f A master sıgn program or the equıvalent that was approved by the Cıty or Redevelopment Agency prıor to the effectıve date of thıs Tıtle or any amendment to thıs Tıtle, shall be deemed to conform to thıs Chapter

g The Dırector shall approve condıtıonally approve or dısapprove any applıcatıon for a master sıgn program

h A new master sıgn program approval shall be obtaıned for substantıal revısıons to the orıgınal approval, as determıned by the Dırector

D **Appeals of Decısıons** A decısıon rendered by the Dırector may be appealed to the Commıssıon ın complıance wıth Sectıon 17 630 030 (Appeals of Decısıon)

Exhıbıts to Staff Report Relatıng to
Cıty's Ordınances Amendıng Sıgn Code

1 *Anheuser Busch v Schmoke*
101 F 3d 325 (4th Cır 1996), *cert denıed* 520 U S 1204 (1997)

2 *Cıty of Rıversıde v Valley Outdoor Inc*
2005 WL 2233617 (Cal App 4 Dıst 2005)

3 *Cıty and County of San Francısco v Eller Outdoor Advertısıng*
192 Cal App 3d 643 (1987)

4 *Clear Channel Outdoor, Inc v Cıty of Los Angeles*
340 F 3d 810 (9th Cır 2003)

5 *Covenant Medıa of Cal L L C v Cıty of Huntıngton Park*
377 F Supp 2d 828 (C D Cal 2005)

6 *Gerrıtsen v Cıty of Los Angeles*
994 F 2d 570 (9th Cır 1993)

7 *Get Outdoors II, LLC v Cıty of San Dıego*
381 F Supp 2d 1250 (S D Cal 2005)

8 *Get Outdoors II, L L C v Cıty of Lemon Grove*
378 F Supp 2d 1232 (S D Cal 2005)

9 *Horızon Outdoor LLC v Cıty of Industry*
228 F Supp 2d 1113 (C D Cal 2002)

10 *Members of the Cıty Councıl v Taxpayers for Vıncent*
466 U S 789, 104 S Ct 2118, 80 L Ed 3d 772 (1984)

11 *Metromedıa, Inc v Cıty of San Dıego*
453 U S 490, 101 S Ct 2992, 69 L Ed 2d 800 (1981)

12 *Outdoor Medıa Group Inc v Cıty of Beaumont*
374 F Supp 2d 881 (C D Cal 2005)

13 *Reno v Amerıcan Cıvıl Lıbertıes Unıon*
521 U S 844, 117 S Ct 2329, 138 L Ed 2d 874 (1997)

14 *Bıg Sıgn Fırm Accused of Corruptıon*
by Ted Rohrlıch, Los Angeles Tımes, October 23, 2005

LAW OFFICES

FOX & SOHAGI, LLP

A REGISTERED LIMITED LIABILITY PARTNERSHIP

DEBORAH J FOX
MARGARET MOORE SOHAGI
STEVEN L FLOWER

10960 WILSHIRE BOULEVARD, SUITE 1270
LOS ANGELES, CALIFORNIA 90024 3702

FACSIMILE
(310) 444-7813

TELEPHONE
(310) 444 7805

HELENE V SMOOKLER
PHILIP A SEYMOUR
DAVID ANDREWS McINTOSH
OF COUNSEL

October 27, 2005

To Heather Iker, Assistant City Attorney
City of Culver City
9770 Culver Boulevard
Second Floor
Culver City, California 90232

From Deborah J Fox, Esq

Subject Exhibits to Staff Report

Billing No

Enclosed Please Find EXHIBITS TO STAFF REPORT RELATING TO CITY' ORDINANCES AMENDING SIGN CODE

- ☐ For your information and files
- ☐ Please review and telephone me
- ☒ In accordance with your request
- ☐ Please sign and return to me
- ☐ Please acknowledge receipt
- ☐ Other ____________________

101 F 3d 325
65 USLW 2340 24 Media L Rep 2491
(Cite as 101 F 3d 325)

United States Court of Appeals
Fourth Circuit

ANHEUSER BUSCH INCORPORATED
Plaintiff Appellant
v
Kurt L SCHMOKE in his official capacity as Mayor of Baltimore City Mayor and City Council of Baltimore City City Council of Baltimore City David Tanner in his official capacity as the General Superintendent of Zoning Administration and Enforcement
Defendants Appellees
and
John Joseph Curran Attorney General of the State of Maryland in his official capacity Defendant
The Association of National Advertisers Incorporated The American Association of Advertising Agencies The Media Institute National Association of Broadcasters The Thomas Jefferson Center for the Protection of Free Expression Washington Legal Foundation Center for Science in the Public Interest Coalition for Beautiful Neighborhoods Baltimore City Wide Liquor Coalition for Better Laws and Regulations Amici Curiae
PENN ADVERTISING OF BALTIMORE INCORPORATED Plaintiff Appellant
v
MAYOR AND CITY COUNCIL OF BALTIMORE CITY A Municipal Corporation Defendant Appellee
and
John Joseph Curran Attorney General of the State of Maryland in his official capacity Defendant
The Association of National Advertiseis Incorporated The American Association of Advertising Agencies The Media Institute National Association of Broadcasters The Thomas Jefferson Center for the Protection of Free Expression Washington Legal Foundation Centei for Science in the Public Interest Coalition for Beautiful Neighborhoods Baltimore City Wide Liquor Coalition for Better Laws and Regulations Amici Cuiiae

Nos 94-1431, 94-1432

Nov 13 1996

The United States District Court for the District of Maryland John R Hargrove Senior District Judge 855 F Supp 811 upheld against First Amendment attack city ordinance banning stationary outdoor advertising of alcoholic beverages in certain areas of city where children were likely to walk to school or play The Court of Appeals 63 F 3d 1305 affirmed The United States Supreme Court 517 U S 1206 116 S Ct 1821 134 L Ed 2d 927 granted certiorari and vacated judgment for reconsideration in light of *44 Liquormart Inc v Rhode Island* 517 U S 484 116 S Ct 1495 134 L Ed 2d 711 On remand the Court of Appeals Niemeyer Circuit Judge held that city ordinance prohibiting placement of stationary outdoor advertising that advertised alcoholic beverages in areas where it was likely to be encountered by minors merely restricted time place and manner of such advertisements did not violate First Amendment's commercial speech guarantees

Judgment of District Court affirmed

Adopting in part opinion at 63 F 3d 1305

Butzner Senior Circuit Judge filed dissenting opinion

West Headnotes

Constitutional Law 90 3
92k90 3 Most Cited Cases

Intoxicating Liquors 15
223k15 Most Cited Cases

City ordinance prohibiting placement of stationary outdoor advertising that advertises alcoholic beverages in certain areas where children are likely to walk to school or play in effort to promote welfare and temperance of minors did not violate commercial speech protections of First Amendment unlike statute banning all advertising of liquor prices ordinance expressly targeted persons who could not be legal users of alcoholic beverages moreover ordinance did not foreclose plethora of newspaper magazine radio television direct mail Internet and other media available to liquor manufacturers U S C A Const Amend 1

Eric Michael Rubin Walter E Diercks Jeffrey Harris Rubin Winston Diercks Harris & Cooke Washington D C John Joseph Walsh Steven G Brody Cadwalader Wickersham & Taft New York New York Thomas M Wood IV Neuberger Quinn Gielen Rubin & Gibber P A Baltimore Maryland P Cameron DeVore Davis Wright Tremaine Seattle Washington for Appellant

Neal M Janey City Solicitor Burton Harry Levin Principal Counsel Department of Law Baltimore Maryland for Appellees Richard E Wiley Lawrence W Secrest III Daniel E Troy Luis de la Torre Frank Winston Jr Wiley Rein & Fielding Washington D C J Joshua Wheeler Robert M O Neil Thomas Jefferson Center for the Protection *327 of Free Expression Charlottesville Virginia for Amici Curiae Media Institute et al Daniel J Popeo David A Price Richard A Samp Washington Legal Foundation Washington D C for Amicus Curiae Washington Legal Foundation Christopher J Fritz Julie Ellen Squire Thomas C Dame Gallagher Evelius & Jones Baltimore Maryland for Amici Curiae Coalition for Beautiful Neighborhoods et al George Hacker Center for Science in the Public Interest Washington D C for Amicus Curiae Center for Science John F Kamp Washington D C Gilbert H Weil New York New York Burt Neuborne New York New York for Amici Curiae Association of National Advertisers Inc

Before NIEMEYER and HAMILTON Circuit Judges and BUTZNER Senior Circuit Judge

Affirmed by published opinion Judge NIEMEYER wrote the majority opinion in which Judge HAMILTON joined Senior Judge BUTZNER wrote a dissenting opinion

OPINION

NIEMEYER Circuit Judge

On May 13 1996 the Supreme Court handed down its decision in *44 Liquormart Inc v Rhode Island* 517 U S 484 116 S Ct 1495 134 L Ed 2d 711 (1996) and a week later vacated our decision in this case and remanded it to us for further consideration in light of *44 Liquormart Inc v Rhode Island* 517 U S 1206 116 S Ct 1821 134 L Ed 2d 927 We have read the opinion in *44 Liquormart* and have considered its impact on the judgment in this case For the reasons that follow we conclude that *44 Liquormart* does not require us to change our decision Accordingly we affirm the district court s judgment for the reasons previously given and readopt our previous decision [FN*] *See Anheuser-Busch Inc v Schmoke* 63 F 3d 1305 (4th Cir 1995) (*Anheuser-Busch I*)

FN* In readopting our opinion we do not continue to rely on *Posadas de Puerto Rico Associates v Tourism Co of P R* 478 U S 328 106 S Ct 2968 92 L Ed 2d 266 (1986) in view of the doubt placed on that opinion by a majority of the Court in *44 Liquormart* *See* 517 U S at 116 S Ct at 1511 (Stevens J concurring in the judgment) (joined by Kennedy Thomas and Ginsburg JJ) *and* 517 U S at 116 S Ct at 1522 (O'Connor J concurring in the judgment) (joined by Rehnquist C J and Souter and Breyer JJ) Because we do not defer blindly to the legislative rationale but rather agree with it based on our own independent conclusion about the fit between legislative objective and the regulation used to achieve that objective the holding in *Posadas* is not necessary to our opinions upholding Baltimore City s ordinance

I

In *Anheuser-Busch I* we upheld against a constitutional challenge a city ordinance prohibiting the placement of stationary outdoor advertising that advertises alcoholic beverages in certain areas of Baltimore City 63 F 3d at 1317 The ordinance was designed to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages by banning such advertisements in particular areas where children are expected to walk to school or play in their neighborhood *Id* at 1314 17 Applying the four prong test for evaluating commercial speech announced in *Central Hudson Gas & Elec Corp v Public Serv Comm n* 447 U S 557 100 S Ct 2343 65 L Ed 2d 341 (1980) we concluded in respect to the disputed prongs that the ban of outdoor advertising of alcoholic beverages in limited areas directly and materially advances Baltimore s interest in promoting the welfare and temperance of minors *See Anheuser-Busch I* 63 F 3d at 1314 After our own independent assessment we recognized the reasonableness of Baltimore City s legislative finding that there is a "definite correlation between alcoholic beverage advertising and underage drinking ' *Id* We also concluded that the regulation of commercial speech is not more extensive than necessary to serve the governmental interest *Id* at 1316 17 Recognizing that in the regulation of commercial speech there is some latitude in the fit between the regulation and the objective we concluded that no less restrictive means may be available to advance the government s interest *Id* at 1316 While we acknowledged that the geographical limitation on outdoor advertising may also reduce ***328** the opportunities for adults to receive the information we recognize that there were numerous other means of advertising to adults that did not subject the children to involuntary and unavoidable solicitation [while] walking to school or playing in their neighborhood *Id* at 1314 Based on our close look at Baltimore s asserted goal and the billboard zoning used to achieve that objective we concluded

> Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed Baltimore s efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration

Id at 1317

II

In *44 Liquormart* by contrast the State prohibited *all* advertising throughout Rhode Island in any manner whatsoever " of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street 517 U S at 116 S Ct at 1501 The State contended that the ban served the State s interest in promoting temperance by keeping alcoholic prices high and therefore consumption low *See id* The district court found as a fact however that the ban has no significant impact' on consumption *44 Liquor Mart Inc v Racine* 829 F Supp 543 549 (D R I 1993) The State also argued that the Twenty first Amendment s delegation to the states of the power to prohibit commerce in or the use of alcoholic beverages U S Const amend XXI § 2 favors the state s ban of price advertising of alcoholic beverages *See* 517 U S at 116 S Ct at 1502

The Supreme Court held the blanket ban unconstitutional simply as an abridgement of speech protected by the First Amendment and rejected the claim that the Twenty first Amendment save[d] Rhode Island s ban on liquor price advertising 517 U S at - 116 S Ct at 1501 1514 15 The opinion for the Court did not provide a rationale for its conclusion that the ban violated the First Amendment and no opinion addressing the First Amendment violation commanded a majority of the Court Under *Marks v United States* 430 U S 188 97 S Ct 990 51 L Ed 2d 260 (1977) when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds *Id* at 193 97 S Ct at 993

Applying the *Marks* rule eight justices in three separate opinions concluded that the mechanism of keeping alcoholic prices high as a way to keep consumption low imposes too broad a prohibition on speech to be justified by the end *See 44 Liquormart* 517 U S at 116 S Ct at 1509 10 (Stevens J concurring in the judgment) *id* at 116 S Ct at 1519 (Thomas J concurring in the judgment) *id* at 116 S Ct at 1521 22 (O Connor J concurring in the judgment) Justice Stevens joined by Justices Kennedy Souter and Ginsburg noted that without any findings of fact or indeed any evidentiary support whatsoever we cannot agree with the assertion that the price advertising ban will significantly advance the State s interest in promoting temperance *Id* at 116 S Ct at 1509 Justice Stevens also noted that alternative forms of regulation were available that would not impinge speech and would be more likely to achieve the State s goal of promoting temperance As the State's own expert conceded higher prices can be maintained either by direct regulation or by increased taxation *Id* at 116 S Ct at 1510 Similarly Justice O'Connor writing an opinion in which Chief Justice Rehnquist Justice Souter and Justice Breyer joined concluded

> If the target is simply higher prices generally to discourage consumption the regulation imposes too great and unnecessary a prohibition on speech in order to achieve it [T]he objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages

***329** *Id* at 116 S Ct at 1521 22 (O Connor J concurring in the judgment) (quoting *44 Liquormart Inc v Rhode Island* 39 F 3d 5 7 (1st Cir 1994) (quoting Rhode Island s expert witness)) Justice O Connor concluded that because the regulation fails even the less stringent standard set out in *Central Hudson* nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation *Id* at 116 S Ct at 1522 (O Connor J concurring in the judgment) Eight justices thus concluded that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any legitimate end *See id* at 116 S Ct at 1509 10 (Stevens J concurring in the judgment) *id* at 116 S Ct at 1518 (Thomas J concurring in the judgment) *id* at 116 S Ct at 1521 22 (O'Connor J concurring in the judgment)

III

While Rhode Island s blanket ban on price advertising failed *Central Hudson* scrutiny Baltimore s attempt to zone outdoor alcoholic beverage advertising into appropriate areas survived our close look at the legislature s means of accomplishing its objective in *Anheuser Busch I* Baltimore s ordinance expressly targets persons who cannot be legal users of alcoholic beverages not legal users as in Rhode Island More significantly Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time place and manner of such advertisements And Baltimore s ordinance does not foreclose the plethora of newspaper magazine radio television direct mail Internet and other media available to Anheuser Busch and its competitors

Moreover in Baltimore City s case neither the state nor the city is attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product as the *44 Liquormart* Court feared was the case with Rhode Island 517 U S at 116 S Ct at 1508 (Stevens J concurring in the judgment) *see also id* at 116 S Ct at 1517 (Thomas J concurring in the judgment) (citing the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly') *Central Hudson* 447 U S at 566 n 9 100 S Ct at 2351 n 9 *Virginia Pharmacy Board v Virginia Citizens Consumer Council* 425 U S 748 780 n 8 96 S Ct 1817 1835 n 8 48 L Ed 2d 346 (1976) (Stewart J concurring) Rather in Baltimore City like in other communities the possession and consumption of alcoholic beverages by minors has been already banned directly and forthrightly through legislation *See* Md Code Art 27 §§ 400 403A Baltimore s restrictions thus reinforce the democratic decisionmaking mechanism s conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children s maturation And far from undermining the free dissemination of information to independently choosing consumers Baltimore s ordinance supports the full development of its young so that they will be able to assess their market options intelligently and independently

In addition to the reasons given in *Anheuser Busch I* and given here based on our consideration of *44 Liquormart* the differences between the Baltimore and Rhode Island regulations further support the constitutionality of Baltimore s ordinance In contrast to Rhode Island s desire to enforce adult temperance through an artificial budgetary constraint Baltimore s interest is to protect children who are not yet independently able to assess the value of the message presented This decision thus conforms to the Supreme Court s repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media In the context of cable television the Supreme Court recently upheld restrictions on programming imposed by the Cable Television Consumer Protection and Competition Act as a means of protecting children from indecent programming *See *330Denver Area Educ Telecommunications Consortium Inc v FCC* 518 U S 727 116 S Ct 2374 2386 135 L Ed 2d 888 (1996) (plurality opinion) In the context of the radio medium, the Court has approved extra restrictions on indecent speech because of the pervasiveness of the medium and the presence of children in the audience *See FCC v Pacifica Foundation* 438 U S 726 750 51 98 S Ct 3026 3040 41 57 L Ed 2d 1073 (1978) (comparing indecent speech during hours when children are listening to the proverbial pig in the parlor) *see also Action for Children's Television v FCC* 58 F 3d 654 657 (D C Cir 1995) (upholding the Public Telecommunications Act against a First Amendment challenge based on the state's compelling interest in protecting minors) *cert denied* - U S 116 S Ct 701 133 L Ed 2d 658 (1996) Similarly the Supreme Court has sustained a law which protected children from non obscene literature *See Ginsberg v New York* 390 U S 629 639 40 88 S Ct 1274 1280 81 20 L Ed 2d 195 (1968) And while it has acknowledged a right to private possession of adult pornography in the home *see Stanley v Georgia* 394 U S 557 566 89 S Ct 1243 1248-49 22 L Ed 2d 542 (1969) the Court has clearly distinguished child pornography and allowed a stronger legislative response to destroy a market for the exploitative use of children *Osborne v Ohio* 495 U S 103 109 110 S Ct 1691 1696 109 L Ed 2d 98 (1990) *see also New York v Ferber* 458 U S 747 759 102 S Ct 3348 3355 56 73 L Ed 2d 1113 (1982) The underlying reason for the special solicitude of children was articulated long ago A democratic society rests for its continuance upon the healthy well rounded growth of young people into full maturity as citizens " *Prince v Massachusetts* 321 U S 158 168 64 S Ct 438 443 88 L Ed 645 (1944)

Baltimore s ordinance attempts to protect its children in a manner and with a motive distinct from those evidenced by Rhode Island in *44 Liquormart* and in accord with an unbroken chain of Supreme Court cases which indicate its desire to ensure that children do not become lost in the marketplace of ideas Accordingly on reconsideration of our *Central Hudson* analysis of the time place and manner restriction in *Anheuser Busch I* in light of *44 Liquormart* we again affirm the judgment of the district court

IT IS SO ORDERED

BUTZNER Senior Circuit Judge dissenting

I dissent because I believe we should vacate the district courts judgments and remand these cases for evidentiary hearings I address in this dissent both the cases pertaining to advertising of alcoholic beverages and the case pertaining to the advertising of cigarettes

The district court whose judgment we review noted that the parties agree that 'the [Anheuser Busch] advertising at issue is not unlawful or misleading and that the City's interest in promoting the welfare and temperance of minors is substantial ' *Anheuser Busch Inc v Mayor and City Council* 855 F Supp 811 813 (D Md 1994) This agreement established that the advertising satisfies the first two parts of the test the Supreme Court prescribed foi determining whether regulation of commercial speech violates the First Amendment *See Central Hudson Gas & Elec Corp v Public Serv Comm'n* 447 U S 557 566 100 S Ct 2343 2351 65 L Ed 2d 341 (1980) The difficulty in these cases and in the related case pertaining to cigarette advertising [FN*] arises from the third and fourth parts of the *Central Hudson* inquiry These are whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest ' *Central Hudson* 447 U S at 566 100 S Ct at 2351 In the cigarette advertising case the district court noted that the parties agree with the first but not the second part of the *Central Hudson* test *Penn Advertising* 862 F Supp at 1406 This slight difference in the posture of the cases *331 does not change my analysis of the proper response to the Supreme Court s remand

FN* *Penn Advertising of Baltimore Inc v Mayor and City Council* 862 F Supp 1402 (D Md 1994) *aff'd* 63 F 3d 1318 (4th Cir 1995) *vacated and remanded sub nom Penn Advertising of Baltimore Inc v Schmoke* 518 U S 1030 116 S Ct 2575 135 L Ed 2d 1090 (1996)

My dissent concerns how we should respond to the Supreme Court's remand and what procedures we should follow at this stage of the litigation My dissent does not undertake to express an opinion on the merits of these cases I wholeheartedly agree with Baltimore's officials the *amici* who support them, and the parties that minors should not be encouraged directly or subliminally to drink or smoke Nevertheless balancing the First Amendment's protection of commercial speech against the city s restriction of the advertising at issue requires answering the third and fourth inquiries of *Central Hudson* To obtain a sound basis for deciding these inquiries district and reviewing courts need factual records The district courts reached their decisions in *Anheuser-Busch* and *Penn Advertising* without an evidentiary hearing Instead the courts relied in large part on *Posadas de Puerto Rico Assoc v Tourism Co of P R* 478 U S 328 106 S Ct 2968 92 L Ed 2d 266 (1986) and deferred to the Baltimore City Council s legislative record and findings Unfortunately the district courts did not have the benefit of *44 Liquormart Inc v Rhode Island* 517 U S 484 116 S Ct 1495 134 L Ed 2d 711 (1996)

In *44 Liquor Mart* the district court did not accept Rhode Island's legislative determination that banning the advertising of liquor prices would reduce consumption Instead the district court conducted an evidentiary hearing and reached the conclusion which was based on testimony at the hearing that the ban was unconstitutional *44 Liquor Mart Inc v Racine* 829 F Supp 543 (D R I 1993) The court of appeals reversed accepting as reasonable Rhode Island s submission that competitive price advertising would increase consumption It held that the statute was constitutional *44 Liquormart Inc v Rhode Island* 39 F 3d 5 (1st Cir 1994) In turn the Supreme Court reversed criticizing the court of appeals reliance on legislative findings to determine whether the ban of commercial speech infringed the First Amendment *44 Liquormart* 517 U S at 116 S Ct at 1503 04 (Stevens J) and 517 U S at 116 S Ct at 1515 (O Connor J concurring in the judgment) By deciding not to remand for an evidentiary hearing despite the teaching of *44 Liquormart* I am concerned that our court is following the First Circuit s path

In *44 Liquormart* the Court criticized its own opinion in *Posadas* 478 U S at 342 344, 106 S Ct at 2977 2978 because it had accepted as reasonable without further inquiry Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than necessary to serve that interest ' *44 Liquormart* 517 U S at 116 S Ct at 1522 (O Connor J concurring in the judgment) At least seven members of the Court expressly decided not to follow *Posadas* concluding that a legislature s decision to suppress commercial speech even if reasonable is not entitled to deference *44 Liquormart* 517 U S at 116 S Ct at 1510 11 (Stevens J concurring in the judgment) and 517 U S at 116 S Ct at 1522 (O Connor J concurring in the judgment) Rather than accept at face value the legislature's proffered justification for a speech regulation courts should take a closer look ' and carefully examine the relationship between the asserted goal and the speech restriction used to reach that goal ' 517 U S at 116 S Ct at 1522 (O Connor J concurring in the judgment) In other words courts should examine the evidence presented by the parties to make an independent determination about whether the underlying facts satisfy the *Central Hudson* test *See* 517 U S at 116 S Ct at 1509-10 (Stevens J concurring in the judgment)

The independent evaluation that is now required is not possible in the absence of a factual record It is true that the positions taken by Baltimore may turn out to be supported by a preponderance of the evidence But speculation about what might be is not enough to resolve issues of First Amendment coverage that must ultimately turn on factual findings In order to meet its burden under *Central Hudson* the city must show not merely that its regulation will advance its interest but also that it will do so to a material degree ' *33244 *Liquormart* 517 U S at 116 S Ct at 1509 (Stevens J concurring in the judgment) (quoting *Edenfield v Fane* 507 U S 761 771 113 S Ct 1792 1800 01 123 L Ed 2d 543 (1993)) Even assuming as common sense might suggest that Baltimore s restrictions will reduce underage drinking to some degree without any findings of fact we cannot determine whether the effect will be significant *See 44 Liquormart* 517 U S at 116 S Ct at 1509 (Stevens J concurring in the judgment) Accordingly each party should be given the opportunity to present evidence on this issue and to test the strength of the opposing party s evidence

Baltimore must also show that its speech regulation is narrowly tailored Anheuser Busch argued that the city could implement other measures that would reduce underage drinking as effectively as the advertising restrictions without regulating speech The company specifically suggested education programs and increased law enforcement efforts *Cf 44 Liquormart* 517 U S at -- 116 S Ct at 1510 (Stevens J concurring in the judgment) and 517 U S at 116 S Ct at 1521-22 (O Connor J concurring in the judgment) The company s position must be viewed in light of the numerous exceptions to the ordinance that inevitably will allow a substantial amount of alcohol advertising to reach a great number of minors The company's argument should be evaluated on the strength of the facts that support and negate it The parties should be given the opportunity to present and contest those facts

The same reasoning applies to Baltimore s restriction on cigarette advertising Whether that restriction advances the asserted governmental interest and whether it is unnecessarily extensive raise factual questions that only an evidentiary hearing can answer For example Baltimore s transit buses which carry children as well as adults are exempted from the ordinance that restricts advertising of cigarettes The ordinance permits such advertising at a ball park where minors watch games What effect these and similar facts have on the validity of the city ordinance should be weighed by a court

A charge that advertising restrictions infringe rights guaranteed by the First Amendment requires careful evaluation assessing the credibility of witnesses and weighing the evidence These functions should be performed by a judge not by a city council *See 44 Liquormart* 517 U S at 116 S Ct at 1511 (Stevens J concurring in the judgment) The court should base its evaluation of the case on the facts underlying the dispute and the reasonable inferences drawn from those facts rather than the version of the facts that appears in the allegations and legislative findings By affirming the district court's judgment without adducing and examining the facts a reviewing court engages in the type of deferential review that *44 Liquormart* deems improper

Present in this litigation are questions about the credibility of expert witnesses and genuine issues of material fact concerning the inferences that reasonably can be drawn from the evidence Because of these circumstances neither summary judgment nor dismissal under Rule of Civil Procedure 12(b)(6) is appropriate

I would vacate the district court's judgment and remand these cases for evidentiary hearings

101 F 3d 325 65 USLW 2340 24 Media L Rep 2491

END OF DOCUMENT

Only the Westlaw cıtatıon ıs currently avaılable

Calıfornıa Rules of Court rule 977(a) prohıbıts courts and partıes from cıtıng or relyıng on opınıons not certıfied for publıcatıon or ordered publıshed except as specıfied by rule 977(b) Thıs opınıon has not been certıfied for publıcatıon or ordered publıshed for purposes of rule 977

Court of Appeal Fourth Dıstrıct Dıvısıon 2
Calıfornıa
CITY OF RIVERSIDE Plaıntıff and Appellant
v
VALLEY OUTDOOR INC Defendant and Appellant
No E036258
(Super Ct No SCVSS115579)

Sept 13 2005

APPEAL fıom the Superıor Court of San Bernardıno County Keıth D Davıs Judge Reversed and remanded wıth dırectıons

Gregory P Prıamos Cıty Attorney James E Brown Supervısıng Deputy Cıty Attorney Bell Orrock & Watase Mıchael A Bell Greınes Martın Steın & Rıchland Tımothy T Coates and Alan Dıamond for Plaıntıff and Appellant

Van Etten Suzumoto & Becket Elıot G Dısner and Darrel C Menthe for Defendant and Appellant

OPINION

RICHLI J

***1** Thıs actıon concerns five bıllboards buılt and maıntaıned by Valley Outdoor Inc (Valley) The bıllboards vıolated a cıty ordınance governıng sıgns Valley however filed an actıon agaınst the Cıty of Rıveısıde (the Cıty) ın federal court for a declaratıon that the sıgn ordınance vıolated the Fırst Amendment and to enjoın the Cıty from enforcıng ıt agaınst Valley's bıllboards

Shortly thereafter ın a case to whıch Valley was not a party thıs court held that portıons of the sıgn ordınance vıolated the Fırst Amendment (although we upheld other portıons) When the Cıty attemptıng to comply wıth our opınıon amended the sıgn ordınance Valley promptly amended ıts federal complaınt so as to challenge the amended sıgn ordınance

The federal court entered judgment ın favor of the Cıty It ruled that the Cıty was entıtled to remove the bıllboards because Valley had buılt them wıthout first obtaınıng permıts or ınspectıons as requıred It further ruled that ın lıght of thıs conclusıon ıt dıd not need to consıder Valley's claıms that (1) the amended sıgn ordınance was unconstıtutıonal ın other respects (2) a permıt applıcatıon would have been futıle or (3) the Cıty had a practıce of acceptıng late filed permıt applıcatıons

Valley appealed the federal judgment to the federal Court of Appeals for the Nınth Cırcuıt (Nınth Cırcuıt) In connectıon wıth that appeal Valley sought a stay preventıng the Cıty from requırıng the removal of the bıllboards whıle the appeal was pendıng Both the federal court and the Nınth Cırcuıt refused to ıssue such a stay (although the federal court dıd enjoın the Cıty from requırıng the removal of the bıllboard foundatıons)

The Cıty then filed thıs actıon ın state court to requıre Valley to remove the bıllboards Moreover the Cıty filed a motıon for a prelımınary ınjunctıon requırıng the removal of the bıllboards (except for the foundatıons) befoıe trıal The trıal court ruled that by vırtue of the collateral estoppel effect of the federal judgment the Cıty was entıtled to a prelımınary ınjunctıon However ıt also ruled that ın lıght of the possıbılıty that the Nınth Cırcuıt mıght reverse the federal judgment ıt would not ıequıre the removal of the bıllboards Instead ıt enjoıned Valley from dısplayıng any commeıcıal advertising on them

Both sides appeal Valley contends the trial court erred by issuing any injunction at all it argues that the federal judgment did not resolve all of its challenges to the enforcement of the amended sign ordinance that it was likely to succeed on the merits of those challenges and that an injunction was barred by laches The City contends the trial court erred by refusing to require the removal of the billboards

We will hold that under the doctrine of collateral estoppel the federal court's rulings required the trial court to issue the injunction the City was seeking Valley has already litigated all of the factual and legal claims it is raising here and lost Although the federal court stopped short of ordering removal of the billboards it clearly ruled that the City was entitled to their removal Accordingly we will reject Valley's appeal and we will uphold the City's

I
FACTUAL BACKGROUND

A *The Original Sign Ordinance*

***2** In 1987 the City adopted an ordinance governing signs (original sign ordinance) It was codified as chapter 19 76 of the Riverside Municipal Code It prohibited all [o]ff [p]remises signs subject to certain exceptions (Former Riverside Mun Code § 19 76 020(A)(3)) One such exception was that billboards were permitted in two specified zones but only if they met certain square footage height and location restrictions (Former Riverside Mun Code § 19 76 020(B)(2)) For example a billboard could not be located within 750 feet of a freeway (Former Riverside Mun Code § 19 76 020(B)(2)(a)(vii))

The original sign ordinance required a permit for the erection construction or installation of almost any sign (Former Riverside Mun Code § 19 76 210(1)) It established a permit fee (Former Riverside Mun Code § 19 76 210(4)) If construction was begun before a permit was obtained a higher permit fee applied (Former Riverside Mun Code § 19 76 210(5))

Like other structures a sign had to have design review approval before a permit would issue (Riverside Mun Code §§ 19 62 020(B) 19 62 030 19 62 040 former Riverside Mun Code § 19 76 210(1)) and had to be built in accordance with the Uniform Building Code (Former Riverside Mun Code § 19 76 210(16)) Moreover an electrical sign had to be installed in accordance with the Uniform Electrical Code (Former Riverside Mun Code § 19 76 210(17))

B *The Construction of the Billboards*

On October 19 1999 we issued our tentative opinion in *City of Riverside v Outdoor Media Group Inc* Case No E022351 (*OMG*) We proposed to hold that the ban on off premises signs in the original sign ordinance violated the First Amendment and hence that the exceptions to the ban also violated the First Amendment However we proposed to hold that the remaining portions of the ordinance were severable and enforceable [FN1] The ban on billboards within 750 feet of a freeway was one of the portions we struck down the permit requirement was one of the portions we upheld

> FN1 We take judicial notice of the date on which we issued our tentative opinion (Evid Code §§ 452 subd (d)(1) 459 subd (a)) In addition we accept Valley's representation that the tentative opinion was substantially similar to the final opinion because it is not crucial to our decision and because the City does not appear to dispute it

On January 8 2000 Valley began building five billboards It did not apply for permits because it knew that the billboards violated the original sign ordinance and therefore the City would refuse to issue them

On January 10 2000 Valley filed an action against the City in federal court challenging the original sign ordinance on First Amendment grounds

On January 13 2000 we filed our final opinion in *OMG* It was essentially the same as our tentative opinion

On January 20 2000 an officer of Valley went to the City s Office of Building and Safety with the intention of applying for all necessary permits for the billboards A City official however refused to accept the application on the ground that billboards were not allowed within 750 feet of a freeway

On February 1 2000 in response to our opinion in *OMG* the City amended the original ordinance The amendments however were not due to go into effect until March 2 2000 Valley soon amended its federal complaint so as to challenge the amended sign ordinance on First Amendment grounds

***3** Meanwhile by February 20 2000 the billboards were complete On February 25 2000 an officer of Valley submitted design review permit applications for the billboards He was told that if the City needed any further information it would send a correction letter Nevertheless in a notice mailed on March 1 2000 (and hence not received until March 2 or later) the City rejected the applications on the ground that they did not adequately specify the color and material of the supporting columns It invited Valley to reapply In Valley s view the City was simply stalling until the amended sign ordinance could go into effect

On March 3 2000 the City posted stop work notices on the billboards citing the fact that they had been built without permits On or about May 14 2000 the City served Valley with notices ordering it to remove the billboards citing several grounds including that they had been built without permits

C *The Federal Court s Rulings*

On July 10 2000 the federal court issued a preliminary injunction enjoining the City from compelling Valley to remove the billboards

On October 21 2003 the date set for trial the City brought a motion in limine to preclude any evidence or argument that it had improperly unlawfully or unconstitutionally handled or refused to accept or process permit applications and/or design[ ] approval applications allegedly submitted to the City It argued that this issue was irrelevant because Valley admitted building the billboards without permits and the City was entitled to remove them for that reason alone

In opposition Valley argued that the City had a practice of allowing late filed permit applications It also claimed the City had rejected its permit applications as a covert way of continuing to enforce the unconstitutional provisions of the original sign ordinance Valley specifically argued "that applying for a permit would have been a futility and that [it] should be excused from doing so '

The federal court granted the motion in limine It reasoned essentially that the City's permit requirement had not been struck down in *OMG* and did not violate the First Amendment Hence based on Valley s admission that it had finished the billboards before even applying for permits the City could require removal of the billboards based on the permit requirement without violating the First Amendment The federal court concluded that whether (1) the City had improperly processed Valley's permit applications or (2) the City had a practice of accepting late filed permit applications were irrelevant to the City s right to removal of the billboards

The federal court also ruled that once it had granted the motion in limine the City was entitled to judgment as a matter of law It indicated that it would modify the existing preliminary injunction pending any appeal so as to require Valley to remove the billboards down to the foundations while preventing the City from requiring Valley to remove the foundations the most expensive part

***4** Accordingly on November 5 2003 the federal court entered judgment in favor of the City and modified the preliminary injunction pending appeal

Valley filed a motion for new trial arguing among otheı thıngs that the federal court had erred by faılıng to consıder (1) ıts constıtutıonal challenges to the amended ordınance (2) the avaılabılıty of a late filed permıt and (3) whether a permıt applıcatıon would have been futıle

On December 22 2003 the federal court denıed the new trıal motıon It commented I narrowly decıded thıs case on the basıs that [Valley was] barred from ıntroducıng any evıdence that the cıty ımproperly refused to accept ıts post constructıon permıt applıcatıons We never got to the content Never got to the constıtutıonal valıdıty of the new ordınance wıth ıegard to content regulatıon But I don t thınk we needed to do that based upon the fact that there was never a permıt obtaıned

On January 7 2004 Valley filed a notıce of appeal At the same tıme ıt asked the Nınth Cıcuıt for an emergency stay pendıng appeal It argued agaın that the federal court had erred by faılıng to consıder (1) ıts constıtutıonal challenge to the amended ordınance and (2) the avaılabılıty of a late filed permıt

On January 15 2004 the Nınth Cırcuıt denıed Valley s motıon for a stay Sua sponte however ıt ordered a lımıted remand to the dıstrıct court for the sole purpose of adjudıcatıng any ıssues between the partıes ın respect to the removal of nonconformıng structures pendıng appeal '

On February 23 2004 at the hearıng on the lımıted remand Valley asked the federal court to enjoın the Cıty from requırıng removal of the bıllboards As a fallback however ıt asked the court *not* to order *ıt* to remove the bıllboards It noted that ıts complaınt merely sought an order *preventıng* the Cıty from removıng the bıllboards the Cıty had never cross complaıned for an order affırmatıvely *requırıng* theır removal

The federal court refused to enjoın the Cıty from removıng the bıllboards ıt reasoned that the Nınth Cırcuıt had already refused to do so However ıt accepted Valley s fallback argument [T]he only thıng I can do ıs the lawsuıt would be dısmıssed and the Cıty could go ahead wıth ıts abatement proceedıng accordıng to ıts local ordınances and state law It therefore further modıfied the exıstıng ınjunctıon so that ıt enjoıned only the Cıty and then only from removıng the foundatıons of the bıllboards [FN2]

FN2 Our record does not contaın any wrıtten order modıfyıng the ınjunctıon to conform to thıs oral rulıng Nevertheless there seems to be no dıspute that the ınjunctıon was effectıvely modıfied

The federal court concluded "[T]he Cıty can ınstıtute ıts abatement proceedıngs and whatever defenses [Valley] may have [Valley] may raıse ' It observed however [B]ased upon thıs record the Superıor Court Judge wıll order ımmedıate abatement and whether or not he stays ıt pendıng the Nınth Cırcuıt rulıng that's goıng to be up to the Superıor Court Judge

II
PROCEDURAL BACKGROUND

***5** The Cıty filed thıs actıon agaınst Valley It alleged among other thıngs causes of actıon for abatement of the bıllboards as a publıc nuısance on the grounds that (1) they had been buılt wıthout buıldıng electrıcal or use permıts and wıthout structural or electrıcal ınspectıons and (2) they vıolated the amended sıgn ordınance The Cıty also filed a motıon for a prelımınary ınjunctıon requırıng Valley to remove the bıllboards

At the hearıng on the motıon the trıal court ındıcated that ıt would grant a prelımınary ınjunctıon It agreed wıth the Cıty s contentıon that the federal judgment was collateral estoppel on the merıts It then commented ' I am reluctant to fashıon an order today that would allow the actual physıcal tear [ ]down of the bıllboards And the reason I am reluctant ıs there stıll ıs the pendıng appeal before the Nınth Cırcuıt And I am reluctant to have anyone go through the tıme trouble and expense of havıng that done when there ıs the possıbılıty however remote that the Nınth Cırcuıt may ın fact reverse [the federal court] s rulıng If that happens obvıously the bıllboards need to be replaced at some sıgnıficant cost and I am concerned about that

Can I not sımply order that untıl the Nınth Cırcuıt has finally determıned thıs matter that there sımply be no advertısıng permıtted on the bıllboaıds and that ınstead they be used for publıc servıce announcements or other noncommercıal usage?"

Counsel for the Cıty responded I do thınk thıs Court ıs empowered to and really should order the removal of the sıgns above the foundatıons [I]f the Court says ıt ıs doıng thıs because ıt ıs waıtıng for the appeal you really aren t gıvıng full faıth and credıt full collateral estoppel [effect] to the federal judgment

Counsel for Valley also opposed the trıal court s proposed approach 'So what the Court ıs doıng ıs sayıng ın effect we are goıng to resolve the cıty's problems by takıng down the content when the content ısn t the real ıssue ın the case and never has been He added 'I would respectfully request that the Court leave the sıgns as ıs leave the constıtutıonally protected content on there

The trıal court responded I haven t heard anythıng to turn me around from my tentatıve Accordıngly ıt ıssued a prelımınary ınjunctıon enjoınıng Valley from usıng the bıllboards to dısplay any commercıal message advertısement or vısıble copy

The Cıty filed an extraordınary wrıt petıtıon ın thıs court We denıed ıt statıng Petıtıoner has faıled to establısh ırreparable harm.

III
DISCUSSION

The appellate standard for revıewıng prelımınary ınjunctıons ıs well establıshed In decıdıng whether to ıssue a prelımınary ınjunctıon a trıal court weıghs two ınterrelated factors the lıkelıhood the movıng party ultımately wıll prevaıl on the merıts and the ıelatıve ınterım harm to the partıes from the ıssuance or nonıssuance of the ınjunctıon [Cıtatıon] 'Generally the rulıng on an applıcatıon for a prelımınary ınjunctıon rests ın the sound dıscretıon of the trıal court The exercıse of that dıscretıon wıll not be dısturbed on appeal absent a showıng that ıt has been abused [Cıtatıons] [Cıtatıon]' (*Hunt v Superıor Court* (1999) 21 Cal 4th 984 999 quotıng *Cohen v Board of Supervısors* (1985) 40 Cal 3d 277 286)

*6 But [w]here the "lıkelıhood of prevaılıng on the merıts factor depends upon a questıon of law the standard of revıew ıs not abuse of dıscretıon but whether the superıor court correctly ınterpreted and applıed [the] law whıch we revıew de novo ' [Cıtatıon]" (*Vo v Cıty of Garden Grove* (2004) 115 Cal App 4th 425 433 quotıng *Efstratıs v Fırst Northern Bank* (1997) 59 Cal App 4th 667 671-672) On thıs record the applıcatıon of collateral estoppel presents a questıon of law (See *Rohrbasser v Lederer* (1986) 179 Cal App 3d 290 296 297)

A *Lıkelıhood of Success on the Merıts*

The trıal court ruled that the Cıty had shown a lıkelıhood of success on the merıts based on collateral estoppel Valley contends thıs was error It addıtıonally contends the Cıty faıled to show a lıkelıhood of success on the merıts ındependent of collateral estoppel Because we wıll conclude below that the trıal court applıed collateral estoppel correctly we wıll not consıder Valley s addıtıonal contentıon

'In general collateral estoppel precludes a party from relıtıgatıng ıssues lıtıgated and decıded ın a prıor proceedıng [Cıtatıons] Tradıtıonally we have applıed the doctrıne only ıf several threshold requırements are fulfilled Fııst the ıssue sought to be precluded from relıtıgatıon must be ıdentıcal to that decıded ın a former proceedıng Second thıs ıssue must have been actually lıtıgated ın the former proceedıng Thırd ıt must have been necessarıly decıded ın the former proceedıng Fourth the decısıon ın the former proceedıng must be final and on the merıts Fınally the party agaınst whom precIusıon ıs sought must be the same as or ın prıvıty wıth the party to the former proceedıng [Cıtatıon] ' (*Gıkas v Zolın* (1993) 6 Cal 4th 841 848 849 quotıng *Lucıdo v Superıor Court* (1990) 51 Cal 3d 335 341)

California follows the rule that the preclusive effect of a prior judgment of a federal court is determined by federal law [Citations]' (*Butcher v Truck Ins Exchange* (2000) 77 Cal App 4th 1442 1452 accord *Younger v Jensen* (1980) 26 Cal 3d 397 411) Subject to one exception however federal principles of collateral estoppel are substantially the same as the state principles set forth above (See generally *Arizona v California* (2000) 530 U S 392 413 [120 S Ct 2304 147 L Ed 2d 374 *U S v Mendoza* (1984) 464 U S 154 158 [104 S Ct 568 78 L Ed 2d 379]) The one exception is that under state law a decision is not final until it has been affirmed on appeal or the time to take an appeal has passed Under federal law by contrast a decision is final unless and until it is reversed on appeal (*Lumpkin v Jordan* (1996) 49 Cal App 4th 1223 1230 1231) Thus even though Valleys appeal to the Ninth Circuit is still pending the federal court's judgment is sufficiently final to have collateral estoppel effect

In the federal action Valley claimed that requiring it to remove the billboards based on either the original sign ordinance or the amended sign ordinance would violate the First Amendment In response the City claimed that the permit requirement was constitutional that Valley had failed to comply with it and that it was therefore entitled to require removal of the billboards

*7 The whole point of the City's motion in limine was that because it could constitutionally require Valley to remove the billboards based on the violation of the permit requirement Valleys other contentions were irrelevant These included the contentions Valley raised in opposition to the motion in limine including that (1) portions of the original sign ordinance and the amended sign ordinance other than the permit requirement were unconstitutional (2) the City had processed Valleys permit applications improperly and in bad faith and (3) the City had a practice of accepting late filed permit applications Thus by granting the Citys motion in limine and entering judgment for the City the federal court actually and necessarily rejected each of these contentions [FN3]

FN3 In its reply brief Valley argues that if the federal judgment is collateral estoppel the Citys present claims necessarily were compulsory counterclaims in the federal action and are therefore barred (See Fed Rules Civ Proc rule 13(a)) It is unclear whether this is an argument or just a rhetorical flourish To the extent that it is an actual argument that the Citys claims are barred as compulsory counterclaims we deem it waived because it was not raised in Valleys opening brief (*Dieckmeyer v Redevelopment Agency of Huntington Beach* (2005) 127 Cal App 4th 248 260) and because it is not stated under a separate heading or subheading or supported by citation to legal authority as required by California Rules of Court rule 14(a)(1)(B)

Valley argues that there were at least five significant issues that were neither actually litigated nor necessarily decided in the federal case We will discuss these seriatim

First Valley argues that the federal court did not rule on its constitutional challenges to the amended sign ordinance It is true that it did not rule on the constitutionality of any portion of the amended sign ordinance *other than* the permit requirement It did rule however that the permit requirement was constitutional that the City was entitled to remove the billboards because they violated the permit requirement and therefore that Valleys other constitutional challenges to the amended sign ordinance were irrelevant Each of these determinations is collateral estoppel here

Valley relies on the federal courts comment that the City can institute its abatement proceedings and whatever defenses [Valley] may have [Valley] may raise The federal court did not mean however that it was carving out all of Valley's defenses from its ruling It evidently believed it had adjudicated all of Valleys defenses as appears from its comment that ' based upon this record the Superior Court Judge will order immediate abatement

In its reply brief Valley tries to recharacterize its federal action as a purely facial challenge to the sign ordinances and the federal court s judgment as a ruling that Valley lacked standing to bring such a facial challenge Thus it suggests that it can still challenge the sign ordinances as applied to its billboards This is nonsense The federal court never discussed mentioned or even so much as alluded to standing It ruled that the sign ordinances could constitutionally be applied to Valley because Valley had violated the permit requirement This was almost by definition the rejection of an as applied challenge Indeed in seeking a stay from the Ninth Circuit Valley argued "The amended ordinance is unconstitutional as applied (Capitalization omitted)

Second Valley argues that the federal court did not decide whether the permit requirement was excused based on futility The record belies this claim In opposition to the City's motion in limine Valley specifically argued futility it even made an offer of proof of the facts underlying its futility claim By granting the motion the federal court necessarily ruled that even *if* a permit application would have been futile the City was entitled to removal of the billboards Again this aspect of its ruling is collateral estoppel here

***8** At one point Valley claims the federal court refused to reach the futility issue solely because Valley had failed to specify it in a pretrial conference order (See Fed Rules Civ Proc rule 16) Not so The federal court s discussion of the futility defense demonstrates that it considered it and squarely rejected it Although Valley does not cite any portion of the record supporting its assertion (see Cal Rules of Court rule 14(a)(1)(C)) it seems to be referring to a statement the federal court made in its order denying Valley s motion for new trial However this was merely one of two alternative grounds the federal court gave for rejecting the futility defense as a basis for a new trial it went on to reject the futility defense again on the merits

Third Valley argues that the federal court did not decide whether the City s handling of its permit applications was unreasonable or improper The very point of the motion in limine however was to preclude evidence of this Again Valley made an offer of proof of the facts underlying this assertion And again the federal court decided that the reasonableness or unreasonableness of the City s permit handling was irrelevant Valley is bound by this ruling

Fourth Valley argues that the federal court did not decide whether it was constitutional for the City to remove a billboard based solely on the failure to obtain a permit We disagree That is precisely what the federal court did decide

Fifth and finally Valley argues that the federal court did not decide whether the City violated equal protection by granting variances to other billboard operators but not to Valley In its federal complaint however Valley alleged similarly that the City had violated equal protection by discriminating against it and in favor of its competitors based on its exercise of its First Amendment rights Thus by entering judgment against Valley the federal court necessarily ruled that this was not a defense to removal of the billboards

In a footnote Valley argues that the pendency of the federal appeal is relevant to the likelihood of success on the merits Although by no means fleshed out the argument seems to be that the possibility that the Ninth Circuit *might* reverse the federal court s judgment lessens the likelihood that the City will ultimately prevail in state court

Although we have found no authority directly on point (and certainly Valley cites none) we believe this approach would be inconsistent with the principle that a federal judgment is final for all res judicata purposes even if it is still subject to reversal on appeal (See *Lumpkin v Jordan supra* 49 Cal App 4th at pp 1230 1231 see generally *Stoll v Gottlieb* (1938) 305 U S 165 170 [59 S Ct 134 83 L Ed 104])

The Supreme Court has declared We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed that it is any the less effective as an estoppel between the parties while in force (*Deposit Bank v Bd of Councilmen of Frankfort* (1903) 191 U S 499 511 [24 S Ct 154 48 L Ed 276]) 'It would undermine the foundation of the principle upon which [collateral estoppel] is based if the court might inquire into and revise the reasons which led the court to make the judgment In such case nothing would be set at rest by the decree but the matter supposed to be finally adjudicated and concerning which the parties had had their day in court could be reopened and examined and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient a new judgment could be rendered because of these divergent views and the whole matter would be at large (*Id* at pp 510 511)

***9** Here if the trial court has been asked to treat the federal judgment as collateral estoppel for purposes of a final judgment including a permanent injunction requiring removal of the billboards it would have had to do so The federal judgment should be no less conclusive merely because the issue before the trial court was the likelihood that the City would obtain a final judgment rather than the final judgment itself

Moreover we see no way the trial court could consider the *fact* of the federal appeal without considering the *merits* of the federal appeal Otherwise how could it decide how *much* to discount the City s likelihood of success? It would have to inquire into the merits of the federal court s reasons for its judgment Thus it would usurp the Ninth Circuit s prerogative of reviewing that judgment The Supreme Court has told us that a federal judgment is deemed final despite the possibility of reversal on appeal precisely to preclude any such inquiry

We therefore conclude that the federal judgment conclusively established for purpose of a preliminary injunction that the City would prevail on the merits

B *The Relative Interim Harm to the Parties*

Valley also contends that the balance of harms weighed against the issuance of any injunction The City responds among other things that just as the federal court s judgment is collateral estoppel on the merits the federal court's denial of an injunction pending appeal is collateral estoppel on the balance of harms

When the federal court refused to grant Valley an injunction pending appeal (except as to the billboard foundations) it found that

1 [Valley] ha[s] not simply shown no likelihood of success on the merits but ha[s] actually lost on the merits of [its] claim and [the City] ha[s] shown not simply a strong likelihood of success on the merits but actual success on the merits

2 [T]he City has demonstrated irreparable harm in that the City has a substantial public interest in the enforcement of valid City regulations and laws concerning billboards

3 In contrast [Valley] ha[s] failed to demonstrate any likelihood of irreparable harm [Valley] ha[s] no right to continue to earn income from, or engage in an unlawful activity especially an activity that creates a potential public safety hazard and in any event the purely economic harm articulated by [Valley] would be fully redressable through any damage award

Thus the federal court did in fact adjudicate the balance of harms issue against Valley Valley argues It is a fallacy to assert that if X is not entitled to an injunction against Y then *a fortiori* Y is entitled to an injunction against X ' But Valley's syllogism is incomplete The federal court decided that Valley was not entitled to an injunction against the City *because* the balance of harms favored the City Here to determine whether the City was entitled to an injunction the trial court likewise had to decide whether the balance of harms favored the City This was identical to the issue already decided by the federal court Of course the balance of harms by itself did not necessarily mean that the City was entitled to an injunction When coupled with the City's likelihood of success on the merits however it did

***10** Valley notes that this court denied the City s petition for a writ of mandate because the City had not shown irreparable injury It argues that this finding should be collateral estoppel against the City However subject to exceptions not applicable here (see e g *Abraham v Workers' Comp Appeals Bd* (2003) 113 Cal App 4th 1082 1089 1090) an order summarily denying an extraordinary writ petition is not collateral estoppel (*Carretti v Italpast* (2002) 101 Cal App 4th 1236 1241 1242 *Lomes v Hartford Financial Services Group Inc* (2001) 88 Cal App 4th 127 132 fn 2)

Valley does not argue that the federal court s denial of an injunction pending appeal was not final for purposes of collateral estoppel Thus we believe it has waived any such argument Nevertheless if only out of an excess of caution we will address it

Under federal law [f]inality for purposes of issue preclusion is a more pliant concept than it would be in other contexts [Citation] (*Henglein v Colt Industries Operating Corp* (3d Cir 2001) 260 F 3d 201 210 *cert den* (2002) 535 U S 955 [122 S Ct 1358 152 L Ed 2d 354] quoting *Dyndul v Dyndul* (3d Cir 1980) 620 F 2d 409 412) The federal courts follow section 13 of the Restatement Second of Judgments (e g *In re Bridgestone/Firestone Inc Tires Products Liability Litigation* (7th Cir 2003) 333 F 3d 763 767 *RecoverEdge L P v Pentecost* (5th Cir 1995) 44 F 3d 1284 1295) which states that for purposes of issue preclusion (as distinguished from [claim preclusion]) final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect

In practice [t]his may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again [Citation] (*In re Nangle* (8th Cir 2001) 274 F 3d 481 485 quoting *John Morrell & Co v Local Union 304A of United Food and Commercial Workers AFL-CIO* (8th Cir 1990) 913 F 2d 544 563 quoting *Lummus Company v Commonwealth Oil Refining Company* (2d Cir 1961) 297 F 2d 80 89)

In determining whether a decision is sufficiently firm, the federal courts consider a number of factors

(1) whether the prior decision was 'adequately deliberated and firm and not 'avowedly tentative

' (2) whether the parties were fully heard

(3) whether the court supported its decision with a reasoned opinion

(4) whether the court s prior decision was subject to appeal or was in fact reviewed on appeal [Citation]" (*Greenleaf v Garlock Inc* (3d Cir 1999) 174 F 3d 352 358)

As a general rule the granting or denial of a preliminary injunction is not based on a final decision on the merits and is not a final judgment for the purposes of collateral estoppel [Citation]" (*Medtronic Inc v Gibbons* (8th Cir 1982) 684 F 2d 565 569) Nevertheless the general rule does not apply and the grant or denial of a preliminary injunction may be given collateral estoppel effect "if the circumstances make it likely that the findings are accurate [and] reliable [Citations]" (*Commodity Futures Trading Com n v Board of Trade* (7th Cir 1983) 701 F 2d 653 657) ' Preclusion would seem to be particularly appropriate in a second action seeking the same injunctive relief [Citations] (*Hawksbill Sea Turtle v Fed Em Management Agency* (3d Cir 1997) 126 F 3d 461 474 fn 11)

***11** For example in *Walsh v Intern Longshoremen s Ass'n AFL-CIO* (1st Cir 1980) 630 F 2d 864 in administrative proceedings before the National Labor Relations Board (NLRB) several shippers had charged a longshoremen s union with unfair labor practices (*Id* at p 866) Under section 10(l) of the National Labor Relations Act (29 U S C § 160(l)) (section 10(l)) when an unfair labor practice charge was pending before the NLRB a regional director of the NLRB could file a petition in federal court for a preliminary injunction against the charged practices The district court would determine only whether there was reasonable cause to believe that the charged unfair labor practice had occurred Moreover any such preliminary injunction would be effective only until the NLRB adjudicated the charges Hence ordinarily the grant or denial of a preliminary injunction under section 10(l) was not final and not collateral estoppel (*Walsh* at p 868)

In *Walsh* however because several shippers were involved several regional directors brought separate section 10(l) actions against the same union (*Walsh v Intern Longshoremen's Ass'n AFL CIO supra* 630 F 2d at pp 866 867) In the first one of them to go to a decision the district court denied a preliminary injunction on the ground that the NLRB lacked jurisdiction (*Id* at p 866) Later in *Walsh* the district court refused to treat the earlier ruling as collateral estoppel (*Id* at p 867)

The Court of Appeals held that the first denial of a preliminary injunction should have been treated as collateral estoppel in the second (*Walsh v Intern Longshoremen's Ass n AFL CIO supra* 630 F 2d at pp 867 875) Thus it held among other things that the first denial was sufficiently final for this purpose

The limited effect of a section 10(l) decision flows naturally from the limited role of the district court in hearing the petition The court does not decide whether an unfair labor practice has occurred that decision is foi the Board subject to review by the court of appeals

But the district court in a section 10(l) proceeding does decide the limited issue of whether there is reasonable cause to believe that a violation has occurred so that injunctive relief is warranted We have been offered no persuasive reason to view that decision on that narrow issue as anything but a final decision for purposes of res judicata In our view the policies undeilying the rule of res judicata apply as well to decisions on section 10(l) as to other decisions The parties in a section 10(l) proceeding have full and fair opportunity to litigate the narrow issue which is placed before the district court [citation] The party against whom the petition is decided may appeal to the court of appeals [citation]

Once the Board has been afforded this opportunity to have its petition heard and adjudicated in the district court and to appeal the denial of relief to the court of appeals we see no reason to permit it to bring a second petition against the same respondent based on the same underlying charge This type of repetition which would be as expensive and vexatious to the respondent as any other type of litigation is exactly what the rule of res judicata is designed to prevent " (*Walsh v Intern Longshoremen's Ass'n AFL CIO supra* 630 F 2d at pp 868 869 quoting *Montana v U S* (1979) 440 U S 147 154 [99 S Ct 970 59 L Ed 2d 210] see also *Avitia v Metropolitan Club of Chicago Inc* (7th Cir 1991) 924 F 2d 689 690 693 [denial of plaintiffs first motion for preliminary injunction was collateral estoppel and required denial of plaintiffs second motion for preliminary injunction])

***12** For purposes of finality this case is on all fours with *Walsh* Admittedly in one sense the federal court s ruling denying an injunction pending appeal was tentative because it was intended to be effective only as long as Valley's appeal is pending in the Ninth Circuit Similarly however in *Walsh* the ruling denying a preliminary injunction was intended to be effective only as long as the administrative charges were pending before the NLRB In both instances on the issue of *whether to issue an injunction* including the subissue of the balance of harms the rulings were final Absent changed circumstances Valley could not keep going back to the federal court and filing new motions for an injunction pending appeal

Moreover the parties were fully heard The federal court supported its decision with a reasoned opinion Finally although the federal court s order was not technically appealable (*Shiley Inc v Bentley Laboratories Inc* (Fed Cir 1986) 782 F 2d 992 993

16A Wrıght & Mıller Federal Practıce & Procedure (1999) § 3954 pp 295 296) ıt was effectıvely revıewable by way of a motıon ın the Court of Appeals (Fed Rules App Proc rule 8(a)(2)(A)(ıı) 28 U S C *Shıley Inc* at p 993 see e g *Matter of Mıranne* (5th Cır 1988) 852 F 2d 805)

Thus the federal courts denıal of an ınjunctıon pendıng appeal was collateral estoppel ıt conclusıvely adjudıcated the ıssue of the balance of harms ın favor of the Cıty

C *Laches*

Valley contends a prelımınary ınjunctıon was barred by laches [L]aches ıs an equıtable defense to the enforcement of a stale claım and requıres a showıng of unreasonable delay plus eıther the plaıntıff's acquıescence ın the act complaıned of or prejudıce to the defendant resultıng from the delay [Cıtatıon] (*People v Koontz* (2002) 27 Cal 4th 1041 1087 1088) 'Generally a trıal court s laches rulıng wıll be sustaıned on appeal ıf there ıs substantıal evıdence to support the rulıng [Cıtatıon] ' (*Johnson v Cıty of Loma Lında* (2000) 24 Cal 4th 61 67)

A delay ın brıngıng suıt wıll be excused where there exısts an actual and substantıal ımpedıment thereto [Cıtatıon] (*Lubın v Lubın* (1956) 144 Cal App 2d 781 794) Here the Cıty had a cast ıron excuse for the supposed delay the federal court had *enjoıned* ıt from compellıng Valley to remove the bıllboards Valley suggests that the Cıty should have fıled a counterclaım for removal of the bıllboards ın the federal actıon and that ıts faılure to do so constıtuted unreasonable delay The Cıty however was actıvely defendıng the federal actıon Valley could not possıbly have been under any ıllusıon that the Cıty was somehow acquıescıng ın the exıstence of the bıllboards Unless and untıl the federal ınjunctıon was lıfted there was no ıeason for the Cıty to do anythıng more At a mınımum, the trıal court could so fınd

D *The Scope of the Prelımınary Injunctıon*

***13** The Cıty contends the trıal court erred by grantıng an ınjunctıon that merely prohıbıted Valley from dısplayıng commercıal advertısıng on the bıllboards It claıms ıt was entıtled to an ınjunctıon that would have requıred Valley to remove the bıllboards (except for the foundatıons as the Cıty ıs stıll subject to the federal court s ınjunctıon prohıbıtıng ıt from requırıng the removal of the foundatıons)

The trıal court found that the Cıty had shown a lıkelıhood of success on the merıts based on collateral estoppel As we held ın part III A *ante* we agree It nevertheless refused to requıre removal of the bıllboards due to what ıt called "the possıbılıty however remote ' that the Nınth Cırcuıt mıght yet reverse the federal judgment It ıs not clear whether ıt belıeved thıs affected the lıkelıhood of success on the merıts the balance of harms or both

As we also held ın part III A *ante* the possıbılıty that the federal judgment mıght be reversed on appeal was ırrelevant to the lıkelıhood of success on the merıts Under federal law the federal judgment was fınal and entıtled to full collateral estoppel effect Moreover as we held ın part III B *ante* the federal court s rulıng that the balance of harms favored the Cıty was lıkewıse fınal and entıtled to full collateral estoppel effect The trıal court was not free to redetermıne thıs ıssue

To the extent that the trıal court *dıd* redetermıne the balance of harms ıssue ıt erred The Cıty wanted an ınjunctıon to prevent the harm to the publıc ınterest that results from the constructıon of a sıgn or any other structure wıthout a permıt An ınjunctıon leavıng the bıllboards ın place whıle prohıbıtıng Valley from dısplayıng commercıal advertısıng on them, ın no way lessened thıs harm On the other hand the harm Valley claımed ıt would suffer from an ınjunctıon was that ıt could not dısplay any advertısıng to the detrıment of ıts Fırst Amendment rıghts as well as ıts fınances An ınjunctıon prohıbıtıng commercıal advertısıng dıd not sıgnıfıcantly lessen thıs harm

We also note that although the trıal court purported to rely on the federal judgment the federal judgment determıned that the Cıty was entıtled to remove the bıllboards ıt ın no way determıned that the Cıty was entıtled to prohıbıt Valley from dısplayıng commercıal advertısıng on them The whole thrust of the federal court s rulıng was that the permıt requırement was a content neutral rule of general applıcatıon hence penalızıng Valley for faılıng to comply wıth ıt dıd not vıolate the Fırst Amendment By contrast an ınjunctıon prohıbıtıng Valley from dısplayıng commercıal advertısıng *ıs* content based and *does* sıngle out Valley for pecuhar treatment The trıal court s ınjunctıon raısed substantıal Fırst Amendment ıssues that the federal judgment had ın no way resolved

Valley argues that a hıgher standard of revıew applıes to a mandatory prelımınary ınjunctıon Of course the ınjunctıon the trıal court actually ıssued was a prohıbıtory ınjunctıon The ınjunctıon the Cıty was seekıng however was a mandatory ınjunctıon (*Kettenhofen v Superıor Court* (1961) 55 Cal 2d 189 191 [ınjunctıon requırıng removal of fence])

*14 ' ' " [A] prelımınary *mandatory* ınjunctıon ıs rarely granted and ıs subject to stricter revıew on appeal ' ' [Cıtatıon] The grantıng of a mandatory ınjunctıon pendıng trıal ıs not permıtted except ın extreme cases where the rıght thereto ıs clearly establıshed ' [Cıtatıon] [Cıtatıon] (*Teachers Ins & Annuıty Ass'n v Furlottı* (1999) 70 Cal App 4th 1487 1493 quotıng *Shoemaker v County of Los Angeles* (1995) 37 Cal App 4th 618 625 quotıng *Board of Supervısors v McMahon* (1990) 219 Cal App 3d 286 295) The Cıty however establıshed ıts lıkelıhood of success on the merıts as a matter of law It lıkewıse establıshed that the balance of harms was ın ıts favor as a matter of law Thus even under thıs hıgher standard the Cıty was entıtled to the ınjunctıon ıt was seekıng

The usual vıce of a mandatory ınjunctıon ıs that the plaıntıff obtaın[s] by the order the complete relıef whıch he had sought ın the actıon ıtself The ınjunctıon d[oes] not tend to maıntaın the status quo but to coerce the defendant ınto performıng an act ın advance of trıal whıch upon trıal mıght not have been decreed ' (*Fretz v Burke* (1967) 247 Cal App 2d 741 746) Here however the Cıty has already fully lıtıgated an actıon to judgment ın whıch ıt was found to be entıtled to requıre removal of the bıllboards Indeed at one poınt the federal court ıtself ıssued a permanent ınjunctıon requırıng removal of the bıllboards later ıt dıssolved ıt but only because the Cıty had not filed a cross complaınt for ınjunctıve relıef not because the Cıty was not entıtled to ıt Thus the polıcıes mılıtatıng agaınst a mandatory ınjunctıon do not apply

We conclude that the Cıty was entıtled to an ınjunctıon requırıng Valley to remove the bıllboards (except the foundatıons) By grantıng a dıfferent and lesser ınjunctıon the trıal court erred We wıll reverse and we wıll remand wıth dırectıons to ıssue the ınjunctıon the Cıty was seekıng

IV
DISPOSITION

The order appealed from ıs reversed On remand the trıal court ıs dırected to ıssue a prelımınary ınjunctıon requırıng Valley wıthın 30 days from the date of the ıssuance of our remıttıtur to remove all portıons of the bıllboards other than the foundatıons The trıal court shall do so wıth no further hearıng except that on a suıtable motıon or other applıcatıon and for good cause shown ıt may shorten or extend thıs 30 day perıod Howevei ıf eıther the federal court s judgment or ıts order concernıng an ınjunctıon pendıng appeal ıs reversed modıfied or vacated these dırectıons shall not be bındıng and ınstead the trıal court shall conduct any further proceedıngs ın accordance wıth any relevant final federal judgment or order then ın effect as well as wıth the vıews expressed ın thıs opınıon The Cıty ıs awarded costs on appeal agaınst Valley

We concur HOLLENHORST Actıng P J and GAUT J

Not Reported ın Cal Rptr 3d 2005 WL 2233617 (Cal App 4 Dıst) Not Officıally Publıshed (Cal Rules of Court Rules 976 977)

END OF DOCUMENT