No. _____

In The

Supreme Court of the United States

JEFFREY HERSON; EAST BAY OUTDOORS, INC., a California corporation,

Petitioners,

v.

CITY OF RICHMOND, a California charter city,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When this Court grants, vacates, and remands ("GVR"s) a case back to a circuit court of the United States "for further consideration in light of" a recently decided opinion of this Court, what exactly does this Court expect; is adding an *ipse dixit* footnote to the original opinion sufficient, or must the circuit court *discuss* how the law applies to the facts in light of the recently decided opinion of this Court?

2. When this Court grants, vacates, and remands ("GVR"s) a case back to a circuit court of the United States "for further consideration in light of" a recently decided opinion of this Court, may the circuit court deem the substantive issue to have been procedurally forfeited even though the substantive issue was raised below and the same procedural forfeiture arguments were unsuccessfully argued to this Court in opposition to the original petition for *certiorari*?

3. A municipal sign ordinance identified various categories of signs based on the type of information they convey, then subjected each category to different restrictions. It exempted signs containing favored noncommercial subject-matter (including foreign and domestic governmental insignia; religious symbols; and civic, patriotic, and commemorative speech). And the city also favored commercial speech over noncommercial speech. In light of this Court's recent opinion in *Reed v. Town of Gilbert*, did the city abridge the First Amendment?

PARTIES

Petitioners are Jeffrey Herson, an individual, and East Bay Outdoor, Inc., a California Corporation.

Respondent is the City of Richmond, a California charter city.

CORPORATE DISCLOSURE STATEMENT

East Bay Outdoor, Inc. certifies that it has no parent company and no publicly held company owns ten percent or more of its stock.

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ORDERS AND OPINIONS

The unreported Memorandum *Opinion* of the Ninth Circuit issued on January 22, 2016, following remand from this Court is reprinted at App. 1-4. The Ninth Circuit *Order* of February 10, 2016 denying rehearing is reprinted at App. 50. The Ninth Circuit *Order* of November 19, 2015 requesting further briefing is printed at App. 5. This Court's *Judgment* (GVR) issued on October 5, 2015 is reprinted at App. 6-7. The original unreported Memorandum *Opinion* of the Ninth Circuit issued on October 21, 2014 is reprinted at App. 9-12. The underlying District Court *Order* granting summary judgment issued on December 5, 2011 is reprinted at App. 13-22 and is officially reported at 827 F. Supp. 2d 1088. A therein referenced prior District Court *Order* granting and denying summary judgment in part issued on April 25, 2011 is reprinted at App. 23-49.

JURISDICTION

The Ninth Circuit rendered its decision on January 22, 2016. App. 1-4. The Ninth Circuit denied rehearing on February 20, 2016. App. 50. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Richmond Municipal Code Chapters 4 & 15 are excerpted in the Appendix, App. 51-59.

STATEMENT OF THE CASE

In June of 2009, Petitioners Jeffrey Herson and East Bay Outdoor, Inc. were denied the right to display speech at certain locations in the City of

Richmond, California under a now-repealed sign ordinance because municipal officials determined that none of the proposed structures would contain messages that were either authorized by, or exempt from, the then-applicable municipal sign ordinance (hereinafter, "Old Ordinance").

The Old Ordinance, which limited signs that could be displayed within 660 feet of a freeway, regulated billboards in at least two ways. First, the regulations generally banned most noncommercial speech including political speech, but expressly excluded particular, favored, subject-matters of noncommercial speech (including foreign and domestic governmental insignia; religious symbols; and civic, and commemorative speech), including one category based upon viewpoint (patriotic speech). Second, it authorized high and large "Major Gateway Area Identification Signs" announcing the location of major commercial shopping centers, with the name of the centers. In addition to those written regulations that appeared on the face of the ordinance, Petitioners demonstrated that the Old Ordinance was administrated by the Richmond Planning Department so as to endorse several high and large signs containing commercial speech, such as the names, trademarks, and products of commercial businesses at the shopping centers.

Petitioners filed suit in the U.S. District Court for the Northern District of California and the case was assigned to the Honorable Phyllis J. Hamilton who ultimately granted summary judgment against

Petitioners and in favor of Richmond. Petitioners appealed to the Ninth Circuit.

A panel of the Ninth Circuit consisting of the Honorable Circuit Judges Sandra S. Ikuta, N.R. Smith, and Mary H. Murguia unanimously concluded in a memorandum decision that Richmond "had an independent, constitutionally valid reason for denying Herson's applications" – "the content-neutral height and size restrictions of the Old Ordinance." 585 Fed. Appx. 522, 523 (9th Cir. 2014).

At the time of the decision, the prevailing law of the circuit was that Judges should determine whether sign restrictions were content-neutral by looking to the government's purpose for the restriction, even when the restriction was facially content-based.

Petitioners sought *certiorari* from this Court, and at the end of last term, this Court issued *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Reed*, this Court disapproved the Ninth Circuit's test for what constitutes a content-neutral sign restriction, and provided much needed clarity to the mode of analysis courts must employ when judging municipal sign regulations under the First Amendment. Under *Reed*, facially content-based restrictions are treated as content-based regardless of the government's purpose.

In their petition for *certiorari*, among other things, Petitioners argued that the ordinance contained content-based exemptions. In opposition to the petition for *certiorari*, among other things, the City of

Richmond argued that this Court should deny *certiorari* because that argument had been procedurally forfeited. Petitioners filed a reply brief refuting that argument.

Upon returning from summer recess, this Court granted the Petitioner's petition for *certiorari*, vacated the Ninth Circuit judgment, and remanded "for further consideration in light of *Reed v. Town of Gilbert*, 576 U.S. ___ (2015)." The same Ninth Circuit panel then called for the parties to simultaneously submit ten-page briefs "addressing what effect, if any, the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), has on our prior disposition in this case."

Recognizing the rarity of this Court granting a petition for *certiorari* and the significance of the opportunity to be the first to apply a new precedent of this Court in the largest circuit in the nation, the Petitioners retained First Amendment scholar, Professor Eugene Volokh of U.C.L.A. who prepared the supplemental brief in his capacity as a private lawyer. Professor Volokh argued that under the principles this Court announced in *Reed*, the panel analysis was no longer valid, because the height and size restrictions of the Old Ordinance were not content-neutral, and denials of permits based on those height and size regulations thus constituted discrimination based on content, requiring the Old Ordinance to pass strict scrutiny (which it could not survive).

However, the same panel simply re-issued the exact same memorandum decision that this Court vacated, with the exception of a newly inserted *ipse dixit* footnote simply stating that the district court's analysis (done prior to the new precedent) "complies with" the new precedent:

> The district court's analysis, in determining that the height and size restriction of the Old Ordinance was content neutral, complies with the Supreme Court's recent opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). The district court first reasoned that the applicable restriction "does not discriminate, on its face, between the content of speech." *Herson v. City of Richmond*, 827 F. Supp. 2d 1088, 1091 (N.D. Cal. 2011). The district court then determined that the restriction was "narrowly tailored to serve a compelling City interest." *Id*. Herson's challenges to the restriction's exemptions were waived when he failed to address the district court's conclusion that these challenges fell outside the scope of the Third Amended Complaint.

App. 2.

Petitioners now return to this Court arguing that there is a reasonable probability that the Ninth Circuit failed to give due "consideration" to this Court's decision in *Reed*, and that *Reed* otherwise requires that the Ninth Circuit's decision in this case

be reversed on its merits and remanded with instructions to consider the issue of remedy.

ARGUMENT

The "all-purpose Latin canon"[1] of *ipse dixit* does not constitute "consideration." When this Court GVR's a case "for further consideration in light of" a new precedent, the circuit court must do more than wave "the magic wand of *ipse dixit*"[2] and incant, "It complies!" The lower court must *discuss* how the law applies to the facts in light of the recently decided opinion of this Court. *Wellons v. Hall*, 558 U.S. 220, 226 (2010) (*per curiam*) (rejecting notion that a court of appeals "should respond to our remand order with a 'summary reissuance' of essentially the same opinion").

The Ninth Circuit's most recent decision in this case, is contrary to this Court's recent decision in *Reed*, and also conflicts with the Fourth Circuit's post-*Reed* decision in *Central Radio Company v. City of Norfolk*, 811 F.3d 625, 2016 U.S. App. LEXIS 1498, *13-19 (4th Cir. 2016). Though this Court's previously issued GVR order directed the Ninth Circuit to review this case in light of *Reed*, the largest circuit in

[1] *See Montgomery v. Louisiana*, 136 S. Ct. 718, 741 (2016) (Scalia, J., dissenting).

[2] *See United States v. Yermian*, 468 U.S. 63, 77-78 (1984) (Rehnquist, J., dissenting).

the nation neglected to meaningfully review its precedents and overrule pre-*Reed* cases such as *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1075-81 (9th Cir. 2006) (upholding speaker-based exemptions and event-based exemptions) and *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 890-94 (9th Cir. 2007) (holding that billboard company lacked standing to facially challenge sign ordinance as content-based even though it had been denied permits).[3]

A party who believes a circuit court has misconstrued or failed to execute the mandate of this Court is not without a remedy; "either upon an application for a writ of mandamus or upon a new appeal, it is for this court to construe its mandate, and to act accordingly." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). Summary procedures are appropriate because "[a] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court."

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[3] Although the Ninth Circuit carefully avoided reciting the content-based text of the San Diego ordinance in its opinion, it is clear from the district court opinion that the text of the ordinance identified various categories of signs based on the type of information they convey, then subjected each category to different restrictions. *Get Outdoors II, LLC v. City of San Diego*, 381 F. Supp. 2d 1250, 1252-54 (S.D. Cal. 2005), *e.g.*, *id.* at 1253 (prohibition of "ideological signs unrelated to any election but expressing ideological or political views").

General Atomic Co. v. Felter, 436 U.S. 493, 497 (1978) (explaining appropriateness of writ procedure).

Here, this Court should either issue a GVR order again, or consider a summary *per curiam* reversal because of the egregious misapplication of settled law. *Cf., Wearry v. Cain*, 2016 U.S. LEXIS 1654, at *15 (2016) (*per curiam*) (summary disposition appropriate when "lower courts have egregiously misapplied settled law"). The fact that a lower court opinion is not published carries "no weight" in deciding whether or not to grant *certiorari* and issue a *per curiam* summary reversal. *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (*per curiam*).

I. FOLLOWING A GVR "FOR FURTHER CONSIDERATION IN LIGHT OF" SPECIFIED AUTHORITY, A LOWER FEDERAL COURT IS EXPECTED TO *DISCUSS* HOW SAID AUTHORITY DOES OR DOES NOT APPLY TO THE FACTS OF THE REMANDED CASE

As the former Chief Judge of the Ninth Circuit has lamented, "[t]he Supreme Court has previously admonished [the Ninth Circuit] for ignoring a grant, vacate and remand (GVR) order and 'reinstating [our] judgment without seriously confronting the significance of the cases called to [our] attention.'" *Harris v. Amgen, Inc.*, 788 F.3d 916, 922-23 (9th Cir. 2015) (Judge Kozinski, dissenting with others from the denial of a petition for *en banc* review), citing *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011). This Court just

recently summarily reversed the Ninth Circuit in *Amgen* in a *per curiam* opinion. *Amgen Incorporated v. Harris*, 136 S. Ct. 758 (2016).

The GVR power is authorized by Congress. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (*per curiam*), citing 28 U.S.C. § 2106. On the one hand, the power is used "sparingly" due to this Court's "[r]espect for lower courts, the public interest in finality of judgments, and concern about [this Court's] own expanding certiorari docket." *Lawrence*, 516 U.S. at 173-74. On the other hand, "dry formalism should not sterilize procedural resources" and "a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson v. United States*, 516 U.S. 193, 197-98 (1996) (*per curiam*).

As this Court's docket has expanded, "the GVR order has, over the past 50 years, become an integral part of this Court's practice. . . ." *Lawrence*, 516 U.S. at 166. The GVR procedure "conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [this Court] rule[s] on the merits, and alleviates the potential for unequal treatment that is inherent in [this Court's] inability to grant plenary review of all pending cases raising similar issue." *Id.* at 167. "[T]he GVR order can improve the fairness

and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Id.* at 168.

Use of a GVR order is appropriate "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . ." *Lawrence*, 516 U.S. at 167, *Wellons*, 558 U.S. at 225, accord, *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2286 (2014) (Scalia, J., joined by Thomas, J., dissenting from denial of writ of *certiorari*).

In practice, this Court has issued GVR orders "in light of a wide range of developments" including the issuance of one of its own opinions. *Lawrence*, 516 U.S. at 167, citing *id*. at 180 (Scalia, J., dissenting). A GVR order may be issued where "the lower court's order shows no sign of having applied" the newly issued opinion – even if the record discloses that the newly issued opinion was clearly brought to the lower court's attention by counsel. *Id.*, 516 U.S. at 169-70.

Summary dispositions tend to be particularly good candidates for GVR orders. This Court has explained that due to the increasing prevalence of summary dispositions by the circuit courts, "it is important that the meaningful exercise of this Court's

appellate powers not be precluded by uncertainty as to what the court below '*might* . . . have relied on.'" *Lawrence*, 516 U.S. at 170. Although ambiguous summary dispositions are less likely to be granted plenary review by this Court, the very nature of their pithiness makes them more likely candidates for a GVR order. *Ibid.* "A contrary approach would risk effectively immunizing summary dispositions by Courts of Appeals from [this Court's] review, since it is rare that their basis for decision is entirely unambiguous." *Stutson*, 516 U.S. at 196.

Indeed, even if a circuit court *expressly* states that it has considered and rejected an argument based upon a newly issued opinion, a GVR may be appropriate if there is a reasonable probability that the argument has been given, "at most, perfunctory consideration" due to the mistaken belief that the argument based upon a newly issued opinion was procedurally barred. *Wellons*, 558 U.S. at 222.

Here, there is a "reasonable probability" that the First Amendment issue only received "perfunctory consideration" due to the mistaken belief that the *Reed v. Town of Gilbert* argument was procedurally barred. After its terse recital that the district court's analysis (performed *before* the issuance of *Reed*) nevertheless somehow "complies with" *Reed*, the Ninth Circuit stated: "Herson's challenges to the restriction's exemptions were waived when he failed to address the district court's conclusion that these challenges fell outside the scope of the Third Amended Complaint." The "waiver" argument is demonstrably false

as was brought to the Ninth Circuit's attention in Professor' Volokh's petition for rehearing (which is reprinted in the next section).

When this Court has recently decided a question of law, it has an obvious interest in seeing that the rule is followed in the lower courts. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Judges of the inferior courts may voice their criticisms, but follow it they must."). However, as a practical matter this Court necessarily limits its merits docket "to a handful of opinions per justice" from the thousands of *certiorari* petitions it receives every Term. *Id.* at 1177 and n. 34. As a consequence, "keeping the law of the circuit consistent" and in conformity with this Court's precedents is by necessity one of the "paramount duties" of the circuit courts. *Id.* at 1178. A GVR order provides circuits the opportunity to conform circuit precedents to the newly announced rule.[4]

This Court also has an obvious interest in seeing *how* the circuit courts apply the new precedent. Too much brevity is not helpful. Without diminishing the important judicial function circuit courts perform in separating the cases that should be precedent from those that should not,[5] it should go without saying

[4] Of course, neither the law of the circuit, nor the law of the case, prevents a panel of the Ninth Circuit from following intervening controlling authority from this Court. *Gonzalez v. Arizona*, 677 F.3d 383, 389, n. 4 (9th Cir. 2012) (*en banc*).

[5] *See Hart*, 266 F.3d at 1180.

that a GVR order from this Court is a strong indicator that an issue is important[6] and warrants further discussion upon remand.

Although a simple statement by the lower court confirming that it did in fact consider the newly issued opinion arguably satisfies the aforementioned concern of this Court that a flagged issue was not duly considered, it does not satisfy another important articulated purpose of the GVR – a simple acknowledgment does not assist this Court "by procuring the benefit of the lower court's insight before we rule on the merits."[7] *Wellons*, 558 U.S. at 225-26 quoting *Lawrence*, 516 U.S. at 167.

Thus, this Court has expressly rejected the notion that a court of appeals "should respond to our remand order with a 'summary reissuance' of essentially the same opinion. . . ." *Wellons*, 558 U.S. at 226. Here, this Court should re-emphasize and squarely hold that as a matter of federal practice,[8] following

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[6] Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

[7] This Court sometimes declines granting *certiorari* on the merits "so it will have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem." *Hart*, 266 F.3d at 1173, citing *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("It is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

[8] *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950) ("Our supervisory power over the judgments of the lower

(Continued on following page)

the issuance of a GVR order "for further consideration in light of" specified authority, a lower federal court is expected to *discuss* how said authority does or does not apply to the facts of the remanded case.

II. THERE WAS NO PROCEDURAL BAR TO APPLYING *REED*

As ably explained by Professor Volokh in the petition for rehearing,[9] the Ninth Circuit panel was demonstrably wrong in concluding that the *Reed* arguments were procedurally barred.

The January 22, 2016 panel decision rejected Herson's argument that the Old Ordinance impermissibly discriminated based on the content of speech. "Herson's challenges to the restriction's exemptions," the decision concluded, "were waived when he failed to address the district court's conclusion that these challenges fell outside the scope of the Third Amended Complaint." App. 2, Memorandum, p. 2 n. 1.

This, however, appears to rest on a misapprehension of the record stemming from the city's argument

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federal courts is a broad one."), citing 28 U.S.C. § 2106, *see also Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (observing this Court has "ample authority to control the administration of justice in the federal courts" as opposed to state courts).

[9] Much of Parts II and III of this brief is quoted virtually verbatim from the Ninth Circuit briefs of Professor Volokh. Quotation marks and edit brackets are omitted to improve readability.

in its supplemental brief, App. 95-99, Appellee's Supplemental Brief 7-10 – a misapprehension that Herson had no opportunity to correct, because the supplemental briefing order called only for simultaneous briefs with no opportunity for a reply brief, and because the Ninth Circuit declined to hear oral argument related to the supplemental briefs.

1. Even if the District Court had been correct to say that the Third Amended Complaint reflected only "a narrow challenge to . . . section 15.06.080(C) of the Old Ordinance," App. 34 § 15.06.080(C) was itself unconstitutionally content-based, for the reasons given in Part III, pp. 27-40. Section 15.06.080(C) allowed signs up to 45 feet high, § 15.06.080(C), if they were "[m]ajor gateway area identification sign[s]" – signs in certain places containing names of major city centers, with no other content. (The City of Richmond apparently viewed the section as implicitly allowing even taller signs, *see* Part III, herein, pp. 36-40.) This argument was thus not waived, even in the District Court's view.

2. Moreover, the District Court erred in concluding that the Third Amended Complaint challenged only § 15.06.080(C) of the Old Ordinance. The Third Amended Complaint expressly also pointed to the Old Ordinance's § 15.06.060 exceptions from the size and height restrictions (*see* Part III, pp. 29-32), and argued that these exemptions also made the restrictions unconstitutionally content-based:

18. OLD CODE Section 15.06.080 sets forth the Richmond Parkway and freeway proximity regulations. Under OLD CODE Section 15.06.080C(1), political signs and many other signs containing noncommercial speech were not permitted in a 660 FOOT RESTRICTED AREA (without a variance), but certain signs containing commercial speech are permitted in a 660 FOOT RESTRICTED AREA. OLD CODE Section 15.06.080C(5) allowed certain signs containing commercial speech to be displayed in a 660 FOOT RESTRICTED AREA and oriented so as to be displayed to those traveling on the Richmond Parkway or a freeway. OLD CODE Section 15.06.080G(6) barred the display of political signs and other signs containing noncommercial speech to those traveling on a freeway. OLD CODE Section 15.06.080G placed certain limits on political speech that are not placed on any other speech, but Section 15.06.080G(6) exempts from the provisions of Section 15.06.080G those signs displayed by those licensed to erect or display outdoor advertising signs or billboards. *OLD CODE Section 15.06.060 provides that signs containing certain noncommercial speech, but not political speech, are exempted from Chapter 15.06 of the OLD CODE. . . .*

. . .

FIRST CLAIM

(42 U.S.C. Section 1983 – First Amendment as to Signs 1 through 4 and 6 through 13 – Damages)

> 20. Plaintiffs reallege Paragraphs 1 through 19, above.
>
> 21. RICHMOND'S regulation of signs as of June 26, 2009, within its 660 FOOT RESTRICTED AREA facially violated the First and Fourteenth Amendments to the United States Constitution by containing content-based restrictions that give greater protection to commercial speech than noncommercial speech, and by regulating noncommercial speech based upon content.

App. 60-63 (emphasis added).

Sections 15.06.060 and 15.06.080 contain the content-based exemptions that Herson's Supplemental Brief relied on, and that show that the Old Ordinance is unconstitutionally content-based. Indeed, § 15.06.060 is a short section consisting entirely of content-based exceptions, which (in the words of the Third Amended Complaint) "provide[ ] that signs containing certain noncommercial speech, but not political speech, are exempted." App. 61.

3. Herson argued in district court, in opposing the City's motion for summary judgment, that §§ 15.06.060 and 15.06.080 made the Old Ordinance unconstitutionally content-based. App. 64-73, Opposition to Defendant's Motion for Summary Judgment, pp. 7-12. The Appellants' Opening Brief in the Ninth Circuit continued this argument. Appellants' Opening Brief 37-41 (as to § 15.06.080), App. 44-48, 74-79 (as to § 15.06.060). When the City replied that the argument had been waived in the District Court, App. 80-81,

Appellee's Brief 37, Herson responded at length, App. 85-87, Appellants' Reply Brief 13-15. In particular, Herson noted that:

> Herson's Third Amended Complaint alleges (App. 60-63, Third Amended Complaint, ¶ 19, p. 4, line 4):
>
> Old Code § 15.06.060 provides that signs containing noncommercial speech, but not political speech, are exempted from chapter 15.06 of the Old Code. Accordingly Signs 1 through 13 were barred under the Old Code.
>
> Not only did Herson allege that § 15.06.060 was content based and unconstitutional, Herson went even further and attached the relevant code sections to the complaint. The City's argument that Herson waived these arguments, or failed to preserve them below is without merit.

App. 87, Appellants' Reply Brief 15.

Though a party may not "raise a new issue in its reply brief," because "[a]n issue advanced only in reply provides the appellee no opportunity to meet the contention," *Image Technical Services, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1356-57 (9th Cir. 1998) (citation and internal quotation marks omitted), here Herson was not raising a new issue – he was responding to an argument made by the City. As the Ninth Circuit has noted, when an issue is "first raised by the appellee's brief," it can be "met in the reply brief." *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981), superseded as to

other matters, *PAE Gov't Services, Inc. v. MPRI, Inc.*, 514 F.3d 856, 859 n.3 (9th Cir. 2007). "Although we ordinarily decline to consider arguments raised for the first time in a reply brief, we may consider them if, as here, the appellee raised the issue in its brief," *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 n.10 (9th Cir. 2002) (quoting *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992)), because, when "appellees raised the issue in their brief, we have the benefit of briefing from both parties on the issue." *Id.*; *see also Rosenbaum v. City & County of S.F.*, 484 F.3d 1142, 1150 n.3 (9th Cir. 2007).

Herson thus did address the claim that the challenges to the content-based exceptions fell outside the scope of the Third Amended Complaint. Moreover, the Ninth Circuit's October 21, 2014 decision in this case did not indicate any need to discuss this claim further.

A few additional points should also be made. First, the hyper-technical pleading argument ignores the Federal Rules of Civil Procedure which merely require a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. Rule 8(a) and *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (*per curiam*) (citing cases rejecting heightened pleading requirement in civil rights cases). And Rule 8(f) command: "All pleadings shall be so construed as to do substantial justice."

Second, the modern appellate process is designed as a funnel to narrow the scope of issues, and this

Court generally does not "open the whole can of worms" when issuing a GVR order. Of course, "when reviewing a judgment of a federal court, [this Court] has jurisdiction to consider an issue not raised below. . . ." *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984). But this Court's rules of practice provide: "[A]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called the Court's attention in the brief in opposition." Supreme Court Rule 15.2 and *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

It is "indisputable" that circuit courts are "bound to carry the mandate of the upper court into execution" and cannot "consider the questions which the mandate laid at rest." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 167-68 (1939). Though the mandate does not extend to issues "neither before the Circuit Court of Appeals nor before this Court" unless "necessarily implied" this Court's mandate "is controlling as to matters within its compass." *Id.* at 168. From "its earliest days" to "later days" this Court has "consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306 (1948).

Importantly, here the forfeiture argument was previously before this Court. In response to Petitioners' content-based argument at pages 14 through 16 of the prior *certiorari* petition, Richmond raised the

forfeiture argument in its opposition, and Petitioners replied to the argument. App. 88-89 (opposition) and App. 90-94 (reply). Thus, the range and scope (*i.e.* "compass") of the prior proceeding *expressly included* Richmond's argument that the petition for *certiorari* should be denied because the arguments were forfeited below. Moreover, the granting of *certiorari* necessarily implies that this Court rejected the forfeiture argument because this Court is generally "reluctant" to exercise its discretion to consider an argument not properly raised in the federal courts below. *Berkemer*, 468 U.S. at 443.

The form of the mandate also indicates the forfeiture argument was rejected. The very narrow mandate in this case was typical of most GVR orders and merely remanded "for further consideration in light of *Reed v. Town of Gilbert*, 576 U.S. ___ (2015)." In contrast, when this Court seriously questions whether an issue has been procedurally forfeited, it knows how to preserve the issue in the remand order. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 697-98 (2010) ("On remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved."). This Court also knows how to write a broad remand order without "hard edges." (*Planned Parenthood v. Casey*, 510 U.S. 1309 (1994) (Souter, J., in chambers on application for stay) (remand for "proceedings consistent with this opinion, *including* consideration of the question of severability" signaled "that there might be something for the courts below to determine

beyond the severability") (italics added), and *Quern v. Jordan*, 440 U.S. 332, 347, fn. 18 (1979) ("for further proceedings consistent with this opinion" signals leeway to consider other issues "not inconsistent with either the spirit or express terms of a decision").

III. THE NINTH CIRCUIT HAS EGREGIOUSLY MISAPPLIED *REED* AND CREATED A CIRCUIT SPLIT BY NOT OVERRULING TWO OF ITS PRE-*REED* PRECEDENTS

As ably explained by Professor Volokh in the supplemental brief after remand, the Ninth Circuit panel egregiously misapplied settled law in concluding that the old Richmond billboard ordinance passes strict scrutiny under *Reed*.

In *Reed*, this Court overruled the Ninth Circuit's test for what constitutes a content-neutral sign restriction. Before *Reed*, the Ninth Circuit decided whether sign restrictions are content-neutral by looking to the government's purpose for the restriction, even when the restriction was facially content-based. But, under *Reed*, facially content-based restrictions are treated as content-based regardless of the government's purpose.[10]

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[10] Though not stated in *Reed*, this rule is undoubtedly influenced by the long-recognized practical difficulties with, and aversion to, judicially assessing whether legislation was passed with illicit motives. *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87, 130 (1810) (such assessment poses "much difficulty" and raises

(Continued on following page)

In its original decision in this case, *Herson v. City of Richmond*, the Ninth Circuit concluded that Richmond "had an independent, constitutionally valid reason for denying Herson's applications" – "the content-neutral height and size restrictions of the Old Ordinance." 585 Fed. Appx. 522, 523 (9th Cir. 2014). But this Court granted certiorari, vacated the decision, and remanded the case for reconsideration in light of the *Reed* opinion. *See* 136 S. Ct. 46 (2015). And there was good reason for this Court to do so: under the principles this Court announced in *Reed*, the panel analysis is no longer valid, because the height and size restrictions of the Old Ordinance are not content-neutral.

The Old Ordinance, which limited signs that could be displayed within 660 feet of a freeway, was content-based in at least three ways. First, it expressly excluded from its height and size restrictions various kinds of foreign and domestic governmental insignia; religious symbols; and patriotic, civic, and commemorative speech. Second, it allowed high and large "Major Gateway Area Identification Signs." Third, in applying the Old Ordinance, the Richmond Planning Department endorsed several high and large signs containing commercial speech.

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numerous practical questions for the judiciary to answer without any "clearly discerned" guiding principles) and *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968) (collecting cases and discussing issue in the First Amendment context).

Any exclusion of Herson's proposed noncommercial speech based on its height and size thus constituted discrimination based on content, and requires the Old Ordinance to pass strict scrutiny. The Old Ordinance cannot survive that scrutiny.

Indeed, other circuits have recognized that an exclusion for foreign governmental, domestic governmental, or religious symbols renders a sign law content-based. In *Neighborhood Enterprises v. City of St. Louis*, the Eighth Circuit struck down a sign code that exempted any "[n]ational, state, religious, fraternal, professional and civic symbol[ ] or crest[ ], or . . . [a] device used to show time and subject matter of religious services." 644 F.3d 728, 737 (8th Cir. 2011) (quoting St. Louis City Rev. 6 Code § 26.68.020(17)(d) internal quotation marks omitted). The Eighth Circuit held that this exception made "the zoning code's definition of sign" "impermissibly content-based" because "the message conveyed determines whether the speech is subject to the restriction." *Id.* at 736 (citation and internal quotation marks omitted). "Put another way, to determine whether a particular object . . . is . . . subject to the regulations, . . . one must look at the *content* of the object." *Id.* (emphasis in original). Likewise, in *Solantic, LLC v. City of Neptune Beach*, a case cited with approval in *Reed*, the Eleventh Circuit held that an exemption for flags and insignia of a "government, religious, charitable, fraternal, or other organization" rendered a sign code content-based. 410 F.3d 1250, 1264 (11th Cir. 2005).

The Fourth Circuit did hold a similar ordinance to be content-neutral despite such an exemption, using an analysis much like that applied in *Reed* by the Ninth Circuit. *Central Radio Co. v. City of Norfolk*, 776 F.3d 229, 235-37 (4th Cir. 2015). But this Court then granted, vacated, and remanded *Central Radio* for further consideration in light of this Court's *Reed* decision. 135 S. Ct. 2893 (2015). The Fourth Circuit just recently ruled "the former sign code fails strict scrutiny, and therefore was unconstitutional under the First Amendment." *Central Radio Co.*, 811 F.3d 625, 2016 U.S. App. LEXIS 1498, at *13-19.

This creates a circuit split with the Ninth Circuit. Although Ninth Circuit opinions of the later part of the last century easily applied an analytical framework similar to *Reed*,[11] in this century the Ninth

[11] *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (essentially utilizing "officer must read it test" and recognizing exemptions for memorial tablets or plaques, real estate and construction signs, open house signs, and traffic and safety signs are content-based and subject to strict scrutiny); *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996) (utilizing "officer must read it test" and recognizing exemptions for official notices, directional, warning, or information structures, public utility signs, and structures erected near a city or county boundary which contain the name of the city, county, or civic, fraternal, or religious organizations located therein were content-based and subject to strict scrutiny); and *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (utilizing "officer must read it test" and recognizing exemptions for "'open house' real estate signs and safety, traffic, and public informational signs" were content-based and subject to strict scrutiny).

Circuit strayed.[12] Although the GVR order in this case provided the Ninth Circuit the opportunity to reexamine its sign precedents in light of *Reed* and conform the law of the circuit to *Reed*, to this day the Ninth Circuit has not yet overruled *G.K. Ltd. Travel*, 436 F.3d at 1075-81 (upholding speaker-based exemptions and event-based exemptions) or *Get Outdoors II*, 506 F.3d at 890-94 (discussed below).[13]

A. The Old Ordinance, Including Its Height and Size Restriction, Was Content-Based

1. This Court's Decision in *Reed* Overturned Ninth Circuit Law

In *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), the Ninth Circuit concluded that even

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[12] The Ninth Circuit case this Court recently reversed in *Reed* discussed the Ninth Circuit's "evolution." *Reed v. Town of Gilbert*, 707 F.3d 1057, 1062-63 (9th Cir. 2013), citing *Reed v. Town of Gilbert,* 587 F.3d 966, 976 (9th Cir. 2009) and *G.K. Limited Travel*, 436 F.3d 1064.

[13] As discussed later in this brief, *Get Outdoors II* egregiously misapplied this Court's precedents regarding standing. It thus never engaged in a facial analysis of the ordinance being challenged. *Id.* at 892 ("Get Outdoors II has standing to challenge only those provisions that applied to it."). As noted above, the text of the San Diego ordinance identified various categories of signs based on the type of information they convey, then subjected each category to different restrictions. *Get Outdoors II*, 381 F. Supp. 2d at 1252-54, *e.g.*, *id.* at 1253 (prohibition of "ideological signs unrelated to any election but expressing ideological or political views").

facially content-based sign restrictions should be viewed as content-neutral when the government "did not adopt its regulation of speech because it disagreed with the message conveyed." *Id*. at 1071. Because of this, the *Reed* panel concluded that differential size and duration limits for "Political Signs," "Ideological Signs," and "Temporary Directional Signs" were not content-based. *Id*. at 1061-63.

But this Court reversed. *Reed*, 135 S. Ct. at 2233. This Court held that, when a sign law "is content based on its face" – *i.e.*, when the application of the law turns "on the communicative content of the sign" – the law cannot be treated as content-neutral. *Id*. at 2227. In that situation, there is "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny." *Id*.

The "commonsense" test for determining whether a law is content-based "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys" including both "obvious" legal distinctions that are based upon the subject matter, topic, and idea of a message, as well as "more subtle" legal distinctions that are based upon the "function or purpose" of a message. *Reed*, 135 S. Ct. at 2227.

And, as this Court held in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), a speech restriction is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed

to determine whether a violation has occurred." *Id*. at 2531 (citations and internal quotation marks omitted).

Under the Supreme Court's decisions in *Reed* and *McCullen*, the Old Ordinance's size and height restrictions were content-based. What a sign said determined whether the restrictions applied, in at least three ways. The exceptions for foreign and domestic governmental symbols, religious symbols, and certain other speech plainly turned on a sign's message. The express favorable treatment for "major gateway area identification" signs was likewise content-based; signs that identified something else did not qualify. Finally, in actual application the Richmond Planning Department construed the Old Ordinance as allowing some gateway signs that exceeded even the size limits apparently set forth for such signs.

2. The Exceptions for Foreign and Domestic Governmental Insignia, Religious Symbols, and Patriotic, Civic, and Commemorative Speech Render the Old Ordinance Content-Based

The Old Ordinance completely exempted certain signs from the height and area restrictions, based on their content. Section 15.06.060 expressly stated that the sign code "shall not apply to the placement of," among other things:

- "Flags, emblems, insignias and posters of any nation, state, international organization, political subdivision or other governmental agency";
- "unilluminated, nonverbal religious symbols attached to a building which is a place of religious worship";
- "temporary displays of patriotic, religious, charitable or civic character"; and
- "[c]ommemorative signs" "placed by historical societies."

§§ 15.06.060(D)-(E); *see* App. 74-79, Appellants' Opening Brief in the Ninth Circuit 44-48 (arguing that these exemptions rendered the Old Ordinance content-based). Thus, a property owner could freely display a high, large poster of any governmental organization (foreign or domestic), or a giant temporary patriotic or charitable display. But signs containing other messages were forbidden. And the restrictions were based on the content of the speech, not the identity of the speaker. Any Richmond property owner could, for instance, display governmental emblems or flags – both cloth flags and posters depicting flags – whether or not the property owner was itself a governmental entity.

In *Reed*, the Supreme Court held that the distinction between the Temporary Event Signs, Political Signs, and Ideological Signs in the law under review was content-based "on its face." 135 S. Ct. at 2227-31. The reasoning of *Reed* applies equally to the

distinction between the exempted signs and the covered signs in this case. Whether a sign constitutes the insignia or poster of some governmental organization (foreign or domestic) turns – to borrow the language from this Court's *Reed* decision – "on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227. Likewise, whether something is a religious symbol, a "display[ ] of patriotic, religious, charitable or civic character," or a "[c]ommemorative sign" turns on what the sign communicates.

As in *Reed*, Herson's and East Bay Outdoors' proposed political signs would have been "treated differently from signs conveying other types of ideas." 135 S. Ct. at 2227. And deciding whether any proposed sign would have fit within the §§ 15.06.060(D)-(E) exceptions would have "required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 134 S. Ct. at 2531 (citations and internal quotation marks omitted).

To be sure, Herson and East Bay Outdoor do not argue that their signs would have been covered by the §§ 15.06.060(D)-(E) exemptions. Rather, as in *Reed*, they argue that §§ 15.06.060(D)-(E) treated speech with certain content better than the speech they wanted to display, and that this made the statutory scheme content-based and thus unconstitutional. Herson and East Bay Outdoor therefore have standing to challenge the constitutionality of the entire statutory scheme, because they claim that others "were exempt from the operation of a [city ordinance]

adversely affecting" them. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987).

The Ninth Circuit's pre-*Reed* decision in *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 893 (9th Cir. 2007), did state that "[s]ize and height restrictions on billboards are evaluated as content-neutral time, place and manner regulations." But, especially after *Reed*, this must simply mean that size and height restrictions are not seen as inherently content-based, and may be content-neutral if they apply regardless of the billboards' content. When a city imposes different restrictions on size and height depending on what a sign says, that action is indeed content-based, as this Court's decision in *Reed* makes clear. *Reed*, 135 S. Ct. at 2224-25, 2230.

Moreover, the standing analysis in *Get Outdoors II* is an egregious misapplication of settled law that cannot be reconciled with this Court's precedents. *Get Outdoors II* limits its First Amendment analysis based upon permit applications in derogation of this Court's admonition that "[t]he Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). It fails to recognize that the overbreadth doctrine is an "exception to the usual rules governing standing." *Bigelow v. Virginia*, 421 U.S. 809, 815-16 (1975). This Court has already held that strict notions of "redressability" (*i.e.*, "whether the plaintiff has asserted an injury that can be

redressed by a favorable decision") are not appropriate in First Amendment cases because "it would effectively insulate underinclusive statutes from constitutional challenge." *Ragland*, 481 U.S. at 227 expressly distinguishing *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Nevertheless, *Get Outdoors II* completely overlooks the distinction this Court made in *Ragland*. 506 F.3d at 891-93, citing *Valley Forge Christian College*, 454 U.S. at 472.

3. The Exception for "[M]ajor Gateway Area Identification Signs" Renders the Old Ordinance Content-Based

The Old Ordinance allowed signs up to 45 feet high, § 15.06.080(C)(6)(i)(i), if they were "[m]ajor gateway area identification sign[s]" – signs in certain places "announcing the location of major city centers," with "wordage" that consisted of "only the name of the center." § 15.06.050(A)(1)(h). Appellants' Opening Brief in the Ninth Circuit, pp. 37-41 (arguing that this exemption renders the old ordinance content-based). Forty-five feet is taller than some of the signs that Herson and East Bay Outdoor wanted to put up.[14] App. 82-84, SER 12, ¶ 7.

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[14] Though a purely legal argument by counsel does not constitute a judicial admission unless made in the complaint, answer, or a stipulation, *Amgen Inc. v. Conn. Ret. Plans & Trust*

(Continued on following page)

Whether a sign could be up to 45 feet high under the Old Ordinance thus likewise turned "on the communicative content of the sign" (whether it "announc[ed] the location of [a] major city center[ ]" and consisted of "only the name of the center"). *Reed*, 135 S. Ct. at 2227. And it "required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 134 S. Ct. at 2531 (citations and internal quotation marks omitted). Thus, the exception for major gateway area identification signs further shows that the Old Ordinance was content-based.

Major gateway area identification signs could have an area of 100 square feet per "sign face." § 15.06.080(C)(6)(i)(iii). And the Old Ordinance had no limitation on the number of "faces" a sign can have, and indeed contemplated that a sign could have "multiple sides or faces," § 15.06.050(A)(4)(a). The 100 square foot per sign face area overrides the statement in § 15.06.080(C)(2) that: "One (1) square foot of sign area for every one linear foot of street frontage or a sign of 20 square feet, whichever is more, shall be allowed." The introductory paragraph

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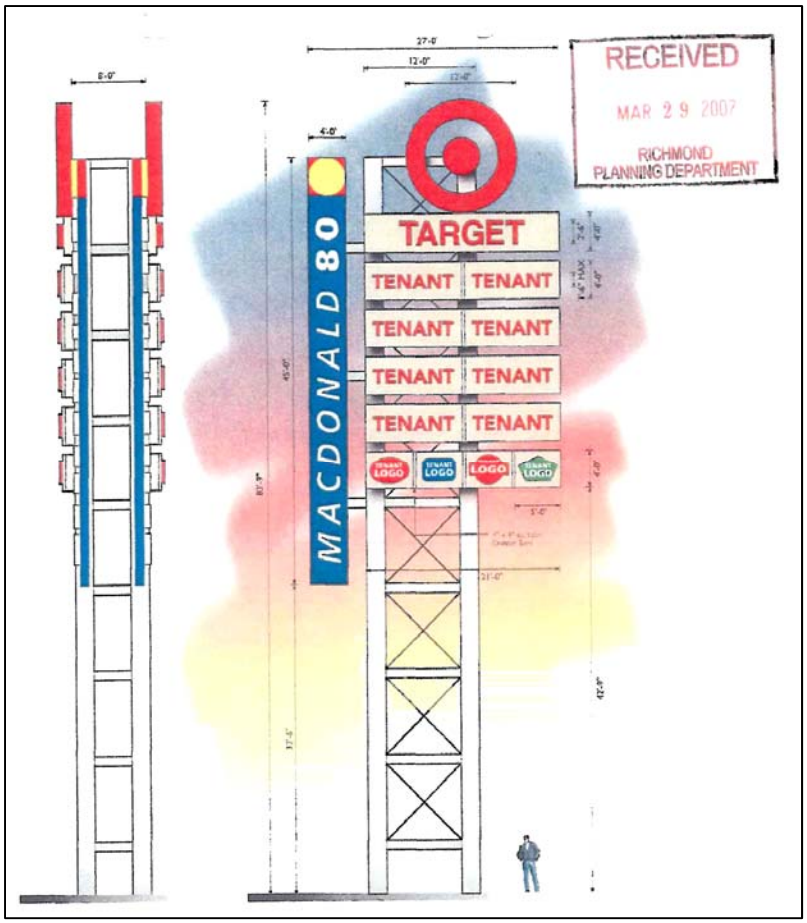
Funds, 133 S. Ct. 1184, 1197, n. 6 (2013), it is nevertheless telling to note that up until this Court rendered its decision in *Reed*, the City of Richmond agreed the "Major Gateway sign category" was "not meaningfully different from the category of 'Temporary Directional Signs Relating to a Qualifying Event' that [the Ninth Circuit] upheld as content neutral in *Reed v. Town of Gilbert*, 587 F.3d 966, 976-78 (9th Cir. 2009)." App. 81, Appellee's Brief in the Ninth Circuit, pp. 25-26.

of § 15.06.080(C)(6) expressly states that: "In addition to the local standards described above, the following size standards shall apply by sign type," and then § 15.06.080(C)(6)(i)(iii) expressly sets forth the one hundred feet per sign face standard for major gateway area identification signs.

Nor can the exception for major gateway area identification signs be dismissed as merely speaker-based rather than content-neutral. "Because [s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 135 S. Ct. at 2230 (citations and internal quotation marks omitted). And the major gateway area identification sign exception reflects a content preference for statements announcing the names of local businesses. The signs may only include a certain kind of content (business names), presumably because Richmond views the display of such content as especially good for commerce.

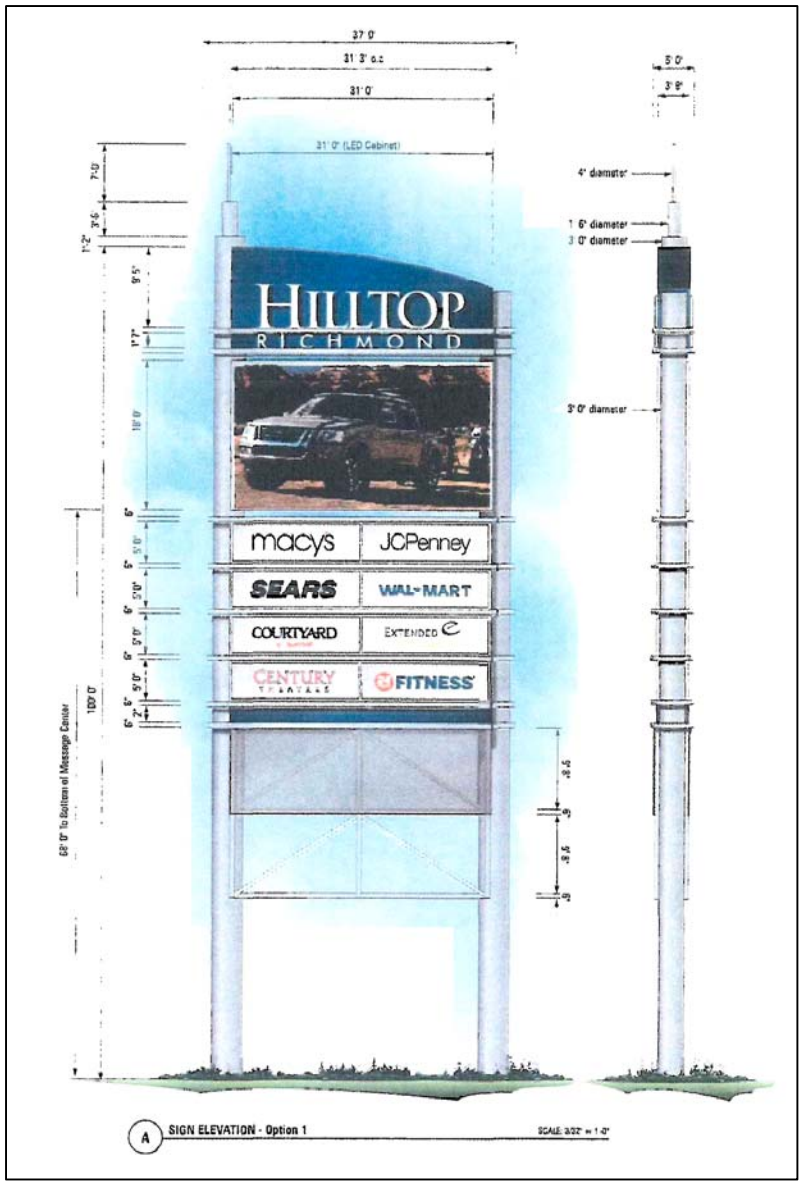
4. The Richmond Planning Department's Endorsement of Many Large Gateway Signs Renders the Old Ordinance Content-Based

The record also suggests that the Richmond Planning Department had indeed interpreted the Old Ordinance as allowing many signs that were 70 feet or taller, and had large display areas, apparently under the rubric of major gateway area identification signs. *See, e.g.*, 3 ER 424, 510. Consider, for instance, the following sign, which was over 80 feet tall, which was endorsed by the Richmond Planning Department, and which was indeed erected, 3 ER 422-433; 2 ER 332 (declaration of Jeffrey Herson):



(McDonald 80 Shopping Center – 83 feet, nine inches tall; approved by Richmond Planning).

Or consider the following sign, which was over 110 feet total, was likewise endorsed by the Richmond Planning Department, 3 ER 503-11, and which was likewise erected, 2 ER 331 (declaration of Jeffrey Herson):



(Hilltop Shopping Center – 112 feet tall, including a 558-square foot video board; approved by Richmond Planning).

The record reveals other examples, such as the Kaiser Anniversary Signs, one of which was 400 square feet in area, 3 ER 399-407, and the Pacific East Mall sign, 70 feet tall with a 266-square-foot video board, 4 ER 789-98; 2 ER 332 (declaration of Jeffrey Herson). The Planning Department's endorsement of excluding all these signs from the operation of the Old Ordinance – without any articulable content-neutral justification for the exclusion – rendered the Old Ordinance content-based, even setting aside the expressly content-based exceptions.

The Ninth Circuit's decision in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011), offers a helpful analogy. In *Hoye*, the Ninth Circuit concluded that an Oakland ordinance limiting speech outside medical facilities was facially content-neutral. *Id*. at 849. But the Ninth Circuit nonetheless held that "a policy of enforcing the Ordinance based on the content of speech" – not enforcing the ordinance against certain pro-abortion speech while enforcing it against anti-abortion speech – rendered the ordinance unconstitutionally "content-discriminatory." *Id*. at 856. And this reflects this Court's statement that "[g]ranting waivers to favored speakers" "would of course be unconstitutional." *Thomas v. Chicago Park Dist*., 534 U.S. 316, 325 (2002).

Likewise, in this case, the city had a policy of excluding certain signs from the Old Ordinance in a "content-discriminatory" way. The commercial signs shown above were allowed even though they were

high and large. Herson's and East Bay Outdoors' proposed political signs were rejected.

To be sure, the discrimination in *Hoye* appeared to be viewpoint-based and not just content-based. But this Court stressed in *Reed* that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." 135 S. Ct. at 2230 (citation omitted).

In particular, sign ordinances discriminating in favor of commercial speech and against political speech are content-based and presumptively unconstitutional. "[A]n ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards." *National Advertising Co.*, 861 F.2d at 248. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality op.).

B. The Old Ordinance Cannot Pass Strict Scrutiny

Because the Old Ordinance is content-based, it is unconstitutional unless it passes strict scrutiny. *Reed*, 135 S. Ct. at 2231. And, like the ordinance in *Reed*, the Old Ordinance cannot pass strict scrutiny.

Even if there are compelling government interests in aesthetics or in traffic safety, the content-based exceptions to the ordinance are not narrowly tailored to those compelling interests. Richmond "has offered no reason to believe" that the forbidden large signs, including Herson's and East Bay Outdoors' proposed signs, would have "pose[d] a greater threat to safety" than the permitted signs would have. *Id*. at 2232. Likewise, Herson's and East Bay Outdoors' proposed signs would have been "no greater an eyesore," *id*. at 2231 (citation omitted), than the signs that Richmond allows. The Old Ordinance is therefore unconstitutional both as applied to Herson's and East Bay Outdoors' proposed signs, and on its face. *See Massachusetts v. Oakes*, 491 U.S. 576, 585-88 (1989) (Scalia, J., writing for five Justices) (concluding that even a repealed law can be subject to a facial challenge, in that case an overbreadth challenge).

After this Court's decisions in *Reed* and *McCullen*, it is no longer correct to say that: "Because Herson's proposed signs violated the content-neutral height and size restrictions of the Old Ordinance, the City had an independent, constitutionally valid reason for denying Herson's applications." *Herson*, 585 Fed. Appx. at 523. Rather, the City's height-and-size justification for rejecting Herson's signs was itself constitutionally suspect, because it was based on content-based height and size rules. The Old Ordinance as a whole was therefore content-based,

and has to be evaluated under strict scrutiny, which the Old Ordinance cannot pass.

CONCLUSION

For the reasons stated above, this Court should grant this petition for a writ of *certiorari* to the Ninth Circuit. In so doing, this Court should seriously consider either issuing another order to vacate and remand for reconsideration in light of *Reed*, or (more preferably) summarily reversing the Ninth Circuit and remanding with instructions to consider the issue of remedies.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY HERSON; EAST BAY OUTDOORS, INC., a California corporation, Plaintiffs-Appellants, v. CITY OF RICHMOND, a charter city, Defendant-Appellee.	No. 11-18028 D.C. No. 4:09-cv-02516-PJH MEMORANDUM* (Filed Jan. 22, 2016)

On Remand From the United States Supreme Court

Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

Jeffrey Herson and East Bay Outdoors, Inc. (collectively "Herson") appeal the district court's orders dismissing their various claims. We affirm.

1. The district court addressed Herson's claims challenging the repealed version of the Richmond Sign Code ("Old Ordinance") in two separate orders. First, the district court dismissed as moot Herson's claims seeking declaratory and injunctive relief from

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

the Old Ordinance, but left intact Herson's damages claim for the denial of his sign applications. The court did not err in dismissing the declaratory and injunctive claims as moot, because the repealed Old Ordinance could no longer be enforced against him. *See Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900-01 (9th Cir. 2007). Thus, "there exist[ed] no live issue upon which the court could issue prospective relief." *Id.* at 901. Subsequently, the district court granted the City's motion for summary judgment on Herson's damages claim. Because Herson's proposed signs violated the content-neutral height and size restrictions of the Old Ordinance, the City had an independent, constitutionally valid reason for denying Herson's applications.[1] *See Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 893-95 (9th Cir. 2007). Therefore, Herson lacks standing to challenge the allegedly unconstitutional portions of the Old Ordinance, because his injury is not redressable. *See id.* at 894.

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[1] The district court's analysis, in determining that the height and size restriction of the Old Ordinance was content neutral, complies with the Supreme Court's recent opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). The district court first reasoned that the applicable restriction "does not discriminate, on its face, between the content of speech." *Herson v. City of Richmond*, 827 F. Supp. 2d 1088, 1091 (N.D. Cal. 2011). The district court then determined that the restriction was "narrowly tailored to serve a compelling City interest." *Id.* Herson's challenges to the restriction's exemptions were waived when he failed to address the district court's conclusion that these challenges fell outside the scope of the Third Amended Complaint.

2. On appeal, Herson argues that the exemptions in Richmond Municipal Code § 15.06 (the "Current Ordinance") were content based and that strict scrutiny should apply in making the summary judgment determination. However, the court questions the relevance of Herson's arguments here. The district court treated the exemptions as content based and applied strict scrutiny. When applying strict scrutiny, the district court found that the exemptions were constitutional, because they were the least restrictive means to achieve a compelling state interest. Because Herson did not argue on appeal that the court erred in its strict scrutiny analysis, he has waived that argument. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

3. The district court did not err in dismissing Herson's equal protection claim. Herson failed to present facts to the district court that could support the conclusion that either the City of Richmond or Ruby Benjamin, the city employee who denied Herson's applications, "intentionally treated [him] differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Herson provided proof that other signs had been allowed in the prohibited area. However, even when taken in a light most favorable to Herson, there is no evidence that Herson was similarly situated to the owners of those signs or that he was intentionally treated differently by the City.

4. Finally, the district court did not err in granting the City's motion for sanctions. Courts may impose monetary sanctions in the amount of extra discovery costs caused by spoliation, including the cost of the sanctions motion. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006). An appellate court must not "disturb the district court's choice of sanction" absent a "definite and firm conviction that the district court committed a clear error of judgment." *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 422 (9th Cir. 2011) (internal quotation marks omitted). Here, we find no clear error. Neither party claims that the district court applied the wrong law. Further, the Order Re Motion for Sanctions of August 11, 2011, adopted by the district court, shows that the district court carefully examined and weighed the facts of the case in determining Herson's liability and the amount of the sanctions.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY HERSON and EAST BAY OUTDOORS, INC., a California corporation, Plaintiffs-Appellants, v. CITY OF RICHMOND, a charter city, Defendant-Appellee.	No. 11-18028 D.C. No. 4:09-cv-02516-PJH Northern District of California, Oakland ORDER (Filed Nov. 19, 2015)

Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

The parties are ordered to submit supplemental briefs addressing what effect, if any, the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), has on our prior disposition in this case.

These supplemental briefs shall be no longer than ten pages or 2800 words and shall be submitted no later than 14 days after the entry of this order. Parties who are registered for ECF must file the supplemental brief electronically without submission of paper copies. Parties who are not registered ECF filers must file the original supplemental brief plus 15 paper copies.

Supreme Court of the United States

No. 14-1322

JEFFREY HERSON, ET AL.,

Petitioners

v.

CITY OF RICHMOND, CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Reed v. Town of Gilbert*, 576 U. S. ___ (2015).

IT IS FURTHER ORDERED that the petitioners Jeffrey Herson, et al. recover from City of Richmond, California Three Hundred Dollars ($300.00) for costs herein.

October 5, 2015

Clerk's costs: $300.00

[SEAL]

A true copy SCOTT S. HARRIS

Test

Clerk of the Supreme Court of the United States

By: /s/ Cynthia Rapp

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY HERSON and EAST BAY OUTDOORS, INC., a California corporation, Plaintiffs-Appellants, v. CITY OF RICHMOND, a charter city, Defendant-Appellee.	No. 11-18028 D.C. No. 4:09-cv-02516-PJH Northern District of California, Oakland ORDER (Filed Dec. 31, 2014)

Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

The panel denies the petition for panel rehearing and denies the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY HERSON; EAST BAY OUTDOORS, INC., a California corporation, Plaintiffs-Appellants, v. CITY OF RICHMOND, a charter city, Defendant-Appellee.	No. 11-18028 D.C. No. 4:09-cv-02516-PJH MEMORANDUM* (Filed Oct. 21, 2014)

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted October 8, 2014
San Francisco, California

Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

Jeffrey Herson and East Bay Outdoors, Inc. (collectively "Herson") appeal the district court's orders dismissing their various claims. We affirm.

1. The district court addressed Herson's claims challenging the repealed version of the Richmond

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Sign Code ("Old Ordinance") in two separate orders. First, the district court dismissed as moot Herson's claims seeking declaratory and injunctive relief from the Old Ordinance, but left intact Herson's damages claim for the denial of his sign applications. The court did not err in dismissing the declaratory and injunctive claims as moot, because the repealed Old Ordinance could no longer be enforced against him. *See Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900-01 (9th Cir. 2007). Thus, "there exist[ed] no live issue upon which the court could issue prospective relief." *Id*. at 901. Subsequently, the district court granted the City's motion for summary judgment on Herson's damages claim. Because Herson's proposed signs violated the content-neutral height and size restrictions of the Old Ordinance, the City had an independent, constitutionally valid reason for denying Herson's applications. *See Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 893-95 (9th Cir. 2007). Therefore, Herson lacks standing to challenge the allegedly unconstitutional portions of the Old Ordinance, because his injury is not redressable. *See id*. at 894.

2. On appeal, Herson argues that the exemptions in Richmond Municipal Code § 15.06 (the "Current Ordinance") were content based and that strict scrutiny should apply in making the summary judgment determination. However, the court questions the relevance of Herson's arguments here. The district court treated the exemptions as content based and applied strict scrutiny. When applying strict

scrutiny, the district court found that the exemptions were constitutional, because they were the least restrictive means to achieve a compelling state interest. Because Herson did not argue on appeal that the court erred in its strict scrutiny analysis, he has waived that argument. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

3. The district court did not err in dismissing Herson's equal protection claim. Herson failed to present facts to the district court that could support the conclusion that either the City of Richmond or Ruby Benjamin, the city employee who denied Herson's applications, "intentionally treated [him] differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Herson provided proof that other signs had been allowed in the prohibited area. However, even when taken in a light most favorable to Herson, there is no evidence that Herson was similarly situated to the owners of those signs or that he was intentionally treated differently by the City.

4. Finally, the district court did not err in granting the City's motion for sanctions. Courts may impose monetary sanctions in the amount of extra discovery costs caused by spoliation, including the cost of the sanctions motion. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006). An appellate court must not "disturb the district court's choice of sanction" absent a "definite and firm conviction that the

district court committed a clear error of judgment." *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 422 (9th Cir. 2011) (internal quotation marks omitted). Here, we find no clear error. Neither party claims that the district court applied the wrong law. Further, the Order Re Motion for Sanctions of August 11, 2011, adopted by the district court, shows that the district court carefully examined and weighed the facts of the case in determining Herson's liability and the amount of the sanctions.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFREY HERSON, et al.,

Plaintiffs,

v.

CITY OF RICHMOND,

Defendant. /

No. C 09-2516 PJH

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The parties' supplemental cross-motions for summary judgment came on for hearing on November 30, 2011 before this court. Plaintiffs, Jeffrey Herson and East Bay Outdoor, Inc. (collectively "plaintiffs") appeared through their counsel, Michael McConnell and Joshua Furman. Defendant City of Richmond ("the City" or "defendant") appeared through its counsel, Matthew Zinn, Winter King, and Jaclyn Prang. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendant's motion for summary judgment and DENIES plaintiffs' motion for summary judgment, for the reasons stated at the hearing, and as follows.

BACKGROUND

The instant action has been the subject of extensive motion practice before the court. Generally, plaintiffs' claim for injunctive, declaratory, and monetary relief against defendant City of Richmond arises

from the City's codified Sign Ordinance – both an old sign ordinance, and a new sign ordinance that in September 2009 replaced the old ordinance.

On April 6 2011, defendant moved for summary judgment with respect to all claims asserted by plaintiffs in the third amended complaint filed on August 11, 2010. Specifically, defendant raised the following issues for resolution: (1) whether plaintiffs lacked standing to seek damages based on the Old Ordinance; (2) whether plaintiffs' claims under the Old Ordinance are barred because any alleged unconstitutionality was not the but-for cause of any sign permit denials; (3) whether the New Ordinance's exemption provision failed under the federal and/or state constitutions; and (4) whether the City violated plaintiffs' rights to equal protection by denying plaintiffs' permit applications.

The court granted summary judgment in part and denied it in part in an order filed April 25, 2011. In that order (which is incorporated herein by reference), the court set forth the factual and procedural history of this case. *See* Order Granting Summary Judgment in Part and Denying Summary Judgment in Part ("Summary Judgment Order") at 1-7. The court then granted summary judgment with respect to all of plaintiffs' claims premised on the New Ordinance. The court also granted summary judgment with respect to plaintiffs' equal protection claim premised on the Old Ordinance.

With respect to plaintiffs' remaining claims under the Old Ordinance – i.e., plaintiffs' section 1983 claim and state constitutional claim – the court denied summary judgment. Specifically, the court ruled that it could not affirmatively decide whether plaintiffs lacked standing to seek damages based on the Old Ordinance. The City had contended that plaintiffs lacked standing because plaintiffs' permit applications were so incomplete as to provide an independent and constitutional reason for the denial of plaintiffs' applications – namely, plaintiffs' failure to comply with the Old Ordinance's size limitations. Plaintiffs, however, had challenged the constitutionality of the Old Ordinance's size limitation provisions in their complaint and in their opposition. But, as the court noted, neither party introduced sufficient evidence or argument as to the actual constitutionality of the size limitation provisions, to enable the court to make a decision on the matter. Thus, summary judgment had to be denied on the standing question, and it followed as well, that summary judgment had to be denied with respect to defendant's but for causation arguments, since they depended from the standing argument.

The court further noted, however, that an affirmative finding with respect to the constitutionality of the Old Ordinance's size limitation provision would be dispositive of the standing question and plaintiffs' claim for damages, since if the court concluded that the size limitation provision is constitutional, and the evidence establishes that plaintiffs' proposed signs

would be in violation of the size limitations, then redressability would likely be lacking. The same would also impact defendant's but for causation arguments.

Thus, the court offered the parties the opportunity to file supplemental summary judgment motions going to the limited question of the constitutionality or unconstitutionality of the Old Ordinance's size limitation provision.

The parties' supplemental cross motions for summary judgment are now before the court.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof

at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Southern Calif. Gas. Co. v. City of Santa Ana,* 336 F.3d 885, 888 (9th Cir. 2003).

On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex,* 477 U.S. at 324-25. If the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. *See* Fed. R. Civ. P. 56(e); *Anderson,* 477 U.S. at 250.

B. Legal Analysis

The only issue before the court is whether the height and size provisions in the old ordinance – specifically, those codified at Section 15.06.080(C)(6)(g)(ii) – could have provided an independent constitutional basis for denying plaintiffs' permits. The actual language of the foregoing provision is undisputed: it provides that "Type B freestanding signs" erected within 660 feet of a freeway or the Richmond Parkway cannot exceed 12 feet in height nor 40 square feet in area.[1] *See* Third Amended Complaint, Ex. 5 at

[1] At the hearing, plaintiffs' counsel conceded that the proposed structures disclosed in plaintiffs' permit applications constitute "Type B freestanding signs" under the old ordinance.

§ 15.06.080(C)(6)(g)(ii). The question now is whether this provision is unconstitutional.

The City asserts that these height and size restrictions are constitutional because they are content neutral, and also narrowly tailored to serve the City's compelling interests in public safety and aesthetics. Plaintiffs, however, contend that the restrictions contain content based exceptions that favor commercial speech over political, noncommercial speech.

On balance, the court agrees with defendant. Generally, "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle,* 409 F.3d 1113, 1129 (9th Cir.2005). Here, section 15.06.080(C)(6)(g)(ii) does not discriminate, on its face, between the content of speech. Regardless of the type of speech expressed upon a Type B free-standing sign, (commercial, non-commercial or political), the foregoing provision does not permit any sign with dimensions exceeding those noted. Thus, the court deems the provision content neutral, a conclusion that is, moreover, consistent with the Ninth Circuit's prior precedent in dealing with similar signs. *See, e.g., Get Outdoors II, LLC v. City of San Diego,* 506 F.3d 886, 893 (9th Cir.2007) (ordinarily, "size and height restrictions on billboards are evaluated as content-neutral time, place and manner regulations.").

Not only is section 15.06.080(C)(6)(g)(ii) constitutional, but the size and height restrictions contained therein also appear narrowly tailored to serve a compelling City interest. *See Flint v. Dennison,* 488 F.3d 816, 830 (9th Cir. 2007) ("A content-neutral time, place, and manner restriction is permissible so long as it is 'narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication.' "). This is because the evidence discloses that the City adopted the size limits to preserve and enhance the aesthetic values of the city and to protect and promote the safety and welfare of its citizens. *See* Mitchell MSJ Decl., ¶ 2. The size limitation serves this purpose in a narrowly tailored fashion in large part because the size limitation, rather than an outright ban, provides some opportunity for the sort of display that plaintiffs' seek, while at the same time prevents applicants from erecting signs which are large enough to distract drivers or blemish the City's open areas. And in addition, the restrictions apply only to the 660 foot strip surrounding freeways and scenic highways – areas in which the City's interests in avoiding driver distraction and protecting aesthetics are the most acutely implicated. All of which – in view of plaintiffs' failure to affirmatively dispute any of this evidence – serves to support a finding that the provision is constitutional.

Instead of affirmatively rebutting defendant's showing, plaintiffs instead rest their argument as to the unconstitutionality of § 15.06.080(C)(6)(g)(ii)

on the purportedly unlawful provisions contained within the old ordinance at other provisions – e.g., §§ 15.06.080(C)(1) and 15.06.080(C)(6)(i). In essence, plaintiffs contend that, because the old ordinance distinguishes between the type of signs that can even be subject to the size and height requirements based upon content (a fact that the City does not dispute), the size and height requirements do not even apply unless the content of the sign passes muster. Therefore, and in essence, the size and height provision is unconstitutional because the law upon which it depends is admittedly unconstitutional.

However, in this respect, defendant's reliance on *Herson v. City of San Carlos,* 714 F. Supp. 2d 1018 (N.D. Cal. 2010) – which involved the same plaintiffs and a nearly identical factual scenario – is on point, and persuasive. In *Herson,* the court considered defendant San Carlos' similar claim that plaintiffs could not demonstrate redressability, even in the face of unconstitutional content-based provisions of the sign ordinance in question, because the City could have denied plaintiffs' permit applications based on the constitutional size and height limitations. The court acknowledged that other provisions of the sign ordinance and even certain language within the size and height restriction provisions, discriminate on the basis of the content of the speech presented on a particular type of sign. However, the court noted that under *Get Outdoors II,* other provisions – such as the unconstitutional content based restrictions in the old Richmond ordinance that plaintiffs argue here – are

irrelevant in determining whether the size and height restrictions were valid, content-neutral, time, place and manner restrictions that independently justified the denial of plaintiffs' application. *Herson* concluded that, because the size and height limitations of San Carlos' sign ordinance, standing alone, were constitutional and "because the city was entitled to reject plaintiffs' permit pursuant to the size restriction, plaintiffs' other claims are not redressable." *See Herson,* 714 F. Supp. 2d at 1028.

So here. The court declines to accept plaintiffs' invitation to find the old ordinance's size and height requirements unconstitutional, based on the unconstitutionality of other independent content-based restrictions within the old ordinance. Moreover, to the extent that plaintiffs attempt to argue the unconstitutionality of other provisions of the old ordinance, these arguments go beyond the scope of the court's prior summary judgment order. As the court stated in that order, the issue for the court now is limited to determining the constitutionality of section 15.06.080(C)(6)(g)(ii) alone.

In sum, since the old ordinance's size and height provision is constitutional, and since it is also undisputed that even the smallest of plaintiffs' proposed signs would have been 35 feet tall and several hundred square feet in area, *see* Mitchell MSJ Decl., ¶¶ 7, 9-11, the court finds that the City could have denied plaintiffs' sign permits based on the constitutionally valid size and height limitation provision. As such, summary judgment as to standing is GRANTED in

defendant's favor. And because, as the court previously acknowledged, the but for causation argument defendant makes in challenging plaintiffs' section 1983 claim also depends upon the foregoing, summary judgment is also appropriate as to this claim.

In accordance with the foregoing, summary judgment is GRANTED for defendant.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: December 5, 2011

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFREY HERSON, et al.,

Plaintiffs,

v.

CITY OF RICHMOND,

Defendant.

/

No. C 09-2516 PJH

ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART

Defendant's motion for summary judgment came on for hearing on April 6, 2011 before this court. Plaintiffs, Jeffrey Herson and East Bay Outdoor, Inc. (collectively "plaintiffs") appeared through their counsel, Karl Olson and Michael Ram. Defendant City of Richmond ("the City" or "defendant") appeared through its counsel, Matthew D. Zinn, Winter King, and Jaclyn Prang. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS the motion in part and DENIES it in part, for the reasons stated at the hearing, and as follows.

BACKGROUND

Plaintiffs seek injunctive, declaratory, and monetary relief against the City, based on the City's codified sign ordinance. Plaintiffs seek relief pursuant to both an old version of the sign ordinance, and a new version of the ordinance that was passed in September 2009 and which replaced the old ordinance.

A. Background Allegations

Plaintiffs are in the business of operating signs displaying non-commercial and commercial speech. *See* Third Amended Complaint ("TAC"), ¶ 9. They lease parcels of land within the boundaries of Richmond, and erect signs thereon. Plaintiffs allege that they intend to earn income by displaying speech on a portion of the signs they erect, which speech is paid for by others. *See id.* On the remaining portion of the signs, plaintiffs wish to display their own speech "designed to influence the action of others and/or speech stating plaintiffs' viewpoints on important issues" – for which plaintiffs will receive no compensation from others. *Id*.

Prior to filing their original complaint, and under the old sign ordinance in effect at the time ("Old Ordinance"), plaintiffs received permission from leaseholders or owners of eight parcels located within the city limits, to display 13 signs. TAC, ¶ 10. On Parcel 1, plaintiffs seek to display signs 1, 2, 3, and 4. *Id*., ¶ 11. Parcel 2 is already displaying sign 5, which was permitted under the Old Ordinance, and plaintiffs seek to display sign 6 on Parcel 2. *Id*., ¶ 12. Parcel 3 will display sign 7. TAC, ¶ 13. Parcel 4 will display signs 8 and 9. *Id*., ¶ 14. Parcel 5 will display sign 10. *Id*., ¶ 15. Parcel 6 will display sign 11, and Parcel 7 will display sign 12. TAC, ¶ 16. Finally, Parcel 8 will display sign 13. *Id*.

On June 26, 2009, plaintiffs submitted applications for permits to display the signs on the eight

different parcels just referenced. TAC, ¶ 17. The City denied plaintiffs' applications, citing section 15.06.080C(1) of Richmond's Old Ordinance, which contained numerous restrictions on signs within a 660 foot restricted area in Richmond. *Id*., ¶¶ 17-18.

Plaintiffs generally allege that, with the exception of sign 5 (which is already permitted and displayed), they still desire to display each of the remaining 12 signs, but that in order to do so, plaintiffs are required to first apply for and obtain a building permit for each structure that will house the desired signs, as well as a sign permit. *Id*., ¶ 19.

B. Procedural/Legislative History

Plaintiffs filed their original complaint in June 2009, and thereafter moved for a preliminary injunction, which motion was heard on August 5, 2009. Plaintiffs specifically sought an order enjoining Richmond from: requiring that plaintiffs comply with the design review, permitting, variance, or conditional use procedures codified by the City before displaying a sign in Richmond; requiring that plaintiffs obtain a permit from Richmond before displaying a sign in Richmond; and instituting abatement or other removal procedures against plaintiffs' structures and signs. Plaintiffs' original complaint, and the ensuing preliminary injunction request, was premised on a challenge to certain provisions of Chapters 4.04, 15.04, and 15.06 of the City's municipal code (collectively referred to as the "old sign ordinance" in the

court's preliminary injunction order; Chapter 15.06 of which is referred to as the "Old Ordinance" in connection with the instant motion).

On August 17, 2009, the court denied plaintiffs' motion. The court held that plaintiffs' action had been rendered moot by virtue of the City's recent July 7, 2009 adoption of Ordinance No. 19-09 N.S. (referred to as the "new sign ordinance" in the court's preliminary injunction order) – which law temporarily repealed the old sign ordinance codified at Chapter 15.06 and issued a temporary 120 day moratorium on the permitting of signs, pending the City's adoption of a permanent new sign ordinance. *See* Order Denying Motion for Preliminary Injunction ("PI Order"). Plaintiffs had argued, in support of their request for preliminary injunctive relief, that the new sign ordinance did not constitute a complete repeal of the old sign ordinance, since the new sign ordinance expressly repealed only Chapter 15.06 of the municipal code (and plaintiffs were challenging chapters 15.04 and 4.04 of the code, too). *Id*. at ¶ 2. However, the court denied this argument, noting that the new sign ordinance contained no reference to Chapters 15.04 or 4.04 of the municipal code, whereas the old sign ordinance had expressly referenced those chapters. *Id*. Thus, it was unclear that the new sign ordinance even applied to chapters 4.04 or 15.04 of the municipal code.

The court allowed plaintiffs to amend their complaint to reflect "the new realities of the situation" however, and to challenge either or both (a)

those provisions of the old sign ordinance that plaintiffs believed were still viable, or (b) provisions of any new sign ordinance that plaintiffs believed to still be infirm. *See id.* at 3.

Subsequently, the parties further clarified the court's order by stipulation, to note that, while the plaintiffs' original complaint had been dismissed as moot with respect to plaintiffs' prospective relief claims, plaintiffs' damages claims based on violation of the Old Ordinance remained intact. *See* Stipulation Requesting Clarification, Docket No. 32.

Meanwhile, the City released to the public a draft of its proposed permanent new sign ordinance on August 11, 2009. *See* TAC, Ex. 7 (copy of new sign ordinance). On August 13, the City held a public workshop to discuss the new ordinance, and it modified the draft ordinance in response to public comments. *See id.,* Ex. 7 at 2. The City adopted the new ordinance on September 22, 2009. *Id*. (referred to as the "New Ordinance" herein). The New Ordinance is codified at Chapter 15.06 of the municipal code (and replaced the older version of chapter 15.06). The New Ordinance contains certain exemptions from permitting for regulatory and warning signs.

After the City had adopted the New Ordinance, plaintiffs amended their complaint on November 2, 2009, to include a challenge to the new sign ordinance codified at Chapter 15.06. Plaintiffs also continued to challenge certain provisions of the Old Ordinance.

Defendant moved for judgment on the pleadings on March 30, 2010, which the court granted in part and denied in part on May 11, 2010. The court preliminarily noted, in its order, that plaintiffs' amended complaint lacked clarity or cohesion, and was in many parts incomprehensible. While defendant had gone to great lengths to infer the provisions of the old and new ordinance that plaintiffs continued to challenge, the court noted that the amended complaint in fact failed to identify or allege the particular provisions of the old and new ordinances that plaintiffs were challenging, or the precise legal basis underlying each challenge. The court then went on to hold that, with respect to any challenge to the New Ordinance stated in the complaint, defendant's motion for judgment on the pleadings was granted on two limited grounds: (1) to the extent plaintiffs' challenge was premised on the CUP provisions or the variance provisions of 15.04.910-920 of the code, these provisions were irrelevant and not actionable; and (2) to the extent plaintiffs challenged the variance provisions of the New Ordinance – section 15.06.150 – this provision is content-neutral and constitutional. The court denied defendant's motion to the extent plaintiffs were alleging a challenge to the exemption provision of the New Ordinance. The court stated that it was unclear whether the language of the exemption should be classified as content neutral or content based, given conflicting Ninth Circuit precedent, and that to the extent the constitutionality of a content-based exemption required a compelling

interest finding, such a finding required an evidentiary record.

With respect to plaintiffs' challenge to the Old Ordinance, the court stated that it was at best only able to discern from the complaint that plaintiffs continued to allege a constitutional challenge to the Old Ordinance, based on damages suffered as a result of the permit applications previously denied by the City under the Old Ordinance. Because the details of such a claim were so unclear, however, the court declined to rule on the merits of any challenge to the Old Ordinance. The court then instructed plaintiffs to file a second amended complaint no later than June 4, 2010. Plaintiffs were further instructed not to enlarge upon the claims presented in the first amended complaint, absent a stipulation or leave of court.

Plaintiffs duly filed their second amended complaint ("SAC") in May 2010. The SAC alleged twelve claims[2] against defendant, challenging (a) the Old Ordinance pursuant to 42 U.S.C. § 1983, on First Amendment and Equal Protection grounds; (b) the New Ordinance pursuant to 42 U.S.C. § 1983 on First Amendment grounds; and (c) the Old and New Ordinance, pursuant to the California Constitution.

[2] This pleading is notably different from the first amended complaint, which asserted two causes of action against the City: (1) for violation of the First and Fifth Amendments, pursuant to 42 U.S.C. § 1983; and (2) for violation of the California Constitution. *See* FAC, ¶¶ 31-39.

Plaintiffs sought injunctive relief and damages for all violations under the Old and New Ordinances. *See generally* SAC. Thus, claims 1-5 and 8-10 deal with challenges to the Old Ordinance.

After the court's order and the filing of the SAC, the City again issued yet another amendment to the New Ordinance. Specifically, on June 1, 2010, the Richmond City Council voted to approve a minor amendment to section 15.06.070(A) of the New Ordinance, to clarify which signs the City intended to exempt from the New Ordinance's provisions (the amendment became effective on June 15, 2010). Thus, under this subsection, the requirements of the New Ordinance do not apply to: (i) official notices posted by public officers in performance of their duties; or (ii) traffic control and danger signs erected by a governmental entity. City's Request for Judicial Notice ("RJN"), Ex. D at 6, 8.

Defendant again challenged the pleadings, and in July 2010, moved to dismiss all claims challenging the Old and New Ordinances in the SAC. On August 2, 2010, the court granted the motion in part and denied it in part.

With respect to the motion to dismiss claims related to the Old Ordinance, the court granted the motion in part and denied it in part, holding: (a) plaintiffs' claims for injunctive relief under the Old Ordinance failed, since there could be no injunctive relief as a remedy for a past wrong; (b) plaintiffs had sufficiently alleged standing for purposes of asserting

a damages claim under the Old Ordinance; (c) plaintiffs had failed to adequately allege an equal protection claim premised on the Old Ordinance, since they failed to identify what specific right was denied, how plaintiffs were a protected class, or what the nature of any equal protection violation was; (d) defendant's argument that plaintiffs had failed to state an as-applied challenge to the Old Ordinance was without merit, since plaintiffs had properly alleged that defendant "facially violated" the Old Ordinance; and (e) plaintiffs' claim that the Old Ordinance's time limitations for ruling on permit applications were unlawful warranted dismissal, since plaintiffs' own permit applications were denied the same day they were submitted.

With respect to the New Ordinance, the court denied defendant's continued challenge to the exemption provisions of the New Ordinance. The court found that it remained unclear whether the language of the exemption should be classified as content neutral or content based, and that an evidentiary record was required before a ruling on the matter could issue.

Plaintiffs were granted leave to file a third amended complaint, in order to resolve deficiencies with respect to the equal protection claim specifically.

Plaintiffs duly filed their third amended complaint on August 11, 2010.

C. Instant Motion

Defendant now moves for summary judgment with respect to all claims asserted in plaintiffs' TAC. The claims number seven:

1. 42 U.S.C. § 1983 claim for violation of First Amendment rights under the Old Ordinance as to Signs 1-4 and 6-13 (seeking damages);
2. 42 U.S.C. § 1983 claim for violation of Equal Protection rights under the Old Ordinance as to Signs 1-4 and 6-13 (seeking damages);
3. 42 U.S.C. § 1983 claim for violation of First Amendment rights under the New Ordinance as to Signs 1-4 and 6-13 (seeking damages);
4. 42 U.S.C. § 1983 claim for violation of First Amendment rights under the New Ordinance as to Signs 1-4 and 6-13 (seeking injunctive relief);
5. violation of the California Constitution under the Old Ordinance (seeking damages);
6. violation of the California Constitution under the New Ordinance (seeking damages); and
7. violation of the California Constitution under the New Ordinance (seeking injunctive relief)

See generally TAC. With respect to plaintiffs' damages claims, plaintiffs seek damages in the amount of $360,000 per month based on the City's June 26, 2009 denial of plaintiffs' permit applications. *See* TAC, ¶¶ 21-29, 37-41.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id*.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Southern Calif. Gas. Co. v. City of Santa Ana,* 336 F.3d 885, 888 (9th Cir. 2003).

On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex,* 477 U.S. at 324-25. If the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in

order to defeat the motion. *See* Fed. R. Civ. P. 56(e); *Anderson,* 477 U.S. at 250.

B. Analysis

Defendant's motion raises the following issues for resolution: (1) whether plaintiffs lack standing to seek damages based on the Old Ordinance; (2) whether plaintiffs' claims under the Old Ordinance are barred because any alleged unconstitutionality was not the but-for cause of any sign permit denials; (3) whether the New Ordinance's exemption provision fails under the federal and/or state constitutions because the exemption is constitutionally sound; and (4) whether the City violated plaintiffs' rights to equal protection by denying plaintiffs' permit applications.

Preliminarily, however, the court notes that plaintiffs have improperly attempted to broaden the scope of their asserted claims by way of their summary judgment opposition. In its earlier rulings on defendant's motions for judgment on the pleadings and to dismiss, the court instructed plaintiffs to clearly allege and set forth in their complaint each provision of the Old and New Ordinance being challenged, and the legal theories/causes of action pursuant to which such provisions are being challenged. The resulting operative TAC accordingly reflects a narrow challenge to (1) section 15.06.080(C) of the Old Ordinance; and (2) section 15.06.070(A)(ii) of the New Ordinance. These are the only two provisions expressly challenged in plaintiffs' complaint. Yet, in

their opposition brief, plaintiffs raise a host of purportedly unconstitutional provisions contained in both ordinances – including the entire Old Ordinance, and additional sections 15.06.130, 15.06.070(A)(i), and 15.06.051 of the New Ordinance.

The court declines plaintiffs' invitation to delve into the constitutionality of these additional provisions. These issues were not raised in the underlying operative complaint, and accordingly fall outside its scope. Moreover, to allow plaintiff to raise new claims now – post-discovery – would be unfairly prejudicial to defendant. Accordingly, the court considers only those claims properly pled before the court.

1. Standing to Seek Damages Under Old Ordinance

In claims 1, 2, and 5, plaintiffs assert damages based on past constitutional wrongs under the now repealed Old Ordinance. As it has repeatedly done, the City continues to argue that plaintiffs do not have standing to assert any claim for damages based on the Old Ordinance. Specifically, defendants contend that plaintiffs lack standing to challenge their permit denials under the Old Ordinance, because plaintiffs' permit applications were so incomplete as to provide an independent and valid reason for the denial of plaintiffs' applications – namely, plaintiffs' failure to comply with the Old Ordinance's required size limitations; plaintiffs' failure to comply with permit application requirements; and the fact that the moratorium ordinance would have resulted in certain

denial at any rate. As a result, argues defendant, plaintiffs' damages claim is not redressible.

As a general matter, this is the third time that defendant has raised redressibility arguments in an attempt to destroy plaintiffs' ability to seek damages under the Old Ordinance. On those previous occasions, the court has noted the general existence of persuasive authority holding that in certain circumstances, where a defendant could have or would have denied the plaintiff's permit on an independent and constitutionally valid basis, or a basis not alleged by plaintiff to be unconstitutional, redressibility cannot be satisfied and standing is therefore lacking. *See, e.g., KH Outdoor, L.L.C. v. Clay County, Fla.*, 482 F.3d 1299 (11th Cir. 2007); *Get Outdoors II, LLC v. City of San Diego, Cal.,* 506 F.3d 886, 895 (9th Cir. 2007). In the present context specifically, courts have also noted that a plaintiff only suffers injury and establishes causation with respect to sign ordinance provisions that were actually applied or that a municipality has explained "would certainly be used against" the plaintiff to deny a sign permit. *See, e.g., Herson v. City of San Carlos,* 714 F. Supp. 2d 1018 (N.D. Cal. 2010); *Get Outdoors II,* 506 F.3d at 892. And in determining which ordinance provisions caused plaintiff's injuries, the court's analysis should be confined to "only sections of the code upon which the City actually relied in denying plaintiffs' permit application . . . ". 714 F. Supp. 2d at 1024.

Here, it is undisputed that at the time of plaintiffs' permit denials, plaintiffs were expressly informed –

via notation at the top of each permit application – that the reason for the denials was because plaintiffs' proposed signs were "not allowed per Section 15.06.080(C) of the Richmond Sign Ordinance." *See, e.g.,* TAC, Ex. 6. There is no evidence that has been cited by the City indicating that the City relied on any alternative reasons for the denial at the time plaintiffs' applications were denied.

Defendant contends that a particular subsection of this provision – specifically, the size limitations contained in Section 15.06.080(C)(6)(g)(ii) of the Old Ordinance – constitute a "constitutionally valid" ground upon which the City could have independently denied plaintiffs' permit applications, since it is clear from plaintiffs' permit applications that the drawings that plaintiffs presented to the City along with their applications are for signs that exceeded the size limitations contained in the subsection. However, defendants take insufficient notice of the fact that plaintiffs have, in fact, challenged the constitutionality of the Old Ordinance's size limitation provision by way of their complaint and in their opposition brief. While true – as argued by defendant – that the gravamen and focus of plaintiffs' complaint is the commercial versus non-commercial distinction contained within Section 15.06.080(C), *see* TAC, ¶ 18, it nonetheless may be reasonably inferred from plaintiffs' complaint and the allegations related more generally to "Section 15.06.080" and "Section 15.06.080(C)" that plaintiffs' challenge technically incorporates all aspects of Section 15.06.080(C) – including the size

limitation provision contained therein. *See id.*; *see also id.,* ¶ 26. Plaintiffs' opposition brief further clarifies the existence of plaintiffs' constitutional challenge to the size limitation provision, in response to defendant's argument. *See* Opp. Br. at 6:22-11:20.

While the parties' briefing goes so far as to make clear that plaintiffs are indeed challenging the constitutionality of the Old Ordinance's size limitation provision, however, the parties do not directly or sufficiently address the question of constitutionality of the provision itself – i.e., the parties introduce no evidence going to the question of whether the size limitation provisions are content-neutral or content-based, and if content-based, whether the provision is the least restrictive means to meet a compelling governmental interest. Without such evidence, the court is unable to conclude, as defendant urges, that the size limitation provision of the Old Ordinance constitutes a constitutionally valid basis upon which plaintiffs' permit applications would likely have been denied – thereby precluding plaintiffs' standing. For this reason, to the extent defendant's standing arguments are premised on the purportedly "constitutional" size limitation provision contained within the Old Ordinance, defendant's summary judgment motion must be, and is, DENIED.

The court notes, however, that an affirmative finding with respect to the constitutionality of the Old Ordinance's size limitation provision would, in fact, be dispositive of the standing question – as well as plaintiffs' claim for damages based on the Old

Ordinance. If the size limitation provision is constitutional, for example, and plaintiffs' proposed sign drawings filed in connection with the permit applications indicate that plaintiffs' proposed signs would be in violation of the size limitation provisions, then the court would likely conclude that redressability is lacking. If, on the other hand, the unconstitutionality of the Old Ordinance's size limitation provisions is established, those provisions could not provide a basis upon which to preclude plaintiffs' ability to recover.

Given the potentially dispositive nature of this constitutional question upon the standing issue, and the fact that both parties have argued the issue as if it had been properly teed up for resolution, the court will allow either party to file a single additional motion for summary judgment targeting this limited issue. The parties shall meet and confer, and advise the court as to a proposed briefing schedule. The briefing on such motion shall be limited to 10 pages per side, and 5 pages on reply, and the issues therein shall be limited to only the question of the constitutionality of the Old Ordinance's size limitation requirements, and that provision's impact on standing.

In so ruling, the court is aware that trial is scheduled for July 25, 2011. If either party decides to pursue the additional summary judgment motion, and the proposed briefing schedule is such that resolution of the motion is inconsistent with maintaining the current trial date, then the court will reschedule the trial.

Finally, with respect to defendant's remaining arguments that (1) plaintiffs' failure to comply with requirements under separate sign permitting and building permitting requirements; and (2) the moratorium instituted upon repeal of the Old Ordinance, would have both resulted in certain denial of plaintiffs' permit applications on independent grounds, the court finds that there are triable issues of fact with respect to these questions. *See generally* Declaration of Richard Mitchell ISO MSJ ("Mitchell Decl.") (setting forth deficiencies contained in plaintiffs' sign permit applications that would have prevented approval); Declaration of Gautam Manandhar ISO MSJ ("Manandhar Decl.") (identifying deficiencies contained in plaintiffs' building permit applications); *cf.* Mitchell Decl., ¶¶ 9, 36-37 (indicating that City's practice upon receipt of deficient sign permit applications is not denial, but rather return of the application as "incomplete" or submission of incomplete application); Declaration of Jeffrey Herson ISO MSJ Opposition ("Herson Decl."), ¶¶ 8-9 (averring that incomplete information in applications could have been remedied within one day). As such, defendant's motion is DENIED with respect to these standing arguments, as well.

2. But-For Causation Under Old Ordinance

Defendant also seeks summary judgment on grounds that plaintiffs cannot recover damages under the Old Ordinance because any alleged unconstitutionality in the Old Ordinance was not the actual

cause of plaintiffs' injuries. Rather, defendant asserts, for reasons that overlap with its standing arguments, that the City would have denied plaintiffs' permit applications on other grounds – thereby precluding any alleged unconstitutionality in the Old Ordinance from being the cause of plaintiffs' injuries.

Because this argument overlaps with the court's preceding standing analysis, and for the same reasons expressed therein, the court DENIES defendant's motion for summary judgment on the instant ground.

3. Constitutionality of New Ordinance's Exemption Provision

Plaintiffs' claims 3-4 and 6-7 state federal First Amendment challenges, as well as state constitutional challenges to the New Ordinance. *See generally* TAC. Plaintiffs specifically challenge only one provision of the New Ordinance: section 15.06.070(A)(ii). TAC, ¶¶ 33, 43. This provision was officially amended on June 15, 2010, as noted by defendant, in order to clarify its limited scope. In its newly amended current form, the provision states: "Provisions of this chapter shall not apply to the placement of any of the following signs:. . . . (ii) Traffic control and danger signs erected by a governmental entity."[3]

[3] As noted at the outset of the analysis herein, and for the reasons already set forth, to the extent plaintiffs have attempted to challenge in their opposition various new provisions of the

(Continued on following page)

Defendant contends that summary judgment as to all claims based on the foregoing provision is appropriate, for three reasons: (1) the exemption for traffic control and danger signs erected by governmental entities is content-neutral and constitutionally valid as a matter of law; (2) even if content-based, is the least restrictive means to achieve a compelling governmental interest; and (3) the exemption does not violate the California constitution. Plaintiffs, in response, contend that the New Ordinance is content-based, thereby requiring an inquiry as to a compelling government interest, and that the evidence in the record materially disputes defendant's compelling interest showing.

As the court has previously noted in conjunction with the prior motions filed by the City, the Ninth Circuit has generally held that exemptions to sign ordinances that do not single out certain content for differential treatment, and that allow officers enforcing the provision to merely note the content-neutral elements of "who" is speaking through the sign and "whether and when an event is occurring," are content-neutral rather than content-based. *See, e.g., G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064 (9th Cir. 2006).

New Ordinance *not* originally identified in the various previous iterations of plaintiffs' complaint, plaintiffs' attempt is misguided and unsuccessful.

Applying these general guidelines, the Ninth Circuit has held the following types of exemptions content-neutral, and ultimately constitutional: exemptions for "public signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs;" and exemptions for "directional signs" relating to certain qualifying events defined as "any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational or other similar nonprofit organization." *G.K. Ltd. Travel,* 436 F.3d at 1076-78; *Reed v. Town of Gilbert, Ariz.,* 587 F.3d 966, 977-78 (9th Cir. 2009). By contrast, however, the Ninth Circuit has also found impermissibly content-based the following: exemptions for "temporary 'open house' real estate signs" and for "Safety, traffic, or other public informational signals, signs, banners or notices erected or maintained by a public officer or employee in performance of a public duty or by a contractor, utility company or other persons responsible for public safety, peace and welfare." *See Foti v. City of Menlo Park,* 146 F.3d 629, 636 (9th Cir. 1998); *see also Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 820 (9th Cir. 1996) (applying content-based test to exemptions for official notices, directional, warning, or information structures, public utility signs, and structures erected near a city or county boundary which contain the name of the city, county, or civic, fraternal, or religious organizations located therein); *Nat'l Adver. Co. v. City of Orange,* 861 F.2d 246, 248 (9th Cir. 1988) (applying content-based test to exemptions for memorial tablets

or plaques, real estate and construction signs, open house signs, and traffic and safety signs). The Ninth Circuit in *Foti* held that such exemptions were content-based because "[t]o enforce the ordinance, a law enforcement officer must 'examine the content of . . . signs to determine whether the exemption applies.' " *Id*.

Based on this overview of Ninth Circuit precedent, the newly amended June 15 exemption appears to fall into the former content-neutral category. It clearly states that it applies to "[t]raffic control and danger signs erected by a governmental entity." Enforcement of the exemption depends solely on who the speaker is (i.e., the government) and furthermore applies only to traffic or danger signs – precisely the types of content-neutral signs that some panels of the Ninth Circuit have previously found constitutional. However, some of the preceding authorities have also swept exemptions related to "traffic" signs into the ambit of content-based regulations, *see, e.g., National Advertising,* 861 F.2d at 248, so it is difficult to conclude with certainty how the signs should be classified. The court nonetheless notes that the exemption would pass constitutional muster even if it were content-based, provided that it is the least restrictive means to further a compelling interest. *See Foti,* 146 F.3d at 637; *Sable Commn's of Cal., Inc. v. F.C.C.,* 492 U.S. 115, 126 (1989).

Defendant has come forward with satisfactory evidence of both a compelling interest and a least restrictive means to achieve that interest. Specifically,

defendant has identified the City's compelling interest in public safety, and the need to erect traffic control and danger signs quickly in order to alert drivers and pedestrians to traffic accidents, construction work, and railroad crossings. Defendant relies on the declaration of Yader Bermudez, the City's Director of the Department of Public Works ("DPW"), who testifies that the DPW erects and maintains permanent traffic control signs to inform drivers of traffic regulations, the need for such signs, and the dangerous consequences that could result without the ability to erect such signs quickly. *See generally* Bermudez Decl. Similarly, the City points out that the exemption is the least restrictive means of furthering its compelling interest, because it is limited in scope to traffic control and warning signs only, and only when the signs are erected by a government entity.

In response to this showing, plaintiffs offer nothing that directly refutes the City's evidence that the exemption meets a compelling need, or the City's argument that the exemption is the least restrictive means of meeting that need. Rather, plaintiffs proffer evidence that the City permitted an LED sign owned by a Councilman's contributor, after the sign owner bought lunch for the Councilman a few times. *See* Olson Decl., Ex. C at 18:10-14; 23:17; 26:3-31:8. This does not create a triable issue of fact as to strict scrutiny, however. Indeed, this evidence says nothing whatsoever about whether the exemption meets a compelling need, or is the least restrictive means of meeting that need. Plaintiffs' evidence is at best a red

herring, a means to distract from the actual strict scrutiny inquiry at issue here.

In sum, since plaintiffs offer no evidence sufficient to dispute the City's showing that the exemption in question – even if content-based – meets a compelling need and is the least restrictive means of meeting that need, the court GRANTS defendant's motion for summary judgment as to plaintiffs' First Amendment challenges premised on the recently amended New Ordinance – i.e., section 15.06.070(A)(ii). Since this same finding applies to both the federal and state constitutional claims, the court therefore GRANTS summary judgment as to all claims pertaining to the New Ordinance – claims 3, 4, 6, and 7. *See*, *e.g. Gonzales v. Superior Court,* 180 Cal. App. 3d 1116, 1125 (1986) (applying compelling interest test to state constitutional claims).

4. Equal Protection Claim

Finally, defendant also challenges plaintiffs' ability to demonstrate an equal protection challenge premised on the Old Ordinance – as set forth in claim 2. Plaintiffs allege that "when the OLD CODE was in effect, third parties similarly situated to plaintiffs were allowed by Richmond to display signs, and, in some (and possibly all) cases, are continuing to display signs, similar to those signs desired by plaintiffs." TAC, ¶ 26(a). In clarifying their equal protection claim in their opposition brief, however, plaintiffs clarify that they are asserting a "class of

one claim," which alleges that the City intentionally treated plaintiffs differently from other similarly situated permit applicants. The Supreme Court has recognized that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 601 (2008) (*citing Village of Willowbrook v. Olech,* 528 U.S. 562 (2000) (per curiam)).

To succeed on their "class of one" claim, plaintiffs must demonstrate that the City: (1) intentionally (2) treated plaintiffs differently than other similarly situated sign owners, (3) without a rational basis. *See Gerhart v. Lake County, Mont.,* ___ F.3d ___, 2011 WL 923381, *7 (9th Cir. 2011); *Willowbrook,* 528 U.S. at 564. Although plaintiffs must show that the City's decision was intentional, plaintiffs need not show that the City was motivated by subjective ill will. *Willowbrook,* 528 U.S. at 565.

Here, plaintiffs have based their equal protection claim on facts surrounding the City's approval of a sign by the Pacific East Mall.[4] Plaintiffs state that the City's principal planner has testified that the Mall

[4] Plaintiffs' counsel also contended at the hearing that Target and Chevron were also granted approval of signs, but counsel failed to direct the court to the evidentiary citations in the record conclusively establishing as much, and failed to point to the relevant evidence on this point in their opposition brief.

received an exemption from the Old Ordinance; that the owners of the Pacific East Mall bought lunch for a city councilman and contributed to his campaign, and that following these actions, the sign was approved. *See* Olson Decl., Ex. D at 31, 150-51; Olson Decl., Ex. C at 21, 23-24, 25, 11-18. Aside from this evidence, however, plaintiffs have submitted no evidence showing that the planner who actually denied his application – Ruby Benjamin – knew these facts when she denied plaintiffs' applications. Furthermore, and as defense counsel argued at the hearing on the motion, even if plaintiffs could establish as much, plaintiffs have failed to argue or demonstrate that plaintiffs, too, approached any City councilman in order to request approval of their signs, and been rejected. Without such evidence, plaintiffs cannot demonstrate that the City intentionally treated plaintiffs differently than other similarly situated owners at all.

Having failed to come forward with proof as to any differential treatment, plaintiffs have failed to identify any genuine issue of material fact with respect to their equal protection "class of one" claim.

Accordingly, the court hereby GRANTS defendant's motion for summary judgment with respect to plaintiffs' equal protection claim.

C. Conclusion

For all the foregoing reasons, the court hereby DENIES defendant's motion for summary judgment in part, and GRANTS the motion in part. The parties

shall advise the court of any desire to pursue a further limited summary judgment motion and a briefing schedule, within 10 days of the date of this order.

IT IS SO ORDERED.

Dated: April 25, 2011

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY HERSON and EAST BAY OUTDOORS, INC., a California corporation, Plaintiffs-Appellants, v. CITY OF RICHMOND, a charter city, Defendant-Appellee.	No. 11-18028 D.C. No. 4:09-cv-02516-PJH Northern District of California, Oakland ORDER (Filed Feb. 10, 2016)

Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

The panel has unanimously voted to deny appellants' petition for rehearing. Appellants' petition for panel rehearing is therefore DENIED.

CITY OF RICHMOND MUNICIPAL CODE

Chapter 4.04 SIGN CODE

* * *

4.04.020 Adoption by reference.

The Uniform Sign Code, most recent edition as of January 1 of any year published by the International Conference of Building Officials is adopted by reference the same as though fully set forth in this chapter.

* * *

4.04.040 Amendments, additions and deletions.

* * *

(I) Addition – Section 303 – Exemptions. The following exemptions are to be added to the Uniform Sign Code Section 303 beginning with number "3.", to read as follows:

"3. Temporary 'sale' signs."

"4. Realty signs."

"5. Residential signs on lots containing less than three living units."

"6. Exempted signs as specified in Chapter 15 of the Municipal Code of the City of Richmond."

(J) Addition-Section 307 – Political Signs. The following new section is added to the Uniform Sign Code as Section 307, to read as follows:

"POLITICAL SIGNS"

"Sec. 307. Each application for a political sign permit shall contain a general description of the intended locations for the placement of such signs (i.e. the limit as to the length of street and thoroughfare frontages; or name of specific neighborhoods, business or industrial areas) as well as the name and address of the persons responsible for erecting, maintaining and removal of such signs. In addition, the application shall be accepted only when accompanied with a scale drawing of the sign for which the permit is requested and a description of the method of installation and support of each duplicate of the sign. . . ."

* * *

Chapter 15.06 USE AND DISPLAY OF SIGNS

* * *

15.06.040 Permits.

A. CONFORMANCE REQUIREMENTS.

1. No person shall erect or cause to be erected any sign upon any fence, post, pole, tree, building or any other structure, attached directly to the ground or attached to any standing vehicle in the city without first applying for and receiving approval of the sign's location, design and dimensions. . . .

* * *

15.06.050 Sign types and definitions.

A. SIGN TYPE DEFINITIONS. For the purpose of this chapter certain terms and words are classified and defined as follows:

1. Classification by Sign Content. The following terms, words and definitions comprise a comprehensive listing of signs differentiated by content. Any sign which is not expressly listed shall be considered to be included within the definition which describes content with most similar characteristics.

(a) "Accessory sign" means a sign which, separately from a business identification sign, announces or advertises a product, commodity or service incidentally offered or provided on the premises. Accessory sign also includes a sign announcing or advertising a rating or special status of the business conducted upon the premises;

(b) "Advertising sign" means a sign which directs attention to a business, profession, commodity, service or entertainment, which is conducted, sold or offered elsewhere than on the same lot or parcel upon which the sign is located;

(c) "Business identification sign" means a sign which identifies, announces, endorses or provides direction or other necessary information about the principal business, industry, profession, product, service or entertainment conducted or offered upon the lot or parcel where the sign is located;

(d) "Civic sign" means a sign which identifies or states the location of, describes the services available or performed upon, describes the function of, describes the activities conducted upon, or states the conditions or use of, premises or facilities used, maintained or owned by any governmental entity, educational institution, society or association, religious society or association, church, recreation society or association, medical institution, group or society or public utility;

(e) "Political sign" means a sign which is designed to influence the action of the voters either for the passage or defeat of a measure appearing on the ballot at any national, state or local election; or which is designed to influence the action of voters either for the election or defeat of the candidates for nomination or election to any office at any national, state or local election;

(f) "Development sign" means a sign of a temporary nature which announces anticipated sale, lease, rental or the character of facilities being constructed or altered, either on the property that the sign is located or, elsewhere, which identifies persons or firms engaged in the promotion, design, construction or alteration thereof;

(g) "Directional sign" means a sign which directs, facilitates or controls the efficient or safe movement of pedestrians or vehicles. It includes a sign which identifies by name or

symbol the entrance to some form of development complex;

(h) "Major gateway area identification sign[”] means a sign located outside the edge of a freeway right-of-way or at the base of a freeway off-ramp announcing the location of major city centers. The wordage of these signs would include no advertising, only the name of the center;

(i) "Realty sign" means a sign of a temporary nature which pertains to the sale, lease, rental or display of existing lots or buildings or other facilities;

(j) "Residential sign" means a sign which conveys the name or address of the residential facility on the same lot or parcel or the name of the resident.

* * *

4. Other Definitions. . . .

(a) Display area: . . . For freestanding, roof, projecting and banner or pennant signs the display area is the entire sign exclusive of uprights or other structural members, except that where a freestanding, roof or projecting sign has two faces back-to-back which are approximately in parallel planes no more than 30 inches apart and exactly identical in size, the display area is the area of one face only. . . .

* * *

15.06.060 Exempted signs.

Provisions of this chapter shall not apply to the placement of any of the following signs:

A. OFFICIAL NOTICES. Official public notices, and notices posted by public officers in performance of their duties.

B. REGULATORY AND WARNING SIGNS. Governmental and other signs for control of traffic and other regulatory purposes, including street signs, danger signs, railroad crossing signs, and signs of public service companies indicating danger or aids to service or safety, including signs showing the placement or location or underground public utility facilities and any sign necessary to identify the location of public telephones.

C. TEMPORARY DISPLAY POSTERS. Temporary display posters, without independent structural support, in connection with civic and noncommercial health, safety and welfare campaigns, provided that such posters shall be removed within 10 days after the conclusion of the campaign.

D. FLAGS AND EMBLEMS. Flags, emblems, insignias and posters of any nation, state, international organization, political subdivision or other governmental agency; unilluminated, nonverbal religious symbols attached to a building which is a place of religious worship; and temporary displays of patriotic, religious, charitable or civic character.

E. HISTORIC SIGNS. Commemorative signs, symbols, memorial plaques and historical tablets, placed by historical societies.

* * *

15.06.080 Special sign regulations.

* * *

C. RICHMOND PARKWAY AND FREEWAY PROXIMITY REGULATIONS. . . .

1. Signs Permitted. The following signs are permitted within 660 feet of the Richmond Parkway or a Freeway Route . . . provided that they are in conformance with the performance standards outlined in subsections (2) through (8) below:

(a) Accessory signs;

(b) Business identification signs;

(c) Freestanding business identification signs;

(d) Gateway directional signs;

(e) Civic signs;

(f) + Development signs;

(g) Major gateway area identification signs;

(h) Window signs.

2. Total Display Area Allowed. One (1) square foot of sign area for every one linear foot of street frontage or a sign of 20 square feet, whichever is more, shall be allowed.

* * *

5. Sign Orientation. All signs, except for major gateway area identification signs and development signs, which are within 660 feet of a freeway route shall be placed in such a manner as to be oriented to the local street system.

6. Maximum Height and Area by Sign Type. In addition to the local standards described above, the following size standards shall apply by sign type. . . .

(i) Major gateway area identification signs:

(i) Height: Forty-five feet maximum or as determines [sic] by the DRO,

* * *

(iii) Area: One hundred feet per sign face

* * *

8. Signs Prohibited. All type signs other than those specified in paragraph 1 of subsection C of this section.

* * *

G. POLITICAL SIGN REGULATIONS. The following regulations shall apply to political signs in any district:

* * *

3. Political Sign Locations Permitted:

(a) Private property;

(b) Adjoining freeways:

(i) Within 660 feet of any freeway right-of-way provided the copy is not visible from such right-of-way.

* * *

6. Exemptions. The provisions of this paragraph shall not apply to the placement of any of the following signs:

* * *

(b) Advertising signs. Political signs posted by a person or corporation duly licensed to erect or maintain outdoor advertising signs or billboards, provided that the sign or signs as posted are in a location and manner authorized or permitted under provisions of this chapter.

* * *

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JEFFREY HERSON, an individual; EAST BAY OUTDOOR, INC., a California corporation, Plaintiffs, v. CITY OF RICHMOND, a charter city, Defendant	Case No. 4:09-cv-02516-PJH **THIRD AMENDED COMPLAINT** (Filed Aug. 11, 2010) (42 U.S.C. § 1983, and Supplemental Claims under California Constitution, for Damages, Declaratory and Injunctive Relief) JURY TRIAL DEMANDED Trial Date: February 28, 2011

* * *

18. OLD CODE Section 15.06.080 sets forth the Richmond Parkway and freeway proximity regulations. Under OLD CODE Section 15.06.080C(1), political signs and many other signs containing noncommercial speech were not permitted in a 660 FOOT RESTRICTED AREA (without a variance), but certain signs containing commercial speech are permitted in a 660 FOOT RESTRICTED AREA. OLD CODE Section 15.06.080C(5) allowed certain signs containing commercial speech to be displayed in a 660 FOOT RESTRICTED AREA and oriented so as to be displayed to those traveling on the Richmond Parkway or a freeway. OLD CODE Section 15.06.080G(6) barred the display of political signs and other signs containing noncommercial speech to those traveling on a freeway. OLD CODE Section 15.06.080G placed certain limits on political speech that are not placed on any other speech, but Section 15.06.080G(6) exempts from the provisions of Section 15.06.080G those signs displayed by those licensed to erect or display outdoor advertising signs or billboards. OLD CODE Section 15.06.060 provides that signs containing certain noncommercial speech, but not political speech, are exempted from Chapter 15.06 of the OLD CODE. Accordingly, Signs 1 through 13 were barred under the OLD CODE.

19. Plaintiffs desire to display each of Signs 1 through 4, inclusive, and 6 through 13, inclusive, on a structure constructed for the sole purpose of displaying signs, (the "STRUCTURE.") RICHMOND ordinances require that Plaintiffs first apply for and obtain a

building permit from RICHMOND for each STRUCTURE prior to the construction of each STRUCTURE. In order to be entitled to a building permit, Plaintiffs must first apply for and be issued a sign permit for the sign by RICHMOND.

FIRST CLAIM

(42 U.S.C. Section 1983 – First Amendment as to Signs 1 through 4 and 6 through 13 – Damages)

20. Plaintiffs reallege Paragraphs 1 through 19, above.

21. RICHMOND'S regulation of signs as of June 26, 2009, within its 660 FOOT RESTRICTED AREA facially violated the First and Fourteenth Amendments to the United States Constitution by containing content-based restrictions that give greater protection to commercial speech than noncommercial speech, and by regulating noncommercial speech based upon content.

22. Accordingly, RICHMOND'S denial of the sign applications on or about June 26, 2009, violated Plaintiffs' First Amendment rights.

23. As a result of the denial of Plaintiffs' First Amendment rights, Plaintiffs have suffered, and will continue to suffer, lost profits resulting from their failure to receive payments from others as described in Paragraph 9, above. For each month after June 26, 2009, that Plaintiffs have been and are unable to display signs, Plaintiffs are suffering lost profits of

$360,000, due to the lost profits at the rate of $30,000 per month for each of Signs 1 through 4 and 6 through 13. Accordingly, Plaintiffs are entitled to recover $360,000 in damages from RICHMOND for each month after June 26, 2009, that RICHMOND has prohibited the display of such signs.

24. Plaintiffs are entitled to recover their attorneys' fees and costs pursuant to 42 U.S.C. Section 1988.

* * *

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JEFFREY HERSON, an individual; EAST BAY OUTDOOR, INC., a California corporation,

Plaintiffs,

v.

CITY OF RICHMOND, a charter city,

Defendant.

Case No. 4:09-cv-02516-PJH

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 7, 2011)

Date: April 6, 2011
Time: 9:00 a.m.
Place: Courtroom 3 [Hon. Phyllis J. Hamilton]

Complaint Filed: June 5, 2009
Trial Date: July 25, 2011

* * *

B. The Prior Code, Including Its Exemptions From Size and Height Limits, Was Content-Based and Unconstitutional.

The size and height requirements cannot be used to bar Plaintiffs' signs for another independent reason. The Old Sign Ordinance (Ex. 5 to TAC, Doc. No. 63) had the same infirmities as the Ordinance struck down by the Ninth Circuit in *Desert Outdoor Advertising, Inc*, 103 F.3d at 821: (1) it had a "standardless permit requirement" (see, e.g., Ex. 3 to TAC, Doc. No. 63, § 15.04.930.110(A)(2)); (2) the City "failed to establish a substantial governmental interest in regulating commercial speech" (Richmond hasn't even tried); (3) "it imposes greater restrictions upon noncommercial than upon commercial speech" (Ex. 5 to TAC, § 15.06.080(C)); and (4) "the exemptions for certain noncommercial structures and signs are content-based and not supported by a compelling governmental interest." (*Id.*) Given those fatal flaws, "the balance of the ordinance cannot function independently after we strike the unconstitutional provisions, we need not consider the City's intent in passing the ordinance, and we declare the entire ordinance invalid." *Desert Outdoor*, 103 F.3d at 821.

The size and height restrictions "cannot function independently" from the rest of the unconstitutional old ordinance, the entire ordinance is invalid, and the size and height restrictions cannot be used to deny Plaintiffs' signs. (*Ibid.*)

The City's prior code section 1506.06.060 [sic] exemption from the regulations of size and height of signs was unconstitutional, like the ordinance in *Desert Outdoor*, for a number of reasons.[4] This means that size and height restrictions cannot be used to bar Plaintiffs' signs.

"'Whether a statute is content neutral or content based is something that can be determined on the face of it,'" and if a statute "'describes speech by its content then it is content based.'" *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir. 2003) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring)). In order to determine whether a regulation is content-based, the "principal inquiry is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998). Where city officials must "examine the content" of signs to determine whether an exemption applies, the regulation is content-based. *Desert Outdoor*, 103 F.3d at 820.[5]

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[4] Section 15.06.060 is attached as Exhibit 5 to the Third Amended Complaint, Doc. No. 63.

[5] The City contends that the Ninth Circuit has rejected the "officer-must-read-it" test of *Foti.* (Motion at 20:23-21:1.) Not so. The Ninth Circuit in *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 978 (9th Cir. 2009) stated, "'Whether an officer must read a message is persuasive evidence of an impermissible content-based purpose, but is not dispositive.'" (*Id.* at 978, quoting *Berger*, 569 F.3d at 1052 fn. 22.) *Berger* found that the regulation

(Continued on following page)

1. Sign Ordinance is Content-Based if Exemptions Based Upon Content.

When "exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content.'" *Foti*, 146 F.3d at 636. In *Foti*, Menlo Park's sign ordinance exempted, among other things, "Safety, traffic, or other public informational signals, signs, banners or notices erected or maintained by a public officer or employee in performance of a public duty or by a contractor, utility company or other persons responsible for public safety, peace and welfare." Id. at 634 n.3. The Ninth Circuit held that Menlo Park's "exemptions for . . . safety, traffic, and public informational signs are content-based because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." Id. at 636. The Court rejected the notion that any perceived innocuousness of the exemptions was relevant to the question of whether they made the statute content-based: "Although Menlo Park's exemptions for . . . safety, traffic and informational signs seem innocuous, we base our content-based determination on whether the ordinance singles out certain speech for differential

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in question *was* a content-based limitation on speech which failed strict scrutiny. *Id.* at 1052-53. *Foti* remains good law, and has not been overruled. Indeed, the city's Motion does not even defend the content-based exemptions struck down in *Foti*.

treatment based on the idea expressed. The reasonableness, harmlessness or worthiness of the idea is irrelevant." *Id.* at 636 n.7.

The Ninth Circuit has reached similar conclusions in other cases. In *National Advertising Co. v. City of Orange*, 861 F.2d 246, 247 (9th Cir. 1988), the sign ordinance at issue "prohibit[ed] all signs relating to activity not on the premises on which the sign is located" with special exemptions for, inter alia, "signs placed by a government body or public utility required to be maintained by law." *Id.* at 247-248 n. 2. The Ninth Circuit held that all of the exemptions to the sign ordinance were content-based: "[b]ecause the exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content." *Id.* at 249; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 495 n.3, 516, 521 (1981) (invalidating as facially unconstitutional an ordinance containing exemption for [a]ny sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation"). The city provides no evidence that the exemptions to the old code further any government interest, or that the ordinance advanced aesthetics and safety.

In *Desert Outdoor Advertising, Inc*, 103 F.3d 814, the sign ordinance at issue included exemptions for: "[o]fficial notices issued by any . . . public body or officer"; "[n]otices posted by any public officer in performance of a public duty"; "[d]irectional, warning or information structures required by or authorized

by law, . . . including signs necessary for the operation and safety of public utility uses"; and "a structure erected near a city or county boundary, which contains the name of such city or county and the names of, or any other information regarding, civic . . . organizations located therein." *Id.* at 817. The Ninth Circuit determined that such exemptions were content-based: "[b]ecause the exemptions require City officials to examine the content of noncommercial offsite structures and signs to determine whether the exemption applies, the City's regulation of noncommercial speech is content-based." *Id.* at 820; *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 906-907 (9th Cir. 2007) (repealed sign ordinance was "content-based" because it exempted among other things, "[c]ertain directional and informational signs" from "the permit requirement")

In *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006), a city citing the "dual goals of traffic safety and community aesthetics" banned "the display of most portable and offsite signs," but exempted several categories of signs from the ban, including "construction signs," "political signs," "major land use action notices" and "real estate signs."[6] *Id.* at 740. The Ninth Circuit held that the "exceptions to the City's portable sign Ordinance are all content based" because "[d]fferent signs are treated differently under the

[6] Section 4.04.040(I) of the sign code (Ex. 1 to TAC, Doc. no. 63) which was part of the Old Code and remains part of the new code, has an exemption for realty signs like the one in *Ballen*.

Ordinance based entirely on a sign's content." Id. at 743.

2. The Prior Code Contained Several Exemptions From Size And Height Limits Based On The Content Of The Sign

Here, as in *Foti, National Advertising, Desert Outdoor* and *Ballen*, city officials needed to examine the content of a proposed sign to determine whether the exemptions in the Prior Code applied. The exemptions to the Prior Code are strikingly similar to the types of exemptions that the Ninth Circuit previously has held make a sign ordinance content-based.

The Prior Code listed a variety of exempt signs in section 15.06.060 (Ex. 5 to TAC, Doc. No. 63) which were not subject to *any* of the provisions of the old code. The blanket exemptions in section 15.06.060 included exemptions for "official notices," "regulatory and warning signs," "temporary display posters," "flags and emblems," and "historic signs."

The Prior Code was content-based because a city official had to examine the content of a sign to determine whether that sign was an "Official Notice," "Regulatory and Warning Sign," "Flag and Emblem" or "Historic Sign." If the official determined that the sign fell into one of those exempted categories, it was not subject to the Prior Code's size and height restrictions, but instead was completely free of size and height limitations. (Prior Code § 1506.06.060 [sic].)

The exemptions in the Prior Code were indistinguishable from the exemptions that made the ordinances in *Foti, National Advertising, Desert Outdoor* and *Ballen* content-based. *See Foti*, 146 F.2d at 634 (exemptions for "safety, traffic and public informational signs" make law content-based); *National Advertising*, 861 F.2d at 248-249 (exemption for "signs placed by a government body or public utility, required to be maintained by law" make law content-based); *Desert Outdoor*, 103 F.3d at 817, 820 (exemptions for "[Official notices . . . [d]irectional, warning or information structures required by or authorized by law, . . . including signs necessary for the operation and safety of public utility uses" make law content-based); *Ballen*, 466 F.3d at 743 (exemption for "construction signs" and "real estate signs" purportedly to "promote traffic and pedestrian safety").[7]

Thus, the size limitations of the Old Ordinance do not foreclose Plaintiffs' challenge to the ordinance, both because Plaintiffs stood (and stand) ready to comply with them (Herson Decl., ¶¶ 9-10), and because

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[7] But *cf. Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 893 (9th Cir. 2007); *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1114-15 (9th Cir. 2003) (*County of Riverside*). Neither case holds that size and height restrictions should always be treated as content-neutral regulations. Neither case analyzed how, as in this case, size and height restrictions can vary from sign to sign depending on the content of what is on that sign. The Prior Code imposed *no* limitation on height and size for signs with exempted content. Thus, *Get Outdoors II* and *Riverside* are not controlling on this point.

they bring a facial challenge to the ordinance. The Ninth Circuit held in *Ballen* that wholesale exemptions for certain types of signs "compromise[s] the city's interests. More specifically, ubiquitous real estate signs, which can turn an inviting sidewalk into an obstacle course challenging even the most dextrous hurdler, are an even greater threat to vehicular and pedestrian safety and community aesthetics than the presence of a single employee holding an innocuous sign that reads 'Fresh Bagels – Now Open.' . . . Here, the City has protected outdoor signage displayed by the powerful real estate industry from an ordinance that unfairly restricts the First Amendment rights of, among others, a lone bagel shop owner. Additionally, temporary window signs and signs on kiosks are no less a threat to vehicular and pedestrian safety and community aesthetics than the ambulant bagel advertisement." (466 F.3d at 743.)

Here, too, Richmond's decision in the Old Code to allow official notices, flags, "temporary display posters"[8] and historic signs – no matter how big and how

[8] The exemption for "temporary display posters . . . in connection with civic and noncommercial health, safety and welfare campaigns" runs particular risks of content-based discrimination. Would "Support Planned Parenthood" be a "health, safety, and welfare" campaign? Would "Abortion is Murder"? Would "Support Single Payer" or "Stop Obamacare"? The "potential for content-based decisionmaking" inherent in answering those questions renders the ordinance unconstitutional. *See Café Erotica of Florida v. St. Johns County*, 360 F.3d 1274, 1284 (11th Cir. 2004) [striking down sign ordinance

(Continued on following page)

high – undermines any claim that the size and height restrictions are necessary to further vehicular and pedestrian safety or aesthetics. The size and height restrictions in the Old Code fall along with the rest of the old sign ordinance. As the Supreme Court held last year in *Citizens United v. FEC*, *supra*, 130 S. Ct. at 896, "a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." The entire Old Code, including its size and height limits, must be invalidated.

* * *

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because it "impermissibly creat[ed] the potential for content-based discrimination"].

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-18028

JEFFREY HERSON, an individual,
and EAST BAY OUTDOOR, INC.,
a California Corporation,
Plaintiffs-Appellants,
v.
CITY OF RICHMOND,
Defendant-Appellee.

APPELLANTS' OPENING BRIEF

(Filed Apr. 12, 2012)

D.C. No. 4:09-cv-02516-PJH
U.S. District of [sic] **Court for**
Northern California, Oakland

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* * *

F. <u>The Sign Code's Exemptions Render The Permitting Scheme Unconstitutional; The District Court Erred By Dismissing This Claim On The Basis Of Standing.</u>

The District Court dismissed Herson's facial attack to the Sign Code's "exemptions" on the basis of standing, essentially concluding that because the City had a constitutional basis for denial of Herson's sign permit applications (height and size), Herson had no standing to make his facial challenges to the Sign Code at large. (ER 081, Doc#137). This was error because it failed to consider the independent basis for standing based on the facial attacks to the entire permitting scheme.

The Old Sign Code, 506.06.060, entirely exempted five types of signs from the city's permitting requirements. This Court has repeatedly held that such exemptions render sign permitting schemes unconstitutional. See *Moreno Valley*, 103 Fd [sic] 814 (9th Cir. 1996), *National Outdoor Advertising v. City of Orange*, 861 F.2d 246 (9th Cir. 1988), and *Foti v. City of Menlo Park*, 146 F.3d 629,636 (9th Cir. 1998). In those cases, exemptions from the sign codes were deemed unconstitutional because the exemptions required the city officials to examine the content of the proposed sign to determine whether the exemptions in the code applied. Such is the case here.

The five types of off-site signs that were exempted from the Old sign Code included:

A. OFFICIAL NOTICES. Official public notices, and notices posted by public officers in performance of their duties.

B. REGULATORY AND WARNING SIGNS. Governmental and other signs for control of traffic and other regulatory purposes, including street signs, danger signs, railroad crossing signs, and signs of public service companies indicating danger or aids to service or safety. including signs showing the placement or location or underground public utility facilities and any sign necessary to identify the location of public telephones.

C. TEMPORARY DISPLAY POSTERS. Temporary display posters, without independent structural support, in connection with civic and noncommercial health, safety and welfare campaigns, provided that such posters shall be removed within 10 days after the conclusion of the campaign.

D. FLAGS AND EMBLEMS. Flags, emblems, insignias and posters of any nation, state, international organization, political subdivision or other governmental agency; unilluminated, nonverbal religious symbols attached to a building which is a place of religious worship; and temporary displays of patriotic, religious, charitable or civic character.

> **E. HISTORIC SIGNS.** Commemorative signs, symbols, memorial plaques and historical tablets, placed by historical societies.

Old Sign Code 15.06.060.

The District Court erred in dismissing Herson's claims related to the exemptions in light of the fact that the Old Sign Code contained content-based restrictions of speech, in violation of the First Amendment. "Whether a statute is content neutral or content based is something that can be determined on the face of it." And if a statute "describes speech by its content then it is content based." *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir. 2003). In order to determine whether a regulation is content-based, the "principal inquiry is whether the government has adopted a regulation of speech without reference to the content of the regulated speech." *Foti*, 146 F.3d at 636. Where city officials must "examine the content" of signs to determine whether an exemption applies, the regulation is content-based. *Moreno Valley*, 103 F.3d at 820.

As is the case here, when "'exceptions to the restriction on noncommercial speech are based on content, then restriction itself is based on content.'" *Foti*, 146 F.3d at 636. In *Foti*, Menlo Park's sign ordinance exempted, among other things

> Safety, traffic, or other public informational signals, signs, banners or notices erected or maintained by a public officer or employee in

> performance of a public duty . . . for public safety, peace and welfare.

(*Id.* at 634 n.3.) This Court held that Menlo Park's exemptions for safety, traffic, and public informational signs "are content-based because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." (*Id.* at 636.) This Court rejected the notion that any perceived innocuousness of the exemptions was relevant to the question of whether they made the statute content-based. This Court explained that

> Although Menlo Park's exemptions . . . seem innocuous, we base our content-based determination on whether the ordinance singles out certain speech for differential treatment based on the idea expressed. The reasonableness, harmlessness or worthiness of the idea is irrelevant.

(*Id.* at 636). In *Moreno Valley*, 103 F.3d at 820, the sign ordinance contained similar exemptions. This Court determined that such exemptions were content-based:

> because the exemptions require City officials to examine the content of noncommercial off-site structures and signs to determine whether the exemption applies, the City's regulation of noncommercial speech is content-based.

Id; see also *Outdoor Media Group v. City of Beaumont*, 506 F.3d 895, 906-907 (9th Cir. 2007) (repealed sign ordinance was "content-based" because it exempted

among other things, "certain directional and informational signs" from "the permit requirement").

In the cases cited above, this Court found that the exemptions placed too high a burden on non-commercial speech, which invalidated the permitting schemes. Here, the Old Sign Code suffers from the same failings as those in the cases cited above, and the result should be the same.

* * *

Docket No. 11-18028

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY HERSON and
EAST BAY OUTDOOR, INC.,
Plaintiffs and Appellants,

v.

CITY OF RICHMOND,
Defendant and Appellee.

Appeal from the United States District Court
For the Northern District of California
Case No. 4:09-cv-02516

APPELLEE'S BRIEF

(Filed May 29, 2012)

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* * *

On the contrary, the Major Gateway category does not convert the Type-B limits into content-based restrictions, for at least three reasons.

First, the Major Gateway sign category is not content based. It is not meaningfully different from the category of "Temporary Directional Signs Relating to a Qualifying Event" that this Court upheld as content neutral in *Reed v. Town of Gilbert*, 587 F.3d 966, 976-78 (9th Cir. 2009). Similar to those signs, which identified the location of an event and directions to reach it, the Major Gateway signs are similarly "directional": they merely "announc[e] the location of major city centers." ER 5:1113-14 (Old Ordinance § 15.06.050(A)(1)(h)). Such "[a] directional sign," the *Reed* court held, "does not contain a message such that regulating directional signs would inherently 'distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.'" 587 F.3d at 977 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994)). Like the *Reed* signs, the Major Gateway sign category "does not mention any idea or viewpoint, let alone single one out for differential treatment." *Id.* Because the Major Gateway sign category is not content-based, even if it were considered an exception to the Type-B size limits, it would not make the Type-B limits content based.

* * *

Docket No. 11-18028
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY HERSON and
EAST BAY OUTDOOR, INC.,
Plaintiffs and Appellants,
v.
CITY OF RICHMOND,
Defendant and Appellee.

Appeal from the United States District Court
For the Northern District of California
Case No. 4:09-cv-02516

APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD
Volume 1 of 1
Pages 1 to 125

(Filed Jun. 26, 2014)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JEFFREY HERSON, an individual; EAST BAY OUTDOORS, INC., a California corporation, Plaintiffs, v. CITY OF RICHMOND, a charter city, Defendant.	Case No. 4:09-cv-02516-PJH **DECLARATION OF RICHARD MITCHELL IN SUPPORT OF DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT** (Filed Jul. 27, 2011) Date: September 21, 2011 Time: 9:00 a.m. Judge: Honorable Phyllis J. Hamilton Dept.: Courtroom 3 Trial Date: TBD

* * *

7. Under section 15.06.080(C)(6)(g)(ii) of the Old Ordinance, the maximum height for Type B Free-standing signs was 12 feet. Even the smallest of Plaintiffs' allegedly proposed signs would have been 35 feet tall.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-18028

JEFFREY HERSON, an individual,
and EAST BAY OUTDOOR, INC.,
a California Corporation,
Plaintiffs-Appellants,
v.
CITY OF RICHMOND,
Defendant-Appellee.

APPELLANTS' REPLY BRIEF

(Filed Jun. 29, 2012)

D.C. No. 4:09-cv-02516-PJH
U.S. District of [sic] **Court for**
Northern California, Oakland

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Herson Challenges Exemptions Under The Old Sign Code Are Similarly Unconstitutional.

The City argues that Herson did not challenge Old Code § 15.06.060 which exempted five categories of signs from the City's overall sign scheme; they included: **Official Public Notices, Regulatory And Warning Signs, Temporary Display Posters, Flags And Emblems and Historic Signs.**

Herson expressly challenged these exemptions in his Complaint. Herson's First Amended Complaint alleges:

> In exempting certain content from its Sign Code, Richmond illegally preferences some speakers and viewpoints over others. "Temporary public display posters," defined as those "without independent structural support, in connection with civic and non-commercial health, safety, and welfare campaigns" are exempted "provided that such posters shall be removed within 10 days after the conclusion of the campaign." "Flags and emblems," including "temporary displays of patriotic, religious, charitable or civic character" are exempt. Displays that Richmond considers unpatriotic, irreligious, on-charitable [sic], or private, however, require a permit. Additionally, "commemorative signs, symbols, memorial plaques and **historical tablets**, placed by historical societies" are exempt irrespective of their size, location and duration. These content and

> viewpoint-based exemptions render Richmond's limitations on other sign content unconstitutional.

In his Second Amended Complaint (ER 1186, line. 22) Herson alleges:

> Old Code Section 15.06.060 provides that signs containing noncommercial speech, but not political speech, are exempted from chapter 15.06 of the Old Code. Accordingly Signs 1through 13 were barred under the Old Code.

Herson's Third Amended Complaint alleges (ER 1059, line 4):

> Old Code § 15.06.060 provides that signs containing noncommercial speech, but not political speech, are exempted from chapter 15.06 of the Old Code. Accordingly Signs 1through 13 were barred under the Old Code.

Not only did Herson allege that § 15.06.060 was content based and unconstitutional, Herson went even further and attached the relevant code sections to the complaint. The City's argument that Herson waived these arguments, or failed to preserve them below is without merit.

* * *

No. 14-1322

In The
Supreme Court of the United States

JEFFREY HERSON and
EAST BAY OUTDOOR, INC.,

Petitioners,

v.

CITY OF RICHMOND,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

(Filed Jun. 5, 2015)

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Rather, Petitioners claim these limits were subject to "content-based exemptions," Pet, at 17. Petitioners do not identify them specifically, but Re-Respondent [sic] assumes Petitioners mean to refer to signs previously identified as exempt from the Old Ordinance altogether, such as official notices and regulatory and warning signs. *See* Pet. at 5 (citing Old Ordinance § 15.06.060).

Petitioners never challenged those exemptions as unconstitutional in any of their four complaints, but rather raised them for the first time in opposition to summary judgment along with a variety of other new arguments. The district court – twice – refused to consider these eleventh-hour arguments. Pet. App. at 13, 26-27. It was correct to do so. *See Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011).

* * *

No. 14-1322

In The
Supreme Court of the United States

JEFFREY HERSON; EAST BAY OUTDOOR, INC.,

Petitioners,

v.

CITY OF RICHMOND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Filed Jun. 19, 2015)

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* * *

1. Content-based Exemptions in the Ordinance Were Challenged in Each Iteration of the Complaint and on Appeal

Richmond claims that "Petitioners do not identify" the content-based exemptions in the Ordinance. Opp. at 9. But the exemptions in sections 4.04.040 and 15.06.060 of the Ordinance are explicitly listed in the Petition (p. 5), and the Ordinance is reprinted in the Petitioner's Appendix filed with the Petition (Pet. App. at 43, 47-48). Richmond's characterization of the Petition itself is wrong.

Richmond then claims that "Petitioners never challenged those exemptions as constitutional in any of their four complaints . . . ." Opp. at 9. But the exemptions were challenged in each iteration of the complaint. In the original complaint, at paragraph 14, Herson alleged:

> In exempting certain content from its Sign Ordinance, Richmond illegally preferences some speakers and viewpoints over others. "Temporary public display posters," defined as those "without independent structural support, in connection with civic and non-commercial health, safety, and welfare campaigns" are exempted "provided that such posters shall be removed within 10 days after the conclusion of the campaign." "Flags and emblems," including "temporary displays of patriotic, religious, charitable or civic character" are exempt. Displays that Richmond considers unpatriotic, irreligious, non-charitable, or private, however, require a

> permit. Additionally, "commemorative signs, symbols, memorial plaques and historical tablets, placed by historical societies" are exempt irrespective of their size, location, and duration. These content and viewpoint-based exemptions render Richmond's limitations on other sign content unconstitutional.

VII ER 1387.

The exemptions were challenged again with explicit reference to the offending section of the Ordinance in the Second Amended Complaint. VI ER 1181 (¶ 18) ("OLD CODE Section 15.06.060 provides that signs containing certain noncommercial speech, but not political speech, are exempted from Chapter 15.06 of the OLD CODE.") These same allegations are repeated in paragraph 18 of the Third Amended Complaint, which is the operative pleading. V ER 1063.[1]

Richmond's assertion that the content-based exemptions were never challenged is simply incorrect. Richmond's characterization of the record is unexplained.

Finally, Richmond tries to insinuate that the district court also found that Herson's complaint did not challenge the exemptions in the Ordinance. Opp.

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[1] The First Amended Complaint was not in the excerpts of record before the Ninth Circuit, however, the two subsequent iterations of the complaint explicitly challenge the exemptions in section 15.06.060.

at 9. Reading the citations to the Petitioner's Appendix, the district court never expressed concern that Herson's challenge of 15.06.060 was improper, it simply found the challenge unpersuasive (Pet. App. at 13). The district court's concern (Pet. App. at 26-27) relates only to the Ordinance sections cited there, sections 15.06.130, 15.06.070, and 15.06.051. Pet. App. at 27. The district court did not find that Herson's challenge of the exemptions was procedurally improper. It decided that it could ignore the exemptions because the height and size restrictions provided a content-neutral justification to deny Herson's permits, the content-based exemptions to that ordinance notwithstanding. The district court acknowledged Herson's argument that, "in essence, the size and height provision is unconstitutional because the law upon which it depends is admittedly unconstitutional" (Pet. App. at 12), but "decline[d] to accept [Herson's] invitation to find the old ordinance's size and height requirements unconstitutional, based on the unconstitutionality of other independent content-based restrictions within the old ordinance." Pet. App. at 13.

The problem with the district court's analysis, and the Ninth Circuit's adoption of that analysis, is that the height and size restriction in the Ordinance is not independent of the content-based restrictions at all. The height and size restrictions do not offer a content-neutral alternative basis to deny Herson's permits when other signs are wholly exempted from the restrictions based on content, including certain preferred subjects of noncommercial speech. The

mere assertion of an alternative content-neutral justification under *Get Outdoors II* fails to safeguard the First Amendment rights of those denied the right to speak on content-based grounds. Richmond could and did allow speech of certain content on signs of unlimited height and size. It cannot rely on the height and size restrictions – which were not applied to Herson's signs – as justification for its unjustified content-based discrimination.

* * *

Docket No. 11-18028

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY HERSON and **EAST BAY OUTDOOR, INC.**, Plaintiffs and Appellants,

v.

CITY OF RICHMOND,
Defendant and Appellee.

Appeal from the United States District Court
for the Northern District of California
Case No. 4:09-cv-02516

SUPPLEMENTAL BRIEF OF DEFENDANT AND APPELLEE CITY OF RICHMOND ON REMAND FROM THE UNITED STATES SUPREME COURT

(Filed Dec. 17, 2015)

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* * *

1. The district court correctly held that Plaintiffs forfeited their section 15.06.060 claim, and Plaintiffs failed to challenge that conclusion on appeal.

In its Appellee's Brief, the City noted that the district court had correctly refused to consider this claim, which Plaintiffs raised for the first time in opposing summary judgment. AB at 37 (citing ER 1:79-80). Plaintiffs did not argue on appeal that the district court erred in refusing to consider the claim. Nothing in *Reed* requires this Court to excuse Plaintiffs' multiple failures to properly present and defend this claim.

In partially granting the City's motion for judgment on the pleadings on Plaintiffs' Second Amended Complaint, the district court found that the complaint was "in large part incomprehensible." ER 1:94. As a condition of leave to amend, therefore, the district court required Plaintiffs to specifically allege any constitutional defects in the Ordinances. ER 1:98 (requiring Plaintiffs to allege "with particularity the express provisions of the 'old sign ordinance' plaintiffs challenge and the legal basis therefor" and "the express provisions of the old or new sign ordinance upon which each cause of action is premised"). Although the Third Amended Complaint included a single reference to section 15.06.060 in describing the Old Ordinance, it identified no claim based on that provision. ER 5:1063.

Yet later, in opposing summary judgment, Plaintiffs argued for the first time that section 15.06.060, and a raft of other newly alleged constitutional defects, invalidated the Ordinance. *See* ER 1:79-80 (order on City's motion for summary judgment). The district court expressly refused to consider those new claims because Plaintiffs had disregarded the court's prior order requiring them to clearly identify the alleged defects in the Old Ordinance. *Id.*

The district court correctly refused to consider Plaintiffs' tardy claims. A plaintiff cannot assert a new claim or legal theory not alleged in the complaint to evade summary judgment. *See* AB at 37; *see also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010)

(holding a plaintiff "may not effectively amend its Complaint by raising a new theory of standing in its response to a motion for summary judgment"). The summary judgment stage was thus too late for Plaintiff to allege that section 15.06.060 invalidated the facially content-neutral size-and-height limits.

Furthermore, Plaintiffs violated the court's reasonable condition on leave to amend by failing to identify the claim in the Third Amended Complaint. *See Int'l Ass'n of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1391 (9th Cir. 1985) ("The district court may, in its discretion, impose 'reasonable conditions' on a grant of leave to amend a complaint.") (citing *Mtn. View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1386 (10th Cir. 1980)); *see also Blakley v. Schlumberger Tech. Corp.*, 648 F.3d 921, 932 (8th Cir. 2011) (affirming dismissal of claim alleged in amended complaint in violation of order granting leave to amend). Plaintiffs then compounded that error by failing in this Court to challenge either (1) the condition imposed on leave to amend, or (2) the district court's refusal to consider the new claim on summary judgment. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (holding that courts refuse to consider arguments not "argued specifically and distinctly in a party's opening brief . . . particularly when, as here, a host of other issues are presented for review"). Instead, Plaintiffs merely reargued the merits of the claim. AOB at 44-48.

Like the district court, this Court properly disregarded Plaintiffs' section 15.06.060 claim, and *Reed*

does nothing to undermine that decision. It does not save Plaintiffs from their multiple procedural defaults.[2] It therefore does not justify reconsidering Plaintiffs' section 15.06.060 claim.

* * *

[2] And these were hardly the first such defaults by Plaintiffs in their billboard lawsuits. *See, e.g.*, *Herson v. City of Reno*, ___ F. App'x ___, 2015 WL 6951568, at *1 (9th Cir. Nov. 9, 2015) (finding likely waiver of claim in the district court); *Herson v. City of San Carlos*, 433 F. App'x 569, 570 (9th Cir. 2011) (holding that Plaintiffs had waived argument by failing to raise it in their opening brief on appeal).