Docket No. 18-15970

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITIZENS FOR FREE SPEECH LLC, and MICHAEL SHAW,
Plaintiffs and Appellants,

vs.

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

Appeal from the United States District Court
for the Northern District of California
Case No. 4:18-cv-00834

APPELLEES' BRIEF

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PRELIMINARY STATEMENT

In 2014, Plaintiffs and Appellants Michael Shaw and Citizens for Free Speech, LLC built several freeway-facing signs in violation of Alameda County's zoning ordinance. When the County threatened enforcement, Plaintiffs challenged the ordinance in federal court. After litigating for two and a half years, Plaintiffs had little to show for their efforts. The district court adjudged the County's sign regulations constitutional after the County amended two defective provisions that had no relation to Plaintiffs' signs. And despite Plaintiffs' repeated requests for a permanent injunction, the district court refused to enjoin the County from enforcing its regulations against Plaintiffs' admittedly unlawful signs. Plaintiffs' first lawsuit then concluded after they conceded they had no further challenge to the County's regulations.

Yet when the County resumed enforcement, Plaintiffs sued again. They immediately requested a preliminary injunction to do what the district court in the prior suit would not: enjoin the County from enforcing its regulations against Plaintiffs' signs. The district court denied their request, and they appealed.

Plaintiffs ask this Court to reverse and direct the entry of a preliminary injunction that would undermine the judgment in the prior suit. They claim that Rule 13(a) of the Federal Rules of Civil Procedure and claim preclusion principles require this disturbance to the repose of the prior judgment.

Plaintiffs have it backwards. Rather than barring the County—the successful defendant in the prior action—from pursuing nuisance abatement, the prior judgment bars Plaintiffs' duplicative causes of action. Neither Rule 13(a) nor claim preclusion bars the County's administrative abatement proceeding. For this Court to hold otherwise would be to allow landowners to force local governments to either (1) litigate administrative zoning proceedings in federal court, the landowners' chosen forum; or (2) cede to the landowners a vested right to continue a nuisance in perpetuity. Neither Rule 13(a) nor claim preclusion requires this absurd result.

The district court saw through Plaintiffs' attempt to undermine the prior judgment. This Court should likewise reject Plaintiffs' specious arguments and affirm the district court's denial of the preliminary injunction.

STATEMENT OF JURISDICTION

The County agrees with Plaintiffs' statement of jurisdiction.

STATEMENT OF ISSUES

1. Was the district court correct in holding that Rule 13(a) does not bar the County from pursuing its administrative enforcement action against Plaintiffs' admittedly illegal signs?

2. Was the district court correct in holding that claim preclusion does not bar the County from continuing its enforcement action as expressly contemplated by the prior judgment?

3. Did the district court abuse its discretion by holding that Plaintiffs failed to establish irreparable harm and a balance of hardships and public interest weighing in their favor given that (A) Plaintiffs failed to raise a colorable claim of First Amendment injury, and (B) the County has agreed not to remove the signs until after the administrative process concluded?

STATEMENT OF FACTS AND THE CASE

I. Plaintiffs have maintained illegal billboards on their property for years.

For approximately four years, Plaintiffs have maintained several large, freeway-facing signs on Plaintiff Michael Shaw's property ("Prop-

erty") in Alameda County. Excerpts of Record ("ER") 209, ¶ 10. These signs are patently illegal under the County's sign regulations, as Plaintiffs candidly admit. ER 209, ¶ 11 (alleging that "[t]he display of Plaintiffs' signs was not allowed under the Code"). The signs are inconsistent with the development plan governing the use of the Property, which permits the display of only a single sign announcing the vehicle-storage business that Plaintiff Michael Shaw operates there. Prior Dkt. 60, Ex. A.[1] Plaintiffs never obtained County approval to erect the signs, as required by the County Code. Prior Dkt. 1, ¶¶ 31-32. And one of Plaintiffs' signs now displays off-site commercial advertising, in violation of the County's ordinances. ER 180, 181.

II. In 2014, Plaintiffs brought a first, unsuccessful challenge to the County's sign regulations.

In June 2014, the County issued a "Declaration of Public Nuisance—Notice to Abate," informing Shaw that the signs on his Property

[1] The district court implicitly took judicial notice of a variety of documents from the prior litigation between the parties, *Citizens for Free Speech, LLC v. County of Alameda*, Case No. C14-cv-02513-CRB. Many of those documents were not resubmitted to the court, but rather referred to by citation to PACER docket numbers. As a result, they are not included in the Excerpts of Record. The County is accordingly moving with this brief to supplement the record with those documents. They are cited here as "Prior Dkt." followed by the relevant docket number.

violated sections 17.18.010 and 17.18.120 of the County Code. Prior Dkt. 65-1, ¶¶ 4-6, Ex. C. In general, these sections prohibit any use of the Property that is inconsistent with the land use and development plan for the Property ("Development Plan") adopted by the Board of Supervisors. ER 38. The abatement notice instructed Shaw to remove the signs or face administrative nuisance abatement proceedings. Prior Dkt. 65-1, ¶¶ 4-6, Ex. C.

On June 1, 2014, Plaintiffs sued the County in federal district court, alleging that various provisions of the County Code violated the free speech and equal protection provisions of the federal and California constitutions and seeking to enjoin the County's enforcement proceeding. *See generally* Prior Dkt. 1. On September 4, 2014, the district court issued a preliminary injunction forbidding the County from continuing its proceeding. Prior Dkt. 50. As the case unfolded, it became clear that Plaintiffs asserted both an as-applied challenge—alleging the County could not, consistent with the First Amendment, apply its sign regulations to Plaintiffs' signs—and a facial, overbreadth challenge—alleging that the County's sign regulations on their face violated the First Amendment and Equal Protection Clause. Prior Dkt. 71 at 4-8.

The district court rejected Plaintiffs' as-applied claim. As the court noted, Prior Dkt. 71 at 6, County Code section 17.18.120 provides that "[a]ny use of land within the boundaries of a [Planned Development] district adopted in accordance with the provisions of this chapter shall conform to the approved land use and development plan." ER 38. Under Plaintiffs' approved Development Plan, "[t]he 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." Prior Dkt. 71 at 5-6 (citations omitted). According to the district court,

> 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.
>
> 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.

Id. As a result, the court granted the County's summary judgment motion with respect to Plaintiffs' as-applied claim. *Id.* at 7.

The district court also rejected all but one of Plaintiffs' facial challenges to the County Code, including all facial challenges brought under the First Amendment. Prior Dkts. 71 at 8, 105. The only issue on which

Plaintiffs prevailed was that County Code section 17.52.520(A) violated the Equal Protection Clause. This section permitted government officials to post notices regardless of size and location but offered no similar authorization for private parties. ER 248, 255-259. The district court held that section 17.52.520(A) was content-based and could not survive strict scrutiny. ER 255-259.

On October 4, 2016, before the district court issued a final judgment, the County amended section 17.52.520(A) to allow any person—not just government officials—to place one unilluminated temporary sign, up to one square foot in area, on any parcel for up to 90 days. Prior Dkt. 117, Ex. 1. The court subsequently held that this amendment cured any constitutional deficiency in the County' sign regulations. *See* ER 224-25. And Plaintiffs themselves then conceded that they had *no further constitutional objections* to the County's sign regulations. Prior Dkt. 123 at 6 ("Citizens does not challenge the current sign code"); *id*. ("the current sign code [is] not challenged in this case").

Because the County corrected the sole code provision that the district court found unconstitutional, the court granted the County's motion to dissolve the preliminary injunction against enforcement of the

sign regulations. Prior Dkt. 125; *see also* Prior Dkt. 121. The court then awarded Plaintiffs $1 in nominal damages and $38,116 in attorneys' fees—an 80% reduction from Plaintiffs' request, which reflected their negligible success in the suit. ER 232-33. The court denied Plaintiffs' repeated requests for a permanent injunction prohibiting the County from enforcing its regulations against Plaintiffs' signs. *See* ER 216, 223 ("The Court has not granted a permanent injunction, despite Citizens' repeated requests."); ER 230 ("Citizens did not receive a permanent injunction allowing it to maintain its signs."). The court thus summed up, "After nearly three years of litigation, . . . very little has actually been accomplished." ER 230-31.

III. Consistent with the prior judgment, the County now seeks to enforce its constitutional sign regulations against Plaintiffs' illegal signs.

With its sign regulations acknowledged as constitutional by both the district court and Plaintiffs, the County resumed its enforcement proceedings against Plaintiffs' illegal signs. On September 28, 2017, the County sent Shaw another "Declaration of Public Nuisance—Notice to Abate." ER 176-77. This notice reminded Plaintiffs that (1) their signs violate County Code section 17.18.120 because they are not permitted

by the Development Plan for the Property, and (2) the electronic billboard Plaintiffs erected during the prior litigation violates County Code section 17.52.515. *Id.*; ER 38-42.

The County then scheduled a hearing before the Alameda County Board of Zoning Adjustments ("BZA"), the body with authority to review abatement notices. ER 48 (section 17.59.060). The County initially set the hearing for December 7, 2017. ER 56, ¶ 3. However, to accommodate Plaintiffs' counsel, the County continued the hearing for two months, until February 8, 2018. ER 56-57, ¶¶ 4-6. In late January, Plaintiffs' counsel requested another continuance, and the County agreed to continue the hearing to February 15, 2018—more than four months after the Notice of Abatement. ER 57, ¶ 7. The County stipulated that it would take no action to remove Plaintiffs' signs until completion of any administrative appeal from the BZA's decision. ER 56-57, ¶¶ 2, 8, 10.

IV. Plaintiffs again filed suit and asked the Court to enjoin the County's administrative abatement process.

Meanwhile, on February 8, 2018, Plaintiffs took advantage of their requested delays and filed a new complaint asking the district court to enjoin the BZA proceedings. ER 207-215. Plaintiffs allege four claims: (1) the County has deprived Plaintiffs of their free speech rights

by "[r]equiring Plaintiffs to either acquiesce in the removal of the signs, or engage in an administrative proceeding which can result in the forcible removal of Plaintiff's [*sic*] signs without the approval of a judicial officer"; (2) the County has denied Plaintiffs due process by enforcing its Code against Plaintiffs "in disregard of the preclusive effect of [the] Court's final order" in the prior action; (3) the County Code deprives Plaintiffs of "free speech rights secured by the First Amendment"; and (4) the County Code denies Plaintiffs equal protection. ER 212-13. Plaintiffs' fifth claim does not allege any legal violation but instead asserts the case is brought under 42 U.S.C. § 1983. ER 213-14.

On March 7, 2018, Plaintiffs moved to enjoin the County from holding a hearing in the enforcement proceeding until the merits of Plaintiffs' claims are resolved. ER 182-204.

V. The district court denied Plaintiffs' motion, determining that Plaintiffs are unlikely to succeed on the merits and failed to establish irreparable harm.

On May 9, the district court entered an order denying the preliminary injunction. ER 5-15. The court rejected all of Plaintiffs' theories that the County's enforcement action is barred by the prior judgment. ER 11-14. It also concluded that Plaintiffs had failed to show irrepara-

ble harm from the County's moving forward with enforcement, ER 14, and that the balance of equities supported the County because of the County's "strong public interest in enforcing its zoning laws," ER 15.[2] On May 25, 2018, Plaintiffs filed this appeal from the district court's order refusing the preliminary injunction. ER 1-4.

SUMMARY OF ARGUMENT

1. The district court correctly held that Plaintiffs failed to establish a likelihood of success on the merits of their argument that Rule 13(a) of the Federal Rules of Civil Procedure precluded the County's enforcement efforts. Rule 13(a) precludes a party from filing a claim in a federal suit when that claim should have been asserted as a counterclaim in a prior federal suit. But it was unnecessary for the County to counterclaim for abatement where the prior suit necessarily resolved the constitutionality and enforceability of the County's sign ordinances in the course of addressing Plaintiffs' claims. Additionally, Rule 13(a) does not prohibit the County from pursuing an administrative abatement action, which is not a claim in a federal suit. Applying Rule 13(a)

[2] Following denial of their motion for a preliminary injunction and the County's filing of a motion to dismiss, Plaintiffs amended their complaint. The First Amended Complaint, however, alleges the same claims as the initial complaint. *See* Dkt. 42.

in the manner urged by Plaintiffs would force local governments to conduct nuisance abatement in federal court, denying the County its choice of forum and frustrating the administrative process described in the County Code.

2. The district court correctly held that Plaintiffs failed to establish a likelihood of success on the merits of their argument that claim preclusion barred the County's enforcement efforts. The purpose of claim preclusion is to enforce the repose of prior judgments. Here, the prior judgment upheld the constitutionality of the County's sign ordinances, and the district court expressly refused to enjoin the County from enforcing those ordinances against Plaintiffs' signs. It is thus Plaintiffs' duplicative request for a preliminary injunction prohibiting enforcement, and not the County's abatement efforts, that is fundamentally inconsistent with the prior judgment.

Plaintiffs further fail to account for the distinct rules governing *defendant* preclusion, which only bar subsequent claims that (1) should have been brought as compulsory counterclaims or (2) constitute collateral attacks on the prior judgment. The County, a successful defendant in the prior suit, is not precluded from pursuing abatement because

abatement (1) was not a compulsory counterclaim in the prior suit and (2) is fully consistent with the prior judgment.

3. Generally, plaintiffs are not entitled to judicial relief for a purportedly threatened injury until they have exhausted available administrative remedies. Plaintiffs here have not exhausted their administrative remedies and are instead attempting to avoid the County's administrative process entirely.

4. The district court did not abuse its discretion by holding that Plaintiffs had not demonstrated irreparable harm. A district court's decision to deny the extraordinary remedy of a preliminary injunction must be upheld absent a showing of an abuse of discretion. *See Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). Here, Plaintiffs' claims of harm were premised on the likelihood that they would suffer First Amendment and due process violations. But Plaintiffs failed to establish even a colorable First Amendment injury, and the district court concluded that Plaintiffs were not likely to succeed on their due process claim. Moreover, the County has agreed not to take any action to remove Plaintiffs' illegal signs until the administrative process has concluded, and Plaintiffs waited four months before filing suit.

5. The district court did not abuse its discretion by concluding that the remaining factors from *Winter v. Nat. Resources Defense Council, Inc.,* 555 U.S. 7 (2008) weighed in the County's favor, as the County and the public have a strong interest in seeing the County's laws enforced.

ARGUMENT

I. Standard of review

A district court's decision denying a preliminary injunction is reviewed for abuse of discretion. *Farris*, 677 F.3d at 864. This review is "'limited and deferential.'" *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)). The Court of Appeals may reverse the district court's decision only if it is based on an erroneous legal standard or "clearly erroneous findings of fact." *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053 (9th Cir. 2013). "'Under this standard, [a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the

case.'" *Shell Offshore*, 709 F.3d at 1286 (quoting *Thalheimer v. City of San Diego*, 45 F.3d 1109, 1115 (9th Cir. 2011)) (alteration in original).

"In addition, when a party seeks injunctive relief in federal court against a state or local government or governmental entity, concerns of federalism counsel respect for the 'integrity and function' of those bodies . . . ." *Signature Props. Int'l Ltd. P'ship v. City of Edmond*, 310 F.3d 1258, 1269 (10th Cir. 2002). "[I]n other words, the federal court must be cautious about issuing an injunction against a municipality." *Id.*

II. The district court correctly determined Plaintiffs cannot succeed on the merits because the County is not precluded from enforcing its sign regulations.

In arguing that they had a likelihood of success on the merits, Plaintiffs focused exclusively on the preclusion arguments underlying their second cause of action. That cause of action asserts that the County's abatement action violates Plaintiffs' due process rights because it is precluded by Rule 13(a) and claim preclusion. Plaintiffs did nothing to establish the merits of their remaining causes of action. ER 16-32, 182-204. Plaintiffs do not raise any arguments on appeal with respect to the likelihood of success on the merits of their remaining causes of action

and have thus waived these arguments. Additionally, the district court correctly concluded that the County is not precluded by either Rule 13(a) or claim preclusion.

A. Rule 13(a) does not bar the County's administrative enforcement proceeding.

1. The district court correctly held that a counterclaim would have been superfluous considering the nature of the prior proceeding.

Rule 13(a) precludes a party from bringing a claim in federal court that it could have brought in prior litigation if the claim arises out of the same transaction or occurrence as an opposing party's earlier claim. Fed. R. Civ. P. 13(a). This procedural rule, the compulsory counterclaim rule, is premised on considerations of judicial economy—that all claims related to a particular subject should be resolved at one time. *See Pochiro v. Prudential Ins. Co.*, 827 F.2d 1246, 1249 (9th Cir. 1987).

In its order denying a preliminary injunction, the district court concluded that the County did not need to bring a counterclaim for abatement where the prior litigation necessarily resolved the constitutionality and enforceability of the County's sign regulations in the course of addressing Plaintiffs' claims. ER 12. "Given the nature of Plaintiffs' challenge," the district court held, "a counterclaim to confirm

the County's right to enforce those ordinances[] would have been superfluous." *Id.*

In their opening brief, Plaintiffs ignore the reasoning supporting the district court's order. Appellants' Opening Brief ("AOB") at 20-21. Instead, they attempt to distinguish this case from the case cited by the district court, *Twin City Fire Ins. Co. v. McBreen & Kopko LLP*, 847 F. Supp. 2d 1084 (N.D. Ill. 2012), because the latter involved exclusively declaratory relief. AOB at 21. But the additional relief Plaintiffs sought in the prior suit is beside the point. By resolving Plaintiffs' declaratory relief claim, the prior litigation necessarily resolved the question of the County's right to enforce the challenged ordinances. That Plaintiffs sought an injunction and damages in addition to declaratory relief does not change this.

Not only was it unnecessary for the County to bring a counterclaim during the prior suit, but also, throughout most of the prior lawsuit, the County was *prohibited* from doing so. At the outset of the prior suit, the district court preliminarily enjoined the County from enforcing its sign regulations against Plaintiffs. Prior Dkt. 50. The preliminary injunction prohibited the County from litigating a counterclaim while it

remained in effect. *Id.* (enjoining "any and all conduct" in enforcing the sign ordinance against Plaintiffs' signs); *see also* AOB at 15, 27-28 (conceding as much). That injunction was not lifted until November 29, 2016, Prior Dkt. 125, after nearly two and a half years of litigation and two summary judgment orders and only four months before entry of judgment. Litigating a counterclaim at that point would have been no different from starting a new proceeding, providing none of the judicial economy that Rule 13(a) is designed to provide.

2. There is no legal support for Plaintiffs' position.

On its face, Rule 13(a) does not prohibit the County from prosecuting its own administrative abatement proceedings to remedy code violations. Rule 13(a), a rule of procedure for the federal courts, applies when a party files a suit in federal court that states a claim that should have been asserted in an earlier suit in federal court. Plaintiffs have never cited a single case, either below or in their opening brief, in which Rule 13(a) has precluded a subsequent claim asserted in any state proceeding, whether judicial or administrative. *See* AOB at 22-23 (citing only *S. Const. Co. v. Pickard*, 371 U.S. 57 (1962), and *Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO v. G.P. Thompson Elec., Inc.*, 363 F.2d

181 (9th Cir. 1966), neither of which involve an administrative agency or an enforcement proceeding); ER 26 (citing *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994), and *Am. Motors Sales Corp. v. Runke*, 708 F.2d 202 (6th Cir. 1983), neither of which involve Rule 13(a)). Indeed, the County's administrative enforcement action does not involve a filing of a "claim" at all. *See, e.g.*, *City of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 48 (2002) ("An administrative proceeding is neither a 'civil action' . . . nor a 'special proceeding of a civil nature' . . . .").[3] Thus, Rule 13(a) is simply inapplicable to the County's administrative proceeding.

Moreover, applying Rule 13(a) to bar the County's administrative proceeding would lead to the untenable consequence of forcing local governments to conduct nuisance abatement in federal court. Any land-

[3] California law distinguishes between "civil actions" and "special proceedings." Cal. Civ. Proc. Code §§ 22, 23. The proper means of challenging the Board of Supervisors' ultimate decision on the County's enforcement action in state court would be via a petition for writ of mandamus—a special proceeding. *See* Cal. Civ. Proc. Code §§ 1085, 1094.5; *Nerhan v. Stinson Beach Cnty. Water Dist.*, 27 Cal. App. 4th 536, 540 (1994) ("a petition for writ of mandate is a special proceeding"). Although California has its own compulsory counterclaim statute, Cal. Civ. Proc. Code § 426.30, that rule does not apply to special proceedings, Cal. Civ. Proc. Code § 426.60(a).

owner could bypass the local zoning board by rushing to federal court at the first hint of enforcement. The Federal Rules of Civil Procedure were not intended to create a federal forum for every local code enforcement matter. The Rules Enabling Act dictates that the federal rules will not have such a sweeping impact. 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."); *see also* 6 Charles Alan Wright et al., *Federal Practice & Procedure: Civil* § 1417, at 161 (3d ed. 2010).

Plaintiffs effectively seek to force the County to pursue its enforcement action in the violator's chosen federal forum. Not only does this deny the County its choice of forum and frustrate the administrative process described in the County Code, *see Smith v. FTC*, 417 F. Supp. 1068, 1088 (D. Del. 1976) (declining to bar an enforcement proceeding where doing so would "eviscerate" an enforcement scheme); *see also* ER 46-54, it also denies the Board of Zoning Adjustments and the Board of Supervisors the ability to make routine decisions about land use in the County, placing them instead in the hands of a federal

judge.[4] Given these preposterous consequences, Rule 13 cannot apply. *Cf. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO*, 363 F.2d at 185 (declining, in light of policy interests, to bar the arbitration of a claim that could have been raised as a counterclaim).

Finally, claim preclusion bars Plaintiffs' Rule 13(a) theory. Plaintiffs could have, but failed to, assert this theory in the prior action. Rule 13(a) can be, and often is, asserted in the proceeding in which the counterclaim was allegedly required to be filed. *See* 6 Wright et al., *supra*, § 1418, at 168. Yet Plaintiffs never argued in the prior action that the district court should maintain the injunction on the theory the County had failed to prosecute its enforcement proceeding as a counterclaim. Prior Dkt. 123**.**

[4] Federal courts have consistently refused to serve as "'the Grand Mufti of local zoning boards'" or "'sit as [] super zoning boards or [] zoning boards of appeals.'" *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (quoting *Hoehne v. Cty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989), and *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985), respectively).

B. Claim preclusion does not bar the County from pursuing enforcement of its constitutional sign ordinances.

1. Plaintiffs' request for a preliminary injunction, not the County's enforcement proceeding, threatens the repose of the prior judgment.

The district court also correctly concluded that the final judgment in the prior litigation does not bar the County's abatement efforts as a matter of claim preclusion. In reaching this conclusion, the district court noted that the court in the prior action had "rejected Plaintiffs' repeated requests for a permanent injunction 'to enjoin enforcement'" against the signs. ER 11-12 (quoting ER 223). The district court also observed that the judgment did not invalidate any part of the sign code or insulate Plaintiffs from further enforcement. *Id*.

In their opening brief, Plaintiffs argue that, because the County could have asserted a counterclaim in the prior suit and did not do so, the court incorrectly concluded that the County is not barred by the prior judgment. AOB at 25-26.

To the contrary, the district court's reasoning was sound and its conclusion correct. The purpose of claim preclusion is to "enforce [the] repose" of prior judgments. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*,

501 U.S. 104, 107-08 (1991). "Such repose is justified on the sound and obvious principle . . . that a losing litigant deserves no rematch after a defeat fairly suffered . . . ." *Id.* The prior litigation ended in the County's securing its objective: a judgment that confirmed the constitutionality and enforceability of its sign regulations. In contrast, as the court concluded in the prior action, and as the court below cited in denying the preliminary injunction, Plaintiffs had "*not achieved a change in the law that justifies the continued display of [their] billboards*." ER 12 (quoting ER 223). In other words, in issuing the judgment in the prior action, the court *expressly rejected* exactly what Plaintiffs seek here: permanent prohibition of enforcement against their signs. ER 223.

It was clear to all in the prior litigation that the County would reinstate its enforcement action after judgment. Plaintiffs repeatedly asserted in filings and at hearings that, without a permanent injunction to prohibit enforcement, the County would restart its enforcement proceedings. *See, e.g.,* ER 242 (Plaintiffs' argument that their "request for injunctive relief is not moot because the County will seek to abate Citizens' signs in the absence of an injunction" and "Citizens' signs are still up and the County still wants to abate them"); Prior Dkt. 118 at 2 ("The

County plainly states that the moment the injunction is dissolved, it will bring . . . enforcement action against Citizens."); Prior Dkt. 123 at 2 ("the County has unequivocally declared that it wants the injunction lifted so it can *enforce the sign code* against Citizens"); *id*. at 5 ("The County will seek to abate Citizens' signs as soon as the injunction is lifted."); *id*. at 6 ("the County imminently threatens to enforce [the sign code] against Citizens as soon as the injunction is lifted"); *see also* Prior Dkt. 137 at 5-6 (Plaintiffs' counsel's argument that without a permanent injunction, "we are probably going to be back here 20 more times, because there is going to be an enforcement action"); *id.* at 6 ("There is just the imminent threat of enforcement because they said they would do it.").

Indeed, the County confirmed that nothing stood in the way of enforcing its sign regulations against Plaintiffs and that it would likely do so. Prior Dkt. 116 at 3-5; Prior Dkt. 138 at 3-4; *see also* ER 223 ("[T]he County stated at the motion hearing that it is considering the removal of Citizens' signs and that the dissolution of the preliminary injunction "frees [it] up" to take such action.").

Yet Plaintiffs never argued that the expected enforcement proceeding would be barred by the judgment or Rule 13(a). To the contrary, they argued strenuously that the district court must issue a permanent injunction to prevent that enforcement. Prior Dkts. 107, 118 at 3, 123 at 3, 123-4, 137 at 5-6. The district court refused that relief and dissolved the preliminary injunction. Prior Dkt. 125. Thus, by pursuing enforcement now, the County acting wholly consistently with the prior court's orders.

What *is* inconsistent with the repose of the prior judgment is Plaintiffs' repetitive lawsuit. The prior action conclusively resolved Plaintiffs' constitutional challenges to the County's sign regulations. Yet in their present suit, Plaintiffs reassert these same challenges, raising the specter of inconsistent judgments. Moreover, Plaintiffs now ask this Court to direct the district court to enjoin the County's enforcement proceeding—i.e., to issue the very same injunction that Plaintiffs sought, and the district court rejected, in the prior action.

In short, after years of litigation, the County obtained a judgment that permits it to pursue enforcement. Claim preclusion cannot be applied to undermine this prior judgment.

2. Plaintiffs' claim preclusion argument adds nothing to their Rule 13(a) argument and lacks merit.

Plaintiffs' argument that claim preclusion bars the County's enforcement action because the County did not counterclaim for abatement is essentially the same as their Rule 13(a) argument. *See* AOB at 23, 25-26. This argument suffers from the same flaws discussed above (that is, the County was not required to counterclaim) and incorrectly applies the principles of claim preclusion.

Plaintiffs ignore the fact that claim preclusion applies differently to plaintiffs and defendants. Claim preclusion typically applies against a *plaintiff* who brings a second action related to a prior action. In such a situation, the familiar three-part test for claim preclusion recited by Plaintiffs applies. *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th Cir. 2016). The rules applicable to a claim newly asserted by a *defendant* in the first action are different. *See Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324 (Fed. Cir. 2008) ("[The three-part test] cannot be used as the exclusive test for preclusion against a defendant in the first action. In such circumstances, the somewhat different rules of 'defendant preclusion' apply."). "A defend-

ant is precluded only if (1) the claim or defense asserted in the second action was a compulsory counterclaim that the defendant failed to assert in the first action, or (2) the claim or defense represents what is essentially a collateral attack on the first judgment." *Id.*; *Restatement (2d) of Judgments*, § 22; *see also* 18 Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* § 4414, at 345 (3d ed. 2016) (discussing defendant preclusion).

Under this test, the County is not precluded. For the reasons stated above, the compulsory counterclaim rule does not apply. *See supra* Section II.A. Further, the County's abatement proceeding is not a collateral attack on the first judgment. As the district court concluded, the prior judgment does not insulate Plaintiffs from abatement of their illegal signs. *See supra* Section II.B.1. Rather, the prior judgment paved the way for the very enforcement action the County is now pursuing.

The cases cited by Plaintiffs do no suggest otherwise. None of them applies claim preclusion against a defendant that succeeded in the prior suit. And none involves application of preclusion to a subsequent administrative proceeding. Quite simply, none of Plaintiffs' cases support their remarkable contention that a first lawsuit seeking to enjoin

agency action can preclude the *defendant agency* from ever moving forward with its action after the plaintiff fails to obtain relief sought to stop it. Indeed, "the separate statutory competencies of courts and agencies commonly mean that a judicial decision does not bar a later agency proceeding as a matter of claim preclusion." 18B Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* § 4475, at 479 (2d ed. 2002) (citing *Hall v. FERC*, 691 F.2d 1184, 1189-91 (5th Cir. 1982)).

This is not a case in which an agency, despite having authority to pursue an administrative remedy, "*chose* to first proceed against [the movant] in the district court," and then later pursued an administrative remedy. *SEC v. G.C. George Secur., Inc.*, 637 F.2d 685, 687 (9th Cir. 1981) (emphasis added); *see also United States v. Norton*, 640 F. Supp. 1257, 1261 (D. Colo. 1986). The County has from the beginning sought to conduct its enforcement proceedings administratively, and Plaintiffs hailed the County into federal court in an attempt to stop those proceedings. Because the district court previously rejected Plaintiffs' requested injunction, the County may proceed with enforcing its sign regulations.

C. Plaintiffs cannot acquire a vested right to maintain illegal signs in perpetuity.

Plaintiffs also fail to confront the absurdity of their Rule 13(a) and claim preclusion arguments. Their proposed rule would allow a party flagrantly violating local land use regulation to "remove" to federal court any administrative enforcement action taken against them, simply by challenging the enforcement action itself. And by preventing all enforcement if the local government fails to counterclaim, the plaintiff-violators would effectively acquire a vested right to continue violating the regulation in perpetuity. Neither the Rules of Civil Procedure nor the principles of claim preclusion justify those bizarre results.

Indeed, in a variety of contexts, California law holds that prior inaction by government officials cannot prevent the government from enforcing the law. *See San Francisco v. Meyer*, 208 Cal. App. 2d 125, 133 (1962) (noting "the general rule that a [local government] may not be estopped by the conduct of its officers or employees") (citing *Farrell v. Cty. of Placer*, 23 Cal.2d 624 (1944); *Cty. of San Diego v. Cal. Water & Tel. Co.*, 30 Cal.2d 817, 826 (1947) ("[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a pol-

icy adopted to protect the public."); *Avco Cmty. Devs., Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785, 789-800 (1976) (holding that a city cannot voluntarily surrender its power to regulate land use in the future). Preventing the County from ever enforcing its zoning code based on its agents' failure to assert a counterclaim would have the same consequence repeatedly rejected under California law.

Plaintiffs further overlook the fact that their admittedly illegal signs represent a continuing violation of the County's sign ordinances. The zoning code prohibits not only the construction of advertising signs, but also their maintenance and operation. ER 038-42 (§ 17.52.515(A)). Further, the Code states that a person "shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this title is . . . continued . . . ." ER 053-54 (§ 17.59.200). Under California law, where the legislature divides continuous action "into a series of separately punishable acts," a person who embarks on a course of violative conduct commits multiple separate offenses. *People v. Djekich*, 229 Cal. App. 3d 1213, 1220-22 (1991) ("[A] provision declaring each day a violation continues a separate of-

fense is designed to make enforcement of a zoning ordinance more facile and more effective.").

Plaintiffs' proposed application of Rule 13(a) and claim preclusion to bar *all* future enforcement guts this principle, undermines County Code section 17.59.200, and essentially immunizes Plaintiffs' continuing violations of the code in perpetuity. Those doctrines cannot have such a far-reaching effect. *See* Fed. R. Civ. P. 13(a)(1) (limiting the rule's application to claims existing "at the time of [the pleading's] service"); *cf. Harkins Amusement Enters., Inc. v. Harry Nace Co.*, 890 F.2d 181, 184 (9th Cir. 1989) (declining to bar a claim for continuing offensive conduct; "[t]he defendants by winning [the prior suit] did not acquire immunity in perpetuity from the antitrust laws").

D. Plaintiffs presented no arguments that they were likely to succeed on the merits of their remaining claims.

As previously noted, Plaintiffs' arguments about likelihood of success on the merits have been predicated entirely on their second cause of action, which alleges that the County is pursuing a precluded enforcement action. However, Plaintiffs alleged the following four additional causes of action: (1) that the County's abatement procedures vio-

lated their rights of free speech (first cause of action), (2) that the sign code violated their rights to free speech (third cause of action), and (3) that the sign code violated their rights to equal protection (fourth cause of action). *See* ER 212-14; *see also* Dkt. 42 at 7-10 (First Amended Complaint asserting the same causes of action).

Plaintiffs did not attempt to establish the elements of any of these causes of action in support of their preliminary injunction motion below. Nor have they attempted to do so in this Court. As a result, Plaintiffs have waived any such argument. *See Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1117 (9th Cir. 2009) (holding appellant waived argument not raised below); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996) (holding that an appellant waives issues "not discussed in the body of the opening brief").

E. Plaintiffs' failure to exhaust administrative remedies provides an independent basis for the district court's order.

The Supreme Court has often reiterated "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.,* 303

U.S. 41, 50-51 (1938). Plaintiffs obviously have not exhausted their administrative remedies as to their preclusion arguments. On the contrary, they attempt to foreclose the entirety of the County's administrative process, which calls for a hearing before the Board of Zoning Adjustments and allows an appeal to the Board of Supervisors. ER 48-49 (County Code §§ 17.59.060, 17.59.090). In those proceedings, the landowner may present "all relevant evidence, objections or protests," *id.* § 17.59.060, including their preclusion theories.

Here, Plaintiffs' sole basis for enjoining the County proceeding is the alleged preclusive effect of the prior judgment.[5] ER 194-200. But a majority of the Courts of Appeals have held that enjoining administrative proceedings is improper under those circumstances because the plaintiff must exhaust its administrative remedies by first presenting its preclusion arguments to the agency. *See N. Nat. Gas Co. v. Trans Pac. Oil Corp.*, 529 F.3d 1248, 1251 (10th Cir. 2008) (applying *SEC v. Otis Co.*, 338 U.S. 843 (1949) (per curiam), and collecting cases). This

[5] In the prior action, Plaintiffs were able to obtain a preliminary injunction because exhaustion of administrative remedies is not required for the § 1983 claims that formed the basis for the injunction. *See Porter v. Nussle*, 534 U.S. 516, 523 (2002).

principle provides an independent basis for affirming the district court's order.

III. The district court did not abuse its discretion in addressing the remaining *Winter* factors, each of which weighs against enjoining enforcement.

A. The district court correctly concluded Plaintiffs will suffer no irreparable harm.

Plaintiffs misstate the standard for determining whether to grant or deny a preliminary injunction. AOB at 30 (citing *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002), *abrogated in part by Winter*, 555 U.S. at 22). Contrary to Plaintiffs' contention, they were required to show a likelihood of irreparable harm regardless of their probability of success on the merits. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011) ("Under *Winter*, plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction.").

Plaintiffs' claim of irreparable harm is premised on the likelihood that they will suffer First Amendment and due process violations. But Plaintiffs did not even argue the merits of their First Amendment claims, and thus failed to show any First Amendment injury. And they failed to explain how moving forward with the County's enforcement

proceeding, even if precluded, would be irreparable harm. Moreover, the district court concluded that Plaintiffs were unlikely to succeed on the merits of their due process claim. ER 14. After making this determination, the district court did not abuse its discretion by concluding that Plaintiffs failed to establish they were likely to suffer irreparable harm. *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d 1165, 1172 (9th Cir. 2015) (concluding that plaintiffs failed to establish irreparable harm after they failed to establish a likelihood of success on the merits of their First Amendment claims); *Feldman v. Reagan*, 843 F.3d 366, 394 (9th Cir. 2016) ("Because it is not likely that [plaintiff] will suffer a violation of her statutory or constitutional rights, she has likely 'failed to establish that irreparable harm will flow from a failure to preliminarily enjoin defendant's actions.'") (quoting *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986)).

But even setting aside the likelihood of success on the merits, Plaintiffs failed to demonstrate that they will suffer irreparable harm if the County conducts the code enforcement hearing that Plaintiffs seek to enjoin. ER 190. Although Plaintiffs assert that this hearing would lead immediately to the removal of their signs, AOB at 31-32, the Coun-

ty has agreed not to take any action to remove Plaintiffs' illegal signs until the administrative process has concluded and the time to challenge the County's administrative decision in court has run. ER 56-57, ¶¶ 2, 8, 10.

Plaintiffs argue that this agreement is "illusory." AOB at 32. But they do not explain why the County's written commitment is "illusory" or why it was abuse of discretion for the district court to conclude otherwise.

Moreover, the County's abatement procedures belie Plaintiffs' assertion that the County will immediately destroy their signs if not enjoined. First, there is no guarantee that the Board of Zoning Adjustments or the Board of Supervisors will order abatement. Second, if they order abatement, Plaintiffs may apply for a stay from the state court. *See* Cal. Civ. Proc. Code § 1094.5(g) ("the court . . . may stay the operation of the administrative order or decision pending the judgment of the court").

Plaintiffs argue, based on *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999), that irreparable harm is likely because such a stay is discretionary, not automatic. AOB at 33. But *4805*

Convoy does not require an automatic stay. In 2004, the Supreme Court held that the special procedural protections referenced in *4805 Convoy* are *not* required when the ordinance at issue simply conditions regulated expressive activity "on compliance with neutral and nondiscretionary criteria, . . . and does not seek to censor content." *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 784 (2004). The district court has already upheld the County's sign regulations as content-neutral and constitutional in the prior action. Prior Dkt. 71 at 20-27; ER 224-25 (acknowledging the constitutionality of the zoning ordinance). Thus, no special procedural protections are required for enforcing those content-neutral regulations. *See City of Littleton*, 541 U.S. at 782 (holding that "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm"); *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) ("We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]."); *Epona, LLC v. Cty. of Ventura*, 876 F.3d 1214, 1225 (9th Cir. 2017) (noting that "the *Freedman* safeguards are not required

for content-neutral time, place, and manner permit schemes"). In short, Plaintiffs will not suffer irreparable harm to their First Amendment rights simply because a state court stay is discretionary.

Plaintiffs' irreparable harm arguments based on *4805 Convoy* also have an even more fundamental flaw. The concern motivating *4805 Convoy* is the unconstitutional suppression of lawful protected speech. This concern is entirely absent here: Plaintiffs' signs are admittedly unlawful, and the district court has already concluded that the sign code is constitutional. ER 224-25. And Plaintiffs themselves admitted that they had no further objections to the County's sign regulations in the prior litigation, before changing their position when threatened with enforcement. Prior Dkt. 123 at 6 ("Citizens does not challenge the current sign code").

Finally, further undermining Plaintiffs' request for immediate injunctive relief, Plaintiffs waited more than four months—until just days before the scheduled administrative hearing—to file their complaint. See ER 176-77 (Notice to Abate sent September 28, 2017); ER 207 (Complaint filed February 8, 2018); ER 182 (Preliminary Injunction Motion filed March 7, 2018); *see also* ER 56-57, ¶¶ 2-8. This delay "implies

a lack of urgency and irreparable harm," and thus weighs against granting a preliminary injunction here. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Metromedia Broad. Corp. v. MGM/UA Ent. Co.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985) (denying motion for preliminary injunction where plaintiff delayed four months in seeking injunction).

B. The public interest and balance of harms weigh in the County's favor.

In determining that the public interest and the balance of harms weighed in the County's favor, the district court determined that Plaintiffs, in failing to show that their constitutional rights would be violated, also failed to show hardship. In contrast, the district court considered the County's "strong public interest" in enforcing its zoning laws. ER 15.

Plaintiffs argue that the district court abused its discretion by focusing on the County's and Plaintiffs' direct interests rather than the public interest. AOB at 34. But in failing to show that their constitutional rights would be violated, Plaintiffs failed to establish any public interest in maintaining their illegal signs, as well. The public has no conceivable interest in maintaining signs that admittedly violate sign

regulations that have been adjudged constitutional. Plaintiffs' citation to *Sammartano*, 303 F.3d 959, is inapposite. AOB at 34-35. In that case, the court identified a public interest in upholding First Amendment principles because the plaintiffs there established a "colorable" First Amendment claim. *Sammartano*, 303 F.3d at 973. Plaintiffs have established no such colorable claim here.

In contrast, the County established a strong public interest in enforcing its zoning code. Contrary to Plaintiffs' arguments, the County's interest in enforcing the code is in service of the public interest. The public has an interest in seeing its laws enforced. *See Enyart v. Nat'l Conference of Bar Examiners*, 630 F.3d 1153, 1167 (9th Cir. 2011) (affirming a district court's holding that the public's interest in the enforcement of its statutes outweighed the competing interests); *Ventura Cty. Christian High Sch. v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1254 (C.D. Cal. 2002) (denying preliminary injunction and finding strong public policy in favor of allowing city to enforce its zoning code against unpermitted structures).

CONCLUSION

The district court correctly concluded that Plaintiffs had failed to establish a likelihood of success on the merits of their Rule 13(a) and claim preclusion arguments. Plaintiffs did not even attempt to establish a likelihood of success on the merits of their remaining claims, which are barred by claim and issue preclusion. Further, the district court did not abuse its discretion by concluding that Plaintiffs had failed to show irreparable harm and that the remaining *Winter* factors weighed in the County's favor. Accordingly, Defendants-Appellees respectfully request that this Court affirm the district court's order denying Plaintiffs' motion for a preliminary injunction.

DATED: July 24, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: /s/
MATTHEW D. ZINN

Attorneys for Defendants and Appellees

STATEMENT OF RELATED CASES

The County is unaware of any related cases pending in this Court.

DATED: July 24, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: /s/
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Attorneys for Defendants and Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,151 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced roman typeface, 14-point New Century Schoolbook, using Microsoft Word 2016.

DATED: July 24, 2018

SHUTE, MIHALY & WEINBERGER LLP

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9th Circuit Case Number(s) 18-15970

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