

## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 CITIZENS FOR FREE SPEECH, LLC,  
12 ET AL.,

No. C14-02513 CRB

13 Plaintiffs,

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
SECOND MOTION FOR SUMMARY  
JUDGMENT; GRANTING IN PART  
AND DENYING IN PART  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**14 v.  
15 COUNTY OF ALAMEDA,  
16 Defendant.

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17 Before the Court are the parties' cross motions for summary judgment in this case  
18 concerning billboards in Alameda County. See generally County MSJ 2 (dkt. 82); Plaintiffs'  
19 MSJ (dkt. 86). Following the Court's first summary judgment ruling, see MSJ Order (dkt.  
20 71), there are three disputes left in the case: (1) whether and how Plaintiffs can recover on  
21 their facial challenge to the now-superseded Alameda County Zoning Ordinance section  
22 17.18.130; (2) whether section 17.52.515 violates Plaintiffs' Equal Protection rights under  
23 the Fourteenth Amendment and California Constitution by preventing display of Plaintiffs'  
24 signs but allowing grandfathered billboard companies to display signs; and (3) whether  
25 section 17.52.520(A) likewise violates Plaintiffs' Equal Protection rights by preventing  
26 Plaintiffs' signs but allowing public agencies to erect official public signs. As explained  
27 below, the Court grants the County's Motion (and denies Plaintiffs' Motion) as to sections  
28 17.18.130 and 17.52.515, but grants Plaintiffs' Motion (and denies the County's Motion) as

1 to section 17.52.520(A).

2 **I. BACKGROUND**

3 The Zoning Ordinance at issue partitions Alameda County's unincorporated territory  
 4 into twenty-five different types of districts, within which only certain buildings, structures, or  
 5 land uses are permitted. See ALAMEDA, CA., CODE § 17.02.050.<sup>1</sup> Plaintiff Michael Shaw  
 6 owns a parcel of land located at 8555 Dublin Canyon Road (the "Parcel") in Alameda  
 7 County. Shaw Decl. (Plaintiffs' RJD) (dkt. 65-1) ¶ 2. The Parcel is located in a Planned  
 8 Development ("PD") district. Id.

9 Plaintiff Citizens for Free Speech, LLC ("Citizens") and Shaw (collectively  
 10 "Plaintiffs") entered into an agreement providing for the construction and display of three  
 11 signs (the "Signs") on the Parcel. Herson Decl. (dkt. 64-2) ¶ 2. Shaw and Citizens have  
 12 agreed to share in the proceeds earned from displaying the Signs. Id. The Signs currently  
 13 consist entirely of non-commercial messages that "challenge the political ideology espoused  
 14 by County officials,"<sup>2</sup> but Plaintiffs assert that the signs will contain commercial messages in  
 15 the future. Id. ¶ 3; Compl. (dkt. 1) ¶ 12.

16 According to Shaw, a County official visited the Parcel on June 9, 2014 to inform him  
 17 that the Signs were prohibited within a Scenic Corridor Combining ("SC") district. Shaw  
 18 Decl. ¶ 4. On June 10, 2014, the County mailed Shaw a "Declaration of Public  
 19 Nuisance—Notice to Abate," claiming that the Signs violated Ordinances sections 17.18.010  
 20 and 17.18.120. Id. ¶¶ 5, 6, Ex. C. The Notice to Abate instructed Shaw to remove the Signs  
 21 or face an abatement proceeding and escalating schedule of fines. Id.

22 Plaintiffs sued and moved for a temporary restraining order to stop the abatement

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25 <sup>1</sup> All citations to code sections are to the Alameda County Municipal Code, Title 17 Zoning  
 26 Ordinances, hereinafter referred to as "the Zoning Ordinance" or "the Ordinance."

26 <sup>2</sup> These signs would make very little sense to most observers: "Huge Plans That Affect You!  
 27 'One Bay Area' aka 'Plan Bay Area'"; "Stack and Parkprojects & Gridlock, Relocation of People: Rural  
 28 to Urban, Cities and Counties Dissolve into 'Region'"; "Plans dictated by non-elected councils called  
 'ABAG' and 'ICLEI'"; "'ABAG' and 'ICLEI' use 'environment' to impose bogus agendas"; "Intensely  
 urbanizing transforming your way of life, stop 'One Bay Area'"; "Inquiring Minds Invited!  
 GlobalizationOfCalifornia.com." See Compl. (dkt. 1) ¶ 11.

1 proceedings and impending fines. Pls.' Mot for Temp. Restraining Order (dkt. 11).<sup>3</sup> In their  
 2 Complaint, Plaintiffs asserted four claims: (1) violation of their right to free speech under the  
 3 First Amendment; (2) violation of their right to Equal Protection under the Fourteenth  
 4 Amendment; (3) violation of their right to free speech under the California Constitution; and  
 5 (4) violation of their right to Equal Protection under the California Constitution. See Compl.  
 6 ¶¶ 34–48.

7 The Court granted Plaintiffs a preliminary injunction, characterizing Plaintiffs' First  
 8 Amendment arguments as "overbreadth" challenges, see Order Granting Motion for  
 9 Preliminary Injunction (dkt. 34) at 4–5, and finding that Plaintiffs were likely to succeed on  
 10 the merits of their arguments that the Ordinance was facially invalid because it (1) gave  
 11 County officials unfettered discretion to make certain determinations regarding signs  
 12 according to a subjective finding of a "material change" and (2) failed to ensure that those  
 13 decisions would be made in a timely manner, see generally Preliminary Injunction (dkt. 50).

14 Following discovery, the County moved for summary judgment on all of Plaintiffs'  
 15 claims. See generally MSJ Order. The Court granted summary judgment for the County on  
 16 Plaintiffs' free speech claims to the extent that they were based on as-applied challenges,  
 17 facial challenges to Ordinance sections 17.520(Q), 17.52.50(D), 17.54.130, and section  
 18 17.52.515's purported regulation of speech based on content. Id. at 2. The Court denied  
 19 summary judgment on (1) Plaintiffs' facial challenge to Zoning Ordinance section  
 20 17.18.130,<sup>4</sup> finding that "the 'totality of the factors' indicates that County officials have  
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 25 <sup>3</sup> The County notes that the lawsuit was actually filed preemptively on June 1, 2014, eight days  
 prior to the County official's visit to the Parcel. See County MSJ 2 at 3.

26 <sup>4</sup> That section gave County officials discretion to determine whether a property owner must seek  
 27 to implement a proposed use through a Conditional Use Permit ("CUP") or an application for rezoning,  
 28 based on whether the proposed use "materially change[s] the provisions of the approved land use and  
 development plan" for the property; it did not define what "materially change" meant or provide any  
 objective standards for making that determination. See id. at 11–12; see also Plaintiffs' RJN (dkt. 87)  
 Ex. C at 28 (excerpting original section 17.18.130).

1 unfettered discretion under that provision,”<sup>5</sup> and on (2) Plaintiffs’ Equal Protection claims,  
 2 finding that the County had failed to address those claims in its opening brief. *Id.* at 14, 30.  
 3 These are the only claims that remain.

4 On September 29, 2015, in response to the Court’s denial of summary judgment, the  
 5 County amended section 17.18.130. See County MSJ 2 at 4; Lopez Decl. ¶ 10; Plaintiffs’  
 6 RJN Exs. A, B. Under the amended section, officials no longer have to determine whether a  
 7 proposed land use constitutes a “material change” to the approved land use—rather, the  
 8 Conditional Use Permit (“CUP”) process is now the only path when a landowner wants to  
 9 use his or her land for a purpose other than that for which it is zoned. Lopez Decl. ¶ 10. The  
 10 amended language of section 17.18.130 authorizes an official to issue a CUP only where he  
 11 or she makes specific findings that:

- 12 a. The proposed change does not increase:
  - 13 1) The number of housing units beyond that permitted in the existing Land  
 use and development plan; or
  - 14 2) The number of, or size of, structures; or
  - 15 3) The number of, or size of, accessory structures; or
  - 16 4) Signage (number and/or/aggregate sign area); or
  - 17 5) The floor area ration of the structures permitted in the existing land use  
 and development plan.
- 18 b. The original land use and development plan was approved less than five years  
 ago;
- 19 c. The proposed change does not reduce public infrastructure provided in the land  
 use and development plan;
- 20 d. The proposed change does not reduce public uses such as community centers,  
 public parks or open spaces;
- 21 e. The proposed change does not have an adverse financial impact on the county,  
 including the provision of services;
- 22 f. The proposed change does not involve uses not previously approved for the

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 24 <sup>5</sup> The Court noted in that Order that Plaintiffs requested partial summary judgment on those  
 25 claims, but that “Plaintiffs might have created a genuine issue of material fact sufficient to defeat  
 26 summary judgment on some of their claims, but they have not shown an absence of a genuine issue of  
 27 material fact in their favor on those claims.” *Id.* at 2 n.4. The Court did not, as Plaintiffs now assert,  
 28 hold that the original section 17.18.130 is unconstitutional or grant summary judgment for Plaintiffs on  
 any claims. See Opp’n to County MSJ 2 (dkt. 95) at 1 (“This Court has concluded twice that the PD  
 District provisions of the zoning ordinance in force at the time Citizens’ signs were built and at the time  
 this action was filed are facially unconstitutional.”); Plaintiffs’ MSJ at 2 (“This Court previously held  
 that the County’s procedure for changed to a PD District . . . was unconstitutional”).

1 project.

2 The Planning Commission shall adopt a statement or resolution of findings for each  
 3 criteria required for issuance of a conditional use permit. A Planning Commission  
 decision pursuant to this Section is subject to appeal pursuant to Section 17.54.670.

4 ALAMEDA, CA., CODE § 17.18.130 (as amended Sept. 29, 2015).

5 The other two sections of the Ordinance that are at issue in this case, and which have  
 6 not changed over the course of the litigation, are sections 17.52.515 and 17.52.520(A).

7 Section 17.52.515 reads, in relevant part:

8 [N]o person shall install, move, alter, expand, modify, replace or otherwise  
 9 maintain or operate any billboard or advertising sign in the unincorporated area  
 10 of Alameda County, except: (1) Those billboards or advertising signs which  
 11 legally exist as of the time this section is first adopted; (2) Those billboards or  
 12 advertising signs for which a valid permit has been issued and has not expired;  
 13 (3) Pursuant to an agreement relocating presently existing, legal billboards or  
 14 advertising signs pursuant to Business and Professions Code Section 5421;  
 15 provided that every billboard or advertising sign relocation agreement shall  
 16 fully comply with the site development review process and criteria in Sections  
 17.54.220 and 17.54.226 . . . .

18 ALAMEDA, CA., CODE § 17.52.515. Section 17.52.520(A) allows “Official public signs or  
 19 notices or any temporary notice posted by a public officer in the performance of his duty.”

20 ALAMEDA, CA., CODE § 17.52.520(A).

21 The County now moves for summary judgment, arguing that the amendment to  
 22 section 17.18.130 renders Plaintiffs’ facial challenge moot, and that Plaintiffs’ Equal  
 23 Protection claims fail because Plaintiffs are not members of a protected class, the challenged  
 24 provisions do not constitute content regulation, and the Zoning Ordinance’s exceptions are  
 25 not content-based. See generally County MSJ 2.<sup>6</sup> Plaintiffs, in their cross-motion, argue that  
 26 they are entitled to a permanent injunction because the original section 17.18.130 is invalid  
 27 and they constructed their signs before the amended section 17.18.130 went into effect. See  
 28 Plaintiffs’ MSJ at 4–6. Plaintiffs also complain that the Ordinance makes exceptions for

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<sup>6</sup> Originally, the County filed a motion for judgment on the pleadings in January 2016. See County MJOP (dkt. 72). In reviewing the papers on that motion, the Court felt that the issues and arguments were more appropriately addressed on summary judgment, and ordered the parties to re-file their motion under FRCP 56. See Order (dkt. 80).

1 other advertisers and for governmental speakers in violation of Plaintiffs' Equal Protection  
2 rights. Id. at 8.

3 **II. LEGAL STANDARD**

4 Summary judgment is appropriate where "the pleadings, depositions, answers to  
5 interrogatories and admissions on file, together with the affidavits, if any, show that there is  
6 no genuine issue of material fact and that the moving party is entitled to judgment as a matter  
7 of law." Fed. R. Civ. P. 56(c). A principal purpose of the summary judgment procedure is to  
8 isolate and dispose of factually unsupported claims. See Celotex Corp. v. Catrett, 477 U.S.  
9 317, 323–24 (1986). The burden is on the moving party to demonstrate that there is no  
10 genuine dispute with respect to any material fact and that it is entitled to judgment as a matter  
11 of law. Id. at 323. A genuine issue of fact is one that a trier of fact could reasonably resolve  
12 in favor of the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
13 (1986). A dispute is "material" only if it could affect the outcome of the suit under the  
14 governing law. Id. at 248–49.

15 If the moving party does not satisfy its initial burden, the nonmoving party has no  
16 obligation to produce anything and summary judgment must be denied. Nissan Fire &  
17 Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102–03 (9th Cir. 2000). If, on the other hand,  
18 the moving party has satisfied its initial burden of production, then the nonmoving party may  
19 not rest upon mere allegations or denials, but instead must produce admissible evidence  
20 showing that there is a genuine issue of material fact for trial. Id. at 1103. The nonmoving  
21 party must "set out 'specific facts showing a genuine issue for trial.'" Celotex, 477 U.S. at  
22 324–25 (quoting Fed. R. Civ. P. 56(c)). If the nonmoving party fails to make this showing,  
23 the moving party is entitled to judgment as a matter of law. Id. at 323.

24 It is not a court's task "to scour the record in search of a genuine issue of triable fact."  
25 Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal citation omitted). Rather, a  
26 court is entitled to rely on the nonmoving party to "identify with reasonable particularity the  
27 evidence that precludes summary judgment." See id. However, when deciding a summary

1 judgment motion, a court must view the evidence in the light most favorable to the  
2 nonmoving party and draw all justifiable inferences in its favor. Anderson, 477 U.S. at 255;  
3 see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

4 **III. DISCUSSION**

5 The Court now turns to the parties' arguments in their cross-motions as to the two sets  
6 of claims remaining in the case: (A) Plaintiffs' facial challenge to section 17.18.130, and (B)  
7 Plaintiffs' Equal Protection challenges to sections 17.52.515 and 17.52.520(A). As to (A),  
8 the Court concludes that the overbreadth challenge to section 17.18.130 is moot, and that  
9 Plaintiffs are entitled to neither injunctive relief nor damages. As to (B), the Court concludes  
10 that the Equal Protection challenge to section 17.52.515 fails, because that section is content-  
11 neutral and has a rational basis, but that the Equal Protection challenge to section  
12 17.52.520(A) succeeds, because that section is content-based and cannot withstand strict  
13 scrutiny.

14 **A. Plaintiffs' Facial Challenge to Section 17.18.130**

15 Plaintiff's facial challenge to the original section 17.18.130 stemmed from that  
16 section's alleged unconstitutional grant of "unfettered discretion" to County officials.  
17 See Compl. ¶¶ 21-22 (discussing the "material change" language in original section  
18 17.18.130 and complaining that "The Code provides no standards to guide the County  
19 Planning Commission in determining whether any given proposed land use constitutes a  
20 'material change' to the Land and Development Plan.""). The County argues that because it  
21 recently amended that section, Plaintiffs' claims are moot. See County MSJ 2 at 6. Plaintiffs  
22 oppose that argument. See Opp'n to County MSJ 2 (dkt. 95) at 6 ("the controversy was not  
23 settled by the County's amendment to 17.18.130 because Citizens' signs are still up and the  
24 County still wants to abate them."). Plaintiffs also, in their own motion, argue that they are  
25 entitled to a permanent injunction because the original section 17.18.130 was  
26 unconstitutional and the amended section 17.18.130 does not apply retroactively where  
27 Plaintiffs' billboards existed prior to its enactment. See Plaintiffs' MSJ at 4-7. Analysis of  
28

1 the mootness question begins with whether the relief sought is injunctive or monetary. See  
2 Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 900–03 (9th Cir. 2007).

3 **1. Injunctive Relief**

4 Generally, a court should not consider a claim moot if a defendant voluntarily ceases  
5 the allegedly improper behavior in response to a suit but is free to return to it at any time.  
6 See Outdoor Media, 506 F.3d at 900–01; Native Village of Noatak v. Blatchford, 38 F.3d  
7 1505, 1510 (9th Cir. 1994). “A statutory change, however, is usually enough to render a case  
8 moot, even if the legislature possesses the power to reenact the statute after the lawsuit is  
9 dismissed.” Outdoor Media, 506 F.3d at 901 (internal quotation marks omitted).<sup>7</sup> Further,  
10 where there is no longer any risk that a plaintiff will be subject to the challenged ordinance,  
11 there exists no live issue upon which a court could issue prospective relief. Id. (citing  
12 Noatak, 38 F.3d at 1510).

13 A claim is not mooted following a statutory amendment where it is “virtually certain”  
14 that the repealed law will be re-enacted. Id. at 901. In City of Mesquite v. Aladdin’s Castle,  
15 455 U.S. 283, 289 (1982), and Northeast Fla. Contractors v. Jacksonville, 113 S. Ct. 2297  
16 (1993), for example, the Supreme Court refused to dispose of claims as moot following  
17 amendment or replacement of the offending statutes. However, to read those cases as a per  
18 se bar to a mootness defense would “not square with this circuit’s precedent. Noatak limited  
19 Mesquite to the ‘rare’ situation ‘where it is virtually certain that the repealed law would be  
20 reenacted.’” Outdoor Media, 506 F.3d at 901 (quoting Noatak, 38 F.3d at 1510) (emphasis  
21 in original). “The fact that the lawsuit may have prompted the [County’s] action does not  
22 alone show the [County’s] intent to later re-enact the challenged ordinance.” Id. at 901; cf.  
23 Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1194 (9th Cir. 2000) (defendant gave no  
24 indication of intention to reinstate policy invalidated while case was pending and the circuit  
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26 <sup>7</sup> The Court previously relied on Outdoor Media in determining that the County’s amendment  
27 of two other sections of the Ordinance, which removed the discretionary elements, mooted Plaintiffs’  
challenges to those sections. See MSJ Order at 10–11.

1 court “will not assume that it will. . . . we will not assume that it will act in bad faith.”).<sup>8</sup>

2 Plaintiffs have not demonstrated that there is any risk that the County will re-enact the  
3 original section 17.18.130. Moreover, the amended section 17.18.130 achieves the County’s  
4 stated goals: preserving open areas and natural and topographic features with minimum  
5 alteration of natural land forms, providing an environment that will encourage the use of  
6 common open areas, and creation of an attractive, efficient, and safe environment. See  
7 ALAMEDA, CA., CODE §17.18.010. Thus, the County has “no motive to re-enact a  
8 constitutionally suspect ordinance to accomplish the same objectives.” See Outdoor Media,  
9 506 F.3d at 901.

10 Plaintiffs insist that their injunctive relief claim is nonetheless still viable. They  
11 maintain that their challenge to the original section 17.18.130 is not moot

12 because Citizens has signs that were erected while the County’s code was  
13 unconstitutional, and because the code has since been amended . . . the County  
14 has no ordinance that could be applied to Citizens’ signs. Nonetheless, the  
15 County has stated that it will seek to abate Citizens’ signs if the injunction is  
16 lifted. Therefore, Citizens’ request for injunctive relief is not moot because the  
17 County will seek to abate Citizens’ signs in the absence of an injunction despite  
18 having no legally cognizable basis to do so.

19 Opp’n to County MSJ 2 at 4–5. Plaintiffs add that the County’s amendment of section  
20 17.18.130 does not “settle[] the controversy,” because “Citizens’ signs are still up and the  
21 County still wants to abate them.” Id. at 6 (quoting Chemical Producers & Distributors  
22 Ass’n v. Helliker, 463 F.3d 871, 875 (9th Cir. 2006) (“Helliker”). But this is not an accurate  
23 characterization of the law.

24 The Ninth Circuit in Helliker explained that “[t]he test for whether intervening  
25 legislation has settled a controversy involving only declaratory or injunctive relief is  
26 ‘whether the new [law] is sufficiently similar to the repealed [law] that it is permissible to say  
27 that the [government’s] challenged conduct continues.’” 463 F.3d at 875. There is no as-

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28 <sup>8</sup> The Outdoor Media court noted that “it would be an odd incentive structure that punishes a city  
29 for repealing an ordinance in response to a litigant’s suggestion that said ordinance was illegal.”  
Outdoor Media, 506 F.3d at 901 n.3.

1 applied challenge left in the case. See MSJ Order at 7. The only issue left as to section  
 2 17.18.130 is its facial invalidity. See id. at 7–9, 11–14. Plaintiffs' complaint alleged that  
 3 section 17.18.130 was facially invalid because it provided unfettered discretion to officials  
 4 determining whether any given proposed land use constituted a “material change.”  
 5 See Compl. ¶¶ 21–22. It no longer does that. The ordinance as amended resolves Plaintiffs'  
 6 concerns by requiring that an official make at least six specific findings regarding new  
 7 criteria when making an assessment, and removing the “material change” language entirely.  
 8 See RJN Ex. A. The required objective and quantifiable findings sufficiently cabin officials'  
 9 discretion by providing “adequate standards to guide the official’s discretion. See Outdoor  
 10 Sys., Inc. v. City of Mesa, 997 F.2d 604, 613 (9th Cir. 1993).<sup>9</sup> The “material change”  
 11 language that Plaintiffs complain of, see Compl. ¶¶ 21–22, no longer exists. The amendment  
 12 “cures the constitutional deficiencies that [Plaintiffs] alleged in connection with the original  
 13 sign ordinance.” See Outdoor Media, 506 F.3d at 901.

14 In their motion, Plaintiffs cite a single Central District of California decision for the  
 15 proposition that it is when the billboards were built that excepts Plaintiffs' signs from the  
 16 mootness doctrine. See Plaintiffs' MSJ at 4–6. In that unpublished decision, which resolved  
 17 a motion to dismiss, the question was whether the plaintiffs' claims for declaratory and  
 18 injunctive relief as to an old ordinance and the amended ordinance were moot. See  
 19 Plaintiffs' RJN Ex. F (dkt. 87-4) (MTD Order in Valley Outdoor, Inc. v. City of Riverside,  
 20 No. CV 00-00370 DT (Cwx)). The district court granted a permanent injunction as to the old  
 21 ordinance, which a California court had found unconstitutional, and entered a preliminary  
 22 injunction barring the city from compelling Plaintiffs to remove their signs. See id. at 13,  
 23 16–17. But that case is factually distinguishable. The plaintiffs' complaint in Valley  
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25 <sup>9</sup> Arguably, the new guidelines in this case are even more objective than those in Outdoor Media,  
 26 which required that the Director of Planning determine whether the proposed sign's content related to  
 27 its site; here the determination is based on measurable indices like time, number of housing units,  
 structures, and signage, and adverse financial impact. See Outdoor Media, 506 F.3d at 904; compare  
 RJN Ex. A.

1     Outdoor included claims about both the old and amended ordinance. See id. at 6; see  
 2     also Valley Outdoor, Inc. v. City of Riverside, 446 F.3d 948, 951 (9th Cir. 2006) (explaining  
 3     that the Third Amended Complaint included claims regarding Original and Amended  
 4     Ordinances). This case pertains only to the original section 17.18.130. See Compl.  
 5     ¶¶ 21–22. In addition, there was evidence in the Valley Outdoor case that the city had  
 6     engaged in illegal enforcement of the old (invalidated) ordinance. Plaintiffs' RJD Ex. F at  
 7     4–5. There is no such evidence here, which is fatal for Plaintiffs' argument, relying on  
 8     Valley Outdoor, that "a permanent injunction preventing the County from enforcing its old  
 9     ordinance [17.18.130] is proper." See Plaintiffs' MSJ at 5; see also id. at 6–7 ("since the  
 10    County has repealed the code section containing this provision, the old code's permit scheme  
 11    cannot be enforced against Citizens. Citizens is therefore entitled to a permanent injunction  
 12    barring enforcement of the old ordinance against its signs.").

13        In granting the preliminary injunction barring the city from compelling the plaintiffs  
 14    from removing their signs, the district court in Valley Outdoor commented on the impact  
 15    such removal would have on the plaintiffs. See Plaintiffs' RJD Ex. F at 17–18.<sup>10</sup> It also took  
 16    note of the city's bad faith with respect to the amended ordinance. Id. at 4–5.<sup>11</sup>  
 17    Subsequently, the district court found that the plaintiffs' actions—unlawfully constructing  
 18    the billboards without seeking or obtaining permits or safety inspections—merited the  
 19    dissolution of the injunction, and it ordered the plaintiffs to remove their signs. See Opp'n to  
 20    Plaintiffs' MSJ (dkt. 92) at 2; RJD Ex. A (dkt. 94-1) (Order of 11/7/2003 Dissolving in Part

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21        <sup>10</sup> The court explained: "Enforcement of the Amended Ordinance presents an actual and  
 22    substantial threat to Plaintiffs' activities and thus poses a hardship to Plaintiffs in the event this Court  
 23    declines to exercise subject matter jurisdiction over Plaintiffs' first cause of action as it relates to the  
 24    Amended Ordinance for several reasons. In enforcing the Amended Ordinance, City has issued five  
 25    Stop Work Notices, ordering Plaintiffs to cease activities in relation to the Freeway Signs. . . . In  
 26    addition, Plaintiffs allege that City is threatening to remove Plaintiffs' Freeway Signs and attempting  
 27    to prevent any change of advertising message on the Freeway signs." Id.

28        <sup>11</sup> The court explained that the plaintiffs had completed construction of signs before the city  
 29    adopted the amended ordinance, that the city had communicated to the plaintiffs before adopting the  
 30    amended ordinance that "applications would be accepted," that the city had in bad faith retroactively  
 31    applied the amended ordinance, and that the city had applied the amended ordinance before it had been  
 32    enacted. Id.

1 and Modifying in Part Preliminary Injunction) at 2.<sup>12</sup> But the Valley Outdoor case does not  
2 provide support for this Court to enter an injunction—if Plaintiffs even seek one—as to the  
3 amended ordinance. If the County indeed seeks to abate Plaintiffs’ signs and has, as  
4 Plaintiffs argue in their opposition brief, “no ordinance” that enables it to do so, see Opp’n to  
5 County MSJ 2 at 4–5, that issue is nowhere contained in this lawsuit. See Compl. ¶¶ 21–22  
6 (overbreadth challenge to “material change” language in original section 17.18.130); Reply  
7 re County MSJ 2 (dkt. 98) at 5 (“That the County may attempt to abate a structure erected in  
8 violation of a valid development plan does not render ‘unsettled’ the original controversy  
9 over the original version of § 17.18.130.”). Thus, although the parties also tangle about  
10 whether the amended ordinance has retroactive effect, see Opp’n to Plaintiffs’ MSJ at 5–8;  
11 Reply re Plaintiffs’ MSJ (dkt. 99) at 2–5, and the County argues that it was actually section  
12 17.18.120<sup>13</sup> and not section 17.18.130 with which Plaintiffs failed to comply, see Shaw Decl.  
13 Ex. C (Notice to Abate: “This is in violation of Alameda County Zoning Ordinance Section

<sup>12</sup> The parties here disagree about the appellate history of the Valley Outdoor case. See Plaintiffs' MSJ at 5 ("The Ninth Circuit affirmed this portion of Judge Tevrizian's ruling"); Opp'n to Plaintiffs' MSJ at 3 ("the Court of Appeals expressly noted that the city had not appealed the District Court's ruling that the amended ordinance could not be enforced against the plaintiff's signs, and that issue was also not before the Court of Appeals when it issued its decision"). To the extent that it matters, the Ninth Circuit held in 2003 that "the appellants' billboards are illegal for one simple reason: they fail to meet the content-neutral zoning, size, and height restrictions in both the Original Ordinance and the New Ordinance." Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111, 1115 (9th Cir. 2003). The Ninth Circuit explained in 2003 that the district court's July 2000 order resulted in a permanent injunction forbidding the city from enforcing the invalidated provisions of the Original Ordinance, and that in April 2002, the district court at summary judgment held that "sections of the amended ordinance are not enforceable against the billboards at issue," adding that "[t]he City does not appeal this ruling." Valley Outdoor, Inc., 446 F.3d at 951. The Ninth Circuit's opinion in 2006 dealt with only (1) whether the plaintiffs had standing, (2) whether the district court abused its discretion in ruling on a motion in limine, and (3) whether the city was entitled to judgment as a matter of law. Id.

26       <sup>13</sup> That section states: "Any use of land within the boundaries of a planned development district  
27 adopted in accordance with the provisions of this chapter shall conform to the approved land use and  
development plan." Section 17.18.120 has not been amended.

1 17.18.010 and 17.18.120); Opp'n to Plaintiffs' MSJ at 5, these arguments are premature.<sup>14</sup>

2 As there are no causes of action based on amended section 17.18.130, and the County  
 3 has made no effort to enforce the original section 17.18.130 against Plaintiffs, there is no  
 4 basis for granting a permanent injunction. The claim being moot, the Court GRANTS the  
 5 County's motion as to Plaintiffs' claim for injunctive relief based on section 17.18.130, and  
 6 DENIES Plaintiffs' motion, which seeks a permanent injunction as to the same section.

7 **2. Damages**

8 Plaintiffs next argue that they are entitled to nominal damages for their First Cause of  
 9 Action. See Plaintiffs' MSJ at 10 ("Since Citizens has its signs, and was not deprived of the  
 10 right to erect the signs—since the County's ordinance cannot be enforced against Citizens'  
 11 signs—it has not sustained economic damages *per se*. Nonetheless, Citizens alleged, and the  
 12 Court found in both its order on Citizens' motion for preliminary injunction and the County's  
 13 first summary judgment motion, that Citizens suffered—or would have suffered in the  
 14 absence of an injunction—a First Amendment injury."). As a matter of law, the repeal of an  
 15 ordinance under which a party claims to have been injured does not moot its claim for  
 16 damages. Outdoor Media, 506 F.3d at 902 (citing Buckhannon Bd. & Care Home v. W. Va.  
 17 Dep't of Health & Human Res., 532 U.S. 598, 608–09 (2001)). Where a plaintiff seeks  
 18 damages for a past violation of its rights, the violation is not mooted by a promise not to  
 19 repeat the alleged conduct in the future. Id.

20 However, the Court has previously recognized that Plaintiffs' facial challenge to the  
 21 Ordinance "are best characterized as 'overbreadth' challenges." MSJ Order at 7; United  
 22 States v. Linick, 195 F.3d 538, 542 (9th Cir. 1999) (considering overbroad regulations that  
 23 vested officials with unbridled discretion to deny expressive activity). Because Plaintiffs  
 24 claimed that the Ordinance was overbroad in certain respects, they were able to seek to

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25 <sup>14</sup> The County also argues at length that enforcing the amended ordinance against Plaintiffs  
 26 would not be a taking. See Opp'n to Plaintiffs' MSJ at 3–5. Plaintiffs respond that they do not assert  
 27 that it is. See Reply re Plaintiffs' MSJ at 2 ("The County's lengthy non sequitur about takings . . . also  
 does not change this fact.").

1 establish the unconstitutionality of sections not applied to them by “showing that [those  
 2 provisions] may inhibit the First Amendment rights of individuals who are not before the  
 3 court.” See 4805 Convoy, Inc. v. City of San Diego, 183F.3d 1108, 1112 (9th Cir. 1999).  
 4 However, damages claims are “unavailable for an overbreadth challenge. An overbreadth  
 5 claim is essentially a claim that a statute may be constitutional as applied to the plaintiff but  
 6 sweeps so broad as to unconstitutionally suppress the speech of others not before the court.”  
 7 Outdoor Media, 506 F.3d at 907 (internal citations omitted). And while this theory  
 8 presupposes that the ordinance is constitutional as applied to Plaintiffs, the Ninth Circuit has  
 9 explained that “[o]n an overbreadth challenge [Plaintiffs] would also be barred from  
 10 collecting § 1983 damages which are available only for violations of a party’s own  
 11 constitutional rights.” Id. (internal quotation marks omitted). Thus, it appears that Plaintiffs’  
 12 damages claim fails.<sup>15</sup>

13 For the foregoing reasons, the Court finds that Plaintiffs are entitled to neither  
 14 injunctive relief nor damages in connection with their First Cause of Action.

15 **B. Equal Protection Claims**

16 Plaintiffs’ Equal Protection claims challenge two parts of the Ordinance, alleging that  
 17 those sections demonstrate a constitutionally impermissible preference for two groups of  
 18 speakers—grandfathered billboard companies and government speakers—over Plaintiffs.  
 19 See Plaintiffs’ MSJ at 8; Opp’n to County MSJ 2 at 7–9. The Court agrees with Plaintiffs as  
 20 to only the latter group.

21 **1. Challenged Sections**

22 The first section Plaintiffs challenge is section 17.52.515, which provides that “no

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23  
 24 <sup>15</sup> Plaintiffs’ argument also hinges on its assertion that “this litigation has conclusively  
 25 established that, at a minimum, the PD District scheme, including the ‘material change’ provision in the  
 26 original ordinance, is unconstitutional.” See Plaintiffs’ MSJ at 9. But the Court has not so held. The  
 27 Court has specifically explained that Plaintiffs requested partial summary judgment on their free speech  
 claims, but that “Plaintiffs might have created a genuine issue of material fact sufficient to defeat  
 summary judgment on some of their claims, but they have not shown an absence of a genuine issue of  
 material fact in their favor on those claims.” MSJ Order at 2 n.4.

1 person shall install, move, alter, expand, modify, replace or otherwise maintain or operate  
 2 any billboard or advertising sign in the unincorporated [area] of Alameda County, except . . .  
 3 (2) Those billboards or advertising signs for which a valid permit has been issued and has not  
 4 expired . . .” Compl. ¶ 18. Plaintiffs argue that this section allows “Clear Channel and CBS  
 5 Outdoor to continue to secure new billboards in any district, pursuant to hefty payments and  
 6 revenue sharing agreements with the County.” Plaintiffs’ MSJ at 8 (citing section  
 7 17.52.515). Plaintiffs argue that this is a “restriction on who can build signs,” which  
 8 “burdens [Plaintiffs’] fundamental rights . . . even in the absence of any other content-based  
 9 restriction.” Id.

10 The second section Plaintiffs challenge is section 17.52.520, under which, Plaintiffs  
 11 allege, “some signs are exempt from the speech restrictions set forth in sections 17.04.010,  
 12 17.30.240, and 17.52.515<sup>16</sup> based on the content of the speech displayed thereon.” Compl.  
 13 ¶ 23. Such signs include: “Official public signs or notices or any temporary notice posted by  
 14 a public officer in the performance of his duty.” Id. Plaintiffs maintain that this exemption  
 15 for signs by public officers is a “restriction on who can build signs,” which “burdens  
 16 [Plaintiffs’] fundamental rights . . . even in the absence of any other content-based  
 17 restriction.” Plaintiffs’ MSJ at 8.

## 18 2. Legal Framework

19 The parties are far from clear in their briefing about what legal framework governs  
 20 Plaintiffs’ challenges to the above sections.<sup>17</sup> Plaintiffs suggest at times that they should  
 21 prevail on both (1) a First Amendment claim based on speaker distinctions in the Ordinance  
 22 and (2) an Equal Protection claim based on those same distinctions. See Plaintiffs’ MSJ at 7  
 23 (“The Exceptions for Government Speakers, Clear Channel, and CBS Outdoor Violate the  
 24 First Amendment and the Equal Protection Clause”) see also Opp’n to Plaintiffs’ MSJ at 10

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25 <sup>16</sup> Note that, as described below, the Court has not agreed with this interpretation of the interplay  
 26 between sections 17.52.515 and 17.52.520.

27 <sup>17</sup> The Court invited the parties to agree on a framework at the motion hearing, to no avail.

1 (addressing “First Amendment Challenge to Section 17.52.520(A)”). There is no First  
2 Amendment claim left in the case, however. See MSJ Order at 30–31 (denying County’s  
3 summary judgment motion only as to Plaintiffs’ facial challenge to section 17.18.130 and  
4 their Equal Protection claims). Accordingly, the Court concludes that Plaintiffs’ First  
5 Amendment arguments do not support a stand-alone First Amendment claim, but instead  
6 form a necessary part of their Equal Protection claims.

7 The Ninth Circuit explained in Honolulu Weekly, Inc. v. Harris that, in an Equal  
8 Protection case, “we begin our analysis by determining the proper level of scrutiny to apply  
9 for review. We apply strict scrutiny if the governmental enactment . . . burdens the exercise  
10 of a fundamental right. . . . If the ordinance does not concern . . . a fundamental right, we  
11 apply rational basis review and simply ask whether the ordinance ‘is rationally-related to a  
12 legitimate governmental interest.’” 298 F.3d 1037, 1047 (9th Cir. 2002) (quoting Ball v.  
13 Massanari, 254 F.3d 817, 823 (9th Cir. 2001)); see also Rubin v. City of Santa Monica, 308  
14 F.3d 1008, 1019 (9th Cir. 2002) (“rational basis review is appropriate unless the restriction  
15 unconstitutionally burdens a fundamental right, here, the right to free speech. Because we  
16 conclude that the restrictions do not unconstitutionally burden [the plaintiff’s] right of free  
17 speech, we find that neither do they violate his Equal Protection right.”). Plaintiffs argue  
18 here that “[Plaintiffs’] fundamental speech right is implicated by the County’s unequal  
19 treatment of different speakers who erect billboards. . . .” Plaintiffs’ MSJ at 8. The Court  
20 must therefore determine whether the challenged sections implicate Plaintiffs’ fundamental  
21 speech right; if so, then the ordinance is subject to strict scrutiny,<sup>18</sup> and if not, then it is  
22 subject to rational basis review.

23 Determining whether the challenged sections implicate Plaintiffs’ fundamental speech  
24 right requires the Court to look first at its previous rulings in this case and then to the  
25 evolving case law.

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26 <sup>18</sup> That is, unless the section pertains only to commercial speech. See Central Hudson Gas &

27 Electric Corp. v. Pub. Serv. Commission of N.Y. 447 U.S. 557, 564 (1980).

**a. Previous Rulings in This Case**

2 Plaintiffs previously advanced a different theory of the Ordinance’s  
3 unconstitutionality. Plaintiffs had argued that the Ordinance banned all billboards in section  
4 17.52.515, but exempted certain kinds of noncommercial signs listed in section 17.52.520;  
5 the Court did not read the Ordinance in that way. See Order Granting Mot. for Preliminary  
6 Injunction at 8, 12. The Court concluded that the County-wide billboard ban of section  
7 17.52.515 did “not prohibit noncommercial speech at all.” Id. at 10 (explaining that the  
8 Ordinance defined billboard as synonymous with advertising sign). Though the “Ordinance  
9 enumerates certain ‘permitted’ signs (not necessarily billboards) that are all of a  
10 noncommercial nature,” the Court held that those permitted signs were not exemptions to a  
11 more generalized ban. Id. at 10–11. Further, “[t]he Zoning Ordinance does not ban  
12 noncommercial speech, and because exceptions cannot exist without a corresponding general  
13 rule, the Court does not interpret the ‘permitted’ signs to be exceptions to any general ban on  
14 noncommercial speech.” Id. at 11.

15 Plaintiffs argued again in opposing the County’s first motion for summary judgment  
16 that section 17.52.520 consisted of content-based exemptions to section 17.52.515, and the  
17 Court again rejected that argument. See MSJ Order at 21 (“In arguing that these permitted  
18 signs are content-based ‘exemptions’ that preclude summary judgment, Plaintiffs essentially  
ask the Court to overturn its prior holding on this issue. The Court previously concluded that  
20 Section 17.52.515 does not regulate noncommercial speech at all.”); id. at 22 (reiterating that  
21 section 17.52.515 “is not ambiguous: it explicitly regulates only commercial speech.”).<sup>19</sup> The  
22 Court noted that “Plaintiffs have alternatively argued” that the Reed v. Town of Gilbert, 135

24       <sup>19</sup> This remains the Court’s interpretation of section 17.52.515, but the County has never  
25 explained to the Court’s satisfaction whether it contends that the Ordinance, somewhere, bars  
26 noncommercial signs other than those explicitly allowed by section 17.52.520. The County has argued  
27 that section 17.52.520 is “entirely permissive.” See Defendant County of Alameda’s Reply to Plaintiffs’  
Supplemental Opposition (dkt. 69) at 1. But if no section of the Ordinance bars noncommercial signs  
(and Plaintiffs’ signs are all currently noncommercial, see Compl. ¶ 11), then presumably the County’s  
answer to Plaintiffs’ challenges would be to apologize for the confusion and inform Plaintiffs that their  
signs are allowed. That has hardly been the County’s position.

1 S. Ct. 2218 (2015) case “makes the exemptions in Section 17.52.520 content-based.” Id. at  
 2 23. But the Court agreed with the County that Reed was distinguishable. Id. “Reed was  
 3 specifically concerned with a sign code’s application of different restrictions—including  
 4 temporal and geographic restrictions—to permitted signs based on their content.” Id. (citing  
 5 Reed, slip op. at 12). As “Plaintiffs [had] not identified any distinct temporal or geographic  
 6 restrictions on different categories of permitted signs in Section 17.52.520 based on those  
 7 signs’ content,” the Court held that Reed did not apply. Id.

8 Plaintiffs now argue again that Reed represents a change in the law—one relevant to  
 9 their Equal Protection claims—by establishing that “speaker-based discrimination offends  
 10 the constitution.” Plaintiffs’ MSJ at 7 (“[T]he fact that a distinction is speaker based does  
 11 not, as the [Ninth Circuit] Court of Appeals seemed to believe, automatically render the  
 12 distinction content neutral.””) (quoting Reed, 135 S. Ct. 2218, 2230). Plaintiffs’ argument is  
 13 more thorough this time,<sup>20</sup> and identifies differing restrictions in the Ordinance based on  
 14 different types of signs. As discussed below, the Court concludes that Reed should not be so  
 15 easily cast aside.

16 **b. Evolving Case Law**

17 In G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1076 (9th Cir. 2006), the  
 18 Ninth Circuit examined a sign code that provided that “public signs, signs for hospital or  
 19 emergency services, legal notices, railroad signs and danger signs” had to comply with the  
 20 sign code but were not subject to the city’s permit and fee process. The plaintiffs argued that  
 21 those exemptions rendered the sign code content-based. Id. The Ninth Circuit disagreed,  
 22 noting that the code reflected the city’s preference not to subject certain agencies to its

23  
 24  
 25 <sup>20</sup> The parties’ briefing on summary judgment had been complete for two weeks when Plaintiffs  
 26 submitted a Notice of Supplemental Authority alerting the Court to the Reed decision, issued the day  
 27 before. See generally Notice of Supplemental Authority (dkt. 68). The County responded with one  
 page of argument, factually distinguishing Reed. See generally Defendant County of Alameda’s Reply  
 to Plaintiffs’ Supplemental Opposition.

1 permitting and fee scheme. Id. at 1077.<sup>21</sup> It held: “The exemptions are purely speaker based  
2 according to the City’s reasonable construction of the provision and say nothing of the City’s  
3 preference for the content of these speakers’ messages, nor do they allow the City to  
4 discriminate against disfavored speech.” Id. The court went on: “Moreover, these  
5 institutional speakers are still subject to the mandates of the Sign Code concerning the type,  
6 number and characteristics of signs that are permissible . . . it is just that certain speakers  
7 need not obtain permits (and pay the associated fee) before posting their signs.” Id. It  
8 concluded: “That the law affects plaintiffs more than other speakers does not, in itself, make  
9 the law content based.” Id.

10 The County touts G.K. Ltd. Travel as dispositive, permitting “purely speaker based”  
11 exemptions like the challenged sections here. See County MSJ 2 at 16; Opp’n to Plaintiffs’  
12 MSJ at 13. For that to be correct, there are at least two hurdles the County must clear.

13       First, while the code at issue in G.K. Ltd. Travel, 436 F.3d at 1077, exempted certain  
14 government speakers from the permitting and fee provisions, those speakers were  
15 nonetheless subject to the sign ordinance generally. Here the Ordinance appears to make a  
16 wholesale exemption for government speakers. See ALAMEDA, CA., CODE § 17.52.520(A)  
17 (explicitly permitting “Official public signs or notices or any temporary notice posted by a  
18 public officer in the performance of his duty.”). At the motion hearing, the Court asked the  
19 County whether public signs are subject to any other restrictions in the Ordinance; counsel  
20 answered that they are not, although they are subject to the restrictions of the agencies’  
21 governing boards and constituents. The threat of irate constituents has no constitutional  
22 bearing, however. Under the Ordinance, it appears that while private speakers’ signs are  
23 subject to various restrictions, public officials’ signs could be a mile high and a mile wide, in

<sup>25</sup> The court included a footnote, observing that “We have previously questioned the  
26 constitutionality of a ‘wholesale exemption for government speech,’ but we do not read Lake Oswego’s  
27 Sign Code to provide such an exemption.” Id. n.11 (citing Foti v. City of Menlo Park, 146 F.3d 629,  
28 637 (9th Cir. 1998)). In Foti, 146 F.3d at 637, the Ninth Circuit stated that it was “troubled by the  
wholesale exemption for government speech,” but made no ruling on that issue, because the parties had  
failed to adequately brief it before the district court and it had not been passed upon below.

1 the middle of a residential neighborhood, and illuminated with bright flashing lights at all  
2 hours.<sup>22</sup> At the motion hearing, Plaintiffs asserted that under section 17.52.520(A), a school  
3 board could erect a sign espousing its own political message (e.g., “Vote Yes on Measure  
4 A!”) with no restrictions, while a private citizen could not erect a competing sign (e.g., “Vote  
5 No on Measure A!”). See also Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250,  
6 1265–66 (11th Cir. 2005).<sup>23</sup> County counsel responded that private citizens could indeed  
7 erect such signs under subsections (H) (temporary political signs) and (P) window signs. But  
8 this response fails to recognize that there are additional restrictions for the private citizen’s  
9 signs that do not apply to the school board’s signs. See, e.g., ALAMEDA, CA., CODE  
10 § 17.52.520(P) (window sign permitted “provided any such sign is neither attached to  
11 windows with its sign copy visible from the outside nor otherwise so located inside so as to  
12 be conspicuously visible and readable without intentional and deliberate effort from outside  
13 the building or structure, provided, however, that any sign or signs which in the aggregate  
14 have an area not exceeding twenty-five (25) percent of the window area from which they are  
15 viewed are also permitted . . .”). That was not an issue in G.K. Ltd. Travel, 436 F.3d at 1077.

<sup>22</sup> County counsel also stated at the motion hearing that there is no evidence that there has been a problematic proliferation of signs by public agencies. The Court accepts this representation, but it is beside the point.

<sup>23</sup> That case explained: “Even those exemptions that favor certain speech based on the speaker, rather than the content of the message—such as exemption (8) for ‘[o]fficial signs of a noncommercial nature erected by public utilities,’ and exemption (4) for signs ‘erected by, or on behalf of, pursuant to the authorization of a governmental body’—are content based. Under these exemptions, public utilities and government bodies may freely erect signs expressing their political preferences, their positions on public policy matters, and, indeed, their chosen messages on virtually any subject. Thus, while a public utility could post a sign proclaiming, for example, ‘Choose Electric Power,’ an individual homeowner or a private business could not display a sign reading, ‘Conserve Electricity: Use Solar Power.’ Similarly, while the city counsel could paper the entire City of Neptune Beach with signs advancing its agenda—for example, ‘Support School Vouchers,’ or ‘Enlist in the National Guard’—an individual resident could not freely post even a single yard sign advocating the opposing position—for example, ‘Oppose School Vouchers,’ or ‘Abolish the National Guard.’” *Id.*

25 The County points out that an Eastern District of Washington case distinguished Solantic, Reply  
26 to Plaintiffs' Mot. at 9, although that case did so with little discussion and might not reflect the current  
27 state of the law in light of Reed, see Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1196  
(E.D. Wash. 2012) (relying on G.K. Ltd. Travel in upholding speaker-based exemption for "signs of a  
public body," stating only, "The Solantic case adopts an overly narrow, restrictive view of the concept  
of 'content-neutral' which differs from the Ninth Circuit and other precedent cited here.").

1  
2       Second, it is not clear whether G.K. Ltd. Travel remains good law, in large part  
3 because of Reed. See United States v. Swisher, 811 F.3d 299, 313 (9th Cir. 2016) (“The  
4 Supreme Court has recently provided authoritative direction for differentiating between  
5 content-neutral and content-based enactments. See Reed, 135 S. Ct. at 2226–27.”). At issue  
6 in Reed was a sign code prohibiting the display of outdoor signs anywhere without a permit,  
7 but exempting 23 categories of signs, three of which were at issue. See Reed, 135 S. Ct. at  
8 2224–25. These were: “ideological signs,” which the code treated most favorably, allowing  
9 them to be up to 20 square feet and placed in all districts without time limits; “political  
10 signs,” treated less favorably, allowed to be up to 16 square feet on residential property and  
11 up to 32 square feet on nonresidential property, and allowed up for 60 days before a primary  
12 election and for 15 days following a general election; and “temporary directional signs,”  
13 treated even less favorably, allowed to be no larger than six square feet, with strict  
14 geographical limitations and allowed no more than 12 hours before a qualifying event and  
15 one hour afterward. Id. The sign code thus “identifie[d] various categories of signs based on  
16 the type of information they convey, then subject[ed] each category to different restrictions.”  
17 Id. at 2224. “The restrictions . . . that appl[ied] to any given sign . . . depend[ed] entirely on  
18 the communicative content of the sign.” Id. at 2227. This was “a paradigmatic example of  
19 content-based discrimination.” Id. at 1130. And content-based distinctions only stand if they  
20 survive strict scrutiny. Id. at 2231.

21       The sign code in Reed was “not speaker based,” as “[t]he restrictions for political,  
22 ideological, and temporary event signs appl[ied] equally no matter who sponsors them,” id.,  
23 and therefore Reed’s commentary on speaker-based distinctions is arguably dicta. But this  
24 Court will not ignore Reed’s guidance on that topic, which is as follows:

25       [T]he fact that a distinction is speaker based does not, as the Court of Appeals  
26 seemed to believe, automatically render the distinction content neutral.  
27 Because “[s]peech restrictions based on the identity of the speaker are all too  
often simply a means to control content,” Citizens United v. Federal Election

Comm'n, 558 U.S. 310, 340, 130 S. Ct. 876, 175 L.E.2d 753 (2010), we have insisted that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference,” Turner, 512 U.S., at 658, 114 S. Ct. 2445. . . . Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

<sup>24</sup> Reed, 136 S. Ct. at 2230–31 (emphasis added).

5 Plaintiffs' challenges here are based on distinctions between speakers. See Plaintiffs'  
6 MSJ at 8 ("[Plaintiffs'] fundamental speech right is implicated by the County's unequal  
7 treatment of different speakers"). The question then is whether the challenged speaker-based  
8 distinctions—(i) allowing "official public signs" but not noncommercial signs by private  
9 individuals, and (ii) allowing grandfathered billboard companies to display billboards, but  
10 not newcomers—reflect a content preference.

### i. Public Signs

12 It is readily apparent that the County's preference for official public signs reflects a  
13 preference for that content: the County nearly says as much in arguing that it is an important  
14 government function to disseminate information to the public. See County MSJ 2 at 16  
15 ("whether it is in the form of warnings about fines for littering, notices related to restriction  
16 on water shortages due to drought, prohibitions on open fires in certain locations or at  
17 specific times, the dates and times of public meetings, applications that have been made by  
18 owners for changes to their property, the identity and location of public facilities or the  
19 availability of public services."). While it is not necessarily unreasonable to believe that a  
20 sign alerting passersby to drought conditions has more value than Plaintiffs' current, almost-

<sup>22</sup> Following the close of briefing and the motion hearing in this case, the Ninth Circuit issued  
22 an order in Lone Star Security & Video, Inc. v. City of Los Angeles, No. 14-55014, 14-55050, slip op.  
23 at 13–14 (9th Cir. July 7, 2016), in which it distinguished Reed. The challenged ordinances in Lone Star  
24 Security prohibited non-motorized mobile billboard advertising displays and mobile billboards on  
25 parked motorized vehicles. Id. at 7. The court held that the ordinances are content neutral because they  
26 “regulate the manner—not the content—of affected speech,” discriminating against the prohibited  
27 billboards based on “their size and mobility alone.” Id. at 13. The court explained that “[u]nlike Reed,  
the mobile billboard ordinances do not single out a specific subject matter for differential treatment, nor  
is any kind of mobile billboard exempted from regulation based on its content.” Id. at 13–14. Lone Star  
Security thus (1) did not address the issue of speaker based exemptions and (2) did not involve an  
ordinance that subjected different types of subject matter to different restrictions. Accordingly, it does  
not affect this Court’s analysis under Reed.

1 indecipherable political messages, see Compl. ¶ 11, and eventual commercial messages, see  
 2 id. ¶ 12, that belief is still very much a content judgment, see Foti, 146 F.3d at 636  
 3 (“Although Menlo Park’s exemptions for open house signs and safety, traffic, and  
 4 informational signs seem innocuous, we base our content-based determination on whether the  
 5 ordinance singles out certain speech for differential treatment based on the idea expressed.  
 6 The reasonableness, harmlessness, or worthiness of the idea is irrelevant.”); see also City of  
 7 Ladue v. Gilleo, 512 U.S. 43, 46–47 (1994) (O’Connor, J., concurring) (“it is quite true that  
 8 regulations are occasionally struck down because of their content-based nature, even though  
 9 common sense may suggest that they are entirely reasonable.”). And of course, distinctions  
 10 favoring official signs might not always be innocuous. Accordingly, the Court agrees with  
 11 Plaintiffs that section 17.52.520(A) is content-based.

12 **ii. Grandfathered Billboard Companies**

13 Plaintiffs would be on much shakier ground arguing that the preference for  
 14 grandfathered billboard companies reflects any kind of content preference. There is no  
 15 difference in the kind of content one billboard company could display over another. Cf.  
 16 Lone Star Security, slip op. at 13–14 (finding content neutral ordinance that did “not single  
 17 out a specific subject matter for differential treatment”). Nor would officials have to review  
 18 the content of a sign in order to determine whether it was permissible; they could look only at  
 19 the identity of the company submitting it. See Outdoor Media Dimensions, Inc. v. Oregon,  
 20 150 Or. App. 106, 945 P.2d 614, 625 (1997) (finding content neutral law granting outdoor  
 21 advertising permits to those who owned billboards on or before certain date); Maldonado v.  
 22 Kempton, No. 02-3167 CRB, 2007 WL 108414, at \*3–4 (N.D. Cal. Jan. 10, 2007) (holding  
 23 that grandfathering provision was not content based as “State officials do not even have to  
 24 read a sign’s message to determine if the sign is subject to the State’s prohibition on off-  
 25 premises commercial advertising . . . the official merely reviews State records to determine if  
 26 the billboard had a permit for such displays prior to the law’s enactment or was otherwise  
 27 lawfully erected.” (citing Jones Intercable of San Diego, Inc. v. Chula Vista, 80 F.3d 320,

1 326 (9th Cir. 1996)); California Outdoor Equity Partners v. City of Corona, No. 15-3172  
 2 MMM, 2015 WL 4163346, at \*9 (C.D. Cal. Jul 9, 2015) (noting that laws are content  
 3 neutral “even where, as here, they ‘grandfather’ existing billboards and permit them to  
 4 remain.”) (citing Maldonado v. Morales, 556 F.3d 1037, 1048 (9th Cir. 2009)); G.K. Ltd.  
 5 Travel, 436 F.3d at 1079 (holding that “[a] grandfather provision requiring an officer to read  
 6 a sign’s message for no other purpose than to determine if the text or logo had changed,  
 7 making the sign now subject to the City’s regulations, is not content based.”).<sup>25</sup> Accordingly,  
 8 the Court agrees with the County that section 17.52.515 is not content-based.

9 **4. Review**

10 As the grandfathering clause is content-neutral and the public signs preference is  
 11 content-based, the Court applies rational basis review to the grandfathering clause and strict  
 12 scrutiny to the public signs preference. See Honolulu Weekly, 298 F.3d at 1047–48.

13 Rational basis review of the grandfathering section requires the County to demonstrate  
 14 that the section is rationally related to a legitimate government interest. See Outdoor Media  
 15 Group, Inc., 506 F.3d at 907. The County argues—and the Court has already found—that  
 16 the County has “an important and legitimate governmental interest in limiting large signs of  
 17 the type erected by plaintiffs.” Opp’n to Plaintiffs’ MSJ at 12 (citing MSJ Order at 24<sup>26</sup>).  
 18 The Court has also already found that section 17.52.515 “advances the County’s interests in  
 19 traffic safety and aesthetics,” by addressing its concern about the proliferation of billboards.  
 20 MSJ Order at 25. As the County argues here, “[a]llowing the owners of legally permitted  
 21 billboards the opportunity to possibly construct other billboards in the County through the

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22 <sup>25</sup> See also City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976) (grandfathering  
 23 provisions do not create basis for suspect classification). It does not appear that Plaintiffs are making  
 24 a suspect class argument, however. See Plaintiffs’ MSJ at 8 (“The analysis turns on the fact that  
 25 [Plaintiffs’] fundamental speech right is implicated by the County’s unequal treatment of different  
 26 speakers who erect billboards, not that [Plaintiffs are] a suspect class.”).

27 <sup>26</sup> The Court held: “the County has demonstrated that the billboard ban was enacted in order to  
 28 implement a substantial government interest. The purpose of the ban is to ‘advance the County’s  
 29 interests in community aesthetics by the control of visual clutter, pedestrian and driver safety, and the  
 30 protection of property values . . . .’” Id.

1 implementation of billboard relocation agreements authorized by section 17.54.226, provides  
2 a means by which the County can reduce the overall number of billboards and control their  
3 location, without the economic burden of compensating the owners for their removal.”  
4 Opp’n to Plaintiffs’ Mot. at 12; County MSJ 2 at 14 (citing Dalton Decl. (dkt. 56) at 2–4  
5 (discussing relocation program)). Accordingly, the Court concludes that the grandfathering  
6 section has a rational basis.

7 Strict scrutiny of the public signs preference requires the County to demonstrate that  
8 the distinction between public signs and non-public signs “furthers a compelling government  
9 interest and is narrowly tailored to that end.” See Reed, 135 S. Ct. at 2231. This is typically  
10 an uphill battle, see Reed, 135 S. Ct at 2234 (Breyer, J., concurring) (“In my view, the  
11 category ‘content discrimination’ is better considered in many contexts, including here, as a  
12 rule of thumb, rather than as an automatic ‘strict scrutiny’ trigger, leading to almost certain  
13 legal condemnation.”); Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2015) (it is the  
14 “rare case[] in which a speech regulation withstands strict scrutiny”), which might be why  
15 the County here has not even attempted to fight it, see Opp’n to Plaintiffs’ MSJ at 13  
16 (“Applying the rational basis test to section 17.52.520(A) . . .”). Setting aside the question of  
17 a compelling government interest, the public sign preference here fails because “[a]llowing  
18 the government to build any signs without any restrictions,” see Reply re Plaintiffs’ MSJ at  
19 12, while including a variety of different restrictions for different permitted signs, see  
20 ALAMEDA, CA., CODE § 17.52.520, is the antithesis of narrow tailoring. See Reed, 135 S. Ct.  
21 at 2231–32; see also id. at 2239 (Kagan, J., concurring) (“the law’s distinctions between  
22 directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even  
23 the laugh test. . . . The Town, for example, provides no reason at all for prohibiting more than  
24 four directional signs on a property while placing no limits on the number of other types of

1 signs.”).<sup>27</sup>

2 Accordingly, the Court holds that section 17.52.515 is content neutral and passes  
3 rational basis review, and that section 17.52.520(A) is content-based and does not withstand  
4 strict scrutiny.

5 **V. CONCLUSION**

6 For the foregoing reasons, the Court GRANTS the County’s Motion (and DENIES  
7 Plaintiffs’ Motion) as to the facial challenge to section 17.18.130; GRANTS the County’s  
8 Motion (and DENIES Plaintiffs’ Motion) as to the Equal Protection challenge to section  
9 17.52.515; and GRANTS Plaintiffs’ Motion (and DENIES the County’s Motion) as to  
10 section 17.52.520(A).

11 **IT IS SO ORDERED.**

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13 Dated: July 8, 2015

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CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE

<sup>27</sup> The Court takes notice that Contra Costa County, Marin County, Napa County, San Francisco County, Solano County, and Sonoma County all appear to have ordinances on their books that exempt government signs. See Request for Judicial Notice (dkt. 85); Exs. C–H; see also Reed, 135 S. Ct. at 2239 (Kagan, J., concurring) (“As the years go by, courts will discover that thousands of towns have such ordinances, many of them ‘entirely reasonable.’ . . . And as the challenges to them mount, courts will have to invalidate one after the other.”). While the Court is sympathetic with well-intentioned lawmakers trying to keep pace with evolving case law, those ordinances are not before the Court today and have no impact on this decision. Counties seeking to bring their sign codes into compliance with Reed, 135 S. Ct. at 2233, would do well to review Justice Alito’s concurrence, which purports to list “some [sign] rules that would not be content based.”