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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITIZENS FOR FREE SPEECH, LLC; MICHAEL SHAW,

Plaintiffs,

v.

COUNTY OF ALAMEDA; EAST COUNTY BOARD OF ZONING ADJUSTMENTS; and FRANK J. IMHOFF, SCOTT BEYER, and MATTHEW B. FORD, all in their official capacities as members of the East County Board of Zoning Adjustments,

Defendants.

Case No. 4:18-cv-00834-SBA

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: April 11, 2018
Time: 1:00 P.M.
Courtroom: TBD
Hon. Saundra Brown Armstrong

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TO THE HONORABLE COURT, ALL PARTIES HERETO, AND THEIR RESPECTIVE COUNSEL HEREIN:

PLEASE TAKE NOTICE THAT on April 11, 2018 at 1:00 P.M. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Saundra Brown Armstrong, located at Courtroom [TBD], 1300 Clay Street, Oakland, California, Plaintiffs CITIZENS FOR FREE SPEECH, LLC, and MICHAEL SHAW will move for an order for a preliminary injunction prohibiting Defendants, their employees, agents, officers, managers, delegates, or assigns and all those in active concert or participation with them, from penalizing, encumbering, or prohibiting Plaintiffs from displaying political and commercial speech on three presently existing signs and their supporting structures constructed on Plaintiff Shaw's parcel of land located at 8555 Dublin Canyon Road within Alameda County, including conducting any administrative proceeding to abate said signs and their supporting structures as a nuisance, and from damaging, destroying, or removing said signs and their supporting structures during the pendency of this action.

This motion will be made on the ground that immediate and irreparable injury will result to Plaintiffs unless the activities described above are enjoined pending trial of this action, and will be based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the declarations of Michael Shaw, Jeffrey Herson, and Timothy V. Kassouni, the Request for Judicial Notice, the other documents filed concurrently with this application pursuant to Civil L.R. 7-2, the totality of the Court's file on this matter, and such further evidence or argument as the Court may receive at the hearing on this matter, or otherwise.

Counsel for Plaintiffs, Timothy V. Kassouni, certifies that he has met and conferred with counsel for Defendants, Matthew Zinn, regarding the relief sought in this motion. (See Declaration of Timothy V. Kassouni at ¶ 2.)

DATED: MARCH 7, 2018

TIMOTHY V. KASSOUNI
KASSOUNI LAW

By /s/ *Timothy V. Kassouni*
TIMOTHY V. KASSOUNI
Attorneys for Plaintiffs Citizens for
Free Speech, LLC and Michael Shaw

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MEMORANDUM OF POINTS AND AUTHORITIES

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I

INTRODUCTION

The issue to be decided is whether the Defendants should be preliminarily enjoined from instituting administrative enforcement proceedings for the abatement of signs on Plaintiff Michael Shaw's property under the doctrines of res judicata, claim preclusion, and the All Writs Act.

Plaintiff Shaw is the owner of a parcel of land located at 8555 Dublin Canyon Road within the County (the "Parcel"). The Parcel is situated within a Scenic Corridor Combining District ("SC") designated by the County. (Declaration of Michael Shaw In Support of Plaintiffs' Motion for Preliminary Injunction [Decl. Shaw], ¶ 2.) There is presently on the Parcel a legally permitted, operating self-storage business with individual lockers to accommodate the storage of customers' property as well as open storage for customers' recreational vehicles. (Decl. Shaw, ¶ 3.)

Plaintiff Citizens has entered into an agreement with Shaw for the construction and display of signs on the Parcel. (Declaration of Jeffrey Herson in Support of Plaintiffs' Motion for Preliminary Injunction [Decl. Herson], ¶2.) Citizens retains an ownership interest in the signs and a share of any revenue derived from the signs. Id.

One sign, displaying on-premises commercial speech advertising for the self-storage business, has been lawfully maintained on the Parcel since the time the business commenced operations. (Decl. Shaw, ¶ 5.)

Citizens has constructed three signs and supporting structures on the parcel per the agreement with Shaw. The signs have a total of six faces. The messages on each face of the signs as originally constructed consisted wholly of noncommercial, political speech intended to challenge the political ideology espoused by County officials. (Decl. Herson, ¶3.) Currently four faces display political messages, one face displays commercial speech, and one face is blank. (Id.)

The County has promulgated certain ordinances, known as the Alameda County Code of

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Ordinances (the "Code"). The Code purports to regulate the display of signs in unincorporated areas of the County. (See Excerpts of Code, attached as Exhibit A to Plaintiffs' Request for Judicial Notice In Support of Plaintiffs' Motion for Preliminary Injunction [Request for Judicial Notice], filed concurrently with this Memorandum.) Under the Code, all new advertising signs are banned within the SC. (Code §§ 17.30.240, 17.52.550.) The Code defines "advertising signs" as synonymous with "billboards." (Code § 17.04.010.) The Code contains content-based exemptions from its general ban, permitting any sign within the SC District if it contains certain speech. Pursuant to section 17.52.520 of the Code, signs are exempt from the SC District speech restrictions if the signs' content includes announcements of public meetings, no trespass signs, warning signs, signs identifying a benefactor, signs identifying a location of public interest, and signs identifying a statue or monument.

II

PLAINTIFFS HAVE SUFFERED AND ARE IN IMMINENT DANGER OF SUFFERING FURTHER VIOLATIONS OF THEIR FIRST AMENDMENT RIGHTS AS A RESULT OF THE COUNTY'S ACTIONS

On or about October 6, 2017, Plaintiff Shaw received a "Declaration of Public Nuisance – Notice to Abate" ("2017 Notice") from the Alameda County Community Development Agency Planning Commission, signed by Paul da Silva, Investigator of the Code Enforcement Division, and Rodrigo Orduna, Assistant Planning Director & Code Enforcement Officer. (Decl. Shaw, ¶ 10; Exhibit B.) This notice ordered that the signs be removed within ten days from the postmarked date of the Notice. The 2017 Notice also threatened to impose fines if Plaintiffs failed to comply. (Id.)

The 2017 Notice, by design and effect, has a chilling effect on the exercise of Plaintiffs' First Amendment rights, and thereby constitutes a cognizable injury in its own right. See *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment

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rights.") (Citing *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); and *Baggett v. Bullitt*, 377 U.S. 360 (1964).) The chilling effect of the 2017 Notice's threat of punitive measures unless Plaintiffs cease to exercise their freedom of speech is even more pronounced because it evidences the County's flagrant disregard of a previous order and judgment of this Court. (See Sections III and IV, below.)

In November, 2017, Plaintiff Shaw received a "Notice of Administrative Hearing on Abatement of Nuisance" ("Notice of Hearing") from the Alameda County Community Development Agency Planning Commission, dated November 22, 2017, and signed by Rodrigo Orduna, Code Enforcement Division. (Decl. Shaw, ¶ 11; Exhibit C.) This notice stated that a hearing was set before the Alameda County East County Board of Zoning Adjustments (the Board), to determine whether the signs on the Parcel violated the Code. (Id.) Originally set for December 7, 2017, the hearing is has currently been postponed by stipulation, pending the resolution of this Motion. (Declaration of Timothy V. Kassouni In Support of Plaintiffs' Motion for Preliminary Injunction [Decl. Kassouni], ¶ 2.) If the Board, an administrative tribunal, determines that the Signs violate the Code, the Board is authorized to order the demolition and removal of the signs, including support structures, without the approval of any judicial officer. (Decl. Shaw, ¶ 11; Exhibit C.) Counsel have agreed that the board will take no such immediate action. (Decl. Kassouni], ¶ 3.)

III

PLAINTIFFS HAVE SUCCESSFULLY CHALLENGED THE COUNTY'S UNCONSTITUTIONAL SPEECH RESTRICTIONS BEFORE THIS COURT

On June 11, 2014, Plaintiff Shaw received a "Declaration of Public Nuisance – Notice to Abate" (2014 Notice) from the Alameda County Community Development Agency Planning Commission, dated June 2, 2014, signed by Paul da Silva, Investigator of the Code Enforcement Division. (Decl. Shaw, ¶ 6; Exhibit A.) Substantially identical to the 2017 Notice, the 2014

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Notice ordered that the signs be removed within 10 days from the postmarked date of the notice. The 2014 Notice also threatened fines and the potential for an abatement hearing if Plaintiffs failed to comply. (Id.)

On June 1, 2014, Plaintiffs filed suit in this Court, Case No. 3:14-cv-02513, (the "Litigated Case"), naming the County as defendant. In the Litigated Case, Plaintiffs alleged that the Code's regulation of signs violated Plaintiffs' rights to free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution, and prayed that the County be enjoined from any and all conduct enforcing the unconstitutional Code to prohibit, encumber, or penalize Plaintiffs' signs. (Decl. Shaw, ¶ 7; Exhibit C, Request for Judicial Notice.) The County did not file a cross-complaint in the Litigated Case. (See Exhibit B, Request for Judicial Notice, showing no docket entry for a Cross-Complaint in the Litigated Case.)

On July 16, 2015, this Court entered an order denying in part the County's motion for summary judgment, finding Code section 17.18.130 unconstitutionally conferred unfettered discretion in County officials. *Citizens for Free Speech, LLC, v. County of Alameda*, 114 F.Supp.3d 952, 963 (2015). The County responded by amending this section on September 29, 2015. (See Alameda County, CA Code of Ordinances - Municode Library, https://library.municode.com/ca/alameda_county/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.18PDDI_17.18.130MOLAUSDEPL (last viewed March 5, 2018).) From that date until the entry of judgment in the Litigated Case, the content of the County's sign ordinance was substantially identical, in all relevant respects, to the present version.

On July 8, 2016, the Court entered an order granting in part Plaintiffs' motion for damages and attorneys' fees as prevailing parties in the Litigated Case ("Prior Order"). (Decl. Shaw, ¶ 8; Exhibit D, Request for Judicial Notice.) A final Judgment ("the Judgment") was entered in the Litigated Case on March 8, 2017. (Decl. Shaw, ¶9; Exhibit E, Request for Judicial Notice.)

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IV

THIS COURT'S FINAL JUDGMENT IN THE PRIOR LITIGATION BARS THE COUNTY FROM ATTEMPTING TO ENFORCE THE CODE'S UNCONSTITUTIONAL SPEECH RESTRICTIONS AGAINST PLAINTIFFS' SIGNS A SECOND TIME

Because the Litigated Case resulted in a valid, final judgment on the merits, further litigation between the parties on the application of the County's sign ordinance to Plaintiffs' signs is barred by long-recognized principles of res judicata. Moreover, because the County did not file a counterclaim in the Litigated Case asserting that Plaintiffs' signs were in violation of the Code and should be abated, it is barred from now raising such a claim by Federal Rule of Civil Procedure 13(a).

A. Claim Preclusion – Res Judicata

It is well established that, "under the doctrine of res judicata (or 'claim preclusion'), a valid final judgment is conclusive of a claim or defense and bars all parties and persons in privity with the parties from relitigating any issues material to the claim or defense that were *or could have been* adjudicated in the prior action." The Rutter Group, California Practice Guide: Administrative Law ¶ 10:21 (2015) (emphasis added) (citing Rest.2d Judgments § 17; *Takahashi v. Board of Ed. of Livingston Union School Dist*., 202 Cal. App. 3d 1464, 1473-1474 (1988)). "It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought." *Tahoe–Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1078 (9th Cir.2003).

It is self-evident that the County could have asserted that Plaintiffs' signs were in violation of the Code during the Litigated Case, since the 2014 Notice was dated the day after that litigation was commenced. (Decl. Shaw, ¶ 6; Exhibit A.) If the County chose not to raise that claim before this Court during the three-year life of the Litigated Case, it is barred by claim preclusion from asserting it now, following the final judgment. See *Robamendedi v. Five Platters, Inc*., 838 F.2d 318, 322 (9tth Cir. 1988) (the doctrine of claim preclusion "prevents

litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.") (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)). See also *Americana Fabrics, Inc. v. L & L Textiles, Inc*., 754 F.2d 1524, 1529 (9th Cir. 1985) ("Under claim preclusion, a final judgment on the merits of a claim bars subsequent litigation of that claim." (Citing *Los Angeles Branch NAACP v. Los Angeles Unified School Dist*., 750 F.2d 731, 737 (9th Cir.1984)).

It is of no consequence that the Code has been amended since the Litigated Case was originally filed. From September 29, 2015, until March 8, 2017 – a period of almost 18 months – the amended sign ordinance existed in its current form while the Litigated Case was pending before this Court. Thus, Defendants had ample opportunity to litigate their present enforcement action in the previous lawsuit, but chose not to.

Although the County now seeks to evade the effect of this Court's judgment by enforcing the Code against Plaintiffs' signs before an administrative tribunal, rather than in a court of law, it cannot escape the bar of res judicata. Claim preclusion applies to bar subsequent administrative proceedings following a final judgment between the parties in litigation. "The doctrines of res judicata and collateral estoppel apply in administrative adjudication. As a result, a prior administrative decision may preclude a subsequent administrative or judicial action and a prior judicial decision may preclude a subsequent administrative action." The Rutter Group, California Practice Guide: Administrative Law ¶10:20 (2015). "It is common to find cases that preclude a party from raising a claim in a second case because a key issue has been determined in a first case, even though one of the cases is administrative adjudication and one of them judicial adjudication." (Id. at ¶10:32.) See *Hi-Desert Med. Ctr. v. Douglas*, 239 Cal.App.4th 717, 731-736 (2015) (administrative proceedings dismissed under doctrine of res judicata, following a final decision in litigation between the parties). In the context of subsequent administrative proceedings no less than in subsequent litigation, "res judicata applies not only to all matters actually raised in the first suit but also all matters which could have been raised." Id. at 725. Thus, this Court's final judgment in the Litigated Case deprives the Board of jurisdiction to hear

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the County's claim that Plaintiffs' signs are in violation of the Code. Nevertheless, neither the 2017 Notice nor the Notice of Hearing make any mention of the Litigated Case or this Court's Judgment therein. (Dec. Shaw, Exhibits B and C.)

B. Claim Preclusion - Rule 13(a)

While the Litigated Case was before this Court, the County could have, but did not, file a counterclaim alleging that Plaintiffs' signs were in violation of the Code. (Exhibit B, Request for Judicial Notice.) Because the County failed to raise such a claim during the pendency of the Litigated Case, it is barred from doing so now by Federal Rule of Civil Procedure 13(a):

> (a) Compulsory Counterclaim.
>
> (1) In General. A pleading must state as a counterclaim any claim that -- at the time of its service -- the pleader has against an opposing party if the claim:
>
> (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
>
> (B) does not require adding another party over whom the court cannot acquire jurisdiction.

As the Supreme Court has noted, Rule 13(a) "was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. *The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint*." *Southern Const. Co. v. Pickard,* 371 U.S. 57, 60 (1962) (emphasis added) (citation omitted).

The criterion that a compulsory counterclaim must arise from "the transaction or occurrence that is the subject matter of the opposing party's claim" is to be interpreted broadly. Among the considerations that establish a common "transaction or occurrence" for purposes of identifying a compulsory counterclaim under Rule 13(a) are whether res judicata would bar a

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subsequent suit on the second claim, and whether there is a logical relationship between the claim and counterclaim. *Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, Ltd.*, 79 F3d 480, 483 n. 2 (5th Cir. 1996) (an affirmative answer to either of these inquiries "indicates the claim is compulsory"). When there is a "logical relationship between the counterclaim and the main action … both claims must be deemed to have arisen out of the same transaction or occurrence." *Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960) (citing *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926); *Lesnik v. Public Industrials Corp*., 144 F.2d 968, 975 (2d Cir. 1944)). See also *Exergy Dev. Grp. of Idaho, LLC v. Fagen, Inc.*, No. 115CV00566EJLCWD, 2017 WL 1097175, at *7 (D. Idaho Mar. 22, 2017) ("The Ninth Circuit has adopted the logical relationship test.") (citing *Moore v. Old Canal Financial Corp.*, 2006 WL 851114 (D. Idaho 2006); *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246 (9th Cir. 1987)).

Although some courts have looked for a commonality of legal issues between the two claims in deciding whether to apply Rule 13(a), courts of the Ninth Circuit look solely to the existence of a logical relationship between the *facts* giving rise to the original claim and to the subsequent action. See *In re Lazar*, 237 F.3d 967, 979 (9th Cir. 2001) ("A logical relationship exists when the counterclaim arises from *the same aggregate set of operative facts* as the initial claim") (quoting *Pinkstaff v. United States* [*In re Pinkstaff*], 974 F.2d 113, 115 (9th Cir.1992)) (emphasis added). See also Robin J. Effron, *The Shadow Rules of Joinder*, 100 Georgetown L.J. 759, 779 (2012) ("Both the Fifth and Ninth Circuits use a fact-only definition of 'transaction or occurrence' when defining the phrase.") (citations omitted). The facts giving rise to the two claims need not be identical to satisfy the "logical relationship" criterion. See *Albright v. Gates*, 362 F. 2d 928 (9th Cir. 1966) ("In deciding what is a transaction, we take note that the term gets an increasingly liberal construction. Two bundles of facts seldom are identical for comparing 'transactions,' and so close judgments must be made from time to time".); *United States v. Eastport Steamship Corp.*, 255 F.2d 795, 804 (2d Cir. 1958) ("In practice this criterion [of a compulsory counterclaim] has been broadly interpreted to require not an absolute identity of

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factual backgrounds for the two claims, but only a logical relationship between them.") (quoting *United Artists Corp. v. Masterpiece Productions*, 221 F.2d 213, 216 2 Cir. 1955)).

Here, the facts that gave rise to the Litigated Case are virtually identical to those on which the County now bases its administrative action against Plaintiffs. Plaintiffs constructed signs on the Parcel and used them to display commercial and political speech protected by the First Amendment. (Decl. Herson, ¶3.) The County responded by mailing a Notice of Abatement, alleging that the signs were prohibited under the Code. (Decl. Shaw, ¶¶ 6, 10.) The only difference between the two sets of facts was that the first notice was mailed in 2014, and the second was mailed in 2017. This clearly establishes a "logical relationship" between the two sets of facts, and therefore establishes that both claims arose out of the same "transaction or occurrence," for purposes of applying Rule 13(a). Yet although Plaintiffs' complaint alleging that the Code's regulations could not constitutionally be applied to bar the signs was pending before this Court until May of 2017, the County made no effort to file a counterclaim in that action, seeking to prove that the signs in fact were in violation of the Code.

The 2014 Notice established on its face that the County intended to enforce the Code against Plaintiffs' signs more than three years ago, at the very outset of the Litigated Case. (See 2014 Notice, Exhibit A to Decl. Shaw.) Accordingly, under Rule 13(a), the County's claim that Plaintiffs' signs are in violation of the Code and should be abated had to be raised as a compulsory counterclaim in the Litigated Case. The County's failure to do so means that any such claim has been waived and cannot now be relitigated before an administrative tribunal. See *Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO v. G. P. Thompson Elec., Inc.*, 363 F.2d 181, 184 (9th Cir. 1966) ("If a party fails to plead a compulsory counterclaim, he is held to waive it and is precluded by res judicata from ever suing upon it again.")

As established in the previous section, the County's claim that Plaintiffs' signs are in violation of the Code could easily have been raised at the outset of the Litigated Case, and is therefore now barred by ordinary principles of res judicata. There is also a clear logical relationship between the facts giving rise to the claims adjudicated in the Litigated Case, and

those supporting the counterclaim the County now wishes to pursue against Plaintiffs before the Board. Nevertheless, unless enjoined by this Court, the County intends to suppress Plaintiffs' signs and stifle Plaintiffs' right to free speech in an adjudicatory proceeding, in flagrant disregard of the compulsory counterclaim requirement of Rule 13(a).

C. All Writs Act

Under the All Writs Act, 28 U.S.C. § 1651, Congress has charged the federal courts to enjoin state judicial or administrative proceedings "that interfere, derogate, or conflict with federal judgments, orders, or settlements." (*Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir.1997)). In particular, the Act authorizes enjoining state proceedings when necessary, as in the present case, to enforce the preclusive effect of a prior district court judgment. "The doctrines of collateral estoppel and res judicata ordinarily provide adequate assurance that one court's resolution of a controversy will be respected by other courts. Nevertheless, under the All Writs Act, 28 U.S.C. § 1651, district courts do have the power to reinforce the effects of these doctrines by issuing an injunction against repetitive litigation." (*Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1524 (9th Cir.1983), cert. denied, 465 U.S. 1081 (1984) (citation deleted)). See also Wright & Miller, *Federal Practice & Procedure* § 4405.1 (2017 update) ("Instead of undertaking the burden of persuading a second court to honor the preclusive effects of a prior judgment, a party may seek protection through an injunction against later litigation.")

In *Securities and Exch. Comm'n v. G.C. George Sec., Inc.*, 637 F.2d 685, 687–88 (9th Cir.1981), the Ninth Circuit held the All Writs Act authorized a district court to stay administrative proceedings involving issues related to a settlement over which the district court retained jurisdiction, noting that the courts of this Circuit have "interpreted § 1651 as authorizing a district court to enjoin a party from attempting to relitigate a cause of action relating to the same subject matter of an earlier action," id. at 688, and that a district court's "powers under § 1651 should be broadly construed." Id. (quoting *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir.

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1972), cert. denied, 406 U.S. 945.)

Moreover, despite the importance of federalism to our system of government, Congress has specifically recognized the need for federal courts to enjoin state proceedings when, as in the present case, local governmental entities seek to evade the force of prior federal judgments. The Anti-Injunction Act, 28 U.S.C. § 2283, "[prohibits] federal courts from enjoining state court actions except in three narrow circumstances. One of these, the 'relitigation exception,' allows a court to issue an injunction when necessary "to protect or effectuate the federal court's judgments." *State of California v. IntelliGender, LLC*, 771 F.3d 1169, 1176 (9th Cir. 2014) (quoting *California v. Randtron*, 284 F.3d 969, 974 (9th Cir. 2002)). The relitigation exception "'empowers a district court to issue injunctions to enforce judgments and to reinforce the effects pf the doctrines of res judicata and collateral estoppel.'" *State v. IntelliGender, id.* (quoting *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006)).

Because the 2017 Notice affirms the County's intent to re-litigate, before the Board, the same claims that were or could have been raised in the Litigated Case, and because the Board has the authority to suppress Plaintiffs' First Amendment rights by ordering the destruction and removal of the signs, prompt injunctive relief by this Court is both appropriate and essential.

V

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

A preliminary injunction is to be issued upon a showing of either (1) a combination of success on the merits and the possibility of irreparable injury, or (2) serious questions going to the merits and a balance of hardships tipping sharply in favor of the party requesting relief. *Brown v. California Dept. of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003). Additionally, even a "colorable First Amendment claim constitutes irreparable injury that justifies the issuance of a preliminary injunction. *Brown,* 321 F.3d at 1225 (quoting *Sammartano v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir. 2002)).

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A. Likelihood of Success on the Merits

As set forth above, Plaintiffs have a strong likelihood of success on the merits. The County has adopted an unconstitutional sign regulation scheme that purports to deny Plaintiffs the right to display their signs. When Plaintiffs challenged the constitutionality of those same regulations in this Court, Plaintiffs received an award of nominal damages and attorney's fees, and a valid, final Judgment resolving the dispute. Standard principles of res judicata preclude the County from now raising any claim against Plaintiffs that could have been adjudicated in the Litigated Case. The County did not file a counterclaim in the Litigated Case asserting that Plaintiffs' signs violated any provision of the Code, and is barred from doing so now under the Federal Rules of Civil Procedure, Rule 13(a). Nevertheless, the County now seeks to evade the preclusive effect of this Court's judgment by charging Plaintiffs with violating its unconstitutional sign regulations in an administrative adjudication before the Board. Because the Board lacks jurisdiction to conduct the scheduled hearing under fundamental principles of claim preclusion, there is a strong likelihood that Plaintiffs will succeed in obtaining an order estopping the Board from re-adjudicating the legality of the County's sign regulations, as applied to Plaintiffs' signs.

The policy considerations underlying the doctrine of claim preclusion apply with full force in the present case. "The interest of parties and the public in ending litigation normally bars a party who has had his day in court from further pressing the same claims or the same defenses. … The doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties, even in connection with a different claim or cause of action." Kenneth Culp Davis, *Administrative Law: Cases - Texts – Problems* 432 (1977). Similarly, injunctive relief to bar the County from re-litigating before the Board the same issues that were or could have been raised in the Litigated Case fully comports with the provisions of the All Writs Act and the Anti-Injunction Act, recognizing the need to reinforce the preclusive effect of this Court's Judgment in situations such as this.

B. Irreparable Injury

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *S.O.C. Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1988) (ordering issuance of preliminary injunction on remand) (citations deleted). Here, Plaintiffs face irreparable injury from the threat of having their signs demolished and their constitutionally-protected speech removed by order of an administrative tribunal, when the County would be barred from seeking the same result in a court of law by the preclusive effect of the Litigated Case. If not enjoined, the County will infringe upon Plaintiffs' First Amendment and Due Process rights.

C. Balance of Hardships

Plaintiffs stand to suffer substantial harm in the loss of their constitutionally-protected right to free speech. Moreover, if the requested injunction is not granted, Plaintiffs face monetary fines and the imposition of costs incurred by the County in destroying Plaintiffs' property and suppressing Plaintiffs' speech.

The County, in contrast, faces no harm from the issuance of injunctive relief allowing Plaintiffs to continue to exercise their freedom of speech. Such injunctive relief would do no more than affirm the authority of long-standing judicial prohibitions on the suppression of protected speech without a determination by a judicial officer, and apply well-established doctrines of res judicata, claim preclusion, and Federal Rule 13(a). The County is already barred from seeking to enforce the Code against Plaintiffs' Signs in a court of law. The injunctive relief Plaintiffs seek would merely confirm that the Litigated Case also bars the County from seeking to achieve the same results via an administrative tribunal.

D. Public Interest

When important rights are at issue, the public interest is also a factor in determining whether an injunction should issue, and the public interest clearly weighs in favor of protecting a

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plaintiff's First Amendment rights. *Sammartano v. First Judicial Court*, 303 F.3d 959, 974 (9th Cir. 2002). See also, *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983) (noting "strong public interest in protecting First Amendment values").

The Court should issue a preliminary injunction against the County enjoining enforcement of the Code via an administrative tribunal to protect the public interest in maintaining the core free speech values embodied in the First Amendment to the United States Constitution and Article I to the California Constitution. The extraordinary importance of the free speech rights impacted by the County's efforts to evade the preclusive effect of the Litigated Case heighten the need for injunctive relief.

E. No Bond Should Be Required

A bond should be waived when First Amendment violations are probable and harm to the government is minimal. *Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F.Supp. 1291, 1302 n.6 (C.D. Cal. 2006) ("In *Jorgensen v. Cassiday*, 320 F.3d 906 (9th Cir. 2003), the Ninth Circuit held that a court may dispense with the filing of a bond when there is no realistic likelihood of harm to the defendant. In *Dr. John's Inc., v. Sioux City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004), the Court held that 'requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay.' Given that this case involves the probable violation of the Bible Club's First Amendment Rights, and that the damages to the District of issuing this injunction seem minimal, if they exist at all, the Bible Club need not post a bond.").

Moreover, where a strong likelihood of success is demonstrated on the application for injunctive relief, "a minimal bond or no bond at all" is appropriate. *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). See also, *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) ("Because

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the Court finds that there is a strong likelihood of success on the merits by Plaintiffs, no bond is necessary.") (citation deleted). *Colin* continues, "In addition, … the Court excuses the bond requirement because there is no risk of monetary loss to the Defendants if the injunction is granted." (*Id.*)

Based on the importance of the First Amendment rights advocated in this matter by Plaintiffs, and based on the strong likelihood of success on the merits presented in this case, as discussed above, the Court may forgo any bond requirement. In addition, any bond requirement is excused because there is no risk of monetary loss to the County arising out of the injunction. Plaintiffs therefore request the Court not require posting a bond in this matter.

VI

CONCLUSION

In light of the foregoing, Plaintiffs respectfully request the Court issue a preliminary injunction as set forth in the concurrently filed proposed order.

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