TIMOTHY KASSOUNI, ESQ., SBN 142907
R.S. RADFORD, ESQ., SBN 137533
KASSOUNI LAW
621 Capitol Mall, Suite 2025
Sacramento, CA 95814
Telephone: (916) 930-0030
Facsimile: (916) 930-0033

FRANK C. GILMORE, ESQ., SBN 283859
ROBISON, SHARP, SULLIVAN & LOW
71 Washington Street
Reno, NV 89503
Telephone: (775) 329-3151
Facsimile: (775) 329-7941

Attorney for Plaintiffs CITIZENS FOR FREE SPEECH, LLC; MICHAEL SHAW

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CITIZENS FOR FREE SPEECH, LLC; MICHAEL SHAW; Plaintiffs, 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.	Case No.: 4:18-cv-00834-SBA **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (Doc#44)**

Plaintiffs CITIZENS FOR FREE SPEECH, LLC; and MICHAEL SHAW ("Citizens" or "Plaintiffs"), hereby bring their Opposition to Defendants' County of Alameda, Alameda County East County Board of Zoning Adjustments; Frank J. Imhoff, Scott Beyer and Matthew Ford's (collectively the "County") Motion to Dismiss the First Amended

Complaint ("FAC")(Doc#44). This Response is made and supported by the following Memorandum of Points and Authorities, the previously filed Request for Judicial Notice with attachments (Doc #26), Defendants' Request for Judicial Notice with attachments (Doc #29), and the pleadings and papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION

I. INTRODUCTION

The County's Motion to Dismiss seeks the Court's application of issue and claim preclusion to dismiss all but one of Plaintiffs' causes of action, but simultaneously contends that the same legal principles of preclusion do not apply to the County. If issue and/or claim preclusion applies to the instant case, then it must apply to both parties.

Citizens Second Cause of Action contends that the County violates their rights by attempting to proceed with abating the signs on the basis that proper application of preclusion principles bars the County's attempt to proceed with its administrative process to remove the signs which were the subject of the prior litigation. The Second Cause of Action states a claim for relief and should not be dismissed.

As to the First Cause of Action, the County contends that the first action is "meritless" and fails to state a claim. The County relies on Judge Breyer's prior rulings to support the contention that the County Code's Abatement Procedures are constitutional. The County misapprehends the first cause of action. That cause of action contends that the Abatement Procedures violate the constitution because it permits the County to abate the signs before a judicial officer can determine whether the County is barred from abating the existing signs under Fed. R. Civ. P. 13(a) and claim preclusion. The first cause of action states a claim for relief and the Motion must be denied as to that claim.

Citizens has alleged in its Third and Fourth Causes of Action that if the County is not precluded from re-litigating the issue of abatement, then Citizens should be permitted to challenge sections of the Alameda Code which remain unconstitutional. However, if Citizens is barred from re-litigating the issues related to its signs and the Code, then the County is similarly barred.

Robison, Sharp, Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

II. BACKGROUND AND ALLEGD FACTS

In determining whether a claim is barred from proceeding on preclusion grounds, this Court may take judicial notice of facts, like the filings and findings in prior actions, in order to properly examine whether preclusion applies. Mack v. S. Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). However, reviewing other facts outside those which are susceptible to judicial notice will convert the Motion to Dismiss into a Motion for Summary Judgment, which would be prejudice Plaintiffs without being afforded an opportunity to oppose a motion which may be converted to a motion for summary judgment. Id. (citing Erlich v. Glasner, 374 F.2d 681, 683 (9th Cir.1967).

Plaintiff Shaw is the owner of a parcel of land located at 8555 Dublin Canyon Road, within the unincorporated area of the County (the "Parcel"). FAC, Doc #42, ¶8. Plaintiff Citizens has entered into an agreement with Shaw for the construction and display of signs on the Parcel. Id. at ¶9. In or about 2014, Citizens displayed signs on newly constructed structures on the Parcel per the agreement with Shaw. These signs initially displayed political messages which Citizens considered to be contrary to the political ideology espoused by County officials (the "Signs").

The County has promulgated certain ordinances, known as the Alameda County Code of Ordinances (the "Code"), which purport to regulate the display of signs in unincorporated areas of the County. Id. at 11. Citizens admit that the display of their signs was not allowed under the Code. Id.

A. The Prior Action.

On June 1, 2014, Citizens filed suit in United States District Court for the Northern District of California (Oakland), Case No. 4:14-cv-02513, (the "Prior Action"), naming the County as defendant. In the Prior Action, Citizens alleged that the Code's regulation of signs violated Citizens' 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 Citizens' Signs. Prior Action, Doc #1 ("Prior Dkt."). Citizens

prayed for "actual damages according to proof at trial; For additional actual, consequential, and other special damages in an amount according to proof at trial." Id.

In response to the Prior Action and the construction of the Signs, on June 11, 2014, Shaw received a "Declaration of Public Nuisance – Notice to Abate" (2014 Notice) from the County. Exhibit 1 to FAC. The 2014 Notice asserted that Shaw was in violation of "Alameda County Zoning Ordinance Section 17.18.010 and 17.18.120." Id. The 2014 Notice ordered that the signs be removed within ten days from the postmarked date of the notice. Id. The 2014 Notice also threatened fines and an abatement hearing if the Signs were not removed. Id.

On July 16, 2015, Judge Breyer in the Prior Action 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 (N.D. Cal. 2015). The County responded by amending the section on September 29, 2015, removing the unfettered discretion of the County officials. Prior Dkt. 105, p.4.

In the Prior Action, both the County and Citizens argued the constitutionality and application of Code §17.18.120. Prior Dkt. 105, pp.12-13. In response to Citizens' Motion for Summary Judgment, the County contended that:

> "The signs were in violation of section 17.18.120 when they were erected, and they continue to be in violation of that section. Unless plaintiffs follow the County's procedure for seeking approval of new uses for the property, the County has an obligation to pursue abatement procedures."
>
> Prior Dkt. 92, p.9.

Further, the County conceded that "[t]he essence of plaintiffs' claims in [the Prior Action] is that, although the signs were in conflict with section 17.18.120, the procedure which the County had established at that time for consideration of the plaintiffs' right to erect the signs was constitutionally deficient . . . ." Prior Dkt. 92, p.9.

Judge Breyer acknowledged that the County had argued that Citizens violated Code §17.18.120: "County argues that it was actually section 17.18.120 . . . with which

Plaintiffs failed to comply." Prior Dkt. 105, pp.12-13.

On July 8, 2016, Judge Breyer entered his order granting in part, and denying in part, Citizens' Motion for Summary Judgment. Prior Dkt. 105. Among other findings, the Court concluded that Citizens were entitled to summary judgment as to their "Equal Protection challenge to section 17.52.520(A) . . . because that section is content-based and cannot withstand strict scrutiny." Id. at p.7

On July 8, 2016, pursuant to the success of Citizens' equal protection claim, Judge Breyer entered his Order Granting Motion for Damages and Attorneys' Fees in favor of Citizens ("Damages Order"). Prior Dkt. 130. Judge Breyer confirmed that Citizens' "prayer for relief in the Complaint sought, among other things, 'actual, consequential, and other special damages in an amount according to proof at trial' and 'such other and further relief as the Court deems just, equitable, and proper.'" Id. at p.3. Judge Breyer decided that "The Court will award Citizens nominal damages of one dollar to acknowledge the 'importance to organized society' that its constitutional rights 'be scrupulously observed.'" Prior Dkt. 130, pp.5-6. The district awarded Citizens attorneys' fees and costs. Prior Dkt. 130, p.17. A final Judgment ("Judgment") was entered on March 8, 2017. Prior Dkt. 131. The County did not file a counterclaim in the Litigated Case. See Prior Action Docket.

B. The 2017 Notice to Abate and the 2018 Action.

On or about October 6, 2017, Appellant Michael Shaw received a "Declaration of Public Nuisance – Notice to Abate" from the County ("2017 Notice"). FAC, Exhibit 2. The 2017 Notice is substantially similar to the 2014 Notice, in that it: (1) determines that the Signs violate Code §17.18.120, (2) orders that the Signs be removed within ten days from the postmarked date of the Notice, (3) failure to cure the violations will result in monetary penalties, and (4) provides the opportunity to appeal. Id.

On or about November 22, 2017, the County mailed to Plaintiff Shaw a "Notice of Administrative Hearing on Abatement of Nuisance" ("Notice of Administrative Hearing"). FAC, ¶23. This notice stated that the Board would conduct an administrative adjudication

Robison, Sharp, Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

to determine whether the signs violate the Code, and could authorize the demolition and removal of the signs and their support structures by the County, at Plaintiffs' expense. Id.

III. STANDARD OF LAW

Citizens agrees with the County's recitation of the applicable Rule 12(b) standard.

IV. ARGUMENT

A. Citizens' Second Cause Of Action States a Valid Claim for Relief.

In its Second Cause of Action, Citizens contend that the current administrative proceeding meant to remove the signs (hereinafter the "Abatement") is being prosecuted in violation of Rule 13(a) of the Federal Rules of Civil Procedure and California Code of Civil Procedure §§426.10 - 426.70.[1] Citizens seeks declaratory relief, injunctive relief, and damages. This Cause of Action states a claim for relief under Rule 12(b).

1. Rule 13(a) -- Compulsory Counterclaims

The Prior Action involved the County's contention that the Signs violated §17.18.120 of the Code, and as such, the County was required to assert an abatement counterclaim in accordance with Rule 13(a). The facts that gave rise to the Prior Action are virtually identical to those on which the County now bases the Abatement. Citizens alleges that in response to the original construction of the Signs, the County served the 2014 Notice, asserting violations of §17.18.120. After the Judgment was obtained in the Prior Action, the County served a subsequent notice, the 2017 Notice, which is substantially similar to the 2014 Notice, alleging that the Signs violated §17.18.120. Prior to the Judgment, the County considered taking action to remove the Signs for the same reasons identified in the 2017 Notice. Judge Breyer noted that, "the 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." Prior Dkt. 130, p.8.

1 Citizens agrees that for purposes of this action, California Code of Civil Procedure §§426.10 - 426.70, does not apply. However, for purposes of the subsequent California state-court action that will occur after the Abatement, that section of the California Code will apply. Citizens cites this section in its FAC to ensure against an argument contending Citizens waived the right to assert California's compulsory counterclaim rule.

Robison, Sharp, Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

Clearly, the 2017 Notice "arises out of the transaction or occurrence that is the subject matter" of the Prior Action. Fed. R. Civ. P. 13(a). This clearly establishes a "logical relationship" between the two sets of facts, and therefore establishes Rule 13(a) is implicated to bar any subsequent claims brought by the County after the conclusion of the Prior Action. The County does not contend that the 2017 Notice arose from different transactions that were at issue in the Prior Action. Instead, the County contends only that this Court's Order Denying Preliminary Injunction (Doc #36)(hereinafter "Injunction Order") dooms the Second Cause of Action.

However, the Injunction Order did not address Citizens' contention that the 2014 Notice (which was litigated in the Prior Action) and the 2017 Notice (the subject of the pending Abatement arise from the same transaction. Without discussion of the substance of Rule 13(a), this Court merely concluded that the compulsory counterclaim rule does not apply to a subsequent action where the prior action was merely a declaratory action, because a counterclaim in a declaratory relief action "would have been superfluous," citing *Twin City Fire Ins. Co. v. McBreen & Kopko LLP*, 847 F. Supp. 2d 1084, 1088 (N.D. Ill. 2012).

The only analysis offered by this Court in rejecting Citizens' Rule 13(a) argument was that a counterclaim is unnecessary where "it is merely the flipside of a complaint for declaratory relief." Injunction Order, p.8. This Court concluded that the Prior Action was only a declaratory relief action. *Id*.

However, the case cited by this Court to support its conclusion is inapposite. In *Twin City Fire Ins. Co. v. McBreen & Kopko LLP,* an insurance company filed a purely declaratory relief action seeking a determination as to its obligation to defend its insured law firm on a claim for breach of fiduciary duty. 847 F. Supp. 2d at 1085. No damages or coercive relief were sought. The court dismissed the declaratory counterclaims of the law firm as "unnecessary" and redundant. *Id*. at 1088. This opinion and its holding has no application to Citizens' Second Cause of Action.

As set forth above, the Prior Action contained First Amendment challenges to the

County Code. Citizens sought damages, declaratory relief, and injunctive relief. After cross-motions for summary judgment, the district court found the Code to be unconstitutional, entering Judgment in Citizens' favor. Citizens were awarded nominal damages and attorneys' fees. The Prior Action was not merely a declaratory relief action. Thus, this Court's reliance on *Twin City* was misplaced.

The County contends that Rule 13(a) cannot be used to bar the Abatement, and that the County had the option to defer its administrative proceeding until after the Prior Action concluded. This type of forum shopping is precisely the type of multiplicity that Rule 13(a) is designed to prevent.

> 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) (citation omitted).

The County acknowledged in its filings in the Prior Action that it maintained an intent and desire to commence an abatement proceeding to remove the Signs. Prior Dkt #130, p.8. The County explained to the district court in the Prior Action that once the injunction was dissolved, it intended to seek abatement proceedings. *Id*. The County could have, and should have, asserted an abatement/nuisance counterclaim in the Prior Action. 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."). Because the County failed to plead the claim in the Prior Action, the subsequent administrative action is barred under Rule 13(a).

Robison, Sharp, Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

2. Claim Preclusion Bars the Abatement Efforts.

The County's Abatement is barred by the doctrine of claim preclusion. "Claim preclusion," or res judicata, "bars litigation of claims that were or could have been raised in a prior action." *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007). "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (internal citation omitted). Claim preclusion is to be widely applied: it "bars bringing claims that were previously litigated as well as claims that were never before adjudicated." *Clements v. Airport Auth. of Washoe Cty*., 69 F.3d 321, 327 (9th Cir. 1995).

This Court has properly identified the circumstances in which res judicata bars subsequent litigation of claims raised in prior litigation. Injunction Order, p.11. This Court acknowledged that "res judicata bars relitigation not only of all grounds of recovery that were actually asserted, but also those that could have been asserted." *Id*. (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980). However, this Court then determined that the "salient question is whether the final judgment entered in the Prior Acton bars the County's current attempt to enforce its sign ordinances against [Citizens] [in the administrative proceeding]." *Id*. This Court then answered its own question by concluding that the Prior Action Judgment does not expressly enjoin the County from proceeding with the abatement proceeding. *Id*. However, the doctrine of res judicata does not require that the final judgment in the prior case expressly resolve the subsequent claim, or that the particular claims was *actually litigated*; res judicata only requires that the subsequent claim was one that "could have been asserted," and that a final judgment was rendered. *Clements*, 69 F.3d at 327. The County's Abatement claim could have been asserted in the Prior Action in the form of a counterclaim, but it was not. Accordingly, res judicata bars the County's 2017 efforts to pursue it.

This Court concluded that the Judgment did not expressly enjoin the County, so res judicata did not apply. However, for res judicata, the substance of the Judgment is

Robison, Sharp, Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

immaterial. Res judicata bars the County's abatement proceeding because it was a claim that could have – and should have – been brought in the Prior Action. The case of *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003), makes this plain.

In that case, The Circuit Court concluded that res judicata:

> bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits. **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**.

Id. at 1078 (emphasis added).

The Injunction Order did not consider whether the abatement claim could have, or should have, been brought in the Prior Action. This Court only evaluated the substance of the Judgment, and concluded that nothing in the Judgment precluded the County from pressing forward with its abatement hearings. The Abatement could have, and should have, been brought in the Prior Action.

There were no obstacles to the County bringing the abatement counterclaim in the Prior Action. First, the Code expressly permits the County to commence a civil action to seek abatement of a nuisance in lieu of administrative hearings. Code §17.59.190. This forecloses the County's contention that it's Abatement could not be litigated in the Prior Action.

Second, the County confirmed to Judge Breyer that it intended to abate the alleged nuisance: "the 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." Prior Dkt. 130, p.8. The County elected not to pursue the claims in the Prior Action so that it could do so in subsequent proceedings, ignoring the preclusive effects of res judicata. This was a purely tactical decision that res judicata is

Robison, Sharp,
Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

intended to prevent. See *Semtek Int'l Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 498, 121 S. Ct. 1021, 1023, 149 L. Ed. 2d 32 (2001).

Finally, it is clear that here "[i]dentity of claims exists" because the Prior Action and the 2017 Notice "arise from the same transactional nucleus of facts." Whether an identity of claims exists requires analysis of four factors: (1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions. *Mpoyo v. Litton Electro-Optical Sys*., 430 F.3d 985, 987 (9th Cir. 2005). "Whether two events are part of the same transaction or series . . . depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992). Here, the 2014 Notice, which was at issue in the Prior Action, seeks the same relief as the 2017 Notice. The central issue in the Prior Action was whether the Signs could be maintained in light of the unconstitutional County Code. Prior Dkt. #105, p.7. Unquestionably, the issue of whether Citizens' Signs constituted a nuisance appropriate for abatement could have logically been tried together with Citizens' §1983 claims.

The County has contended, without support, that res judicata cannot bar a subsequent administrative proceeding. While there does not appear to be binding authority on this issue in this Circuit, the Supreme Court has made it clear that an administrative proceeding litigated to finality will preclude subsequent court action.

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 2169, 115 L. Ed. 2d 96 (1991). If an administrative proceeding can bar subsequent court action, then it stands to reason that a court action can bar subsequent administrative proceedings.

B. <u>The First Cause Of Action States a Claim for Relief.</u>

Citizens' first Cause of Action challenges the Abatement Procedures as a violation of Citizens' constitutional rights. The County's Abatement Procedures does not provide requisite protection that the County will not Abate the Signs before determination of the merits of Citizens' claims by a judicial officer.

The County's administrative procedure for abatement of signs is contained in Chapter 17.59 of the Alameda County Ordinance Code, entitled the "Abatement Procedures." The Code provides that if an enforcement officer deems a property to constitute a nuisance, the property owner is to receive a notice to abate. §17.59.030. In the event the property owner refuses to abate the nuisance, the County shall hold a hearing before the Board. §17.59.040. The Board does not consist of judicial officers, but instead consists of citizens selected by County officials.

If, after a hearing, the Board determines that a nuisance exists, it may enter an order for abatement of the nuisance. §17.59.060. The order includes the right to appeal to the County Board of Supervisors, an elected body. §17.59.090. After a hearing held by the Board of Supervisors, a resolution may be entered setting forth the conditions of the abatement with timing requirements. §17.59.100. A property owner may appeal a Board of Supervisors order within thirty days. §17.59.120. The Abatement Procedure does not contain a provision which permits the property owner to seek and obtain an automatic stay of the enforcement of the abatement order pending a decision from a judicial officer. The Abatement Procedure permits the County to abate a sign deemed to be a nuisance without the requirement that a judicial officer evaluate the abatement order from the Board of Supervisors.

Here, Citizens are facing removal of their Signs in violation of the protections afforded them in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999). The Abatement Procedure grants discretion in the board of supervisors to abate the Signs without protecting the status quo pending judicial review. The Code merely permits Citizens the right to seek judicial review, but it does not provide for a stay of enforcement pending judicial review. This runs afoul of the safeguards needed to "guard against undue delay that could lead to the suppression of protected speech." *Id*. Under the Abatement Procedure, there is no mechanism to ensure that the Signs are not abated until after a judicial officer reviews the appropriateness of the abatement. *Id*. Thus, the County's own self-seated administrative hearings officers could order the Signs abated, and they would be abated, prior to any opportunity for judicial review. Critically, even if Citizens may be able to seek a stay of abatement in the judicial review process, this does not satisfy Convoy. 183 F.3d at 1116 (where "there is no guarantee of a stay" after seking judicial review, "[t]his gives rise to the possibility of the suppression of protected expression before judicial review of the case on the merits").

The County contends that the administrative process does not qualify as a prior restraint because the Signs were built before the Abatement effort. Motion, p.13. This argument lacks merit.

First, "[a] permitting requirement is a prior restraint on speech and therefore bears a heavy presumption against its constitutionality." *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir.2009). The Sign Code requires a permit before being able to display a sign. Thus, the Code is a prior restraint. The allegation raised in the First Cause of Action is that it constitutes an illegal prior restraint because it lacks constitutional safeguards against impermissible denial of speech because the board of supervisors can abate a sign without judicial review. Abatement of the Signs is unquestionably an attempt to deny speech on the basis that Citizens lack a sign permit. The County's distinction as to timing of the speech relative to the enforcement action is simply wrong. The theory of the prior restraint is that "a free society prefers to punish the few who abuse

rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59, 95 S. Ct. 1239 (1975). "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). In other words, a prior restraint itself burdens speech, and it does not require that a court find that licenses have been improperly denied to find that such a prior restraint violates the First Amendment. Simply because the timing of the Signs pre-dated the enforcement action does not render the Abatement Procedures a valid prior restraint.

Second, while *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1116 (9th Cir. 1999) dealt with licensing of adult expression, the concepts contained therein are not limited to only obscenity licensing or revocation. Speech, and speech conduct which requires a license also qualifies as a prior restraint. See *City of Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, 759 (1988)(newsrack licenses); *Epona v. Cty. of Ventura*, 876 F.3d 1214 (9th Cir. 2017)(wedding ceremonies); *Kaahumanu v. Hawaii*, 682 F.3d 789 (9th Cir. 2012)(commercial activity on public beaches); *Se. Promotions*, 420 U.S. at 546 (denial of permission for the production of "Hair" in a public auditorium).

Third, the protections necessary to guard against illegal prior restraints apply to all First Amendment activities, particularly signs and display of speech. "[A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." *Se. Promotions, Ltd*., 420 U.S. at 560. Here, the Abatement Procedures do not provide the opportunity for prompt judicial

review and status quo pending the determination.

Lastly, the judicial review Citizens seek is with respect to the preclusive effects of the Prior Action to the Abatement. Undoubtedly, the administrative hearings board will not be sufficiently equipped to address Rule 13(a) and res judicata. Judicial review is paramount before the Signs can be abated.

C. <u>If Citizens' Third and Fourth Cause of Action are Barred by Preclusion, then The Abatement Should Also Be Barred</u>.

The County cannot urge the Court to apply preclusion doctrines to Citizens' claims but simultaneously contend that preclusion does not apply to its Abatement. For all the reasons the County has presented as to why Citizens' Third and Fourth Causes of Action are barred, the County's Abatement is barred. The County cannot have it both ways. Either preclusion applies to all subsequent proceedings brought after the Judgment, or they do not. The County all but concedes this fact. The County confirms that the 2017 Notice "changes nothing," because the Abatement is "merely continu[ing] the same enforcement action that [Citizens] unsuccessfully sought to enjoin in the prior action." Motion, p.9:11-13. If, as the County concedes, the 2017 Notice merely continues the prior 2014 Notice, then the County has conceded that res judicata applies with equal force to any substantive claims brought by either party subsequent to the Judgment.

III. CONCLUSION

For the reasons set forth above, the Motion to Dismiss must be denied.

DATED: This 9th day of July, 2018.

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

/s/ Frank C. Gilmore
FRANK C. GILMORE, SBN 283859
TIMOTHY KASSOUNI, ESQ., SBN 142907
R.S. RADFORD, ESQ., SBN 137533
Attorneys for Plaintiffs/Appellants CITIZENS FOR FREE SPEECH, LLC; MICHAEL SHAW

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that on this date I caused to be served a true copy **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** on all parties to this action by the method(s) indicated below:

____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Matthew D. Zinn, Esq
Winter King, Esq.
Aaron M. Stanton, Esq.
Shute, Mihaly & Weinberger, LLP
396 Hayes Street
San Francisco, California 94102
Attorneys for Defendants

__X__ by using the Court's CM/ECF Electronic Notification System addressed to:

Matthew D. Zinn, Esq
Email: Zinn@smwlaw.com
Winter King, Esq.
Email: King@smwlaw.com
Aaron M. Stanton, Esq.
Email: Stanton@smwlaw.com

____ by placing an original or true copy thereof in a sealed envelope for personal delivery/hand delivery of original addressed to:

____ by facsimile (fax) addressed to:

____ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 26th day of July, 2018.

/s/ Mary Carroll Davis
Employee of Robison, Sharp, Sullivan & Brust

Robison, Sharp,
Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151