4th Civ. No. E036258

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF RIVERSIDE,

Plaintiff, Appellant and Respondent,

v.

VALLEY OUTDOOR, INC.,

Defendant, Appellant and Respondent.

Appeal from the San Bernardino County Superior Court
Case No. SCVSS 115579
Honorable Keith D. Davis

COMBINED RESPONDENT'S AND APPELLANT'S OPENING BRIEF

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INTRODUCTION.

In early 2000, Valley Outdoor, Inc. ("Valley") constructed and installed five oversized billboard structures in the City of Riverside (the "City") without obtaining permits or public safety inspections in defiance of multiple provisions of the Riverside Municipal Code ("RMC"). Valley filed a federal lawsuit to prevent the City from removing the signs. Valley lost. The district court adjudged the signs illegal, a nuisance and subject to immediate abatement. No other outcome was possible. Valley itself stipulated in the federal pretrial order that it (1) made a deliberate decision to begin constructing its signs without applying for permits; (2) completed the foundational work for its signs before applying for permits or inspections; (3) proceeded to install the above-ground portions of the signs without permits or inspections; (4) made inspection impossible by closing the hole to be inspected; and (5) wired and energized three of its signs without electrical plan review, permits or inspections, presenting a potential fire and/or electrocution hazard.

The district court invited the City to seek immediate state-court relief to remove the above-ground portions of the signs. Valley appealed and sought emergency relief from the Ninth Circuit. It lost again. The Ninth Circuit refused to stop the City from removing the signs, finding that Valley had not shown irreparable harm or a likelihood of success on appeal. On the contrary, the Ninth Circuit expressly noted that it was "*clear* from the findings of the district court" that Valley erected billboard structures in the City without first obtaining permits or city inspections in violation of

"ordinances of the City of Riverside." (Valley's Appendix ["VA"] 196-197, emphasis added.) According to the district court, the Ninth Circuit gave the City "a green light to remove [Valley's] non-conforming structure[s] with the exception of the foundation." (VA 60.)

The City then filed the present case and sought a preliminary injunction to effect the immediate dismantling and removal of the above-ground portions of Valley's signs – exactly as envisioned by the two federal courts. The City established its right to a preliminary injunction by proving it was not simply likely but *certain* to succeed on the merits because:

1. The status of Valley's signs was *fully adjudicated* in Valley's federal lawsuit – and the signs were found to be illegal and their above-ground portions subject to *immediate abatement* in state court; and

2. Under California law, the federal judgment, though appealed by Valley, is final for res judicata and collateral estoppel purposes, and binding on Valley in state court.

The trial court acknowledged all of this. It even agreed that the City was entitled to preliminary injunctive relief.

So why is it that Valley's five illegal billboard structures are still standing?

The answer: The trial court, while acknowledging the imperatives of res judicata, was not prepared to obey those imperatives by ordering Valley to take down the above-ground portions of its signs. Instead, the court crafted its own approach, ordering Valley to remove all commercial (as opposed to public-service) copy from the signs and enjoining it from placing new commercial copy on them. The signs, however, were allowed to remain standing.

The court gave as its sole justification for this curious decision its concern that there was a pending federal appeal and thus "the possibility, however remote, that the Ninth Circuit may in fact reverse [the district court's] ruling." (Reporter's Transcript ["RT"] 13-14.) Were that to happen, the trial court feared "the possibility of future damages" if the billboards had to be restored, "particularly where public funds will have to be expended." (RT 14, 16.)

The trial court was wrong in refusing to order Valley to remove the above-ground portion of signs that two federal courts had held to be illegal.

The trial court had no discretion to deny the City that relief. As the court itself found, the City more than satisfied the two prongs of preliminary injunctive relief – proving a *certainty* of success on the merits and irreparable harm *as a matter of law*. By reason of the collateral estoppel effect of the federal judgment, the City must be deemed to have prevailed on the merits of this litigation just as if there had been a state-court trial. By using the appellate posture of the federal judgment as the basis for allowing Valley to maintain its illegal signs, the trial court effectively negated the California rule that a federal judgment, even on appeal, is final for res judicata purposes.

For signs that were illegal *ab initio*, Valley's signs have been allowed to remain standing far too long. At the outset of its federal action, Valley obtained a federal injunction that precluded the City from removing the signs. As a result, for four years, Valley has maintained the illegal signs and raked in huge, unearned revenues from leasing space on them.

But, after entering judgment in the City's favor, the district court made clear that Valley's free ride was over:

> [T]he Ninth Circuit has given me the authority . . . to order the removal of the sign above ground within so many days and *I've already delayed it, and delayed it, and delayed it* . . . but there *has to be a day now* in which, you know, *the sign has to be dismantled to ground level.*

(VA 265, emphasis added.)

Because the trial court here refused to act, that "day" has still not arrived. Meanwhile, the limited injunction the trial court crafted has failed in its purpose of stopping Valley's illegal earnings. Valley has not only *not* stripped its signs of commercial messages, it has *increased* their number by replacing public-service announcements with *new* commercial messages. (City's Appendix ["CA"] 95-98.)[1]

The injunction the City seeks is interlocutory in name only; in substance, it is akin to a permanent injunction, because all the facts necessary to justify it were determined in favor of the City in Valley's federal lawsuit. Valley's federal appeal is irrelevant. Under the governing law, the relevant judgment is to be given immediate collateral estoppel effect. The trial court erred in refusing to grant relief that the federal courts expressly countenanced and that the City was certain to obtain at trial.

STATEMENT OF FACTS

As noted, the facts that form the basis of the City's suit against Valley and of the trial court's ruling on the injunction are largely

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[1] The City's Appendix includes relevant documents from the trial court that were not included by Valley in its Appendix, as well as omitted portions of a document included in Valley's Appendix.

undisputed. They come from two sources: Valley's pleadings in its unsuccessful federal lawsuit against the City and the findings and determinations made by the district court in entering judgment as a matter of law against Valley on the causes of action in its federal complaint.[2]

A. Valley Erects Five Billboards In The City of Riverside Without Building, Electrical Or Use Permits And Without City Inspections.

In early January 2000, Valley began the process of constructing and installing five outdoor billboard structures (also known as off-site or off-premises signs) on parcels of land within 50 to 100 feet from the 91 Freeway in the City of Riverside. (VA 100-101, 151.) By January 15, 2000, Valley had excavated the foundations, poured the concrete footings, and completed all underground work necessary for the installation of the billboards. (VA 100-101, 151, 152.) In the following weeks, Valley completed the construction of the above-ground portions of the billboards, including electrical work and wiring, and installed the billboards on the freeway-proximate parcels of land. (VA 100-102, 151-152, 155.)

Valley constructed, installed and electrified its billboards without obtaining building, electrical or use permits, without requesting or obtaining structural and electrical inspections by city officials and without submitting plans or specifications to the City. (VA 151-153, 155.) It acted

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[2] As we show below, Valley is bound by both the admissions in its pleadings and the district court's findings.

deliberately. (VA 152.) It acted stealthily to conceal its illegal activities.[3] It acted although it knew that by pouring the concrete for the footings it made future city inspection impossible. (VA 152.) It acted although it knew that wiring and energizing its signs without permits or inspections presented a potential fire and/or electrocution hazard. (VA 155.)

Valley's actions violated multiple sections of RMC. Specifically, Valley's billboards are illegal and nonconforming under the following sections of the RMC:

1. **Section 19.76.210(A)**: No sign shall be erected, installed, constructed or lighted "until a permit for the same has been issued."

2. **Section 16.08.020** (adopting § 106 of the Uniform Building Code ["UBC"]): "[N]o building or structure regulated by this code shall be erected [or] constructed . . . unless a separate permit for each building or structure has first been obtained." (§ 106.1.)

3. **Section 16.08.020** (adopting § 108 of the UBC): All construction shall be subject to inspection and "shall remain accessible and exposed for inspection purposes." (§§ 108.1, 108.5.1, 108.5.2.)

4. **Section 16.16.020** (adopting § 301 of the National Electrical Code ["NEC"]): No electrical system shall be installed "unless a separate electrical permit for each building, structure, system or equipment has first been obtained." (§ 301.1.)

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[3] Valley did not apply for use, building or electrical permits or request inspections. (VA 151-153, 155.) It installed the above-ground portions of its billboards in the pre-dawn hours of a Presidents' Day holiday weekend. (VA 151.) It served the City with its federal lawsuit only after its billboards were fully installed, serving the complaint on the very day after the installation – a 40-day delay between filing and service. (VA 152.)

5. **Section 16.16.020** (adopting §§ 305 and 306 of the NEC): All electrical systems and equipment shall be subject to inspection, "the electrical system shall remain accessible and exposed for inspection purposes" and persons shall not make electrical connections with building-official approval. (§§ 305.1, 305.2, 305.4, 306.1.)

6. **Section 16.16.051**: All electrical wiring and equipment "shall be inspected and approved by the Building Official before being concealed, energized or used."

On March 3, 2000, the City tagged each of Valley's billboards with stop-work notices. Each notice stated: "Billboard installed without permits and inspections"; each notice directed Valley to "stop work, obtain permits, request inspections." (VA 163-177.) Thereafter, the City also served Valley with five documents entitled "Notice To Remove Sign" directing Valley to remove each of its five billboards by June 14, 2000. (168-177.) As shown below, Valley did not remove any of its billboards by the June 14 date; all the billboards are still standing and Valley continues to earn revenue from their use as part of its business

B. Shortly After Valley Begins Construction, In A Separate Case, This Court Invalidates Part Of The City's Sign Ordinance, But Upholds The Remainder As Valid And Enforceable. The City Amends The Ordinance.

In *City of Riverside v. Outdoor Media Group, Inc.*, E022351 (Jan. 13, 2000) (the "*OMG* case"), this Court upheld the constitutionality of the City's sign ordinance (RMC, Chapter 19.76), except for those portions banning off-site signs. It upheld the ordinance's restrictions on commercial

signs as justified by aesthetic concerns and held that for the same reason the City could constitutionally restrict off-site billboards on property where on-site signs were allowed. (VA 506-508.) It also ruled that the ordinance did not favor commercial over non-commercial speech in its regulation of on-site signs. (VA 508-511.)

However, the ordinance's regulation of off-site signs was struck down to the extent it effectively prohibited all non-commercial off-site signs, thereby regulating speech on the basis of content, without showing a compelling state interest. (VA 508-516, 519-520.) It was "not possible," this Court concluded, "to save the ban on 'off-premises' signs" [RMC, § 19.76.020 (A)(3)] or the "other portions of the Ordinance, purporting to regulate 'off-premises' signs allowed by exception [§§ 19.76.020 (B) (1)-(14)]." (VA 519-520.)

But the court upheld the rest of the sign ordinance: "[T]he remaining portions of the Ordinance are valid and may be enforced." (VA 520.)

In response to the *OMG* case, the City amended the sign ordinance, effective March 2, 2000. (VA 102, 153.) It included an express statement of purpose at the start of the ordinance, declaring that "the purpose of this sign ordinance" is "to preserve and enhance the aesthetic, traffic safety and environmental values of our communities and growing commercial/industrial districts" and to "safeguard[] and preserve[] the health, property, and public welfare of Riverside residents." (RMC, § 19.76.005.) As recited in the amended ordinance, those values were advanced by:

- Keeping sign information "to a minimum, specifically with regard to signs adjacent to freeways" (*ibid.*);

- "[M]inimiz[ing] visual clutter, and enhanc[ing] traffic safety by ensuring that signage does not distract, obstruct or otherwise impede traffic circulation" (*ibid.*);
- "[P]rohibiting, regulating, and controlling the design, location, and maintenance of signs" (*ibid.*).

The amended ordinance also permits non-commercial signs wherever other signs are permitted, and in all zones (i.e. even where commercial signs are not permitted) subject to reasonable time, place, and manner regulations. (RMC, §§ 19.76.005; 19.76.020(B)(9).)

These facts are not in dispute, having been stipulated to by Valley in the federal-court pretrial order. (VA 153-154.)

C. Valley Sues The City In Federal Court And Unsuccessfully Attacks The Constitutionality Of The City's Sign Ordinance.

Two days after beginning its secretive and illegal billboard construction, Valley (along with Regency Outdoor Advertising, Inc.) filed a federal lawsuit (*Valley Outdoor, Inc., et al v. City of Riverside*, United States District Court, Central District of California, Case No. CV 00-00370k-DT (CWx)) attacking the City's sign ordinance on constitutional grounds and seeking to enjoin the City from enforcing the ordinance or otherwise interfering with Valley's erection or maintenance of billboards built without permits or city inspections. (VA 93, 100-101.) Valley sought declaratory and injunctive relief and damages under 42 U.S.C. section 1983. (*Ibid.*) As noted, the lawsuit was not served on the

City until Valley had successfully completed installation of its illegal signs. (VA 151-152.)

Valley later amended its complaint (its third amended complaint is the operative complaint) to allege that the March 2, 2000 amendments regulating the size, height and location of off-premises signs were also unconstitutional on their face and as applied. (VA 102, 110-112.)

The district court rejected all Valley's facial challenges to the constitutionality of the City's regulations of billboards. It held that the City's ordinances, including the permit, inspection and zoning provisions, are constitutional regulations of the non-communicative aspects of billboards, promote the substantial governmental interests of aesthetics and safety and do not discriminate in favor of commercial speech at the expense of non-commercial speech. (VA 145-148, 190, 309-311.) It also upheld the constitutionality of the City's amended size, height and location restrictions and of the provision limiting nonconforming use status to "lawfully established" structures. (VA 145-148, 296-297.)

In addition, it rejected Valley's misleading description of what this Court held in the *OMG* case. According to Valley, this Court held that the City's sign ordinance, as regards off-premises signs, was unconstitutional in toto, invalidating "all its provisions regulating off-premises signs" and declaring unenforceable the provisions "regulating the construction and/or maintenance of off-premises signs." (VA 101-103, ¶¶ 15, 17, 21.)

However, the district court disagreed: "There were other provisions that were found by the State Court of Appeal and this court to be valid and that is the permitting process" and "other City-wide bans and building code provisions." (VA 132, 232-233, 295; see also VA 216.) Therefore, the district court concluded, Valley's "assertion that 'no valid ordinance' was in

effect during the period after the appellate court invalidated the provisions relating to off-premises signs in the original ordinance and before the amended ordinance took effect is incorrect." (VA 295.)[4]

D. Valley Loses Its Federal Lawsuit. The District Court Finds That Valley's Billboards Are Illegal And Subject To Immediate Abatement.

On November 5, 2003, the federal district court entered judgment for the City and against Valley under Rule 50(a)(2), Federal Rules of Civil Procedure, on the ground that "there is no legally sufficient evidentiary basis for a reasonable jury to find for [Valley], because construction of the billboards was commenced without obtaining permits or inspections of any kind, including electrical, building or use permits as required by valid portions of the Riverside Municipal Code." (VA 193-194.)

The district court based its decision on Valley's own admissions that it "made a deliberate decision to begin constructing its signs without applying for permits" and "submitted no application of any kind before it completed the foundational work necessary for the installation of the sign structures." (VA 152; see VA 233-236.) The court held that Valley's assertions that it thereafter applied for so-called "as-built" permits and the

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[4] Valley ultimately conceded this point in the federal pretrial conference order. (VA 153, ¶ 5-24.) By that time, the state trial court, on remand in the *OMG* case, far from construing the *OMG* decision as having struck down the City's permitting requirements, enforced those requirements by granting a mandatory injunction requiring OMG to remove its billboard because it had been erected and installed without permits. (VA 155, ¶ 6-1.) That judgment has now been affirmed on appeal. (*City of Riverside v. Outdoor Media Group, Inc.*, 4th Civil No. E031014 (Cal. Ct. App. 2003).)

City improperly refused to process the applications, even if proven true, could not entitle Valley to judgment on its lawsuit, because its signs were illegal and a public nuisance subject to immediate abatement as soon as their underground portions were constructed without permits and inspections; any supposedly unconstitutional action by the City subsequent to that time cannot change the fact that Valley's billboards were subject to removal from the outset. (VA 209, 211-214, 217, 219-220, 221-223, 230, 233-236, 261-262, 265, 267, 273-275, 309-311.)[5]

In addition, the court found that Valley had "offer[ed] no authority to support the absurd proposition that it has an entitlement to an 'as built' permit once it violated basic public safety standards by undertaking substantial construction of the critical foundation portions of the signs without first submitting either the plans, or the foundations themselves, for City inspection." (VA 309-310.)

Valley has appealed the judgment to the Ninth Circuit, and the appeal is currently pending before that court. (See VA 710.)

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[5] The district court followed two Ninth Circuit cases to which, coincidentally, Valley was itself a party and in which it was ordered to remove illegal billboards even though other parts of the respective municipal ordinances were alleged or found to be unconstitutional. (*Valley Outdoor, Inc. v. County of Riverside* (9th Cir. 2003) 337 F.3d 1111 and *Virtual Media Group, Inc. v. City of San Mateo* (N.D.Cal. 2002) 2002 WL 485044, aff'd. unpub. decision (9th Cir. 2003) 66 Fed. Appx. 129.)

E. The District Court Dissolves Its Preliminary Injunction So As To Allow The City To Bring A State-Court Action To Compel Valley To Remove Its Billboards.

At the outset of the lawsuit, the district court *sua sponte* issued a preliminary injunction precluding the City from taking any action to compel the removal of Valley's billboards. (VA 148.) After ruling against Valley on the merits, the federal district court dissolved in part and modified in part the existing preliminary injunction. (VA 273, 308.) Specifically, the court ordered that the City could take appropriate action to compel Valley to "remove all portions of the five outdoor advertising displays above the foundation," while leaving the foundation intact during the pendency of Valley's appeal to the Ninth Circuit. (VA 275, 241-242, 246, 308.) The district court acknowledged that, because the City prevailed on the merits, "the entire injunction should be dissolved"; however, "I'm trying to hedge my bet as to what the Ninth Circuit will do and that is I don't want to pull the foundations out because they're under the ground but everything above ground should come out at this particular point." (VA 246.)

Valley filed an emergency application to stay the district court's order partially dissolving the preliminary injunction. The Ninth Circuit denied the stay application, holding that Valley "has failed to meet the requisite standards" for such an order, such as a likelihood of success on the merits and a danger of irreparable harm. (VA 196-197.)

F. In Adjudicating And Rejecting Valley's Lawsuit To Enjoin The City From Removing Valley's Billboards, The District Court And the Ninth Circuit Made Determinations That Bind Valley In The Instant Lawsuit.

The district court made express findings and determinations in support of its judgment on the merits and its order dissolving in part and modifying in part its preliminary injunction. The Ninth Circuit adopted those findings in denying Valley's stay application.

Among its key findings and determinations, the district court found and determined as follows:

FINDING: Valley has lost on the merits of its claim against the City and it is not entitled to the maintenance of a preliminary injunction barring the City from taking any action to compel the removal of Valley's billboards. (VA 274.)

FINDING: The City demonstrated irreparable harm in that it has a substantial public interest in the enforcement of valid City regulations and laws concerning billboards, including permitting and inspection requirements to assure compliance with basic public safety standards governing construction which constitute reasonable restrictions on billboard displays. (*Ibid.*)

FINDING: Valley unlawfully constructed the foundations and other portions of its billboards without seeking or obtaining permits or safety inspections from the City, "including electrical, building or use permits as required by valid portions of the Riverside Municipal Code." (VA 194, 274.)

FINDING: Valley's maintenance of unlawful billboards constitutes a per se public nuisance, a potential public safety hazard, and causes visual blight, none of which can be redressed through any monetary means. (VA 274.)

FINDING: Valley has no right to continue to earn income from, or engage in an unlawful activity, by maintaining the above-ground portions of its billboards, and it has failed to demonstrate any likelihood of suffering irreparable harm if the above-ground portions of the billboards are removed. (*Ibid.*)

FINDING: The California superior court could order an "immediate abatement" of the per se nuisance represented by the billboards "based upon this [the district court] record." (VA 267.)

In denying Valley's emergency stay application, the Ninth Circuit held that "[i]t is clear from the findings of the district court that" Valley "has erected structures to carry advertising messages without first obtaining permits for construction of such structures" and the structures "have not been inspected and approved as required in ordinances of the City of Riverside." (VA 197.)

We show in the legal section below that these findings bind Valley under the doctrine of res judicata and collateral estoppel.

G. Valley's Signs Also Violate The Current Size, Height And Location Restrictions of The RMC.

Valley's signs do not conform to the City's current height, square footage and zoning requirements for off-premises signs, the constitutionality of which was upheld by the district court. (VA 145-148.)

The billboards are illegal because they (1) are within 50 to 100 feet of the 91 Freeway in violation of RMC section 19.76.020(B)(2)(a)(vii); (2) exceed 300 square feet in display face area in violation of RMC section 19.76.020(B)(2)(a)(i); and (3) exceed 45 feet in overall height in violation of RMC section 19.76.020(B)(2)(a)(ii). (See VA 31-40, 102, 151, 155, 168-177.)

Although Valley's billboards were installed prior to the effective date of these amended provisions, they do not qualify for legal non-conforming status under the RMC. To do so, a billboard must "lawfully occupy[] a site" and be "lawfully established." (RMC, §§ 19.04.385, 19.04.390.) Because Valley's billboards were installed without permits or inspections, they were necessarily unlawful and cannot qualify for non-conforming status. As noted, the district court upheld the constitutionality of the nonconforming use provisions. (VA 296-297.)

STATEMENT OF THE CASE.

A. The Complaint.

On April 7, 2004, the City filed its Complaint for Nuisance Abatement, Injunction, Unfair Business Practices, Violation of the Outdoor Advertising Act and Violation of Riverside Municipal Code against Valley in the Riverside Superior Court. (VA 11.) The action was subsequently transferred to San Bernardino Superior Court on stipulation by the parties. (VA 335, 340-341.)

The City alleged, inter alia, that the district court and the Ninth Circuit had made findings sufficient to allow the superior court to order an immediate abatement of Valley's illegal signs and that Valley was bound by those findings. (VA 17-18.)

B. The Order Granting In Part And Denying In Part The City's Motion For A Preliminary Injunction.

Concurrently with the complaint, the City filed a motion for preliminary injunction. (VA 67.) It sought an order directing Valley forthwith to remove the above-ground portions of its signs and enjoining it from leasing space on the signs for messages of any kind or retaining any such messages or otherwise using the signs to advertise goods or services or as part of its business. (VA 23, 92; CA 65-68.)

The court granted the preliminary injunction in part insofar as it fashioned an order of its own making requiring Valley to remove commercial (as opposed to public-service) messages from the signs and

enjoining it from placing or displaying commercial messages on the billboards. (VA 937; RT 14, 30.)[6]

C. The Appeals.

Both Valley and the City filed timely appeals from the trial court's order granting in part and denying in part the motion for preliminary injunction. (VA 941; CA 69.) The City appealed from that portion of the order that denied its request to compel Valley to remove the signs above the foundation. (CA 70; VA 937.) The City also filed a petition for writ of mandate, which was summarily denied. (VA 946.)

STATEMENT OF APPEALABILITY.

An order denying a preliminary injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (6); *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1560.)

STANDARD OF REVIEW.

Where a party's entitlement to a preliminary injunction is purely a question of law, the appellate court reviews the matter de novo. (*Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 320 [decision to grant or deny preliminary injunction rests in sound discretion of trial court, and "reviewing court's task is simply to ensure that

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[6] The trial court's reasoning is more fully discussed at pp. 35-36, *post*.

the trial court's factual determinations are supported by substantial evidence," but if "the material facts are not disputed, then the issue becomes a question of law for our de novo review"]; *Los Angeles County Assn. of Environmental Health Specialists v. County of Los Angeles* (2002) 102 Cal.App.4th 1112, 1117, fn. 4 [where trial court grounded denial of preliminary injunction "solely on the merits of the Union's claim," which was pure legal issue, rather than on evaluation of likelihood of success on the merits and magnitude of interim harm, the matter is reviewed de novo]; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512-513 [given "uncontested" facts, question on appeal "hinges upon [a] purely legal question"]; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, *supra*, 8 Cal.App.4th at 1558, 1561 [reviewing de novo and reversing denial of preliminary injunction]; *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1194 [where factor of likelihood of prevailing on the merits "depends upon a question of law or the construction of a statute, rather than upon evidence to be introduced at a subsequent full trial, the standard of review is whether the superior court correctly interpreted and applied the law, which we review de novo"].)

The question here is purely legal. All the material facts are based on Valley's own judicial admissions in its federal lawsuit and the binding adjudicated conclusions of the district court – and therefore cannot be contested. The pure legal question here, then, is whether, after determining that the district court judgment was final for purposes of res judicata and collateral estoppel and, based on that judgment, that the City was entitled to a preliminary injunction, the trial court could nonetheless refuse to give the

City the relief it sought on the sole ground that there was a pending appeal from the district court judgment.

LEGAL ARGUMENT

THE TRIAL COURT'S PRELIMINARY-INJUNCTION ORDER MUST BE REVERSED INSOFAR AS IT FAILS TO COMPEL VALLEY TO REMOVE ITS ILLEGAL SIGNS ABOVE THE FOUNDATION BECAUSE THE COURT HAD NO DISCRETION TO DENY THAT REQUESTED RELIEF GIVEN THAT THE CITY CONCLUSIVELY SHOWED THAT IT IS NOT JUST LIKELY BUT CERTAIN TO PREVAIL ON THE MERITS OF ITS CLAIMS AND TO SUFFER IRREPARABLE HARM, FAR EXCEEDING ANY HARM TO VALLEY, IF THE ILLEGAL SIGNS ARE ALLOWED TO REMAIN STANDING.

A. Where A Plaintiff Meets The Requirements For Obtaining A Preliminary Injunction, The Trial Court Has No Discretion To Refuse The Relief Sought And Instead To Grant A Lesser And Inferior Form Of Relief Insufficient To Undo The Irreparable Harm.

In determining whether to grant a preliminary injunction, the superior court must consider the likelihood that the plaintiff will prevail on the merits at trial, and weigh the interim harm to the plaintiff if the injunction is denied against the interim harm to the defendant if the

injunction is granted. (*People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.*, *supra*, 104 Cal.App.4th at 1193-1194.)

If the plaintiff proves those factors, he is entitled to the relief he sought to remove the interim harm. (*Gardner v. County of Los Angeles* (1995) 34 Cal.App.4th 200, 227 ["As plaintiffs satisfied both of the predicate requirements for a preliminary injunction, it was error for the trial court to deny it"].) Along the same lines, it is frequently noted in the case law that "[w]hen a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to satisfy either or both of the interim harm and likelihood of prevailing on the merits factors." (*Abrams v. St. John's Hospital & Health Center* (1994) 25 Cal.App.4th 628, 636, internal quotes omitted.) That is simply another way of saying that once those two factors have been satisfied, the court must grant the requested injunctive relief.

We show below that the City proved both factors and that the trial court so found. There is no legal justification for its denial of the City's request that it order Valley to remove its illegal signs above the foundation.

B. The City Has Satisfied Both Prongs Of The Preliminary-Injunction Test.

Few cases can present a stronger basis for imposing a preliminary injunction than the present case, because the City here proved both elements of its entitlement to a preliminary injunction as a matter of law.

1. The City is *certain* to prevail on the merits at trial.

To satisfy the first requirement for a preliminary injunction, a plaintiff need show only a *likelihood* of success on the merits, not that he will ultimately prevail at trial. (E.g., *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1145; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) In the typical case, the trial court must evaluate and weigh the evidence to determine whether that first requirement has been met. (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 355-356.)

The present case is not typical, because there are no facts for the court to weigh or determine, since all the pertinent facts have been conclusively established in the City's favor by the judgment of the district court in Valley's federal lawsuit – a judgment that is final for res judicata and collateral estoppel purposes.

a. Valley is collaterally estopped to contest the findings and conclusions of the federal courts that its illegal billboards are per se public nuisances subject to immediate abatement.

In support of its preliminary-injunction motion, the City did not simply demonstrate a likelihood of success on the merits. It went further – it *proved to a certainty* that it *will* ultimately prevail at trial, because it *already prevailed* on the merits in Valley's federal lawsuit and, under the doctrine of collateral estoppel, the district court's determinations of fact and law are binding on Valley in this state court action.

"In general, collateral estoppel (or as it is sometimes known, issue preclusion) precludes a party from relitigating an issue of fact or law if the

issue was litigated and decided in a prior proceeding," a final judgment on the merits was entered in the prior proceeding and "the party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding." (*Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1229-1230.) Here, the parties are obviously the same as in the federal lawsuit. The core issue is identical as well: Is the City entitled to compel Valley to remove its illegal signs?

All facts and legal conclusions necessary to entitle the City to injunctive relief, preliminary and permanent, in this action were already adjudicated and determined adversely to Valley in its federal lawsuit.

Valley's federal lawsuit sought to enjoin the City from removing its illegal billboards. The district court adjudicated Valley's right to that relief; it addressed and rejected every claim by Valley that it was entitled to maintain the billboards or that the City was not entitled to compel their removal. Among other things, it adjudicated and determined that:

- Valley's billboards were illegally constructed without permits or safety inspections in violation of multiple provisions of the City's municipal code and constituted nuisances per se, potential public safety hazards and sources of visual blight. (VA 274.)
- The billboards were subject to immediate abatement. (VA 261-262, 265-267.)
- Valley not only showed no likelihood of success on the merits of its lawsuit to enjoin the City from removing the billboards, but "actually lost on the merits of [its] claim." (VA 274.)
- Valley was *not* entitled to a federal injunction to maintain the billboards above the foundation during the pendency of its appeal to the Ninth Circuit. (VA 274-275.)

Thereafter, the Ninth Circuit refused to intervene to stop the City from compelling Valley to remove the signs above the foundation before the appeal was decided. It held that the district court had made "clear" findings that Valley erected its billboards "without first obtaining permits" or inspections "as required in ordinances of the City of Riverside" and that Valley "ha[d] failed to meet the requisite standards" for a stay order, such as a likelihood of success on the merits and a danger of irreparable harm. (VA 196-197.)

These findings are conclusive on Valley in this lawsuit, because the district court's judgment, even though on appeal, is immediately final for res judicata and collateral estoppel purposes. As our Supreme Court has explained:

> On this question of finality, federal law is controlling. A federal court judgment has the same effect in the courts of this state as it would in a federal court. [Citations.] The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition. [Citations.]

(*Martin v. Martin* (1970) 2 Cal.3d 752, 761-762.)

Numerous cases are to the same effect:

- *Lumpkin v. Jordan*, *supra*, 49 Cal.App.4th at 1230 (internal quotes omitted): "[F]or collateral estoppel purposes, the federal court's ruling on the summary judgment, even though appealed, must be considered final. A federal judgment has the same effect in the courts of this state as it would have in a federal court."

- *Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887: Federal bankruptcy judgment must be given preclusive effect in state court

though on appeal, and court "need not now decide questions that may arise if plaintiffs are successful in their ninth circuit appeal."

Swaffield v. Universal Ecsco Corp. (1969) 271 Cal.App.2d 147, 160: Giving collateral estoppel effect to federal criminal conviction even though "Swaffield's counsel declares that a petition for certiorari has been filed with the United States Supreme Court," because "for purposes of collateral estoppel respondents are entitled to assert Swaffield's criminal conviction as conclusive proof that he committed the acts charged by the indictment."

Lumpkin is particularly instructive. There, a federal court granted summary judgment against a plaintiff claiming he was fired from his position because of his religious beliefs. The court declined to decide plaintiff's claim for state-law discrimination under the California Fair Employment and Housing Act ("FEHA"), which plaintiff was permitted to refile in state court. The state court sustained a demurrer to plaintiff's complaint on collateral estoppel grounds, even though plaintiff was then appealing from the federal judgment. The Court of Appeal affirmed, holding that the pending federal appeal was irrelevant to its obligation to apply collateral estoppel: "Because the federal court's ruling on the summary judgment has not been reversed or modified, the decision is 'final'"; and, as such, "[t]he federal court order is entitled to collateral estoppel effect regardless of our agreement or disagreement with the decision itself." (49 Cal.App.4th at 1231-1232.)

Because collateral estoppel applies here, the court below was not permitted to weigh or evaluate evidence. "[T]he collateral estoppel doctrine precludes relitigation of an issue previously adjudicated by final judgment between the parties." (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 568.) It was simply required to

accept as conclusive the binding conclusions made against Valley in its federal lawsuit.

The court was also required to accept as proven the factual admissions Valley made in its federal complaints and in the federal pretrial order. For example, in those pleadings, Valley admitted and stipulated that it violated City ordinances by deliberately installing billboards without use, building or electrical permits and by constructing their foundations without even attempting to apply for permits or inspections and in a manner that made later inspection impossible. (VA 153-154.) Valley is independently bound by those judicial admissions. (*Troche v. Daley* (1990) 217 Cal.App.3d 403, 409 ["A judicial admission in a pleading . . . is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues," internal quotes omitted]; *American Title Ins. Co. v. Lacelaw Corp.* (9th Cir. 1988) 861 F.2d 224, 226 [factual assertions in pretrial orders "are considered judicial admissions conclusively binding on the party who made them"].) The district court relied on those admissions in entering judgment against Valley and dissolving that part of its preliminary injunction that precluded the City from compelling the removal of Valley's signs above the foundation.

b. The district court's binding conclusions demonstrate that the City is certain to prevail on the merits at trial.

The City is certain to obtain permanent injunctive relief at trial or on summary judgment based on the uncontestable facts found by the district court and Valley's own judicial admissions. Such injunctive relief is specifically provided for under the RMC.

Under California law, a city's "legislative body may declare what constitutes a nuisance." (Gov. Code, § 38771; *People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1076 ["[c]ourts have established that it is within the police power to declare an act or condition to be a nuisance for regulatory purposes"].) Such a "legislatively declared public nuisance constitutes a nuisance per se." (13 Cal.App.4th at 1076, internal quotes omitted.)

Here, the City of Riverside made a legislative declaration that "any condition caused or permitted to exist in violation of any of the provisions of [the RMC], or the provisions of any code adopted by reference by [the RMC], shall be deemed a public nuisance." (RMC, § 1.01.110(E).)

As shown above, Valley's five billboards were erected in violation of multiple provisions of the RMC and of national building and electrical codes adopted by reference in the RMC. As a result, the billboards constitute a public nuisance.

Under Code of Civil Procedure section 731, "[a] civil action may be brought . . . to abate a public nuisance . . . by the city attorney of any town or city in which such nuisance exists." The RMC expressly authorizes the City to abate a public nuisance. (RMC, § 1.01.110(E).)

And that is what the City has done here in seeking both preliminary and permanent injunctive relief (see VA 18) in that an "injunction is the traditional method of abating a nuisance" (*People ex rel. Dept. Pub. Wks. v. Adco Advertisers* (1973) 35 Cal.App.3d 507, 511, internal quotes omitted; see Code Civ. Proc., §§ 525, 526, 731).

The facts and legal conclusions on which the City's right to an injunction rest cannot be contested in this lawsuit.

For one thing, Valley admitted that it "made a deliberate decision to begin constructing its signs without applying for permits" and "submitted no application of any kind before it completed the foundational work necessary for the installation of the sign structures" and invited no inspections; indeed, made inspection impossible by pouring the concrete footing. (VA 152.) Valley further admitted that it "proceeded to install the above-ground portions of the sign structures – still without permits or inspections," "submitted no plans or inspections before installing its signs," "wired and energized" three signs "without electrical plan review, permits or inspections," which "present[s] a potential fire and /or electrocution hazard." (VA 152-155.)

In addition, the district court specifically found that Valley "unlawfully constructed the foundations and other portions of the signs without seeking or obtaining permits or safety inspections from the City" and that the maintenance of the unlawful billboards "constitutes a per se public nuisance, a potential public safety hazard, and causes visual blight, none of which can be redressed through any monetary means." (VA 274.) As such, Valley's signs were subject to "immediate abatement" in state court based on the federal court record. (VA 267.)

The City also seeks (VA 20) and is entitled to injunctive relief under Section 17200 et seq., Business And Professions Code. Valley's continuing use of illegal billboards to sell advertising space constitutes unfair competition within the meaning of that statute. Unfair competition is defined there as "any unlawful, unfair or fraudulent business act or practice," and this includes "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 531-532.)

By virtue of its illegal conduct, Valley has obtained a competitive advantage over law-abiding sign companies who, in complying with the RMC, are unable to offer advertisers space on billboards in close proximity to the 91 Freeway or on billboards whose size and height exceed allowable limits. Moreover, law-abiding businesses must obtain permits and submit to city inspections; by its violations of those laws, Valley has gained an unfair competitive advantage over law-abiding businesses.

The City is thus entitled to an order compelling Valley to remove the above-ground portions of its illegal billboards so that it can no longer use them to display advertising messages. (Bus. & Prof. Code, § 17203; *Herr v. Nestlé U.S.A., Inc.* (2003) 109 Cal.App.4th 779, 781-782, 789-790 [upholding order under section 17203 enjoining age discrimination as unfair competition because older workers are more highly compensated; similarly, "employer which fails to pay overtime wages gains an unfair advantage over its competitors"]; *Hewlett v. Squaw Valley Ski Corp.*, *supra*, 54 Cal.App.4th at 531-533 [upholding mandatory and prohibitory injunctions under section 17203 where business violated zoning laws by felling trees to develop ski runs].)

2. As a matter of law, the balance of harms weighs conclusively in the City's favor.

The second prong of the preliminary-injunction test requires the City to prove that absent the preliminary injunction, it will suffer irreparable harm that outweighs any arguable harm to Valley. (*White v. Davis* (2003) 30 Cal.4th 528, 554 [court must consider "irreparable injury or interim harm that [plaintiff] will suffer if an injunction is not issued pending an adjudication of the merits" and "the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief"].)

The City has proven this prong *as a matter of law* for the following independent reasons:

First, the district court and the Ninth Circuit made findings on this issue that bind Valley and establish as a matter of law that the balance of harms in this case tips decisively in the City's favor. Specifically, in dissolving its existing preliminary injunction so as to allow the City to compel the removal of the above-ground portions of Valley's billboards, notwithstanding its pending Ninth-Circuit appeal, the district court found:

- "[T]he City has demonstrated irreparable harm in that [it] has a substantial public interest in the enforcement of valid City regulations and laws concerning billboards, including permitting and inspection requirements." (VA 274.)
- "In contrast, [Valley has] failed to demonstrate any likelihood of suffering irreparable harm and in fact the only harm cited by [Valley] is the loss of income from the unlawful billboards." (*Ibid.*)
- Valley has "no right to continue to earn income from, or engage in an unlawful activity, especially an activity that creates a potential public safety hazard." (*Ibid.*)

- Any economic harm to Valley "would be fully redressable through any damage award should [it] prevail on appeal" and "some of the economic harms" Valley asserts "with respect to the removal of the signs may be mitigated by allowing the foundational structures of the signs to remain intact pending appeal." (VA 274-275.)

And the Ninth Circuit refused to stay the district court's order vacating that part of its preliminary injunction that had theretofore barred the City from filing an abatement action to compel removal of the signs. It did so by making its own finding that Valley had failed to show that it would suffer irreparable harm if the above-ground portion of its signs was taken down pending appeal. (VA 196-197.)

Without more, then, these findings – binding on Valley under collateral estoppel – establish the second prong of the preliminary-injunction test.

Second, under the facts of this case, the trial court is entitled to *presume* harm to the City sufficient to satisfy the second prong. "A legislatively declared public nuisance constitutes a nuisance per se against which an injunction may issue without allegation or proof of irreparable injury." (*People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra*, 5 Cal.App.3d at 511-512.) "'Where the Legislature has determined that a defined condition or activity is a nuisance . . . [t]he function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid.'" (*Amusing Sandwich, Inc. v. City of Palm Springs* (1985) 165 Cal.App.3d 1116, 1129-1130 [injunction properly issued to abate nuisance on finding that city ordinance was constitutional and plaintiff violated it].) "[W]here a legislative body has specifically provided injunctive relief for a violation of

a statute or ordinance, a showing by a governmental entity that it is likely to prevail on the merits should give rise to a presumption of public harm." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 71, 73, 75 [given facts showing zoning violation, trial court "correctly presumed that the County would suffer greater harm if the injunction were not issued than IT would suffer from [its] issuance"].) "'[I]f the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harm tips in his favor.'" (*Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 696.)

Here, the City's motion falls squarely within this case law. The City's ordinance declares that signs built in violation of permitting and inspection requirements are a nuisance per se. Those provisions are plainly constitutional as content-neutral regulations of the non-communicative aspects of billboards. (*Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 502 [101 S.Ct. 2882, 69 L.Ed.2d 800].) No one has ever contended otherwise. (See VA 232-233, 321.) It cannot be disputed that "a statutory violation in fact exists" in that Valley admitted and the district court found that Valley erected five billboards without building permits or inspections. The ordinance expressly provides for injunctive relief in that situation. And, as shown above, the City has shown not merely that it will likely prevail on the merits, but that it is certain to do so.

Therefore, the trial court here was entitled to presume that the City fully satisfied the second prong.

Third, as a matter of proven fact, the City satisfied this prong. The harm suffered by public entities and their citizens is often intangible in

nature – hence our Supreme Court's creation of a "presumption of public harm." Here, however, the court can properly infer that huge billboard structures that were constructed and installed (and, in three cases, electrified) without any public safety inspections can constitute a serious public safety hazard and, further, that they are a source of visual blight. Indeed, Valley itself admits that because the trial court refused to order the removal of the billboards above the foundation "Valley remains free under it to post non-commercial messages on them— even garish ones!" (Valley's Opening Brief ["V-AOB"] 28-30.)

The court can also infer harm to the public from the fact not only that Valley wilfully violated City ordinances but by virtue of the size and location of its illegal signs, those violations are in-your-face affronts to the residents of the City that the law has been violated with impunity. These inferences are consistent with the district court's conclusive finding – which the trial court was bound to apply – that the maintenance of Valley's billboards "constitutes a per se public nuisance, a potential public safety hazard, and causes visual blight, none of which can be redressed through any monetary means." (VA 274.)

Fourth, apart from collateral estoppel and case law presumptions, Valley simply failed to prove that it would suffer any irreparable harm were it required to remove its signs above the foundation. Without that proof, Valley cannot even try to rebut the presumption that harm to the City outweighs harm to Valley, because Valley must first demonstrate "that it would suffer grave or irreparable harm from the issuance of the preliminary injunction" before the trial court could "examine the relative actual harms to the parties." (*IT Corp. v. County of Imperial, supra,* 35 Cal.3d at 72.)

Here, Valley's proof showed that any harm it might suffer was wholly limited to economic harm easily compensable in damages. (VA 371-372 [the cost of dismantling, storing and reassembling the above-ground portions of the signs; lost revenue from not being able to lease space on the signs; a reduction in advertising rates Valley can charge in the future; damage to its reputation from not fulfilling its contracts].) Such economic loss does not constitute irreparable harm. (35 Cal.3d at 75 [upholding preliminary injunction even though it would cause enjoined party "a substantial economic loss"].)

Indeed, Valley is the author of its own predicament. It claims that the preliminary injunction, if enforced, will shut down five of Valley's eight signs. (VA 372.) But nobody forced Valley to structure its business so as to rely on income from illegal signs. The injunction the City requested would not stop Valley from earning income from legally-constructed signs. Moreover, Valley complains that it is bound by long-term contracts to furnish advertising space to third parties and will be harmed if it cannot deliver. This is genuine chutzpah. Valley entered most of these long-term contracts *after* the district court ruled on November 3, 2003 that its signs were illegal and subject to immediate abatement (VA 925-926, 927, 929, 930, 932, 933, 935); and, five of *those* contracts were entered *after* the Ninth Circuit cleared the way for the City to compel the removal of the signs above the foundation (VA 927, 930, 932, 933, 935).

Thus, if Valley faces possible economic loss, that loss is self-inflicted, a product of actions that at worst were openly illegal and at best skirted the boundaries of illegality and imprudence. Such self-inflicted damages do not constitute irreparable harm. (*Pacific Gas & Elec. Co. v. Minnette* (1953) 115 Cal.App.2d 698, 708-710 [affirming mandatory

injunction requiring removal of building where appellants' wrongdoing "was not in the nature of innocent mistake," because "before beginning construction, their attention was specifically directed to the dangerous situation they would be creating if they built their building as planned"].)

Both as a matter of law (the doctrines of collateral estoppel and presumption of public harm) and as a matter of fact (the admitted and adjudicated illegality of Valley's signs), the City has conclusively established the second prong of the test for a preliminary injunction.

C. The Trial Court Committed Plain Legal Error In Refusing To Order Valley To Dismantle Its Signs Above The Foundation.

The City moved for a preliminary injunction that sought, inter alia, to enjoin Valley from maintaining its five billboard structures and to require it immediately to remove the above-ground portions of the billboards. (VA 23, 92; CA 65-68.) It also sought to enjoin Valley from selling or leasing space on the billboards for advertisements or messages of any kind or using the billboards as part of Valley's business. (*Ibid.*)

The trial court acknowledged that the City had proven its entitlement to its requested injunctive relief. First, it found that there was "good cause to grant" the City's motion. (VA 937.) Next, it held that the district court's judgment in favor of the City was final for purposes of res judicata and collateral estoppel and that it "makes no difference [that] an appeal from the judgment is pending before the [Ninth] Circuit Court of Appeal." (RT 13.) It stated that it had "no quarrel with the City's position on the law" and conceded that it was legally capable of granting the preliminary injunction,

stating that "indeed I could fashion [the] order" the City seeks and "can order the billboards [to] be torn down." (RT 16.)

Nonetheless, the court refused to grant the core relief the City sought – removal of the above-ground portions of the signs. It based that refusal solely on the one factor it had no right to consider given the finality of the district court judgment – the pendency of the Ninth Circuit appeal. The court declared itself "reluctant to fashion an order today that would allow the actual physical tear down of the billboards" because "there still is the pending appeal before the Ninth Circuit" and thus "the possibility, however remote, that the Ninth Circuit may in fact reverse [the district court's] ruling." (RT 13-14.)

Instead, the court fashioned its own order. (RT 14.) Rather than directing Valley to remove the signs above the foundation, the trial court "simply order[ed]" Valley to remove commercial (as opposed to public-service) messages from the signs and enjoined it from placing or displaying commercial messages on the billboards. (VA 937; RT 14, 30.)

In refusing to order Valley to remove the signs above the foundation, the trial court was not concerned about any harm Valley would suffer in the unlikely event of a Ninth-Circuit reversal, since it recognized that such harm was wholly compensable in damages. Rather, the trial court feared "the possibility of future damages" if the billboards had to be restored, because "public funds will have to be expended" to do so. (RT 14, 16.)

The trial court erred in not granting the full relief the City sought for multiple reasons.

First, once it satisfied the two-prong test for a preliminary injunction, the City was entitled to the relief it requested as a matter of law. (*Gardner v. County of Los Angeles, supra,* 34 Cal.App.4th at 227 ["As

plaintiffs satisfied both of the predicate requirements for a preliminary injunction, it was error for the trial court to deny it"].) As we've shown, the City plainly met that test. Indeed, the trial court admitted it had "no quarrel with the City's position on the law" and was legally empowered to "order the billboards to be torn down." (RT 16.) Without more, the court's order must be reversed insofar as it failed to order the immediate dismantling of Valley's illegal signs above the foundation.

Second, given both the finality of the district-court judgment and the dictates of res judicata, the trial court had no discretion to deny the City complete relief at the preliminary-injunction stage on the basis of what the court conceded was the "remote" possibility "that the Ninth Circuit may in fact reverse [the district court's] ruling." (RT 13-14.)

As we have shown above (pp. 22-26, *ante*), the district court's judgment in favor of the City and against Valley is final for res judicata purposes, irrespective of any pending federal appeal. Therefore, the trial court should never have based a ruling as to the City's current entitlement to injunctive relief on speculation as to what might remotely happen in Valley's Ninth Circuit appeal. The trial court was simply wrong to deny the City complete relief on the fear that the Ninth Circuit could "gut[] my order." (RT 16.) That was tantamount to treating the federal judgment as only "a little bit final" – and that is not an option under California law. As our Supreme Court has made clear, a district court judgment is final in California as soon as it is rendered and remains so unless "reversed on appeal or modified or set aside in the court of rendition" (*Martin v. Martin, supra*, 2 Cal.3d at 761-762) – none of which has happened here.

In that final judgment, the district court adjudicated and decided adversely to Valley and in favor of the City every fact and legal point

necessary to support the City's right to obtain an order requiring Valley to remove its signs. Therefore, under res judicata, the court below was required to apply those findings and legal conclusions as conclusive determinations in favor of the City and against Valley on the question of the City's right to an immediate abatement of Valley's illegal billboards. (E.g., *Lumpkin v. Jordan*, *supra*, 49 Cal.App.4th at 1233 [because defendants "have satisfied their burden of proving the requirements for application of collateral estoppel," plaintiff "is estopped from pursuing his state action"].)

Once the trial court did so, the City was ipso facto entitled to its requested relief. (See *id.* at p. 1232 ["[o]nce we give collateral estoppel effect to the prior judicial determination . . . the outcome . . . is preordained"].) Valley's pending appeal was irrelevant. So, too, was the fact that the City was seeking a *preliminary* injunction. Under the peculiar facts of this case, the City's requested injunction is preliminary in name only. As our Supreme Court has recently stressed, "a *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim*." (*White v. Davis, supra*, 30 Cal.4th at 554.)

Here, of course, there *has been* "a full adjudication of the merits." Indeed, there has been a finding by the district court that the California superior court could order an "immediate abatement" of Valley's billboards – solely "based upon [the district court] record." (VA 267.) It is manifest that if the City moves for summary judgment based on the federal judgment, collateral estoppel would dictate entry of a judgment of a permanent injunction. The fact that the City moved for preliminary relief should not, and cannot, alter the result.

Third, a court cannot defeat collateral estoppel by the backdoor means of formally granting a preliminary injunction but denying the

primary relief to which the plaintiff is entitled. As one court put it in an analogous situation: "The trial court could not directly disregard [the collateral estoppel] doctrine because it believed the earlier case was improperly decided. It is concluded that it cannot do so indirectly for the same reasons." (*Estate of Cates* (1971) 16 Cal.App.3d 1, 20.)

Fourth, the court's refusal to order the signs down is particularly insupportable given Valley's track record of delay. It filed a federal complaint, but didn't serve it on the City, thereby buying time to install its illegal signs without detection. Then, on the basis of spurious constitutional claims in the complaint, it secured a federal court injunction that kept its signs in place for four years. Next, when the district court finally vacated that injunction, it furthered delayed matters by seeking, unsuccessfully, an emergency stay in the Ninth Circuit, and promoted even that loss into further stays in the district court. This track record explains the district court's frustrated recognition that it had "already delayed it, and delayed it, and delayed it . . . but there has to be a day now in which, you know, the sign has to be dismantled to ground level." (VA 265.)

Here, Valley obtained an unearned boon in that the trial court allowed its signs to remain standing pending the disposition of its Ninth Circuit appeal. The court did so in the full belief that Valley would comply with the rest of its order; specifically, that it would remove all commercial displays from its signs and allow no new commercial messages to be displayed. (RT 13-16, 30-32.) But, once again, Valley sought delay. It insisted that it needed a 90-day stay of the injunction to give it time to find alternative signage for third parties with whom it had contracts. (RT 31-32, 40-42.) The trial court was dubious, noting that a preliminary injunction usually takes effect "immediately" and that it "could order this injunction

[to] go forthwith." (RT 43-44.) In the end, it accepted Valley's representations that "there are some things that need to be done" under its contracts, and the court stayed its order for 30 days. (RT 44-45; VA 937.)

In fact, Valley failed to comply. After the 30-day stay expired, it granted itself a permanent stay of its own. It did not remove a single commercial sign face; worse yet, it placed new commercial displays on its signs, including on a sign carrying a public service message. (CA 95-111.)

Notwithstanding Valley's non-compliance, the trial court declined to hold Valley in contempt; however, it ordered Valley to bring itself into compliance with the injunction by removing the commercial copy from any billboard that had carried non-commercial copy and immediately to cease and desist from placing new copy on any of its billboards. (See CA 286-288.)

The City recognizes that the matter of Valley's non-compliance is in the first instance a matter for the trial court. We raise it here for one purpose: It demonstrates why the trial court's half-a-loaf approach cannot hope to work with a company as schooled as Valley in the art of delay. Only an order compelling Valley to physically dismantle its signs above the foundation, an order that leaves Valley no wriggle room, can ensure a speedy end to a violation of law that is entering its fifth year.[7]

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[7] Because this is a combined opening and respondent's brief, we will address Valley's arguments in detail in the next section of the brief. For now, suffice it to say that Valley seeks to use this appeal to reopen its federal case and reargue its assertion that the City's sign ordinance is unconstitutional. We will answer these contentions on the merits. But in fact none of them can be raised on this appeal because they were adversely decided against Valley in the district court and in some instances are being raised for the first time on appeal.

CONCLUSION

For all the foregoing reasons, the City requests this Court to reverse the trial court's preliminary-injunction order insofar as it did not require Valley to dismantle and remove its illegal billboards above the foundation and to direct the trial court to enter an injunction ordering Valley to dismantle and remove the billboards forthwith.

Dated: December 31, 2004

Respectfully submitted,

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RESPONDENT'S BRIEF

INTRODUCTION

Because Valley is bound by findings in a federal judgment that its billboard structures are illegal, the trial court granted the City interlocutory relief by enjoining Valley from displaying commercial messages on the signs. However, mistakenly solicitous of Valley's pending appeal to the Ninth Circuit, the trial court refused to compel it to remove the signs. Valley does not defend any part of this ruling; indeed, it attacks it even more strenuously than the City, arguing that it constitutes a per se prior restraint on speech because it is aimed at the speech on the signs and not the signs themselves. (Valley's Opening Brief ["V-AOB"] 1-2, 4-5.)

There is a simple remedy for Valley's complaint: Direct the trial court to order Valley to remove its signs above the foundation – without regard to their particular messages. That is the relief the City sought in the first place. It is the relief the federal courts expressly blessed. (VA 267 [state court could order "immediate abatement" of billboards]; VA 60 [Ninth Circuit gave the City "green light to remove (Valley's) non-conforming structure(s) with the exception of the foundation"].)

Valley has presented no serious response to the City's position. It pads its brief with First Amendment rhetoric, but there is no live First Amendment issue here.

The issue here is simple. Valley built signs without permits or inspections in violation of the City's building, electrical and zoning ordinances. It filed a federal lawsuit to enjoin the City from removing the signs. The district court decided that lawsuit against Valley, finding that its

signs were illegal and a per se nuisance under the RMC, the City was entitled to obtain immediate abatement of the nuisance and there was no constitutional impediment to enforcing the Code against the illegal signs.

Under res judicata and collateral estoppel, Valley is bound by the findings and legal adjudications of the district court. Those findings and adjudications conclusively establish both prongs of the test for obtaining a preliminary injunction. The court below agreed that "the City's position on the law" permitted the court to "order the billboards to be torn down." (RT 16.) The question on appeal is whether, given that finding, the trial court erred in not ordering Valley to remove its signs above the foundation.

Valley, however, insists that the City is not entitled to preliminary relief of any kind. Given the federal judgment, this is absurd on its face. Valley's specific contentions are equally unconvincing, and mostly barred by res judicata.

- Valley asserts the City cannot "actually point to some enforceable statute it claims Valley's signs violate," and thus "has no likelihood of success on the merits." (V-AOB 19.) Not so. In the trial court (VA 4-5, 11) and now on appeal (pp. 5-7, 15-16, *ante*), the City clearly identifies specific provisions of the City's building, electrical and sign codes that Valley violated when it erected signs without permits or safety inspections.

- Valley asserts the trial court granted the preliminary injunction to enforce size and location provisions that this Court struck down in the *OMG* case. (V-AOB 20.) Nonsense. Valley has not produced a shred of evidence or offered a single record cite to support that assertion. The City's preliminary-injunction motion was based on Valley's admitted

violations of the City's permitting and inspection provisions. And *those* provisions were *not* struck down – indeed, were *upheld* – in the *OMG* case.

What's more, the trial court did not enforce the City's current size and location restrictions, which were amended in response to the *OMG* case, and it certainly didn't enforce the invalidated restrictions. (V-AOB 20, 21.) It, like the district court, enforced the City's valid permitting and inspection requirements, and granted the instant injunction based on Valley's violations of *those* provisions.

- Valley asserts that a "failure to obtain permits before construction is not a sufficient justification for a preliminary injunction." (V-AOB 22.) Wrong. Valley cites no authority for this contention. In fact, California law empowers a city to declare that structures erected in violation of its municipal code constitute nuisances per se and identifies injunctions as the traditional method of abating a nuisance.

Here, the City declared that "any condition" that exists "in violation of any of the provisions" of the RMC "shall be deemed a public nuisance." (RMC, § 1.01.110(E).) That obviously includes signs erected in violation of provisions precluding construction "until a permit for the same has been issued" (RMC, § 19.76.210(A)) and requiring a separate permit for each "structure has first been obtained" (RMC, § 16.08.020, adopting UBC § 106).

- Valley asserts the City must grant it a so-called "as-built" permit because the sign code establishes a schedule of fees for signs constructed without a permit. (V-AOB 23-24.) Not so. No RMC provision requires or even authorizes the City to grant "as-built" permits for large structures built without city inspection. And Valley cites none. Valley's billboards weigh approximately 68,000 pounds each. (VA 389.) The

notion that it can build such structures without inspections and then stroll in for a permit weeks later is absurd. Anyway, Valley lost this exact argument in the district court, and is barred from making it again here. (VA 309-311.)

- Valley asserts it can offer its own evidence that the signs are safe in lieu of city inspections. (V-AOB 25-26.) That position would effectively privatize the City's inspection function and make its inspections superfluous. What builder wouldn't rather hire its own "inspectors" and schedule their "inspections" under self-serving conditions? The reliability of such inspections can be gauged by that fact that Valley's signs were "inspected" by the contractor who built them. (V-AOB 25, 29; VA 392.) In any event, the district court rejected this argument, and Valley cannot reargue it here.

Valley tries to disguise the feebleness of these assertions by advancing a series of First Amendment claims. But waving the First Amendment about cannot save Valley's illegal signs. Its free-speech claims are irrelevant, barred by res judicata and without merit. The district court upheld the facial constitutionality of the City's sign, building and electrical codes and rejected Valley's as-applied challenges because they were based on conduct asserted to have occurred *after* Valley had already illegally constructed the underground foundations of its signs. The court relied on two recent Ninth Circuit decisions (cited p. 12, fn. 5, *ante*) in which Valley (once again) constructed signs in violation of municipal ordinances. As here, Valley raised a slew of constitutional challenges. The Ninth Circuit held that each challenge, even if true, was irrelevant. What mattered was that Valley had violated indisputably valid parts of each ordinance and those independent violations served to authorize the removal of the signs.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE CITY OF RIVERSIDE INJUNCTIVE RELIEF ON THE BASIS OF BINDING JUDICIAL DETERMINATIONS THAT VALLEY ERECTED ILLEGAL BILLBOARDS IN THE CITY THAT CONSTITUTE PER SE PUBLIC NUISANCES SUBJECT TO IMMEDIATE ABATEMENT.

A. Valley's Factual Admissions In This Court Confirm That The City Is Entitled To A Preliminary Injunction Ordering The Immediate Removal Of Valley's Billboards Above The Foundation.

The City showed in its opening brief that the district court found that Valley's signs were illegal because they were constructed without permits or city safety inspections and those findings were, in turn, based on Valley's judicial admissions in federal court that it deliberately constructed the billboards without seeking or obtaining permits or inspections.

Valley now confirms these facts in its opening brief. Valley concedes, for example, that it "began excavations for the sign footings" on January 8, 2000, but only first "attempted to apply for permits" on January 20, 2000. (V-AOB 7-8.) As we know from Valley's admissions in its federal-court lawsuit, by that time, Valley had "completed the foundational work necessary for the installation of [its] sign structures" and thus had made any later "inspection impossible." (VA 101, 151, 152.) Valley also confirms that it then proceeded to install the above-ground portions of its

signs, also without having obtained permits or inspections – as it also pleaded in federal court. (V-AOB 8; VA 151, 152.)

Without more, Valley's signs are illegal and subject to immediate abatement. And the traditional instrument to effect such immediate abatement is the injunction. (Code Civ. Proc., §§ 525, 526, 731; *People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra,* 35 Cal.App.3d at 511.)

B. Valley Is Unable To Rebut The City's Showing Of Success On The Merits – The First Prong Of The Preliminary-Injunction Test.

We showed above that the City is not just likely but certain to prevail on the merits at trial or on summary judgment. (Pp. 27-29, *ante*.) Valley complains that "[i]nstead of making any factual showing to the trial court of the need for relief, the City relied *exclusively* on misplaced assertions of collateral estoppel." (V-AOB 2.) It is true that the City invoked collateral estoppel and res judicata in the trial court, but the use of those doctrines was not misplaced. Collateral estoppel applies here because every issue necessary to support injunctive relief against Valley was litigated and decided in Valley's federal lawsuit and a final judgment on the merits was entered against Valley that, though on appeal, is final in California courts. (See pp. 22-26, *ante*.)

And, contrary to Valley's assertions, collateral estoppel does not require a party to repeat in a second lawsuit a factual showing already made in an earlier action. Rather, collateral estoppel operates "to obviate the need to relitigate issues already adjudicated in the first action" so as "to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent

judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation." (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878, internal quotes omitted.) Where, as here, collateral estoppel applies, the City is not required to start from scratch in proving its case; indeed, it is required *not* to do so.

Among the explicit determinations the district court made, it found that (1) far from being likely to succeed in its lawsuit to stop the City from removing the billboards, Valley had "actually lost on the merits of [its] claim"; and (2) it was not entitled to maintain the billboards above the foundation during its appeal to the Ninth Circuit, but the billboards were subject to immediate abatement. (VA 261-262, 265-267, 274-275.) The Ninth Circuit made similar findings. (VA 196-197.)

Nonetheless, Valley insists that the trial court erred in finding the City was likely to prevail on the merits "because neither the billboards nor the speech on them violate the substance of any enforceable ordinance." (V-AOB 19.)

Valley is wrong.

1. Valley's signs violate enforceable provisions of the RMC.

Valley argues that the City "has no likelihood of success on the merits" because it cannot "actually point to some enforceable statute it claims Valley's signs violate." (V-AOB 19.) This argument is easily refuted. Indeed, it is borderline frivolous.

Because Valley's signs were constructed without permits, they violate the following provisions in the RMC: section 19.76.210(A) ["no sign" shall be erected, installed, constructed or lighted "until a permit for

the same has been issued"]; section 16.08.020 (adopting UBC § 106) ["no building or structure regulated by this code shall be erected [or] constructed . . .unless a separate permit for each building or structure has first been obtained"]; section 16.16.020 (adopting NEC § 301) [no electrical system shall be installed "unless a separate electrical permit for each building, structure, system or equipment has first been obtained"].)

Because Valley's signs were constructed without inspections, they violate the following RMC provisions: section 16.08.020 (adopting UBC § 108) [all construction shall be subject to inspection and "shall remain accessible and exposed for inspection purposes"]; section 16.16.020 (adopting NEC §§ 305 and 306) [All electrical systems and equipment shall be subject to inspection, "the electrical system shall remain accessible and exposed for inspection purposes" and persons shall not make electrical connections with building-official approval]; section 16.16.051 [all electrical wiring and equipment "shall be inspected and approved by the Building Official before being concealed, energized or used"].)

Valley does not demonstrate why these provisions are not enforceable against it. They are all plainly constitutional, as being elementary content-neutral, permit, inspection and safety regulations. (E.g., VA 145-148, 190, 309-311.) They were not invalidated in the *OMG* case, where this Court struck down a portion of the City's *sign* ordinance (RMC, former § 19.76.020(A)(3)) that imposed location, square-footage and height restrictions on billboards based on their content, but left intact all other provisions in the RMC regulating billboard structures, including permit and inspection requirements (VA 520 ["the remaining portions of the Ordinance are valid and may be enforced"]). In fact, Valley admitted all this in the federal pretrial order. (VA 153.) And the district court construed *OMG* as

upholding "the permitting process" and "specifically affirm[ing] other City-wide bans and building code provisions." (Pp. 10-11, *ante*.)

2. Valley's violations of those provisions entitle the City to injunctive relief.

Given Valley's own admission that it violated the City's permit and inspection requirements – indeed, did so deliberately – and that those provisions are valid and enforceable (VA 152-154), Valley is reduced to an effort to try to belittle its lawbreaking. Thus, it contends its failure to "obtain permits for its signs before they were built" is "a legally meaningless predicate, in light of the City's late-filed/as-built statutory permit options." (V-AOB 3.) It insists that its deliberate decision "to wait until after it broke ground to submit permit applications" was only "nominally improper." (V-AOB 4.) And it argues that "[a]ny failure to obtain permits *before* construction is not a sufficient justification for a preliminary injunction." (V-AOB 22.)

In fact, as Valley stipulated in its federal action, it did far more than just "break ground." It began constructing its signs without applying for permits," it "excavat[ed] the foundations for the footings necessary for the placement of its various sign structures," it "completed the foundation work for its signs before applying for permits or inviting inspections" and by its actions, it made all City inspection impossible because "the concrete footing had already been poured." (VA 151, 152.)

Valley cites no legal authority of any kind for the extraordinary proposition that what it did in this case is no big deal and cannot serve as a basis for the City to declare its signs a nuisance and seek their immediate abatement. In fact, what Valley did here is a very big deal and the City was

entitled at a bare minimum to the interlocutory relief the trial court granted.

Under California law, as we've shown, a city's legislative body may declare an act or condition to be a nuisance for regulatory purposes and that "legislatively declared public nuisance constitutes a nuisance per se." (*People ex rel. Dept. of Transportation v. Outdoor Media Group, supra,* 13 Cal.App.4th at 1076, internal quotes omitted.) That's what happened here. The City of Riverside made a legislative declaration that "any condition caused or permitted to exist in violation of any of the provisions of [the RMC], or the provisions of any code adopted by reference by [the RMC], shall be deemed a public nuisance." (RMC, § 1.01.110(E).)

The RMC could not be clearer: A person cannot build first, and get around to applying for permits and inspections at his leisure or at such time as he thinks the circumstances are most advantageous. Clearly, under the RMC and California law, Valley's signs are public nuisances per se. The district court expressly held to the same effect. (Pp. 23, 27-31, *ante*.)[8] All of that is more than sufficient justification for a preliminary injunction – which is "'the traditional method of abating a nuisance.'" (*People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra,* 35 Cal.App.3d at 511; see pp. 27-31, *ante*.)

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[8] In light of this, it is inconceivable that Valley asserts that "neither the Ninth Circuit nor the district court declared these signs to be nuisances." (V-AOB 30, fn. 11.)

3. Valley presents no facts or law that would excuse it from the consequences of its deliberate lawbreaking.

a. Valley cannot defeat the City's entitlement to injunctive relief on the basis of the defense of futility.

Valley argues that it "attempted to make such application [for permits] and contends that any further effort would have been futile." (V-AOB 22.) This is transparently false. Valley did not attempt to apply for permits before starting and completing the underground portions of its billboards. That is an unshakable fact. As we've shown, Valley admitted that in federal court and admits it again in its opening brief.

Elsewhere, Valley argues that it "was excused from applying for permits on the grounds of futility; the City would never have given Valley any permits because it was trying to enforce its unconstitutional content-based restrictions against Valley's signs." (V-AOB 3.) This is of course pure speculation. Nowhere in its discussion of this supposed futility does Valley provide a single record cite that might provide any factual basis for its conjecture. (V-AOB 3, 22, 38-39.) Moreover, Valley misconceives – or misapplies – the futility doctrine. As Valley's own authority shows, it is a defense to a claim that a plaintiff lacks standing to sue. (See V-AOB 38-39.) It does not license a builder to go out and erect a structure in violation of lawful permitting and inspection requirements on the ground that it would have been futile to ask for a permit. The notion is absurd. Valley cites no case that uses futility in that way.

At any rate, and of dispositive significance, Valley is barred from raising any kind of futility defense here. The "doctrine of res judicata precludes the litigation of any claim which could have been raised in the federal action." (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1110.) Valley did not raise a futility defense in the federal district court, not in the pretrial order or at trial. When Valley sought to raise it in a new trial motion, the district court held it waived. (VA 311-312.)

b. Valley cannot defeat the City's entitlement to injunctive relief on the basis of the supposed safety and code-compliance of the illegal billboards.

Valley insists we can take its word that its signs are safe: "Even though the City has not bothered to inspect the signs, we have," and they "do meet all the safety and building requirements of the City codes." (V-AOB 29.) As evidence to support these self-serving assertions, Valley offers, incredibly, the testimony of the contractor who built the signs. (V-AOB 22, 25, 29, citing VA 391-395.) Needless to say, the notion that in lieu of obtaining city inspections, a sign company may simply secure the opinion or warrant of its own contractor that the contractor's own work satisfies city codes is patently absurd.

Valley also offers the testimony of its president that more than three years after Valley erected the billboards *without* City inspections, he hired a private company "to verify once again that these signs were in compliance with all code provisions" by verifying "the concrete depths to show the integrity of the concrete foundations of the signs." (V-AOB 22, fn. 9.) Valley contends this evidence cannot be disputed. (*Ibid.*) What nonsense. Not only *can* the evidence be disputed, it *has been* conclusively *refuted* by

Valley's own judicial admission in the federal action that its "president knew generally what inspections entail and *that Valley made such inspection impossible* since the hole to be inspected has already closed because the concrete footing had already been poured." (VA 152, emphasis added.)

Furthermore, Valley's evidence is not just feeble, but totally irrelevant. It doesn't matter what Valley's contractor and hired agents say about its signs' supposed safety. The RMC requires pre-construction inspection by city inspectors, not post fact inspection by private companies hired and paid by Valley.[9] Valley cannot unilaterally treat mandatory inspection requirements as merely friendly suggestions to be acted on whenever Valley has a mind to do so. In effect, Valley's approach would privatize the City's inspection function. Unsurprisingly, Valley cites no authority of any kind – not an ordinance provision, not a section from the nationwide UBC, not case law – warranting such literal lawlessness.

In any event, Valley is estopped to argue that it is entitled to retain its billboard structures on the ground that they are safe. It made the same argument in the district court. (See VA 260, 266.) It based that argument on the same evidence it submitted in the court below in opposition to the City's preliminary injunction motion. (E.g., VA 260, 387, ¶ 30, 388, 391.) Notwithstanding that argument and that evidence, the district court

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[9] For example, the RMC provides that "[a]ll construction or work for which a permit is required shall be subject to inspection *by the building official* and all such construction and work shall remain accessible and exposed for inspection purposes *until approved by the building official*." (RMC, § 16.08.020, adopting UBC § 108, emphasis added.) Those sections further provide that it "shall be the duty of the permit applicant to cause the work to remain accessible and exposed *for inspection purposes*." (*Ibid*, emphasis added.)

reaffirmed that the signs are nuisances subject to immediate abatement and refused to restore its preliminary injunction so as to stop the City from seeking the removal of the above-ground portions of the signs. (VA 266-268.) Under collateral estoppel, Valley cannot relitigate that issue here.

c. Valley cannot defeat the City's entitlement to injunctive relief by claiming a right to an "as-built" permit.

Valley argues that the City grants "late-filed/as-built" permits for sign structures constructed without permits or inspections. (V-AOB 3, 23-24.) Therefore, Valley argues, the City here must grant Valley such an as-built permit rather than compel the removal of its billboards as nuisances per se. (V-AOB 23-26.)[10] Valley is wrong on both counts.

First, Valley utterly fails to show that the City ever grants as-built permits to structures the size of Valley's billboards – which each weighs approximately 68,000 pounds. (VA 389.) Valley also fails to show that the City is either required or authorized to grant an as-built permit to a structure

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[10] Valley hyperbolically, and incorrectly, claims that the City seeks the "summary demolition" of Valley's signs. (V-AOB 3, 25, 26.) It is of course true that the City wants an order requiring Valley to remove its billboards above the foundation. How Valley effects that removal is in the first instance largely up to Valley. The City has never requested that the signs be demolished. And Valley's own plan does not envision demolition; if it was ordered to remove the signs, Valley plans to dismantle them so that they can be reassembled for some future use. (See VA 388-389.) Moreover, there is nothing "summary" about the procedure that should result in the dismantling of the signs. Valley has had multiple opportunities to argue its case first in the federal courts and now again in the state courts.

The phrase "summary demolition" is particularly inapt as applied to the order Valley seeks to reverse on appeal – which not only didn't order demolition, it didn't even order the removal of the sign structures.

that was built, like Valley's signs, in such a way as to make later city inspection impossible. True, Valley cites a provision in the sign code that establishes a schedule of fees for signs constructed without a permit. (V-AOB 23.) On the basis of that provision, it claims that the City is "circumvent[ing] its own code and practice." (V-AOB 25.) Not so. The provision Valley cites neither requires nor authorizes the City to grant "as-built" permits, let alone to do so for structures whose foundations cannot be inspected. Valley claims there is "plenty of evidence in the record that the City does permit late-filed permits" (*ibid.*) – but cites none.[11]

Second, nothing in the RMC (including the fee schedule provision Valley cites) can possibly be construed to mean that the City cannot compel Valley to remove its illegal signs. After all, the RMC expressly empowers the City to compel the abatement of illegal structures, providing:

- "It is unlawful for any person to violate any provision or to fail to comply with any of the requirements or provisions of this code heretofore or hereafter enacted or the provisions of any code adopted by reference by this code." (RMC, § 1.01.110(A).)

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[11] After four years of litigation, all Valley is able to offer as proof that the City grants as-built permits to illegal large structures is a letter that the City sent to Valley in which it returned Valley's post-construction design-review applications as incomplete. (V-AOB 24.) Valley argues that this shows that the City accepts some late permits because otherwise the City would have rejected Valley's design-review applications outright. "In fact," Valley argues, "if that were the rule, one would have expected the clerk at the filing window to reject the applications on the spot, upon observing that they concerned an *existing* structure." (*Ibid.*) This is all wildly speculative. Moreover, it takes no account of the fact that Valley was applying for design-review approval only, and did not submit applications for building or electrical permits. (See VA 154-155 ¶¶ 5-31, 5-34, 5-36.) It also takes no account of the fact that applications are never rejected at the filing window. (VA 634-635.)

- "[A]ny condition caused or permitted to exist in violation of any of the provisions of this code, or the provisions of any code adopted by reference by this code, shall be deemed a public nuisance and *may be abated by the City*, and each day such condition continues shall be regarded as a new and separate offense." (RMC, § 1.01.110(E), emphasis added.)

It is difficult to conceive on what basis any public entity operating under any set of rules could grant Valley an as-built permit under the conditions it created here: no building, use or electrical permits sought or obtained; no safety inspections sought or obtained; construction that made later city inspections impossible.

In any event, Valley is barred under res judicata from raising the issue of whether the City was obligated to grant Valley an as-built permit for its illegal billboards rather than seeking their removal. For one thing, Valley did not preserve any issue regarding its alleged entitlement to as-built permits in the pretrial order. (VA 149-160.) For another, when Valley sought to resurrect the issue in its new trial motion, the district court decided the issue against Valley on the merits. It found that Valley had completely failed to support its assertion that such so-called "as-built" permits "are routinely granted by the City" (VA 310) and held, significantly, that Valley had offered:

> no authority to support the absurd position that it has an entitlement to an "as-built" permit once it violated basic public safety standards by undertaking substantial construction of the critical foundation portions of the signs without first submitting either the plans, or the foundations themselves, for City inspection.

(VA 309-310.)[12]

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[12] Though the issue is irrelevant, Valley's factual assertions regarding its alleged efforts to obtain post-construction permits are themselves questionable, to say the least. Valley claims that its president attempted to apply for permits five days *after* it completed the underground construction of its billboard structures, and that an unnamed "City official" rebuffed Valley for unconstitutional reasons. (V-AOB 8.) The contention is simply incredible: suddenly after secretly completing the underground portions of its billboards, Valley decided to apply for a permit, was rebuffed on what it claims were illegitimate grounds, made no objections, wrote no letters, didn't even find out the name of the City official involved, sought no relief in its then pending (though as yet unserved) federal lawsuit, and instead simply proceeded to complete the above-ground portions of its signs, also without permits or inspections. Simply put, Valley's story is a self-serving fairy tale.

Next, Valley claims that "[o]n February 25, after the construction and installation of the signs was completed, [it] tried again to apply for permits" pursuant to the RMC section that supposedly "expressly authorizes such 'late-filed' permits." (VA 8.) However, Valley itself admits that its applications were for design-approval only; they were not applications for building or electrical permits. (VA 154.)

C. Valley Is Unable To Rebut The City's Showing Of Irreparable Harm – The Second Prong Of The Preliminary Injunction Test.

Valley argues that the City could not prove irreparable harm in regard to Valley's illegal signs, because, according to Valley, they present (1) no safety hazard since they "have stood for four years without incident"; (2) "no aesthetic harm" because "they are like other billboards" to which "the City has granted variances"; and (3) no traffic hazard "because the City has undertaken no studies" and produced no citizen complaints. (V-AOB 28-29.) In addition, Valley argues that the balance of hardships tips in its favor, insisting "the record is undisputed that Valley will indeed suffer grave harm from this injunction." (V-AOB 31.)

The dispositive answer to these points is that they are irrelevant and that Valley is barred to raise them on appeal. First, the issue of irreparable harm was adjudicated in the district court and decided against Valley. Both the district court and the Ninth Circuit made findings on this issue that bind Valley and establish that the balance of harms in this case tips decisively in the City's favor. (Pp. 30-31, *ante*.) Second, under the facts of this case, the trial court is entitled to *presume* harm to the City sufficient to satisfy the second prong. (Pp. 31-32, *ante*.) It doesn't need to find that the signs are unsafe or a traffic hazard or a visual blight. The harm to the City is presumed.[13]

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[13] As we showed above, it is also proven as a matter of fact. (See pp. 32-33, *ante*.) How, for example, can Valley get around the undisputed fact that its signs far exceed the City's height and size restrictions for billboards and are located illegally close to a freeway (e.g., VA 151; CA 168-177) and its (continued...)

Valley notes that the presumption is rebuttable, but fails to disclose how strong the presumption is. For example, Valley cites *City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193 for that proposition. (V-AOB 31.) But Valley fails to discuss the actual holding or to quote the case's critical language. In *Barnes*, the trial court issued a preliminary injunction enjoining a violation of a city zoning ordinance. Like Valley did here, the defendant in *Barnes* "in effect concede[d] the ordinance violation." (3 Cal.App.4th at 1199.) Like Valley did here, the defendant argued that the zoning ordinance was unconstitutional and that the preliminary injunction imposed hardships on her and her business. (*Id.* at 1196, 1197.)

Nonetheless, the court of appeal affirmed the preliminary injunction, holding: "Assuming that there was evidence that [defendant] would suffer grave or irreparable harm from a preliminary injunction, and assuming there was evidence that [defendant] could prevail in the balancing of the harms, we nonetheless conclude that no abuse of discretion occurred. '[I]f it appears *fairly clear* that the [city] will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the [city] is unable to prevail in a balancing of the probable harms.'" (*Id.* at 1199, emphasis added.)

Here, the likelihood that the City will prevail on the merits is not just "fairly clear" but *certain*. Even if Valley could identify "grave or irreparable harm," *Barnes* shows that the City's *certain* showing on the merits would still entitle it to interlocutory relief. But Valley cannot even

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[13] (...continued)
admission that having "wired and energized" three signs "without electrical plan review, permits or inspections," it has created "a potential fire and /or electrocution hazard" (VA 152-155)? It can't.

get that far; the only harm it asserts is a loss of current business income if it can't carry displays on its signs and a potential loss of future income if its advertisers wind up refusing to contract with it in the future (V-AOB 33-34) – and that kind of injury is plainly compensable in damages.

D. None Of Valley's Remaining Arguments Defeat The City's Right To Interlocutory Relief Against Valley's Illegal Signs.

1. Contrary to Valley's contention, the preliminary injunction was not based on former provisions of the RMC that were invalidated by this Court.

In the *OMG* case, this Court struck down restrictions in the City's sign code on the size, height and location of billboards as well as the exceptions to those restrictions because the Court found the scheme to be content-based. (Pp. 7-9, *ante*.) Valley argues that it was "clear error" for the court below "to grant a preliminary injunction to enjoin any alleged violations of those invalid portions of the Code." (V-AOB 20.) The trial court did nothing of the kind. This is a total misrepresentation of the basis of the preliminary injunction. The City did not ask the trial court to enforce any invalidated provision in the RMC – why would it? – and the court didn't do so. Not surprisingly, Valley does not support its assertion to the contrary with a single record cite.

2. Contrary to Valley's contention, the trial court could have independently based the preliminary injunction on Valley's violations of the City's size, height and location restrictions.

The primary focus of the litigants, lawyers and court on the motion for preliminary injunction was Valley's failure to seek or obtain permits or inspections before constructing the underground portions of its signs. The City stressed these violations because it was able to rely on the collateral estoppel effect of the district court's ruling that Valley's signs were per se nuisances, which was based on the finding that they had been constructed without permits or inspections. (E.g., VA 85-86; see pp. 14-15, *ante*.) Valley's focus was the same. At the preliminary-injunction hearing, it argued that this case "is about [the City's] claim the sign wasn't built right, wasn't constructed right, talking about footings, the foundation, etcetera." (RT 19.) And that is the position the City argued as well. (E.g., RT 27-29.)

But Valley also violated the City's current size, height and location restrictions, enacted in response to the *OMG* case. In Valley's federal lawsuit, the district court upheld the constitutionality of those amended provisions. (VA 145-148.) Now, Valley asserts that the trial court here relied on those provisions, and that that was error because "they can serve no useful purpose here, to bootstrap this Court into now providing some injunctive relief or anything else." (V-AOB 21.)

Valley provides neither a record citation nor a developed argument to prove any fact of that assertion. In any event, it makes no difference.

Valley's violations of the City's permitting and inspection requirements by themselves fully justify the trial court's interlocutory relief. There is no need to add other violations to the mix. On the other hand, the

trial court could certainly have based a preliminary injunction in whole or in part on Valley's violations of the amended location, height and size restrictions. Valley freely admits that all its signs are in prohibited locations in close proximity to the 91 Freeway. (VA 151, 155.) It is also undisputed that its signs far exceed height and square footage limitations. (CA 168-177.) That's enough to entitle the City to an order compelling the removal of the signs.

True, when Valley erected its signs, the amended size, height and location restrictions had not yet been enacted, and the existing restrictions had just been struck down by this Court in the *OMG* case. Nonetheless, Valley cannot escape the effect of the amended rules by relying on the zoning rules as they existed when it built its signs. For one thing, it cannot claim a vested right in the pre-amendment zoning rules, because it built without a permit. (See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791-793.) For another, its signs cannot qualify for legal nonconforming status under the RMC – because, to do so, a sign must "lawfully occupy[] a site" and be "lawfully established." (RMC, §§ 19.04.385, 19.04.390.) But having been constructed without permits and inspections, Valley's signs are not lawfully established. (*Mang v. County of Santa Barbara* (1960) 182 Cal.App.2d 93, 102 [excavating without permit is illegal act that precludes nonconforming status].)

In short, there is undisputed evidence that Valley has violated *both* those RMC provisions requiring permits and inspections before construction and those RMC provisions regulating the size, height and location of billboards. Accordingly, the trial court was entitled to grant a preliminary injunction based not only on Valley's failure to obtain permits

and inspections, but on the separate ground that Valley's signs do not conform to the City's size, height and location restrictions.

In response, Valley insists the City is barred by res judicata from enforcing the amended location, size and height restrictions. The short answer to this is that even were Valley correct, it would not matter, because the injunction is alone justified by Valley's violation of the City's permit and inspection requirements. However, since Valley raises the issue, the simple truth is that the district court's determinations *do* allow a state court to apply the amended location, size and height restrictions to Valley, since the district court held that they were constitutional. (VA 145-148.)

Yet, according to Valley, in the order denying Valley's summary-judgment motion, the district court stated that the City could not enforce the amended size, height and distance provisions against signs erected prior to the enactment of the amended provisions. (V-AOB 21, quoting VA 684.) As a threshold matter, Valley conspicuously ignores the context of the district court statement. The district court order denied the City's motion for summary judgment (and Valley's cross-motion as well), concluding that it could not yet determine whether Valley's signs were "lawfully established," i.e., whether Valley's failure to secure building permits and safety inspections prior to construction rendered them illegal and hence outside the "nonconforming use" exception of the amended ordinance. (VA 296-297; 683-684.)

In sum, the district court did *not* purport to bar application of the ordinance to Valley's signs if they were in fact illegal at the time they were built. And, of course, based on subsequent Ninth Circuit case law, the district court at trial eventually determined that Valley's signs were illegal, and granted judgment to the City.

In any event, regardless of what the district court meant, a statement appearing in a denial of a summary judgment motion can have no res judicata effect as to the City because it was not part of a final judgment in favor of Valley. (*Castro v. Higaki* (1994) 31 Cal.App.4th 350, 357 ["'A valid final judgment on the merits *in favor of a defendant* serves as a complete bar to further litigation on the same cause of action,'" emphasis added].) Similarly, it can have no collateral estoppel effect because the district court's ruling on whether the amended restrictions could be applied against Valley's existing signs was not essential to its judgment in favor of the City. (E.g., *In re Cruz* (2003) 104 Cal.App.4th 1339, 1345 [collateral estoppel prohibits same parties from retrying issue identical to issue "actually and *necessarily decided* in a prior proceeding that resulted in a final judgment on the merits," emphasis added]; *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 887, fn. 3 ["court's ruling on the choice-of-laws issue was not essential to the judgment in favor of Pike and AGI and, thus, need not be given issue preclusive (collateral estoppel) effect"].)

3. Contrary to Valley's contention, the trial court did not err in declining to apply the doctrine of laches against the City.

Valley complains that the City inexcusably delayed moving for an injunction because it "spent four years litigating the constitutionality of its sign ordinance in Federal district court," and "during all that time, it never sought to abate any alleged 'nuisance' from [Valley's] billboards." (V-AOB 1, 43-45.) Therefore, according to Valley, the trial court abused its discretion by not applying the doctrine of laches. (V-AOB 43.)

This argument is utterly without merit. Indeed, once again Valley's position borders on the frivolous.

> A party asserting laches must show both unreasonable delay and prejudice resulting from the delay. [Citation.] A trial court's ruling regarding laches will be sustained if there is substantial evidence to support it.

(*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 257-258.)

The City is not remotely guilty of unreasonable delay. Rather, all delay in this case is properly laid at *Valley*'s door. *It* filed a federal action enjoining the City from removing its billboards. (Pp. 9-10, *ante*.) *It* constructed its billboards in secret (even waiting to file its federal complaint until the day after its last billboard was installed) so the City would not learn of – and therefore could not take action to stop – Valley's illegal activities. (Pp. 6 & fn. 3, 9-10, *ante*.) *It* prayed for and obtained a preliminary injunction barring the City from taking any action to compel Valley to remove the signs. (VA 100, 113.) And, after losing on the merits, *it* successfully objected to the district court's plan to order the billboards removed above the foundation, insisting instead that the City had to start over again with an abatement action in state court. (VA 259, 262-266.)

Moreover, Valley has made no showing of prejudice from the alleged delay. How could it? Far from suffering prejudice, Valley has obtained the benefit of a four year free pass to maintain its illegal signs and earn substantial income from them. "'Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.] Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances,

and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained.'" (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1126-1127.)[14]

Valley clearly argued laches in opposing the City's preliminary injunction motion. (E.g., VA 365-366.) The trial court rejected the laches defense. As shown above, there is substantial evidence to support the trial court's ruling.

4. Contrary to Valley's contention, the trial court was required to give collateral estoppel effect to the district-court judgment whether or not the district court decided all of Valley's constitutional claims.

Valley asserts that the trial court could not apply collateral estoppel because the district court didn't decide what Valley calls its constitutional defenses. (V-AOB 36-37.) Specifically, while acknowledging that the district court decided certain constitutional matters in entering judgment in favor of the City, Valley insists that "[i]f even one issue was not decided, it was error to grant a preliminary injunction based on collateral estoppel." (V-AOB 37.) Valley is wrong.

The district court properly ruled on all issues that it needed to rule on in order to determine whether Valley could obtain an injunction enjoining

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[14] If, as here, a defendant cannot show prejudice, it may show that plaintiff acquiesced in the defendant's underlying fault. (E.g., *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 672.) Needless to say, Valley has not even argued, much less tried to show, that the City acquiesced at any point in Valley's illegal conduct – something utterly belied by the City's stop notices, notices to remove and the hotly contested litigation in federal and state court.

the City from removing its billboards. Once it determined that (1) Valley was not entitled to any relief because its signs had been erected without permits or inspections; (2) the permitting and inspection requirements were constitutional; and (3) the City could seek the immediate abatement of the signs, the district court was not required to decide – indeed, was required *not* to decide – constitutional challenges that did not bear on its decision. (*United States v. Conkins* (9th Cir. 1993) 9 F.3d 1377, 1386 [court declined to decide issue because "the Barragans would obtain no relief even if this court were to adopt the holding" they urged, and "federal courts are not authorized to issue advisory opinions"].)

Valley fails to cite any authority that restricts the application of collateral estoppel under these circumstances. Indeed, collateral estoppel also applies to the district court's ruling that it was not required to address Valley's constitutional claims in order to dismiss its lawsuit and order its signs abated. (E.g., VA 328 ["I don't think we needed to [decide the constitutional claim] based upon the fact that there was never a permit obtained in this – for this sign; nor were there any inspections that were signed off with respect to this sign"].)

In ruling as it did, the district court relied on two recent Ninth Circuit decisions that are directly on-point with the present case, even to the point that the unlawful billboards in each case are *Valley* billboards. In *Valley Outdoor, Inc. v. County of Riverside, supra* [the "*County* case"], Valley sought to enjoin the County of Riverside from removing four billboards adjoining the 91 Freeway that violated the zoning and height restrictions of the County's original and amended sign ordinances. In order to shield its illegal billboards, Valley raised the same constitutional claims it raised in

this case, first in the district court and now in its opening brief here. (337 F.3d at 1112, 1113.)

In the *County* case, the Ninth Circuit held that Valley's "signs ran afoul" of provisions of both the original and amended County ordinances (specifically, the zoning, maximum height, and maximum surface area provisions), and further held that those provisions "were both constitutional and severable" from any unconstitutional provisions. (*Id.* at 1113.) It concluded that, despite other constitutional challenges to or infirmities in the County ordinance, those provisions were "independently enforceable" ordinance provisions. (*Id.* at 1114-1115.)

Accordingly, the County could compel Valley to remove the illegal signs, but Valley was entitled to neither injunctive nor monetary relief on the basis of other unconstitutional provisions in the County ordinance, because "the subject billboards were 'independently' illegal under that ordinance's [remaining provisions]." (*Id.* at 1115.)

The same principle was announced in the second case the district court relied on, *Virtual Media Group, Inc. v. City of San Mateo, supra*, 2002 WL 485044 – which Valley also lost. The case was binding on both Valley and the district court under principles of collateral estoppel. (See *Diruzza v. County of Tehama* (9th Cir. 2003) 323 F.3d 1147, 1152.)

In *Virtual Media*, the San Mateo Municipal Code made it unlawful to construct any structure without first obtaining building and electrical permits. After billboards were erected in San Mateo without building or electrical permits, Valley challenged the constitutionality of various other provisions of San Mateo's old sign ordinance, arguing that if those provisions were declared unconstitutional, Valley's signs would qualify as legal nonconforming uses under San Mateo's new ordinance.

The district court rejected this logic and granted defendants summary judgment. According to the court, whatever the constitutional status of other ordinance provisions, Valley's signs remained unlawful because they did not comply with San Mateo's building and electrical permit requirements. The district court refused to excuse the illegal construction of the signs simply because those enforceable permit requirements adjoined other unconstitutional provisions in San Mateo's old sign ordinance. (2002 WL 485044 at * 2-3.) Indeed, the court went further: It found the billboards to be nuisances per se based on the fact that they were erected without building or electrical permits, and ordered them taken down. (*Id.* at * 4.) The Ninth Circuit then affirmed the district court judgment by unpublished disposition in *Virtual Media Group, Inc. v. City of San Mateo* (9th Cir. 2003) 66 Fed. Appx. 129.

These cases teach that a sign company cannot escape the operation of enforceable provisions of an ordinance by opportunistically relying on claims of unconstitutionality that are unrelated to the violations at issue.

Here, Valley could not obtain relief in its federal lawsuit that would stop the City from removing Valley's billboards, because no determination of Valley's constitutional claims could change the fact that it deliberately began and completed the underground construction of its signs without complying with content-neutral permit and inspection requirements whose constitutionality was not and, indeed, could not be challenged. As the district court approvingly summed up the City's position: Valley's constitutional claims are "purely theoretical and cannot be redressed in this lawsuit because the City is entitled to remove Valley's sign[s] due to the illegality of Valley's action and building without permits." (VA 220.)

Valley barely discusses the *County* case; incredibly, it totally ignores the on-point *Virtual Media* case. Valley charges that the district court misread and misinterpreted the *County* case (V-AOB 12, 37-38) as holding "that Valley's failure to apply for a permit to erect a sign *before* beginning construction *ipso facto* foreclosed its standing to challenge the constitutionality of the underlying sign ordinance" (V-AOB 38). But as noted, the district court well understood the *County* case. In the *County* case, as we've seen, Valley was denied injunctive and monetary relief even though a portion of the sign ordinance was declared unconstitutional "because the subject billboards were 'independently' illegal under that ordinance's content-neutral zoning, size and height provisions." (337 F.3d at 1115.) Here, Valley's signs are illegal under content-neutral permitting and inspection provisions in the RMC. In both cases, as a matter of logic, and under basic principles of causation, if Valley's signs are illegal under enforceable provisions of an ordinance, no decision regarding unrelated claims of unconstitutionality can save the illegal signs. There was no error in the district court properly recognizing this.

Nothing changes if the matter is analyzed as one of standing. In *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois* (7th Cir. 1993) 9 F.3d 1290, an advertising company filed suit seeking to enjoin several provisions of a public entity's sign and zoning codes on constitutional grounds. The district court dismissed the action as moot, and the Seventh Circuit affirmed, holding that the company's sign was unlawful under other portions of the statutory scheme that the plaintiff hadn't challenged, and hence it "lack[ed] standing to challenge either the sign code or the zoning code, because it could not put up its sign even if it achieved total victory in this litigation." (*Id.* at 1291.) The court observed: "An

injunction against the portions of the sign and zoning codes that it has challenged would not let it erect the proposed sign; the village could block the sign simply by enforcing another, valid, ordinance already on the books. Harp has no more to gain from winning this suit than would a firm seeking to erect a sign in Alaska (where an ordinance similar to Chicago Ridge's spelled the difference), or a lawyer living in Chicago Ridge and interested not in erecting signs but in constitutional governance." (*Id.* at 1292.)

Here, too, Valley has nothing to gain from winning its constitutional claims in federal court. None can affect the fate of Valley's signs, because there is no nexus between Valley's assertions of constitutional violation and its failure to obtain permits. (Cf. *Central Delta Water Agency v. United States* (9th Cir. 2002) 306 F.3d 938, 946-947 [it is an "indispensable part of the plaintiff's case" to prove both a "causal connection between the injury and the conduct complained of" and the likelihood "that the injury complained of can be redressed by a favorable court decision," internal quotes omitted].)

Valley cites *Desert Outdoor Advertising, Inc. v. City of Moreno Valley* (9th Cir. 1996) 103 F.3d 814 (V-AOB 38), but that case can't aid Valley, for it only stands for the unexceptional proposition that a sign company has standing to judicially challenge an ordinance if it was futile to apply for a permit under the ordinance. But what has this to do with Valley? First, as we've seen, Valley failed to raise a futility defense in its federal action; and, under res judicata, is precluded from raising it here. (Pp. 52-53, *ante*.) In addition, as we've also shown, and as *Desert Outdoor* confirms, the futility doctrine operates solely in the judicial arena. (P. 52, *ante*.) The doctrine merely preserves a plaintiff's standing to challenge an ordinance that he did not attempt to comply with; it does not license the

plaintiff to go out in the real world, ignore a city's permitting requirements and proceed to engage in construction without a permit. Thus, even if Valley were able to prove that it could not have obtained a permit for its signs, and it has *never* made any such showing, and even were it not precluded from litigating that point – and it *is* precluded because the issue was adjudicated against it by the district court – Valley could not defend its exercise of illegal self-help by arguing futility.[15]

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[15] Significantly, in *Desert Outdoor*, the defendant city asserted violations other than the plaintiff's failure to apply for a building permit or obtain safety inspections as the ground for removing its illegally constructed signs. Therefore, the plaintiff's mere failure to apply for permits did not deprive the sign company of federal Article III standing because "a declaration that the ordinance is unconstitutional would likely redress Desert and OMG's injuries by enabling them to maintain their signs." (103 F.3d at 818.) In contrast, as the district court concluded, Valley could obtain no relief allowing it to maintain its signs (or to obtain damages, for that matter) precisely because they were illegal under portions of the RMC that Valley has never challenged.

II. THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE TRIAL COURT GRANTING THE CITY AN INTERLOCUTORY ORDER THAT ENJOINS VALLEY FROM RETAINING OR DISPLAYING COMMERCIAL MESSAGES OR THAT REQUIRES VALLEY TO REMOVE ITS SIGNS ABOVE THE FOUNDATION.

A. The District Court Adjudicated All Of Valley's Facial Challenges To The City's Billboard Regulations And Ruled That The Regulations Are Constitutional.

Valley has never challenged the constitutionality of the City's permit and inspection requirements in its building and electrical codes. It is difficult to see how it could. They are content-neutral public safety regulations that apply to all structures erected in the City of Riverside, including billboards. As the Supreme Court emphasized in *Metromedia, Inc. v. San Diego*, *supra*, 453 U.S. 490, "whatever its communicative function, the billboard remains a 'large, immobile, and permanent structure which like other structures is subject to . . . regulation.'" (453 U.S. at 502.)

Early on in the federal litigation, Valley claimed that this Court in the *OMG* case had invalidated the City's entire sign ordinance as it related to billboards, including the permitting requirements. (E.g., VA 101-103, ¶¶ 15, 17, 21.) The argument was absurd on its face, given the actual language of the *OMG* opinion; in any event, the district court rejected the argument out of hand, and Valley itself ultimately abandoned it. (Pp. 7-8, 10-11 & fn. 4, *ante*.)

On the face of it, the City's ordinances are constitutional regulations of the non-communicative aspects of billboards. Billboards, "like other media of communication, combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium." (*Metromedia, Inc. v. San Diego, supra,* 453 U.S. at 502.) Indeed, the need for governmental regulation is particularly insistent where billboards are concerned. As noted, they are "'large, immobile, and permanent structure[s].'" (*Ibid.*) "[B]ecause it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development." (*Ibid.*) "[B]illboards do present their own unique problems: they are large immobile structures that depend on eye-catching visibility for their value." (*Id.* at 528, conc. opn. of Brennan, J.).)

Here, Valley's deliberate construction of these "'large, immobile and permanent structure[s]'" without permits or safety inspections is a violation of regulations directed at the non-communicative aspects of Valley's signs. The district court agreed; for example, holding:

- "Non-communicative aspects of billboards – such as electrical connections – are subject to regulations promoting the substantial government interests of esthetics and safety." (VA 190.)
- "This Court has found that the City's building permit requirements are content neutral and were in place long before [Valley] had constructed these signs." (VA 309.)

The district court also upheld the overall constitutionality of the City's sign ordinance against a plethora of attacks by Valley. The district court:

- Rejected Valley's contention that the sign ordinance, as amended post-*OMG*, discriminates in favor of commercial speech at the expense of noncommercial speech, holding that the very face of the sign ordinance shows that "it expressly excludes non-commercial signs from the general prohibition against all off-premises signs." (VA 145.)

- Rejected Valley's contention that the sign ordinance was void for vagueness, holding that under Ninth Circuit authority, the ordinance is not required to define commercial and non-commercial speech, which must be defined by judicial precedent. (VA 145-146.)

- Rejected Valley's contention that the sign ordinance failed to satisfy the three prongs of the controlling "*Central Hudson*" test, which provides that an ordinance regulating lawful commercial speech is valid if it (1) seeks to implement a substantial governmental interest, (2) directly advances that interest, and (3) reaches no further than necessary to accomplish it. (VA 146, citing *Central Hudson Gas & Elec. Corp. v. Public Service Com.* (1980) 447 U.S. 557, 563-566 [100 S. Ct. 2343, 65 L. Ed. 2d 341].)[16]

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[16] The district court held that the first and second prongs were satisfied by the sign code's statement of purpose, which declared its purpose as preserving and enhancing "aesthetic, traffic safety and environmental values" and safeguarding and preserving "the health, property and public welfare of Riverside residents." (RMC, §19.76.005, cited VA 146-147.) It rejected Valley's assertion that the City was required to present detailed evidence to establish the second prong; according to the Ninth Circuit, no evidence was needed, the statement of purpose was sufficient. (VA 147.) Lastly, the district court "agrees with [the] City that the Ordinance reaches no further than necessary to accomplish its stated purpose and is comparable to the scheme approved by the Supreme Court in *Metromedia*." (VA 147-148.)

- Rejected as "without merit" Valley's assertion that the City's nonconforming use provisions (RMC §§ 19.04.385, 19.04.390) are facially unconstitutional. (VA 296.)

In addition to the district court's findings, Valley itself stipulated to facts in the pretrial order that show the sign ordinance's constitutionality. Valley stipulated that the amended sign ordinance:

- Was amended "in response to the OMG case by setting forth the purpose of the Chapter, by amending various definitions and by removing limitations based upon content [on] on-premise and off premises signs." (VA 153, ¶ 5-27.)

- Contains a detailed statement of purpose and explicitly identifies as the means to advance its declared goals an intention to restrict signs near freeways and regulate their design, location and maintenance. (VA 154, quoting RMC, §19.76.005.)

- "[P]ermits non-commercial signs wherever other signs are permitted, and in all zones (i.e., even where commercial signs are not permitted) subject to reasonable time, place and manner regulations." (VA 154, ¶ 5-30.)

This is what follows from the foregoing:

The bottom line: The trial court was not constitutionally barred from granting a preliminary injunction and basing it on Valley violations of the City's building and safety regulations. Those violations alone support the injunction, and are unaffected by Valley's constitutional claims. In sum, there is no need for this Court even to consider Valley's arguments with respect to the amended provisions.

However, were it of a mind to do so, this Court could affirm the injunction not only on the basis of Valley's building and safety violations,

but independently on the basis that Valley's signs do not conform to the City's amended size, height and location restrictions.

B. Valley's Constitutional Attacks On The Sign Ordinance Are Irrelevant To The Issues On Appeal And Without Merit. In Any Event, Valley Is Collaterally and Judicially Estopped From Raising Those Challenges.

On appeal here, as in federal court, Valley's constitutional assault is directed at one particular ordinance in the RMC, the sign ordinance. Valley asserts that the sign ordinance, as amended in response to this Court's ruling in the *OMG* case, "is as substantively flawed as the Original Ordinance" that was in part struck down in *OMG*. (V-AOB 40.) This argument must fail for multiple reasons.

To begin with, it is irrelevant. As we've pointed out, the preliminary injunction was based and justified solely on Valley's violation of the City's permitting and inspection requirements. Those requirements are found in the City's building, electrical and sign codes. Valley does not challenge and has never challenged any portion of the first two codes. Nor could it, since all their provisions (including permit and inspection requirements) are plainly content-neutral regulations of the non-communicative aspects of billboards. At an early stage of its federal lawsuit, Valley did try to challenge the permit requirement in the sign ordinance (RMC, § 19.76.210 (A)) based on the false assertion that in the *OMG* case, this Court had struck down the sign ordinance in toto. (See pp. 10-11 & fn. 4, *ante*.) In fact, that section was plainly not invalidated in *OMG*, the district court agreed, and Valley stipulated as much in the pretrial order. (*Ibid.*) Thus, *none* of the

City's permitting and inspection regulations can be the subject of Valley's assertion that "the Amended Ordinance is as substantively flawed as the Original Ordinance." (V-AOB 40.) Those regulations were not substantively flawed, were not invalidated in *OMG* and were consequently not amended.

That leaves the *amended* parts of the sign ordinance as the subject of Valley's attack; in particular, the City's size, height and location provisions. Those provisions, however, are not relevant to determining whether the trial court correctly applied res judicata based on the final federal judgment to grant the City interlocutory injunctive relief. As we've shown, the trial court need not have relied on any of the amended provisions in order to grant that relief. It could rely solely on Valley's failure to apply for or obtain permits and inspections before constructing its billboards, as did the district court.

In any event, Valley's attacks cannot possibly succeed. Valley argues that "the City has done nothing to repair substantively the content-based restrictions found in the original ordinance." (V-AOB 41.) But that is patently untrue. Valley itself stipulated that "[t]he City amended its sign ordinance in response to the *OMG* case by setting forth the purpose of the Chapter, by amending various definitions and *by removing limitations based upon content* [on] on-premise and off-premises signs." (VA 153, ¶ 5-27, emphasis added.) Whereas the sign ordinance had previously (and unconstitutionally, as this Court found in *OMG*) given preference to commercial over non-commercial signs in establishing the locations where billboards were permitted, after the amendments became effective, non-commercial signs are permitted – as Valley itself stipulated – "wherever other signs are permitted, and in all zones (i.e. even where commercial signs

are not permitted) subject to reasonable time, place and manner regulations." (RMC, §§ 19.76.005, 19.76.020(B)(9); VA 154, ¶ 5-30.)

Valley is thus judicially estopped from arguing that "the City has done nothing to repair substantively the content-based restrictions found in the original ordinance." It is also collaterally estopped from making that argument, because the district court adjudicated those issues and held that the City's current size and location restrictions do not "discriminate[] in favor of commercial speech at the expense of noncommercial speech."

Valley's individual attacks on what it calls the sign ordinance's "*non*changes" or "nominal modifications" also fail. (V-AOB 40, 41.) Again, as a general matter, the nature of the changes Valley made to the invalidated parts of the sign ordinance has nothing to do with the permitting and inspection requirements that Valley violated, which were upheld in *OMG* and have not been changed in response to that case. At any rate, Valley is wrong. The amendments the City made to the sign ordinance are substantial, and in the pretrial order, Valley itself so conceded.

First, Valley argues that the sign ordinance's new statement of purpose is constitutionally insufficient because it contains only "platitudes." (V-AOB 41.) Nonsense. As shown above, the ordinance identifies "aesthetic, traffic safety and environmental values" as the interests it seeks to advance. (RMC, § 19.76.005.) These are the very interests identified by the Supreme Court as sufficient to allow municipal billboard regulation. (See *Metromedia, Inc. v. San Diego, supra,* 453 U.S. at 507-508 ["Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals. It is far too late to contend otherwise with respect to

either traffic safety or esthetics," citations omitted].) Neither of Valley's cases repeal this holding; they are, in fact, conspicuously inapt.[17]

The City's statement of purpose is also sufficient to allow the City to forego producing proof that its restrictions on billboard location, square footage and height directly advance its stated goals of traffic safety and aesthetics. The matter can be decided on the face of the ordinance. (*Metromedia, Inc. v. San Diego, supra*, 453 U.S. at 509-510 [ordinance directly advances traffic safety and aesthetics, even though no adequate record, because lawmakers may make common-sense judgment that billboards "are real and substantial hazards to traffic safety" and "by their very nature . . . can be perceived as an 'esthetic harm'"]; *Ackerley Communs. of Northwest, Inc. v. Krochalis* (9th Cir. 1997) 108 F.3d 1095, 1096, 1100 [affirming summary judgment that sign ordinance constitutional; given its statement of purpose, city not required to present "detailed proof that the billboard regulation will in fact advance the City's interests in traffic safety and esthetics"].)

Second, Valley presents a chart comparing provisions of the original sign ordinance with the same provisions as amended, and asserts that "none

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[17] *National Advertising Co. v. Town of Babylon* (2d Cir. 1990) 900 F.2d 551 involved an ordinance that *did not contain any statement of purpose*, hence, the court found that since the ordinance contained no statement of purpose, and the city did not attempt to introduce extrinsic evidence of such a purpose, the provision was invalid. (*Id.* at 555 ["[e]ven though one might assume that the towns were interested in traffic safety and aesthetics, the ordinances include no such statement of purpose"].) In *Dills v. Marietta* (11th Cir. 1982) 674 F.2d 1377, the court found that a time limit on temporary signs could not be justified on esthetic grounds, since *there was no statement of purpose to the effect that esthetics were a consideration* in enacting the regulation. (*Id.* at 1381.) The facts at bar simply could not be more different.

of these *de minimis* changes comes even close to solving the very serious defects found by the Court of Appeals [sic]" (V-AOB 40-41) in *OMG*. Valley does not specify what "serious defects" it is referring to or show in what way the amended ordinance fails to cure them. There is just the chart and the bald assertion – and that's it. Valley's bare conclusory assertion constitutes waiver on the point. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"]; *McClellan v. Northridge Park Townhome Owners Assn.* (2001) 89 Cal.App.4th 746, 757 ["Given the conclusionary nature of the briefing, and its failure to explain in what manner the evidence is insufficient to establish Northridge Park's successor liability for the amount due on the judgment, the contention is waived"].)

The frivolous nature of Valley's naked contention is underscored by the fact that the changes in the ordinance, far from being insufficient, reflect the very language *recommended* by this Court in *OMG*. (Compare V-AOB 40-41 with VA 512.)[18]

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[18] For example, this Court stated:

> "Off-site signs, which ordinarily would include any sign which is not an 'on-site' sign are defined however, strictly in terms of the commercial message of the sign. That is, instead of defining an off-site sign as 'a sign *not identifying* a business or product' available at, or an occupant of, the property where the sign is located, the Ordinance defines an off-premises sign as one 'identifying a business or product *at some other location other than the property where the sign is displayed.*' . . . . Similarly a billboard is defined as a sign 'that directs attention to a business, profession, product, commodity or service that is not the primary business . . . conducted . . . on the site on which on the sign is located,' [citation] *rather than* as a sign that *directs attention to anything other than* a business,

(continued...)

The bottom line is that Valley is trying to use the chart to challenge as content-based the City's elemental distinction between on-site signs and billboards, and thereby the City's right to impose different height, location and size standards for the latter. But that challenge must fail; a public entity's right to make and act on that distinction is long settled. The United States Supreme Court, as well as the Ninth Circuit, have held that public entities may validly prohibit off-site commercial signs, while allowing on-site commercial signs. (*Metromedia v. San Diego, supra*, 453 U.S. at 502, 512 ["It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"]; *Members of City Council v. Taxpayers for Vincent* (1984) 466 U.S. 789, 806-807 [104 S.Ct. 2118, 80 L.Ed.2d 772] [in *Metromedia*, seven justices explicitly concluded that the city's interests in avoiding visual clutter justified a prohibition of billboards]; *Ackerley Communs. of the Northwest, Inc. v. Krochalis, supra,* 108 F.3d 1095 [Seattle's ban on new billboards is valid; *Metromedia*'s plurality opinion is law in Ninth Circuit]; *Outdoor Systems, Inc. v. Mesa* (9th Cir. 1993) 997 F.2d 604, 610-612 [sign ordinance banned new offsite signs, and was valid].)

In these cases, as in the present case, the difference between billboards and on-site signs is not a content-based difference, but a location-

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[18] (...continued)
profession, product, commodity or service that is the primary business offered or conducted on the site where the sign is located." (VA 512.)

based one, i.e. whether the sign is on or off site. (Cf. *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 373 ["content neutrality turns on whether the regulation is justified by legitimate concerns that are unrelated to any disagreement with the message conveyed by the speech (citation), and that such a regulation will be found content neutral even if it has an incidental effect on some speakers or messages but not others," internal quotes omitted].)

In any event, all of these issues were decided against Valley during the course of its federal court litigation, and therefore Valley is barred from re-litigating them here.

C. Valley Cannot Assert A New Theory Based On The California Constitution That It Failed To Raise In The Trial Court. Moreover, Its Argument Is Barred By Res Judicata, Is Irrelevant And Is Without Merit.

Valley claims that the trial court erred in not applying the decision of the California Supreme Court in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 497 before issuing a preliminary injunction. (V-AOB 17-19.) According to Valley, that decision "announced that the free speech guarantee of the California Constitution afforded greater protection to commercial speech than has sometimes been envisioned under the First Amendment" and "means that in order to regulate commercial speech in California, on the principle of 'traffic safety' or 'aesthetics,' a City must first make a real showing whether community or freeway aesthetics or traffic safety is *actually served* by its legislation, not just rely on a

presumption that may work only under the 'somewhat' protection of the First Amendment." (V-AOB 17, 18.)

That assertion gets Valley nowhere for multiple reasons.

First, Valley is barred from raising this issue on appeal because it never raised it in the trial court. "Points not raised in the trial court will not be considered on appeal. [Citation.] 'Even a constitutional right must be raised at the trial level to preserve the issue on appeal [citation].' [Citation.] In civil cases, constitutional questions not raised in the trial court are considered waived. [Citation.] [¶] Due to the Hepners' failure to raise their constitutional challenges in the trial court, it is unnecessary to address their constitutional arguments to dispose of the matter before us." (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486; *Burden v. Snowden* (1992) 2 Cal.4th 556, 570.)[19]

Needless to say, it takes a certain brazenness to complain, as Valley does, that the trial court "failed to recognize and properly apply California law" – when Valley never cited or made an argument based on that California law.

Second, the argument is barred by res judicata. Valley could have raised the issue in its federal court lawsuit, but chose to abandon it. Specifically, while Valley's federal complaint contains a brief reference to the California Constitution, the pretrial conference order refers only to

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[19] Moreover, according to Valley, its new contention requires the consideration of disputed facts. (V-AOB 17-19.) But a "contention may not be raised for the first time on appeal [if] it is a new theory [that] contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 945, fn. 13, internal quotes omitted.)

plaintiff's claims under the First Amendment to United States Constitution. (VA 16, 18, 157, ¶¶ 7-12, 7-13, 7-14.)

Nor did Valley even attempt to argue any California constitutional claim at any point in the district court federal lawsuit. Clearly, it could have raised the claim had it not abandoned it, and claims that could have been raised are barred by the final judgment under res judicata.

Here, too, Valley shows no small amount of audacity when it states, with considerable condescension, that "we should not be too surprised that a *federal* judge was unaware of" this California law (V-AOB 19) – when it was Valley who once again failed to bring to a court's attention law that it now insists is vital to its case.

Even if Valley were not precluded from raising its new theory, that theory could not aid Valley, because nothing in *Gerawan* compels a court to deny the City injunctive relief on the facts presented here. According to Valley, *Gerawan* requires the City to "make a real showing" that its time, place and manner restrictions on the location, size and height of billboards "actually serve[]" traffic safety and aesthetics. (V-AOB 18.) However, as noted, even had *Gerawan* said any such thing, the ruling could not affect an injunction based on violations of content-neutral permitting and safety requirements whose constitutionality has never been challenged or doubted.

But *Gerawan* doesn't hold what Valley claims it holds. It does not purport to so much as suggest that *Metromedia v. San Diego, supra*, is somehow no longer good law. (See V-AOB 17-18.) Insofar as its interpretation of the California Constitution, *Metromedia v. San Diego* remains good law. *Gerawan* did not purport to overrule the decision. Moreover, it does not hold, as Valley claims, that before a city can "regulate commercial speech in California, on the principle of 'traffic safety' or

'aesthetics,' a City must first make a real showing whether community or freeway aesthetics or traffic safety is *actually served* by its legislation, not just rely on a *presumption* that may work only under the 'somewhat' protection of the First Amendment." (V-AOB 18.)

The giveaway here is that Valley does not actually cite to *Gerawan* in support of these contentions. (See V-AOB 18-19.) How could it? *Gerawan* is not a billboard case. It doesn't even discuss the impact of a sign ordinance's statement of purpose. Certainly, nothing in *Gerawan* remotely suggests that it rejects what the United States Supreme Court calls "the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety" and "that a legislative judgment that billboards are traffic hazards" is to be presumed sufficient without an evidentiary showing. (*Metromedia v. San Diego, supra*, 453 U.S. at 509.) No surprise there, since the California Supreme Court is itself one of those "many reviewing courts." (See *ibid.*)

Moreover, the Supreme Court has explicitly limited *Gerawan*'s reach to its own factual situation, notwithstanding some of its broader pronouncements. (See *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1028-1029 [rejecting the argument that "[o]ur recent statement in *Gerawan* that California's free speech clause 'runs against the world, including private parties as well as governmental actors'" means no state action is necessary, because "[a] decision is not authority for everything said in the . . . opinion but only for the points actually involved and actually decided," internal quotes omitted].) If this is true as to "everything said" in an opinion, how much more so is it true when a matter is not even referenced?

D. A Preliminary Injunction Requiring Valley To Remove Its Commercial Sign Faces, As The Trial Court Ordered, Or Its Entire Billboard Above The Foundation Without Regard To The Messages Carried Is, Either Way, Not An Unconstitutional Prior Restraint On Speech.

Valley argues that the preliminary injunction constitutes an invalid prior restraint on freedom of speech. (V-AOB 15.) Valley does not challenge the City's right to order the removal of its signs after trial and judgment, but insists that "there is no authority . . . for granting a *preliminary* injunction against posting advertisements in this state." (V-AOB 16.) Indeed, it notes that the two Ninth Circuit cases on which the district court relied both "granted relief only *after* judgment." (V-AOB 16, fn. 8.)

Valley is wrong for multiple reasons. First, the injunction granted below was in fact granted after Valley had had a full trial on the merits. As we've shown, the district court determined every factual and legal issue necessary to support the preliminary injunction granted below, and the trial court accepted that it was bound by those finding under the doctrine of res judicata. Therefore, even if Valley were right in general about preliminary injunctions, that would not prove that the trial court abused its discretion in granting injunctive relief here.

Second, Valley is not right. It is not a prior restraint when an injunction is aimed at conduct that is unlawful under a content-neutral regulation. (*DVD Copy Control Assn. v. Bunner* (2004) 31 Cal.4th 864, 886, 889 [upholding preliminary injunction under both California and federal constitutions and noting "that *only* content-based injunctions are

subject to prior restraint analysis"].) Courts regularly issue preliminary injunctions aimed at stopping illegal conduct – here, Valley's erection of five billboard structures without complying with the non-communicative aspects of the City's building, electrical and zoning codes – even though speech is implicated. (See *Bank of Stockton v. Church of Soldiers* (1996) 44 Cal.App.4th 1623, 1626, 1631 [affirming preliminary injunction enjoining church from soliciting donations on bank's property, though court held these were free speech activities]; *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1248, 1252-1255 [directing trial court to issue temporary restraining order prohibiting former church member from expressing "contrary religious views" on church property because if "'conduct is permissibly prohibited under the state and federal Constitutions, the fact that the conduct may peripherally involve speech or association does not cloak it with constitutional protections that invalidate the criminal statute prohibiting the conduct'"]; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1120 [affirming preliminary injunction where court found conduct enjoined was public nuisance and that injunction burdened no more speech than necessary to serve a significant governmental interest]; *In re Englebrecht* (1998) 67 Cal.App.4th 486 [same]; *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.* (9th Cir. 1997) 109 F.3d 1394 [affirming preliminary injunction against distribution of book using Dr. Seuss-like rhymes to tell story of O.J. Simpson murder trial].)

DVD Copy Control is particularly instructive. There, the trial court issued a preliminary injunction under a statute preventing the misappropriation of trade secrets that enjoined defendants from posting on the internet or otherwise disseminating computer codes. The court of

appeal reversed on the ground that the enjoined codes were "pure speech" and "the injunction was an invalid prior restraint on pure speech." (31 Cal.4th at 874.) The Supreme Court reinstated the injunction. It held that the preliminary injunction was content neutral, even though it plainly restrained speech:

> "Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech. [Citation.] [L]iteral or absolute content neutrality is not necessary. [Citation.] The government's purpose is the controlling consideration, and a governmental regulation of speech is only content based if the government adopted the regulation because of disagreement with the message it conveys. [Citations.] This is true for speech cases generally . . . [Citation.] Thus, an injunction that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."

(31 Cal.4th at 877, internal quotes omitted.)

Applying those principles to the case before it, our Supreme Court held that "[t]he underlying basis for the injunction is the trial court's holding that [defendant] misappropriated [plaintiff's] property – its trade secrets – in violation of California's trade secret law." (*Id.* at 877-878.) It further found that the trial court "singled out" the enjoined communications for reasons having nothing to do with their subject matter, message or viewpoint. (*Id.* at 878.) And, the Supreme Court continued, "the governmental purpose behind protecting trade secrets . . . through injunctive relief is wholly unrelated to their content." (*Ibid.*) The court recognized that given the nature of the conduct to be enjoined, the injunction had to

refer to the content of the information. However, "[t]he fact that the preliminary injunction identifies the prohibited speech by its content does not make it content based"; rather, the "injunction remains content neutral so long as it serves significant governmental purposes unrelated to the content of the proprietary information." (*Id.* at 878-879.)

This defines the present case perfectly. Here, we have shown the substantial governmental purpose behind the City's permitting and safety inspection requirements, as well as behind the time, place and manner restrictions on billboards built near a freeway. There is not a shred of evidence that the City's ordinances are aimed at suppressing the particular messages carried on the billboards they regulate. The same is true about the interlocutory injunctive relief sought by the City – the removal of the above-ground portions of the signs without regard to whether the signs carried commercial or non-commercial messages.

The trial court's order – though we strongly believe it is too limited and should have required the total removal of Valley's illegal billboards above the foundation – is nonetheless also content neutral. Although it is phrased in terms of a content distinction between commercial and noncommercial messages, that is not because the trial court disagreed with the content of Valley's commercial messages or preferred one kind of message over another. Rather, the court's obvious purpose was to cut off Valley's ability to continue generating income from its illegal signs – an objective that required only the removal of commercial messages, not Valley's public service announcements. As our Supreme Court held, "a governmental regulation of speech is only content based if the government adopted the regulation because of disagreement with the message it conveys." (31 Cal.4th at 877, internal quotes omitted.) That clearly is not

the basis for the preliminary injunction sought in this case – not the one sought by the City – which the City in its opening brief asks this Court to substitute for the one granted by the trial court – and not the more limited injunction crafted by the trial court.

Our Supreme Court concluded by ruling that the preliminary injunction there was not a prior restraint, because "*only* content-based injunctions are subject to prior restraint analysis." (*Id.* at 886.) And an injunction is only content based if premised on a scheme that involves "subject-matter censorship" rather than "content-neutral time, place, and manner regulation." (*Ibid.*, internal quotes omitted.) In this regard, the court held:

> The injunction is content neutral . . ., and the trial court found that [defendant] had previously disclosed [plaintiff's] trade secrets in violation of California law. The court therefore issued the content-neutral injunction because of [defendant's] prior unlawful conduct. [Citation.] Although the court made its finding of prior unlawful conduct in the context of a preliminary injunction and found only that [plaintiff] was likely to succeed on the merits, this finding is sufficient to render inapplicable the heavy presumption against prior restraints.

(*Id.* at 887, internal quotes omitted.)

The Supreme Court made it clear that its conclusion remained the same whether the preliminary injunction was analyzed under the federal Constitution or under the California Constitution. (*Id.* at 889.)

At any rate, if there is a concern with the injunction crafted by the trial court, the answer is not to give the City no relief, but to give the City the primary relief it sought – an order requiring Valley to remove its signs

above the foundation. That relief cannot possibly be seen as implicated with the content of the signs.

E. Valley Plainly Makes No Equal Protection Showing And Is In Any Event Precluded From Arguing That The Preliminary Injunction Offends Equal Protection.

Valley argues that the City's "sign ordinance" is unconstitutional as applied to Valley because "Valley has contended for years that the City politically picks and chooses those permits it grants for structures that might otherwise violate its sign ordinance." (V-AOB 42.) Valley cites to its federal complaint as proof that it has "contended" this for years. (V-AOB 42-43.)

As a threshold matter, this argument is barred by res judicata. It was pleaded in Valley's federal complaint, but Valley ultimately abandoned any equal protection claim in its federal action. It did not raise it in the pretrial order or in any of its trial arguments before the district court, including its offer of proof. (See VA 149-161, 247-253) Accordingly, the issue is barred by res judicata.

Second, Valley cites absolutely no evidence that the City in fact engages in the alleged conduct. Its evidence on that issue begins and ends with its assertion that "Mr. Whyld testified at his deposition that there are six permitted billboards along the freeway, all with variances" and they "are the same height, size, and distance from the freeway as Valley's." (V-AOB 43.)[20]

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[20] In fact, Valley does not cite to any page of Mr. Whyld's deposition on (continued...)

Valley makes no developed equal protection argument based on these facts. It does not cite a single case dealing with equal protection. The reason is obvious. "The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law," but "[i]f persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

Plainly, Valley has totally failed to prove that its billboards are similarly situated in regard to the six billboards near the freeway. First, as Valley admits, the six billboards were "permitted billboards" – that is, unlike Valley's signs, they were built only *after* permits were obtained and inspections conducted. (See VA 663.) In addition, as Valley also concedes, the billboards "all" had variances. In other words, all the billboards were legally installed. (See *ibid.*) In contrast, Valley built its billboards without permits or inspections. Moreover, the billboards now, under the amended ordinance, do not conform to the City's zoning restrictions on size, height and distance from a freeway. It is undisputed that Valley never sought a variance or zone change; certainly, it does not even try to show that it ever made such an application.

"'[T]he proponent of an equal protection claim must demonstrate that the challenged state action results in disparate treatment of persons who are similarly situated with regard to a given law's legitimate purpose.'"

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[20] (...continued)
which he makes any statement as to the size or height of other billboards near the freeway. Moreover, Whyld testified that he could only testify about three of the billboards, the Martin billboards. (See VA 646-647.)

(*People v. Boulerice* (1992) 5 Cal.App.4th 463, 472.) Having admitted that it constructed its signs without permits, inspections or requests for variances or zone changes, Valley clearly failed to meet its burden of showing that it is similarly situated with sign companies who obeyed all these rules.[21]

F. Valley's Argument Based On The Doctrine Of *England* Reservation Is Frivolous Since (1) The Doctrine Doesn't Remotely Apply Here; And (2) Valley Failed Even To Make An *England* Reservation In The Trial Court.

In a footnote, Valley purports to reserve its federal constitutional arguments for possible adjudication in federal court at a later date, citing *Government & Civil Employees Organized Committee CIO v. Windsor*

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[21] Valley ends the equal-protection section of its brief (V-AOB 42-43) with an assertion that is both unsupported by any record cite and unconnected to any equal protection argument. Specifically, Valley asserts that "the variance process *is* the permitting process in Riverside. The City has moved the permitting process out of the permitting office into the political arena, where officials have unbridled discretion to permit or ban signage." (V-AOB 43.) This comes out of nowhere. It is asserted without any proof. It is apparently meant to support a constitutional argument that the City's regulations give it "unbridled discretion" in licensing speech (*ibid.*); however, in addition to the lack of record cites for the factual foundation for the argument, the argument is not presented in a form that permits its consideration by this court, because a legal point is not sufficiently raised on appeal unless it is called to the appellate court's attention in an appellate brief *heading* and properly developed and supported. (E.g., Cal. Rules of Court, rule 14(a)(1)(B); *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [contention is waived because it was "not developed on appeal" and only "contained within a single brief paragraph"; as such, issue "may be deemed abandoned and discussion by the reviewing court is unnecessary"].)

(1957) 353 U.S. 364 [77 S.Ct. 838, 1 L.Ed.2d 894] and *England v. Louisiana State Board of Medical Examiners* (1964) 375 U.S. 411 [84 S.Ct. 461, 11 L.Ed.2d 440]. (V-AOB 2, fn. 2.) Valley's invocation of *England* teeters on the absurd.

As the Ninth Circuit observed in the very case Valley cites, an *England* reservation is applicable where (1) a litigant has been forced into state court either by virtue of a federal court's exercise of abstention or a need to exhaust state remedies; and (2) the litigant advises the state court of potential federal claims so that the court may potentially construe the state law so as to avoid constitutional conflict and render an authoritative interpretation that would allow a subsequent federal court to make a determination based upon a concrete as opposed to abstract application of state law. (*United Parcel Service, Inc. v. California Public Utilities Com.* (9th Cir. 1996) 77 F.3d 1178, 1182-1184; *Windsor*, *supra*, 353 U.S. at 366-367.)

Thus, *England* is inapplicable here for three reasons.

First, Valley isn't being forced into state court without first having had the opportunity to have its federal claims resolved by a federal court. Rather, Valley's problem is that it has already had the opportunity to litigate its constitutional arguments in federal court and lost. The federal court concluded that none of Valley's purported constitutional arguments would allow it to maintain its signs given that they were illegal based upon unchallenged content-neutral public safety inspection and building permit requirements.

Second, Valley didn't make an *England* reservation in the trial court in opposing the motion for preliminary injunction. On the contrary, it

presented its constitutional arguments—however meritless and inartful—in lengthy form. (VA 355-374.) In fact, *England* isn't even mentioned in Valley's trial-court opposition.

Finally, although Valley gives lip service to making an *England* reservation in its opening brief here, it actually proceeds to argue (however ineffectively) its constitutional contentions. As the Ninth Circuit emphasized in *United Parcel Service*, *England* does not afford a litigant "'two bites at the apple.'" (77 F.3d at 1185.) Here, in fact, Valley wants *four* bites. It argued its constitutional claims in federal court, then in the trial court below, where it didn't mention *England*, now here on appeal and, if it loses here, claims the right to argue them again in some federal court based on the purported *England* reservation. This is obviously not how *England* works.

In *United Parcel Service*, the court noted that a party making an *England* reservation "walks a fine line between saying too little and saying too much" in state court pleadings, holding that there the plaintiff had properly made its *England* reservation in a footnote on the first page of a nine page document, and had never presented arguments on its federal constitutional claims but, rather, merely referenced them in argument headings. (77 F.3d at 1186.)

In contrast, here, Valley offers full blown, if superficial and unsupported, arguments as a substantive basis for denying the injunction. Valley's position makes a mockery of the *England/Windsor* doctrine.

CONCLUSION

For all the foregoing reasons, the City urges the Court to reject Valley's demand that the preliminary injunction be vacated and no injunctive relief of any kind be granted the City in its stead. As more particularly discussed in the City's opening brief, the City also urges this Court to reverse the injunction insofar as it fails to provide that Valley must forthwith dismantle and remove its illegal billboards above the foundation and to direct the trial court to enter an injunction containing that requirement.

Dated: December 31, 2004

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, rule 14(c), I certify that this **APPELLANT'S OPENING BRIEF AND RESPONDENT'S BRIEF** contains 26,114 words, not including the tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: December 31, 2004

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Alan Diamond