a balance between the need to

protect the public's health and safety and the goal of providing an efficient and practical telecommunications services for the public's benefit and (2) to ensure nationwide uniformity as to this balance. In support of this argument, CTIA relies on the Third Circuit's decision *Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir.2010).

The Court agrees with CTIA that *Farina* is an instructive case with respect to the purposes underlying the above TCA provision. In *Farina*, the plaintiff sued on the ground that "cell phones, as currently manufactured, are unsafe to be operated without headsets because the customary manner in which they are used—with the user holding the phone so that the antenna is positioned next to his head—exposes the user to dangerous amounts of radio frequency ('RF') radiation." *Id.* at 104. The Third Circuit held that the plaintiff's lawsuit was subject to obstacle preemption. The court noted first that, "although [the plaintiff] disavow[ed] any challenge to the FCC's RF standards, that is the essence of his complaint....In order for [the plaintiff] to succeed, he necessarily must establish that cell phones abiding by the FCC's SAR guidelines are unsafe to operate without a headset." *Id.* at 122. The court then concluded that there was obstacle preemption, particularly because "regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Id.* at 123.

> The reason why state law conflicts with federal law in these balancing situations is plain. When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a re-balancing of those considerations. A state-law standard that is more protective of one objective may result in a standard that is less protective of others.

Id. The FCC was tasked with a balancing act—not only to "protect[ ] the health and safety of the public, but also [to] ensur[e] the rapid development of an efficient and uniform network, one that provides effective and widely accessible service at a reasonable cost." *Id.* at 125. "Were the FCC's standards to constitute only a regulatory floor upon which state law can build, juries could re-balance the FCC's statutory objectives and inhibit the provision of quality nationwide service." *Id.*

Moreover, in *Farina*, the Third Circuit also stated that uniformity was one of the purposes underlying the TCA:

> The wireless network is an inherently national system. In order to ensure the network functions nationwide and to preserve the balance between the FCC's competing regulatory objectives, both Congress and the FCC recognized uniformity as an essential element of an efficient wireless network. Subjecting the wireless network to a patchwork of state standards would disrupt that uniformity and place additional burdens on industry and the network itself.

Id. at 126.

Finally, as noted in *Farina*, the legislative history for the TCA, which instructed the FCC to "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions," 104 P.L. 104 (1996) (discussing § 704), includes a House Report that also indicates uniformity is an important goal. The House Report states, *inter alia*:

> *8 The Committee finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and

> the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

H.R. Rep. No. 104-204, at 94 (1996).[6]

[4] But even though *Farina* persuasively identifies the purposes underlying the TCA provision at issue, the limited disclosure mandated by the Berkeley ordinance does not, with one exception, impose an obstacle to those purposes. As noted above, the notice required by the City ordinance states as follows:

> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. This potential risk is greater for children. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A). This disclosure, for the most part, simply refers consumers to the fact that there are FCC standards on RF energy exposure—standards which assume a minimum spacing of the cell phone away from the body—and advises consumers to refer to their manuals regarding maintenance of such spacing. The disclosure mandated by the Berkeley ordinance is consistent with the FCC's statements and testing procedures regarding spacing. *See, e.g.*, FCC Consumer Guide (advising "on some simple steps that you can take to reduce your exposure to RF energy from cell phones[;] [f]or example, wireless devices only emit RF energy when you are using them and, the closer the device is to you, the more energy you will absorb"); *2013 FCC Reassessment,* 28 F.C.C. Rcd. at 3588 (stating that "Commission calculations ... suggest that some devices may not be compliant with our exposure limits without the use of some spacer to maintain a separation distance when body-worn, although this conclusion is not verifiable for individual devices since a test without a spacer has not been routinely performed during the body-worn testing for equipment authorization"). It is also consistent with the FCC's own requirement that cell phone manufacturers disclose to consumers information and advice about spacing. *See* FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4). Thus, the ordinance does not ban something the FCC authorizes or mandates. And CTIA has failed to point to any FCC pronouncement suggesting that the agency has any objection to warning consumers about maintaining spacing between the body and a cell phone. Moreover, the City ordinance, because it is consistent with FCC pronouncements and directives, does not threaten national uniformity.

*9 [5] There is, however, one portion of the notice required by the City ordinance that is subject to obstacle preemption —namely, the sentence "This potential risk is greater for children." Berkeley Mun. Code § 9.96.030(A). Notably, this sentence does not say that the potential risk *may* be greater for children; rather, the sentence states that the potential risk *is* greater. But whether the potential risk is, in fact, greater for children is a matter of scientific debate. The City has taken the position in this lawsuit that its notice is simply designed to reinforce a message that the FCC already requires and make consumers aware of FCC instructions and mandates, *see, e.g.*, Opp'n at 1, 4, but the FCC has never made any pronouncement that there *is* a greater potential risk for children, and, certainly, the FCC has not imposed different RF energy exposure limits that are applicable to children specifically. At most, the FCC has taken note that there is a scientific debate about whether children are potentially at greater risk. *See, e.g.*, FCC Consumer Guide ("Some health and safety interest groups have interpreted certain reports to suggest that wireless device use may be linked to cancer and other illnesses, posing potentially greater risks for children than adults. While these assertions have gained increased public attention, currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses."); *2013 FCC Reassessment,* 28 F.C.C. Rcd. at 3501 ("[T]he Commission invites health and safety agencies and the public to comment on the propriety of our general present limits and whether additional precautions may be appropriate in some cases, for example with respect to children."). Importantly, however, the FCC has not imposed different exposure limits for children nor does it mandate special warnings regarding children's exposure to RF radiation from cell phones. Thus, the content of the sentence—that the potential risk *is* indeed greater for children compared to adults—threatens to upset the balance struck by the FCC between encouraging commercial development of all phones and public safety, because the Berkeley warning as worded

could materially deter sales on an assumption about safety risks which the FCC has refused to adopt or endorse. [7]

Accordingly, although CTIA has not demonstrated a likelihood of success or even serious question on the merits in its preemption challenge to the main portion of the notice, it has established a likelihood of success on its claim that the warning about children is preempted.

2. First Amendment

Having determined that the required statement, "This potential risk is greater for children," is likely preempted by federal law, the Court now addresses CTIA's likelihood of success with respect to its First Amendment challenge to the remainder of the notice. [8]

a. Level of Scrutiny

***10** With respect to CTIA's First Amendment claim, the Court must first determine what First Amendment test should be used to evaluate the ordinance at issue. CTIA contends that strict scrutiny must be applied because the ordinance is neither content nor viewpoint neutral. *See Reed v. Town of Gilbert*, —U.S. ——, 135 S.Ct. 2218, 2228, 2230, 192 L.Ed.2d 236 (2015) (stating that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based"; adding that "[g]overnment discrimination among viewpoints...is a 'more blatant' and 'egregious form of content discrimination' "). But in making this argument, CTIA completely ignores the fact that the speech rights at issue here are its members' *commercial* speech rights. *See Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir.2011) (stating that "[c]ommercial speech is 'defined as speech that does no more than propose a commercial transaction' "; " 'strong support' that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation"). The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, *see, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (stating that "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"); *see also Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 533 (D.C.Cir.2015) (noting that, "as the Supreme Court has emphasized, the starting premise in all commercial speech cases is the same: the First Amendment values commercial speech for different reasons than non-commercial speech"), and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid. [9]

[6] [7] [8] CTIA contends that, even if the commercial speech rubric is applied, the ordinance should be subject to at least intermediate scrutiny, pursuant to *Central Hudson*:

> If the communication is neither misleading nor related to unlawful activity, ... [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved..... Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Central Hudson, 447 U.S. at 564, 100 S.Ct. 2343. But as indicated by the above language, *Central Hudson* was addressing *restrictions* on commercial speech. Here, the Court is not confronted with any restrictions on CTIA members' commercial speech; rather, the issue is related to *compelled disclosure* of commercial speech. The Supreme Court has treated restrictions on commercial speech differently from compelled disclosure of such speech. This difference in treatment was first articulated in the plurality decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), and subsequently affirmed by the majority opinion in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010).

Because *Zauderer* is a critical opinion, the Court briefly discusses its holding. The plaintiff in *Zauderer* was an attorney. He ran an advertisement in which he "publiciz[ed] his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known

as the Dalkon Shield Intrauterine Device." *Id.* at 630, 105 S.Ct. 2265. In the advertisement, the plaintiff stated that " '[t]he case are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.' " *Id.* at 631, 105 S.Ct. 2265. Based on the advertisement, the state Office of Disciplinary Counsel filed a complaint against the plaintiff, alleging that the plaintiff had violated a disciplinary rule because the advertisement "fail[ed] to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful" and therefore was deceptive. *Id.* at 633, 105 S.Ct. 2265. The state supreme court agreed with the state Office of Disciplinary Counsel. The plaintiff appealed, asserting that his First Amendment rights had been violated.

***11** In resolving the issue, the plurality began by noting that

> [o]ur general approach to restrictions on commercial speech is...by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest [*i.e.*, *Central Hudson*].

Id. at 638, 105 S.Ct. 2265.

The plurality pointed out, however, that there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650, 105 S.Ct. 2265. While, "in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech," that is not always the case. *Id.* Here, the state was not " 'prescrib[ing] what shall be orthodox in politics, religion, [etc].' "; rather,

> [t]he State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that *because disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech*, "[warnings] or [disclaimers] might be appropriately required...in order to dissipate the possibility of consumer confusion or deception."
>
> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Id. at 651, 105 S.Ct. 2265 (emphasis added).

The plurality then held that this standard was satisfied in the case at hand.

> Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"—terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the...public before it [may] determine that the [advertisement] had a tendency to mislead." The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

Id. at 652–53, 105 S.Ct. 2265. Accordingly, *Zauderer* suggests that compelled disclosure of commercial speech,

unlike suppression or restriction of such speech, is subject to rational basis review rather than intermediate scrutiny.

Approximately fifteen years later, a majority of the Supreme Court addressed *Zauderer* in *Milavetz*. *Milavetz* concerned the constitutionality of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The act regulated the conduct of debt relief agencies, *i.e.*, "professionals who provide bankruptcy assistance to consumer debtors." *Milavetz*, 559 U.S. at 232, 130 S.Ct. 1324. Part of the act required debt relief agencies to make certain disclosures in their advertisements. *See id.* at 233, 130 S.Ct. 1324. The parties disagreed as to whether *Central Hudson* or *Zauderer* provided the applicable standard in evaluating the statute. The Supreme Court concluded that *Zauderer* governed, noting as follows:

> The challenged provisions of § 528 share the essential features of the rule at issue in *Zauderer*. As in that case, § 528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies ... from conveying any additional information.

Id. at 250, 130 S.Ct. 1324. The Court then determined that "§ 528's requirements that [the petitioner] identify itself as a debt relief agency and include information about its bankruptcy-assistance an related services are 'reasonably related to the [Government's] interest in preventing deception of consumers.' " *Id.* at 252–53, 130 S.Ct. 1324. Accordingly, it "upheld those provisions as applied to [the petitioner]." *Id.* at 253, 130 S.Ct. 1324.

[9] Since *Zauderer* and *Milavetz*, circuit courts have essentially characterized the *Zauderer* test as a rational basis or rational review test. *See, e.g., Nat'l Ass'n*, 800 F.3d at *55 (stating that "[t]he Supreme Court has stated that rational basis review applies to certain disclosures of 'purely factual and uncontroversial information' "; quoting *Zauderer*); *King v. Governor of N.J.*, 767 F.3d 216, 236 (3d Cir.2014) (stating that *Zauderer* "outlin[ed] the 'material differences between disclosure requirements and outright prohibitions on speech' and subject[ed] a disclosure requirement to rational basis review"); *Safelite Group v. Jepsen*, 764 F.3d 258, 259 (2d Cir.2014) (characterizing *Zauderer* as "rational basis review"); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 189 (4th Cir.2013) (noting that, under *Zauderer*, "disclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny"); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n. 8 (6th Cir.2012) (characterizing *Zauderer* as a "rational-basis rule"); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir.2005) (Boudin, J., concurring) (stating that "[t]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken" because *Zauderer* is in essence a rational basis test). This is consistent with the underlying theory of the First Amendment. As the Second Circuit has noted, "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests"—indeed, "disclosure further, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.' " *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir.2001).

***13** CTIA protests that, even if *Zauderer* makes a distinction between restrictions on commercial speech and compelled disclosure, the more lenient test articulated in *Zauderer* is applicable only where the governmental interest at issue is the prevention of consumer deception, and that, here, the governmental interest is in public health or safety, not consumer deception. But tellingly, no court has expressly held that *Zauderer* is limited as CTIA proposes. In fact, several circuit courts have held to the contrary. For example, in *American Meat Institute v. United States Department of Agriculture.*, 760 F.3d 18 (D.C.Cir.2014), the D.C. Circuit, sitting en banc, considered a regulation of the Secretary of Agriculture that required disclosure of country-of-origin information about meat products. The plaintiffs argued that the regulation violated their First Amendment rights. The question for the court was whether "the test set forth in *Zauderer* applies to government interests beyond consumer deception." *Id.* at 21. The court began by acknowledging that

> *Zauderer* itself does not give a clear answer. Some of its language suggests possible confinement to correcting deception. Having already described the disclosure

mandated there as limited to "purely factual and uncontroversial information about the terms under which [the transaction was proposed]," the Court said, "we hold that an advertiser's rights are adequately protected as long as [such] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." (It made no finding that the advertiser's message was "more likely to deceive the public than to inform it," which would constitutionally subject the message to an outright ban. The Court's own later application of *Zauderer* in *Milavetz, Gallop & Milavetz, P.A. v. United* States, 559 U.S. 229, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010), also focused on remedying misleading advertisements, which was the sole interest invoked by the government. Given the subject of both cases, it was natural for the Court to express the rule in such terms. The language could have been simply descriptive of the circumstances to which the Court applied its new rule, or it could have aimed to preclude any application beyond those circumstances.

The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception. After recounting the elements of *Central Hudson*, Zauderer rejected that test as unnecessary in light of the "material differences between disclosure requirements and outright prohibitions on speech." Later in the opinion, the Court observed that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." After noting that the disclosure took the form of "purely factual and uncontroversial information about the terms under which [the] services will be available," the Court characterized the speaker's interest as "minimal": "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." All told, *Zauderer's* characterization of the speaker's interest in opposing forced disclosure of such information as "minimal" seems inherently applicable beyond the problem of deception, as other circuits [*e.g.*, the Second and First] have found.

Id. at 21–22.

In *National Electrical*, the Second Circuit also rejected a reading of *Zauderer* as being limited to a situation where the government's interest is prevention of consumer deception. The case concerned a Vermont statute that "require[d] manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste." *Nat'l Elec.*, 272 F.3d at 107. The court acknowledged that

> *14 the compelled disclosure at issue here was not intended to prevent "consumer confusion or deception" per se, but rather to better inform consumers about the products they purchase. Although the overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products. Accordingly, we cannot say that the statute's goal is inconsistent with the policies underlying First Amendment protection of commercial speech, described above, and the reasons supporting the distinction between compelled and restricted commercial speech. We therefore find that it is governed by the reasonable-relationship rule in *Zauderer*.
>
> We believe that such a reasonable relationship is plain in the instant case. The prescribed labeling would likely contribute directly to the reduction of mercury pollution, whether or not it makes the greatest possible contribution. It is probable that some mercury lamp purchasers, newly informed by the Vermont label, will properly dispose of them and thereby reduce mercury pollution. By encouraging such changes in consumer behavior, the labeling requirement is rationally related to the state's goal of reducing mercury contamination.
>
> We find that the Vermont statute is rationally related to the state's goal, notwithstanding that the statute may ultimately fail to eliminate all or even most mercury pollution in the state.

Id. at 115; *see also N.Y. St. Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir.2009) (stating that "*Zauderer's* holding was broad enough to encompass nonmisleading disclosure requirements").

The First and Sixth Circuits are in accord with the D.C. and Second Circuits. *See Pharm. Care*, 429 F.3d at 310 n. 8 (noting that "we have found no cases limiting *Zauderer* [to potentially deceptive advertising directed at consumers]"); *Disc. Tobacco*, 674 F.3d at 556-57 (discussing *National Electrical* approvingly); *cf. Pharm. Care*, 429 F.3d at 316 (Boudin, J., concurring) (stating that "[t]he idea that

these thousands of routine regulations require an extensive First Amendment analysis is mistaken" because *Zauderer* is in essence a rational basis test). Furthermore, in an unpublished decision, the Ninth Circuit addressed a San Francisco ordinance which also imposed a notice requirement on cell phone retailers (based on RF energy emission), but the court did not hold that *Zauderer* was limited to circumstances in which a state or local government was trying to prevent potentially misleading advertising. *See generally CTIA—The Wireless Ass'n v. City & County of San Francisco*, 494 Fed.Appx. 752 (9th Cir.2012). The court assumed *Zauderer* applied to mandatory disclosures directed at health and safety, not consumer deception.

The circuit authority cited above is persuasive, and thus the Court disagrees with CTIA's interpretation of *Zauderer* as being limited to preventing consumer deception. Indeed, it would make little sense to conclude that the government has greater power to regulate commercial speech in order to prevent deception than to protect public health and safety, a core function of the historic police powers of the states. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 715, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (stating that "[it] is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens' "); *Barnes v. Glen Theatre*, 501 U.S. 560, 569, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (noting that "[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals").

Moreover, there is a persuasive argument that, where, as here, the compelled disclosure is that of clearly identified *government* speech, and not that of the *private speaker*, a standard even less exacting than that established in *Zauderer* should apply. In *Zauderer*, the plaintiff-attorney was being compelled to speak, and nothing about that compelled speech indicated it was anyone's speech but the plaintiff-attorney's. In contrast, here, CTIA's members are being compelled to communicate a message, but the message being communicated is clearly the City's message, and not that of the cell phone retailers. *See, e.g.*, Berkeley Mun. Code § 9.96.030(A)-(B) (providing that the notice shall state "The City of Berkeley requires that you be provided the following notice" and that "the notice shall include the City's logo"). In other words, while CTIA's members are being compelled to provide a mandated disclosure of Berkeley's speech, no one could reasonably mistake that speech as emanating from a cell phone retailer itself. Where a law requires a commercial entity engaged in commercial speech merely to permit a disclosure by the *government*, rather than compelling speech out of the mouth of the *speaker*, the First Amendment interests are less obvious. Notably, at the hearing, CTIA conceded that there would be no First Amendment violation if the City handed out flyers or had a poster board immediately outside a cell phone retailer's store. But that then begs the question of what is the difference between that conduct and the conduct at issue herein—*i.e.*, where the City information is being provided at the sales counter inside the store instead of immediately outside the store. While the former certainly seems more intrusive, that is more so because it seems to impinge on property rights rather than on expressive rights. CTIA has not cited any appellate authority addressing the proper standard of First Amendment review where the government requires mandatory disclosure of *government* speech by a private party in the context of commercial speech.

***15** To be sure, there are First Amendment limits to the government's ability to require that a speaker carry a hostile or inconsistent message of a third party, at least in the context of noncommercial speech. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (holding that First Amendment rights of a parade organizer and council were violated when they were required to include a gay rights organization in their parade); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality decision) (concluding that the First Amendment rights of privately owned utility company were violated by an order from the California Public Utilities Commission that required the company to include in its billing envelopes speech of a third party with which the company disagreed); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 243, 256, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (holding that "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press"; noting that the "statute exacts a penalty on the basis of the content of a newspaper" and also "intru[des] into the function of editors"). But, as stated above, these cases involved noncommercial speech, not commercial speech as here. *See, e.g., PG&E*, 475 U.S. at 9, 106 S.Ct. 903 (noting that company's newsletter, which was included in the billing envelopes, covered a wide range of topics, "from energy-saving tips to stories about wildlife conservation, and from billing information to recipes," and thus "extend[ed] well beyond speech that [simply] proposes a business transaction"; citing *Zauderer* and *Central Hudson*). This is a significant distinction, particularly because First Amendment analysis in

the commercial speech context assumes that more speech, so long as it is not misleading, enhances the marketplace (as well as the marketplace of ideas). *See Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265 (noting that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides"). That is why the Court in *Zauderer* afforded particular deference to the government's decision to compel disclosures (in contrast to laws restricting speech). Here, the ordinance expressly affords retailers the right to add comments to the notice, and there is no showing that adding comments would be a significant burden on retailers.

Moreover, *Miami Herald* can be distinguished on an additional ground. More specifically, in *Miami Herald*, the primary concern was the chilling of speech by the entity subject to the disclosure requirement as a consequence of the challenged law. *See Miami Herald*, 418 U.S. at 257, 94 S.Ct. 2831 (noting that, "[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy"). In contrast to *Miami Herald*, here, there is no real claim that the retailer's speech is chilled by the Berkeley ordinance; in fact, as indicated above, the ordinance expressly allows retailers to add "other information" at the retailer's discretion. Berkeley Mun. Code § 9.96.030(B).

While CTIA has argued that being forced to engage in counter-speech (*i.e.*, speech in response to the City notice) is, in and of itself, a First Amendment burden (as indicated in *PG&E*), that is not necessarily true where commercial speech is at issue. As the City points out, *Zauderer* spoke only in terms of chilling speech as a First Amendment burden in the context of commercial speech. *See Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265 (stating that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech"); *see also Am. Meat*, 760 F.3d at 27 (acknowledging the same; also stating that "*Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech"). This makes sense as the value of commercial speech comes from the information it provides—*i.e.*, more speech, not less. That being said, even if CTIA were correct that the right not to speak had some application to commercial speech, he need for counter-speech—at least in the circumstances presented herein—are minimal, as discussed *infra*.

[10] Thus, there is good reason to conclude that the First Amendment test applicable in this case should be even more deferential to the government than the test in *Zauderer*. More particularly, the rational basis test applicable to compelled display of government speech need not be cabined by the *Zauderer's* requirement that the compelled disclosure be "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265. In *Zauderer*, it made sense that the Supreme Court imposed the baseline requirement that the compelled speech be purely factual and uncontroversial because, where speech is in fact purely factual and uncontroversial, then the speaker's interest in countering such information is minimal. The *Zauderer* test thus insures any First Amendment interest against compelled speech is minimal. But where there is attribution of the compelled speech to someone other than the speaker—in particular, the government—the *Zauderer* factual-and-uncontroversial requirement is not needed to minimize the intrusion upon the plaintiff's First Amendment interest.

***16** Instead, under more general rational basis principles, the challenged law must be reasonably related to a legitimate governmental interest. In particular, if the law furthers a legitimate government interest in requiring disclosure of governmental speech, it should be upheld. This is not to say that First Amendment interest in this context is nonexistent. Even though no speech is compelled out of the mouth of retailers and there is no claim that their speech is chilled, the fact that they may feel compelled to respond to Berkeley's notice arguably implicates to some extent the First Amendment. *See PG&E*, 471 U.S. at 15, 105 S.Ct. 1694 (in case involving noncommercial speech, noting that the company "may be forced either to appear to agree with [third party's] views [included in the company's billing envelope] or to respond"). Because there is an arguable First Amendment interest, it may reasonably be contended that the more exacting forum of rational basis review (which some commentators have labeled "rational basis with bite," *see Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir.2014) (citing law review articles addressing "rational basis with bite," "rational basis with teeth," or "rational basis plus"); *Powers v. Harris*, 379 F.3d 1208, 1224–25 n. 21 (10th Cir.2004) (same)), which requires an examination of actual state interests and whether the challenged law actually furthers that interest rather than the traditional rational basis review which permits a law to be upheld if rationally related to any conceivable interest. *Compare Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (holding that a Colorado constitutional amendment that prohibited all

legislative, executive, or judicial action designed to protect homosexual persons from discrimination "lacks a rational relationship to legitimate state interests"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (striking down under rational basis city council decision preventing group home for mentally disabled); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (invalidating under rational basis portion of statute excluding immigrant children from public schools), *with Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (applying traditional rational relationship test in evaluating constitutionality of legislation). *See also Wal–Mart Stores, Inc. v. City of Turlock*, 483 F.Supp.2d 1023, 1038, n. 6 (E.D.Cal.2007) (recognizing *Cleburne/ Romer* approach commonly referred as "rational basis with bite").

For purposes of this opinion, the Court shall evaluate the Berkeley ordinance under the the more rigorous rational basis review as well as the *Zauderer* test. As discussed below, both of these standards have been met in the instant case.

b. Application of Rational Basis Test

[11] In identifying the government interest supporting the notice required by the ordinance, Berkeley argues that it simply seeks to insure fuller consumer awareness of the FCC's SAR testing procedures and directive to manufacturers to disclose the spacing requirements used to insured SAR does not exceed stated levels. Promoting consumer awareness of the government's testing procedures and guidelines obviously is a legitimate governmental interest. *Compare Sorrell v. IMS Health Inc.*, ---- U.S. ----, 131 S.Ct. 2653, 2672, 180 L.Ed.2d 544 (2011) (stating that "the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech' "), *with Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir.1996) (stating that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context"). And the mandated notice (apart from the warning about risk to children) furthers and is reasonably related that governmental interest. As noted in the preemption analysis above, nothing in the required Berkeley notice contradicts what the FCC has said and done, and the upshot of the notice (advising consumers to consult the cell phone instructions or user manual on how to safely use the phone) tracks what the FCC requires.

CTIA argues that framing the governmental interest as insuring consumer awareness begs the question and misses the real mark. It contends that the real asserted interest here is purported public safety and that the mandated notice is misleading because it suggests a substantial risk to health that does not in fact exist. To the extent the true ultimate governmental interest for the ordinance is public health and safety (since the purpose of referring consumers to the user manual is so that consumers will know how to "use your phone safely"), such an interest undoubtedly is a legitimate public interest. *See, e.g., Hispanic Taco Vendors v. Pasco*, 994 F.2d 676, 680 (9th Cir.1993) (finding ordinance that regulated itinerant vending and imposed licensing fees supported by legitimate governmental interests in, *e.g.*, health and safety). The question then is whether the ordinance is reasonably related to such interest. Notwithstanding CTIA's argument to the contrary, the Court concludes that it is.

***17** While there is scientific uncertainty as to the relationship between SAR levels and the risk of, *e.g.*, cancer, and there is scientific debate about whether nonthermal as well as thermal effects of RF radiation may pose health risks, there is a reasonable scientific basis to believe that RF radiation at some levels can and do present health risks. The SAR limits were established by the FCC in the interests of safety in view of the potential risks of RF radiation exposure. Although current maximum SAR levels set by the FCC were designed to provide a comfortable margin, at least with respect to risks posed by the thermal effect of RF radiation, the FCC has in fact established specific limits to SAR exposure and uses those limits in the testing and approval of cell phones for sale to the public. And testing procedures governed by FCC rules incorporating those SAR limits assume a minimal amount of spacing of the cell phone from the body, without which SAR levels may exceed the established guidelines. *See CTIA*, 827 F.Supp.2d at 1062 (noting that "the FCC has implicitly recognized that excessive RF radiation is potentially dangerous[;] [i]t did so when it 'balanced' that risk against the need for a practical nationwide cell phone system," and "[t]he FCC has never said that RF radiation poses no danger at all, only that RF radiation can be set at acceptable levels"), *rev'd on other grounds*, 494 Fed.Appx. 752 (9th Cir.2012). Unless the Court were to find that the FCC guidelines themselves are scientifically baseless and hence irrational—which no one has asked this Court to do—the mandated notice here, being

predicated on the FCC's guidelines, is reasonably related to a legitimate governmental interest.[10] In short, so long as the challenged law requiring display and disclosure of governmental message in the context of commercial speech is supported by some reasonable scientific basis, it is likely to pass the rational basis test applicable under the First Amendment.

c. Application of *Zauderer* Test

[12] Even if the ordinance is subject to the more specific *Zauderer* test,[11] *see CTIA*, 494 Fed.Appx. at 752 (addressing San Francisco ordinance also imposing a notice requirement on cell phone retailers and applying *Zauderer*), the Berkeley ordinance would likely be upheld. Under *Zauderer*, the predicate requirement is that the compelled speech must be factual and uncontroversial. But how a court should determine whether such speech is factual and uncontroversial is not clear.

For example, a good case can be made that a court should tread carefully before deeming compelled speech controversial for *Zauderer* purposes. As the Sixth Circuit has noted, facts alone "can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason"; thus, the court rejected "the underlying premise that a disclosure that provokes a visceral response must fall outside *Zauderer's* ambit." *Disc. Tobacco*, 674 F.3d at 569 (adding that "whether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy"). The Sixth Circuit also made the point that the use of the word "uncontroversial" appeared only once in *Zauderer* and that elsewhere the *Zauderer* plurality simply "refer[red] to a commercial speaker disclosing 'factual information' and 'accurate information.' " *Id.* at 559 n. 8 (citing *Zauderer*, 471 U.S. at 651 & n.14, 105 S.Ct. 2265). Furthermore, in *Milavetz*, the Supreme Court did not repeat the use of the term and instead "use[d] the language *required factual information* and *only an accurate statement* when describing the characteristics of a disclosure that is scrutinized for a rational basis." *Id.* (emphasis in original; citing *Milavetz*, 1130 S. Ct. at 1339-40). Accordingly, this Court agrees with the Sixth Circuit that the term "uncontroversial" should generally be equated with the term "accurate."

***18** As for the requirement that the compelled speech be factual (or accurate), in any given case, it is easy to conceive of an argument that, even if the compelled speech is technically accurate, (1) it is still suggestive of an opinion or (2) it is misleading. For example, on the former, one could contend that the mere fact that the government is compelling the speech in the first place indicates that it is the government's opinion that there is a point of concern for the public. One could also argue that the compelled speech is misleading because it omits more specific information.

But *Zauderer* cannot be read to establish a "factual and uncontroversial" requirement that can be so easily manipulated that it would effectively bar any compelled disclosure by the government. This is particularly true where public health and safety are at issue, as in the instant case. Any time there is an element of risk to public health and safety, practically any speech on the matter could be deemed misleading unless there were a disclosure of everything on each side of the scientific debate—an impossible task. One could easily imagine that an overly rigorous "factual and uncontroversial" test would render even the Surgeon General's textual warnings found on cigarette packages a violation of the First Amendment. *See* 15 U.S.C. § 1333(a) (listing warnings, including "Tobacco smoke can harm your children," "Tobacco smoke causes fatal lung disease in nonsmokers," and "Quitting smoking now greatly reduces serious risks to your health"); *see also Nat'l Elec.*, 272 F.3d at 116 (taking note of "the potentially wide-ranging implications of NEMA's First Amendment complaint," as "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," ranging from securities disclosures and disclosures in prescription drug advertisements to tobacco and nutritional labeling and California's Proposition 65).

Turning to the City ordinance at issue here, the Court finds that the factual-and-uncontroversial predicate requirement has likely been met, particularly as the Court has now found the sentence regarding children preempted. With that sentence excised, the ordinance provides in relevant part as follows:

> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to

a wireless network, you may exceed the federal guidelines for exposure to RF radiation. ~~This potential risk is greater for children.~~ Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A).

The notice contains accurate and uncontroversial information —*i.e.*, that the FCC has put limits on RF energy emission with respect to cell phones and that wearing a cell phone against the body (without any spacer) may lead the wearer to exceed the limits. This is consistent with the FCC's directive to cell phone manufacturers to advise consumers about minimum spacing to be maintained between the body and a cell phone, and although there is in fact a good safety margin (at least for thermal effects of RF radiation), nothing indicates that the FCC objects to informing consumers about spacing the phone away from the body.

CTIA takes issue with the use of the words "safety" and "radiation," but the use of both words is accurate and uncontroversial. Regarding "safety," the FCC clearly imposed limits because of safety concerns. The limits that the agency ultimately chose reflected a balancing of the risk to public health and safety against the need for a practical nationwide cell phone system, but it cannot be denied that safety was a part of that calculus. *See CTIA*, 827 F.Supp.2d at 1062 (in the San Francisco ordinance case, noting that, "[e]ven the FCC has implicitly recognized that excessive RF radiation is potentially dangerous" because it " 'balanced' that risk against the need for a practical nationwide cell phone system[;] [t]he FCC has never said that RF radiation poses no danger at all, only that RF radiation can be set at acceptable levels"), *rev'd on other grounds*, 494 Fed.Appx. 752 (9th Cir.2012). As for the term "radiation," RF energy is undisputedly a form of radiation. *See 2013 FCC Reassessment*, 28 F.C.C. Rcd. at 3585 (stating that RF energy is " 'a form of electromagnetic radiation that is emitted by cell phones' "). That the City notice does not make the finer distinction that RF energy is non-ionizing radiation rather than ionizing radiation is immaterial as that distinction would likely have little meaning to the public. As for CTIA's contention that there may be a negative association with nuclear radiation (ionizing radiation), that seems unlikely, particularly in this day and age when radiation comes from various sources in everyday life, including, *e.g.*, radios, televisions, and microwave ovens. No one seriously contends that consumers are likely to believe cell phones emit nuclear radiation or something akin to that.

*19 Finally, CTIA protests that the notice is misleading because, even if a cell phone is worn against the body, it is unlikely that the federal guidelines for SAR will be exceeded. *See* Mot. at 15-16 (arguing that "this may be possible only 'with the device transmitting continuously and at maximum power [such as might happen during a call with a handset and the phone in the user's pocket at the fringe of a reception area],' and that 'using a device against the body without a spacer will generally result in an actual SAR below the maximum SAR testing' "). But as indicated above, the Court is wary about any contention that a compelled disclosure—particularly where the message in the disclosure is attributed to the government—is misleading simply because the disclosure does not describe with precision the magnitude of the risk; the point remains that the FCC established certain limits regarding SAR, limits which have not been challenged as illegal. The mandated disclosure truthfully states that federal guidelines *may* be exceeded where spacing is not observed, just as the FDA accurately warns that "Tobacco smoke *can* harm your children." More importantly, the sentence criticized by CTIA is tempered by the following sentence: "Refer to the instructions in your phone or user manual for information about how to use your phone safely." That is the upshot of the disclosure—users are advised to consult the manual wherein the FCC itself mandates disclosures about maintaining spacing. *See* FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4). This is, in essence, factual in nature for purposes of *Zauderer*.

For the foregoing reasons, the Court finds that the City notice, with the sentence regarding children excised from the text on preemption grounds, *likely* meets the *Zauderer* factual-and-uncontroversial predicate requirement.

d. Government Interest

As indicated above, under the *Zauderer* test, if the disclosure requirement is factual and uncontroversial, then it does not violate the First Amendment so long as it is reasonably related to the governmental interest. This test has been met, for largely the reasons articulated above in discussing the traditional rational review test. Given the fact that the spacing requirements employed by the FCC were established to insure maximum specific levels of SAR are not exceeded and the FCC acknowledges there is a connection between SAR and safety, even if the precise parameters and limits are matters of

scientific debate, the ordinance appears "reasonably related" to a legitimate government interest.

e. Undue Burden

Finally, CTIA contends that the disclosure requirement here cannot be upheld because it still violates the First Amendment as it is unduly burdensome. But for this argument to succeed, CTIA cannot show just any kind of burden; rather, it must show a *First Amendment* burden, *i.e.*, a burden on speech.

CTIA has not made any argument that the City ordinance would chill its or its members' speech; rather, it contends that there is a burden on its or its members' speech because they would rather remain silent but, with the compelled disclosure, are now being forced to engage in counter-speech. As noted above, the City asserts that, where commercial speech is at issue, the only cognizable burden is chilling of speech, not the burden of being compelled to speak. While this position has some grounding in *Zauderer*, which identified only the chilling of commercial speech as a burden, *see Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265, the Court need not definitively resolve whether compelled commercial counter-speech can be an undue burden because, even accepting that it can, [12] the burden here to CTIA or its members is nothing more than minimal. The ordinance gives retailers the discretion to add their own speech to Berkeley's message. And because the City's required notice contains factual and uncontroversial information, the need for "corrective" counter-speech is minimal.

f. Summary on First Amendment Claim

On the first preliminary injunction factor, the Court cannot say that CTIA has established a strong likelihood of success on the merits with respect to its First Amendment claim. Nor has it raised serious question on the merits. While the sentence in the Berkeley ordinance regarding the potential risk to children is likely preempted, the remainder of the City notice is factual and uncontroversial and is reasonably related to the City's interest in public health and safety. Moreover, the disclosure requirement does not impose an undue burden on CTIA or its members' First Amendment rights.

C. Likelihood of Irreparable Harm and Balancing of Equities

***20** CTIA's argument on both the likelihood of irreparable harm and the balancing of equities largely depends on there being preemption or a First Amendment violation in the first place. [13] *See* Mot. at 21 (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (stating that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury")). But, as discussed above, the likelihood of success on both the preemption and First Amendment claims is weak once the sentence on children is excised from the text of the City notice. Accordingly, the second and third preliminary injunction factors, like the first, do not weigh in CTIA's favor.

D. Public Interest

Finally, the fourth preliminary injunction factor does not weigh in CTIA's favor—again because of the weakness of its claims on the merits. CTIA contends that the public interest does not weigh in favor of the City because "accurate and balanced disclosures regarding RF energy are *already* available," Mot. at 23 (emphasis in original), but the City has a fair point that, in spite of the availability, there is evidence that the public does not know about those disclosures. *See, e.g.*, Jensen Decl., Ex. A (survey) (reflecting that a majority of persons surveyed were, *e.g.*, not "aware that the government's radiation tests to assure the safety of cell phones assume that a cell phone would not be carried against your body, but would instead be held at least 1-to 15 millimeters from your body"). Furthermore, as suggested above, there is a public interest in public safety as well as assuring fuller consumer awareness, particularly where the federal government through the FCC has endorsed consumer awareness by requiring that cell phone manufacturers provide information about spacing to consumers.

III. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part CTIA's motion for a preliminary injunction. The motion is granted to the extent the Court finds a likely successful preemption claim with respect to the sentence in the City notice regarding children's safety. The motion is denied to the extent the Court finds that a First Amendment claim and preemption claim are not likely to succeed on the remainder of the City notice language.

The Berkeley ordinance is enjoined, unless and until the sentence in the City notice regarding children safety is excised from the notice.

This order disposes of Docket Nos. 4 and 36.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2015 WL 5569072

Footnotes

1 The National Resources Defense Council ("NRDC") has filed a motion for leave to file an amicus brief in conjunction with the preliminary injunction proceedings. This motion is hereby **GRANTED**. CTIA has failed to show that it would be prejudiced by the Court's consideration of the brief, particularly because CTIA had sufficient time to submit a proposed opposition to NRDC's proposed amicus brief.

2 SAR is "a measure of the amount of RF energy absorbed by the body from cell phones." *CTIA—The Wireless Ass'n v. City & County of San Francisco*, 827 F.Supp.2d 1054, 1056 (N.D.Cal.2011) (Alsup, J.).

3 *See* 47 C.F.R. § 2.1093 (setting RF energy exposure limits).

4 Some contend that RF energy can have both thermal biological effects and nonthermal biological effects. *See, e.g.*, Miller Decl. ¶¶ 7, 10-14 (noting that "RF radiation is non-ionizing radiation," that "[n]on-ionizing radiation can harm through thermal effects, usually only in high dosage," and that "[t]here is an increasingly clear body of evidence that non-ionizing radiation can harm through non-thermal effects as well," including cancer; adding that the evidence indicates that "RF fields are not just a *possible* human carcinogen but a *probable* human carcinogen"). The safety factor built in by the FCC seems to be addressed to the thermal biological effects only.

5 CTIA has claimed only conflict preemption and not other kinds of preemption such as *e.g.*, field preemption. *See, e.g.*, Reply at 12-13 (arguing that the City "challenges a *field* preemption argument that CTIA does not raise") (emphasis in original).

6 The Court notes, however, that statement in the House Report is not clearly targeted at the requirement that the agency make rules regarding RF energy emissions. This is because § 704 of the TCA concerned not only this directive but also another—*i.e.*, that the FCC "prescribe a national policy for the siting of commercial mobile radio services facilities." H.R. Rep. No. 104-204, at 94 (also stating that "[t]he siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with the Commission RF emission regulated levels").

7 At the hearing, the City argued that there *is* a greater potential risk because of behavioral differences between children and adults. *See* Cortesi Decl. ¶¶ 5-8 (testifying, *inter alia*, that children are heavy users of cell phones, that they often sleep with their phones on or next to their beds, that they often text which leads to them keeping phones close to their bodies, etc.). The City contends that CTIA has done nothing to refute the evidence submitted by the City on the behavioral differences, and thus the evidence of record establishes that the potential risk *is* greater. This argument, however, has little merit in light of the FCC evidence cited above, which indicates that at most there is a scientific debate regarding the risk to children. Moreover, the wording of the notice suggests to the general public that the danger to children arises from their inherent biological susceptibility to RF radiation, not behavioral susceptibility.

8 The Court shall evaluate the ordinance as if the sentence regarding children were excised from the text. This approach is appropriate in light of Berkeley Municipal Code § 1.01.100 which, in effect, allows for severance. *See* Berkeley Mun. Code § 1.01.100 ("If any section, subsection, sentence, clause or phrase of this code is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this code. The council hereby declares that it would have passed this code, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional, and if for any reason this code should be declared invalid or unconstitutional, then the original ordinance or ordinances shall be in full force and effect.").

9 Ironically, the classification of speech between commercial and noncommercial is itself a content-based distinction. Yet it cannot seriously be contended that such classification itself runs afout of the First Amendment.

10 The mere fact of scientific uncertainty and/or inexactitude does not render the government's interest in issuing safety warnings to the public irrational or unreasonable. Such uncertainty and inexactitude inheres in the assessment of any risk. To require the government to prove a particular quantum of danger before issuing safety warnings would jeopardize an immeasurable number of laws, regulations, and directives. *See Nat'l Elec.*, 272 F.3d at 116 (taking note

of "the potentially wide-ranging implications of NEMA's First Amendment complaint," as "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," ranging from securities disclosures and disclosures in prescription drug advertisements to tobacco and nutritional labeling and California's Proposition 65).

11 At the hearing, the Court discussed with the parties who had the burden of proof with respect to the *Zauderer* test. Where a commercial speech restriction is at issue, the party seeking to uphold the restriction bears the burden of proof in justifying it. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002). But here, the Court is not dealing with a commercial speech restriction but rather a compelled disclosure. For purposes of this opinion, the Court need not resolve the issue of who bears the burden of proof.

12 As noted above, there is an arguable First Amendment interest in not being compelled to respond to speech of a third party, though the only precedent for such a proposition is in the context of noncommercial speech.

13 CTIA also argues irreparable harm to its members' customer goodwill and business reputations and from the threatened enforcement of a preempted ordinance, *see* Mot. at 22, but ultimately these arguments are predicated on the First Amendment argument. In any event, CTIA has made no satisfactory showing that its business interests are jeopardized by the Berkeley notice if the warning about children is excised.

End of Document

DECLARATION OF SERVICE

I am a citizen of the United States and employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is Meyers, Nave, Riback, Silver & Wilson, 707 Wilshire Boulevard, 24th Floor, Los Angeles, California 90017.

On November 20, 2015, I served the within:

APPLICATION BY THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT CITY OF LOS ANGELES; PROPOSED BRIEF

on the parties in this action, by placing a true copy thereof in a sealed envelope(s), each envelope addressed as follows:

Michael F. Wright, Esq. Matthew D. Taggart, Esq. STEPTOE & JOHNSON, LLP 2121 Avenue of the Stars, Suite 2800 Los Angeles, CA 90067	Attorneys for Petitioner Lamar Central Outdoor, LLC
Terry Kaufmann Macias, Esq. Kenneth T. Fong, Esq. Michael J. Bostrom, Esq. Office of the City Attorney 200 North Main Street, Suite 700 Los Angeles, CA 90012	Attorneys for Respondent City of Los Angeles
Clerk, Los Angeles County Superior Court, Dept. 82 111 North Hill Street Los Angeles, CA 90012	
California Supreme Court San Francisco Office 350 McAllister Street, Rm. 1295 San Francisco, CA 94102-3600	E-submission

(X) (**BY FIRST CLASS MAIL**) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Dated: November 20, 2015

Gale L. Matteson

416.034 2549516.1