No. _____

In The
Supreme Court of the United States

CITY OF SANTA CRUZ; CHRISTOPHER KROHN, individually and in his official capacity as Mayor of the City of Santa Cruz; TIM FITZMAURICE and SCOTT KENNEDY, individually and in their official capacities as Members of the Santa Cruz City Council; and LORAN BAKER, individually and in his official capacity as Sergeant of the Santa Cruz Police Department,

Petitioners,

v.

ROBERT NORSE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD RUDA
108 Newlands Street
Chevy Chase, MD 20815
(301) 656-0982

GEORGE J. KOVACEVICH
Counsel of Record
ATCHISON, BARISONE, CONDOTTI & KOVACEVICH
333 Church Street
Santa Cruz, CA 95060
(831) 423-8383
gkovacevich@abc-law.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the First Amendment protects a contumacious hate gesture, the Nazi salute, unaccompanied by any utterance and conspicuously directed at a city council during a public session.

PARTIES TO THE PROCEEDING

In March 2002, when respondent Robert Norse filed his complaint, he named as defendants the City of Santa Cruz, Mayor Christopher Krohn, city council members Tim Fitzmaurice, Keith A. Sugar, Emily Reilly, Ed Porter, Scott Kennedy, and Mark Primack, and Sergeant Loran Baker of the Santa Cruz Police Department. As of the date of filing this petition, the remaining defendants are petitioners City of Santa Cruz, Mayor Krohn, council members Fitzmaurice and Kennedy, and Sergeant Baker.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Santa Cruz, Christopher Krohn, Tim Fitzmaurice, Scott Kennedy, and Loran Baker respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc is reported at 629 F.3d 966. Pet. App. 1a. The order of the en banc court denying the parties' petitions for rehearing is unreported. *Id.* at 27a. The 2009 opinion of the court of appeals panel is reported at 586 F.3d 697. *Id*. at 28a. The 2007 order of the district court dismissing plaintiff's complaint upon finding of qualified immunity of defendants is unreported. *Id.* at 44a. The 2004 opinion of the court of appeals panel is reported at 118 Fed. Appx. 177. *Id.* at 61a. The 2002 order of the district court granting defendants' motion to dismiss is unreported. *Id.* at 67a.

JURISDICTION

The en banc court of appeals filed its opinion on December 15, 2010. It denied the parties' petitions for rehearing on February 4, 2011. On April 29, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including

June 6, 2011. No. 10A1045. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

Cal. Gov. Code § 54954.3 provides:

> (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item,

> as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.
>
> (b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.
>
> (c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

Cal. Pen. Code § 403 provides:

> Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character, other than an assembly or meeting referred to in Section 302 of the Penal Code or Section 18340 of the Elections Code, is guilty of a misdemeanor.

STATEMENT

The facts material to respondent's claim that the First Amendment protects a Nazi salute at a city council meeting have never been disputed. Respondent first set them out in his complaint filed on March 26, 2002. Pet. App. 79a.[1] They were subsequently relied upon by the district court, the court of appeals panel, and the en banc court of appeals.[2]

As the case now comes to this Court, the undisputed material facts remain those set forth in respondent's complaint filed in 2002. Petitioners have never deviated from their position that they are

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[1] Respondent's complaint is reproduced at Pet. App. 79a-89a.

[2] Although respondent amended his complaint to add a second First Amendment claim related to his ejectment from a city council meeting in 2004, he later expressly abandoned that claim. Appellant's Petition for Rehearing and Rehearing En Banc, *Norse v. City of Santa Cruz*, No. 07-15814 (9th Cir.) (filed 11/17/09), at p. 1 ("Appellant also sued for having been ejected from a meeting in 2004. The panel ruled against him on that claim which he now abandons."). Respondent's abandonment of his 2004 claim was apparently overlooked by the en banc court of appeals. In its opinion of December 15, 2010, that court discussed the merits of the 2004 claim, Pet. App. 4a, 11a-12a, and reversed and remanded the case for trial on both the 2002 claim and the abandoned 2004 claim. *Id.* at 23a. *See also id.* at 21a ("the question of whether the two ejections [sic] constituted an act or acts of official government policy is a question of fact appropriately decided on a more fully-developed record"). Petitioners called the en banc court's attention to this oversight in the first paragraph on page one of their petition for rehearing filed on December 29, 2010. That petition was denied without comment on February 4, 2011. Pet. App. 27a.

entitled to judgment as a matter of law based on respondent's allegations in this complaint. They have requested that relief before the district court, the court of appeals, the en banc court of appeals, and now request it in this Court.

1. As related in respondent's complaint, on March 12, 2002, he "attended a public meeting of the Santa Cruz City Council." Pet. App. 82a. "During oral communications, a period when members of the public are allowed to address the Council, a woman stood at the podium and began to speak." *Id.* at 82a-83a.[3] The mayor, petitioner Christopher Krohn, "told her that public comment was over and that she would not be permitted to address the Council." *Id.* at 83a. When she "objected, Krohn told her to step away from the podium or she would be expelled from the Council chamber." *Id.* While "she walked away in compliance with this order, [respondent] raised his arm for one second [sic] in a gesture that mimicked a Nazi salute." *Id.* While making this gesture, respondent "did not utter any words or make any sound." *Id.*

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[3] California law provides that every agenda for public meetings "shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public . . . that is within the subject matter jurisdiction of the legislative body." Cal. Gov. Code § 54954.3(a). A city council may, however, "adopt reasonable regulations . . . including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." *Id.* § (b). This state law does not "confer any privilege or protection for expression beyond that otherwise provided by law." *Id.* § (c).

Petitioner Krohn "did not observe plaintiff's gesture and continued on with the meeting," *id.*, but a member of the City Council, petitioner Tim Fitzmaurice, "interrupted Krohn as he was speaking and said, 'A point of order, Mr. Mayor. Mr. Norse just made a Nazi salute.'" *Id.* The mayor "then instructed [respondent] to leave the meeting." *Id.* Respondent "objected to the order that he be removed." The mayor thereupon "declared a five minute recess." *Id*.

"During the recess," the Sergeant-at-Arms, petitioner Loran Baker, "approached [respondent] and told him that he would have to leave or be arrested." *Id.* Respondent "said that he had not disturbed the meeting and did not intend to leave. . . . [and] sat down." *Id.* The Sergeant-at-Arms "then told [respondent] that he was under arrest and ordered him to place his hands behind his back." *Id.* Respondent "stood up and complied with [his] commands." *Id.*

Respondent "was detained for approximately five and one half hours and was then released on his own recognizance." *Id.* Respondent was also "given a citation for violation of California Penal Code section 403, disrupting a public meeting." *Id.* at 83a-84a.[4]

2. On March 26, 2002, Norse filed a complaint for damages and injunctive relief alleging that on

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[4] Cal. Pen. Code § 403 provides: "Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character, other than [exceptions inapplicable here] is guilty of a misdemeanor."

March 12 petitioners had violated several provisions of the Constitution, including his right to freedom of speech. *Id.* at 85a-86a. Petitioners moved to dismiss, arguing that respondent's "Nazi salute was an offensive gesture during the non-public-comment portion of the hearing." Pet. App. 72a.

Treating the allegations of paragraph 9 of the Complaint as the "operative facts," *id.* at 68a, the district court granted petitioners' dispositive motion. It found, based on respondent's own allegations, that "the meeting was in fact disrupted as a direct result of [his] gesture" and that "a Nazi salute is a gesture that is offensive and could be viewed as a personal attack on the Mayor and/or members of the City Council." *Id.* at 73a. Moreover, "the facts alleged in the Complaint reveal that the proceedings were disrupted by [respondent's] offensive, out-of-order gesture." *Id.* at 74a. The district court accordingly ruled that "there was no constitutional violation in ordering [respondent] to be removed from the meeting."

Norse appealed and the court of appeals reversed, holding by a 2-1 vote that the complaint was inadequate to decide whether Norse's removal from the meeting was valid. The court of appeals remanded for a determination of "the reasonableness of the Mayor's conclusion that Norse should have been ejected." Pet. App. 64a.

Judge O'Scannlain dissented. Like the district court, he reasoned that even when the factual allegations of the complaint "are construed in the light most

favorable to Norse, . . . it cannot be doubted that his Nazi salute did occasion a significant disruption in the City Council's proceedings." Pet. App. 65a. Respondent's complaint alleged that the mayor had "discontinued the normal course of public business and instructed Norse to leave the meeting after being informed of his inappropriate gesture." *Id.* Norse also alleged that he "refused to comply with this instruction" and the Mayor thereupon "ordered a five-minute recess during which the Sergeant at Arms – acting at the Council's behest – arrested Norse." In Judge O'Scannlain's view, "[t]his unscheduled interlude in the Council's agenda is inconsistent with the well-recognized 'need for civility and expedition in carrying out of public business,'" just as another Ninth Circuit case had held that it was constitutional "for board members to remove an observer who made an obscene gesture" during a board meeting. *Id*. (citing *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995)).

On remand, the district court examined the evidence and ruled that Norse's ejectment for making a Nazi salute did not violate the First Amendment. *Id.* at 44a. The court of appeals affirmed this ruling by a vote of 2-1. *Id.* at 28a. It noted that when a council member informed the Mayor that Norse had made a Nazi salute, the Mayor "was suddenly faced with a meeting that had been interrupted by an offended council member." *Id.* at 32a (quoting district court's opinion). He "also knew that two Council members in the previous months had expressed to Norse their abhorrence of his Nazi gestures." *Id.* The court of

appeals also agreed with the district court that "the ejection was not on account of any permissible expression of a point of view." *Id.* at 34a. The court accordingly affirmed the district court's ruling that petitioners had acted reasonably and were entitled to qualified immunity.

The court of appeals granted Norse's petition for rehearing en banc and reversed the panel's judgment. *Id.* at 3a. It rejected petitioners' argument that they were "entitled to judgment as a matter of law, either on the pleadings or based on other undisputed facts." *Id.* at 15a. It entered judgment for respondent primarily because the district court, only four days before a jury trial was scheduled to begin, had "issued an order regarding trial proceedings in which it stated that rather than hold trial on the 26th, it would 'consider the question of whether any of the individual defendants . . . is entitled to qualified immunity.'" *Id.* at 5a. The court unanimously held that "the procedure the district court used in summarily disposing of Norse's claims was deficient and unfair to Norse" because of the district court's failure to allow Norse to present evidence concerning his 2002 and 2004 ejectment claims. *Id.* at 6a, 10a. The court remanded because, in its view, "the question of whether the two ejections [sic] constituted an act or acts of official government policy is a question of fact appropriately decided on a more fully-developed record." *Id.* at 21a.[5]

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[5] As noted above, the en banc court of appeals mistakenly believed that it was ruling on two ejectment claims, whereas

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On March 4, 2011, almost nine years after the district court had first granted petitioners' motion for judgment as a matter of law, the court of appeals denied petitioners' request for rehearing. *Id.* at 27a. The en banc court sent the case back to the district court for full evidentiary proceedings on both the 2002 First Amendment claim involving respondent's Nazi salute and his defunct 2004 claim.

REASONS FOR GRANTING THE PETITION

It has long been settled that "personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), *quoted in Snyder v. Phelps,* 131 S.Ct. 1207, 1223 (2011) (Alito, J., dissenting). As is clear from his complaint, respondent hijacked a city council meeting by making a contumacious hate gesture, the Nazi salute, at the council and remaining seated and refusing to leave the chamber after being directed to do so by the mayor. Petitioners have litigated this case for almost 10 years in the hope of securing judicial recognition that the broad protections of the First Amendment do not extend to hate gestures made during a city council meeting.

Norse expressly abandoned the second claim in his petition for rehearing filed six months before oral argument. *See* p. 4, n.2, *supra*.

1. This Court has repeatedly held that hate gestures and contumacious speech are unprotected in a courtroom

This Court has long been aware that coarse and contumacious language and behavior are toxicants that have spread to the Nation's courtrooms. *See, e.g., Illinois v. Allen*, 397 U.S. 337 (1970); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (per curiam). In *Eaton*, for example, petitioner referred to an alleged assailant as "chicken shit" during his trial in the municipal court. He was thereafter convicted of direct contempt for this "insolent behavior during open court and in the presence of [the judge]." *Id.* at 697-98. This Court reversed because his behavior was not directed at the court, did not "prevent the judge or any other officer of the court from carrying on his court duties," *id.* at 698 (quoting *Holt v. Virginia*, 381 U.S. 131, 136 (1965)), and because he "had received no prior warning or caution from the trial judge with respect to court etiquette." *Id.* at 700 (Powell, J., concurring). Justice Powell nonetheless made clear that he "place[d] a high premium on the importance of maintaining civility and good order in the courtroom." *Id.*[6]

In *Allen* the Court held that notwithstanding the Sixth Amendment a state trial court properly removed the defendant from the courtroom during his criminal trial because he "persisted in . . . unruly conduct."

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[6] Justice Rehnquist, joined by two other Justices, dissented. *See* 415 U.S. at 701.

397 U.S. at 346. In his opinion for the Court, Justice Black emphasized that "dignity, order, and decorum" are "essential" in court proceedings. *Id.* Consequently, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.* at 343. It would, he wrote, "degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed." *Id.* at 346.

The state courts have likewise recognized that "it is neither necessary nor desirable that the trial judge remain passive until matters degenerate to the point where proceedings cannot be held." *Mitchell v. State*, 580 A.2d 196, 200 (Md. 1990). *See also, e.g., Pennsylvania v. Williams*, 753 A.2d 856 (Pa. Super. Ct. 2000). In *Mitchell* the defendant directed "a contumelious single-finger gesture at the judge" immediately after sentencing, and the trial judge "summarily found [him] in direct contempt." 580 A.2d at 197. Maryland's highest court approved the use of contempt sanctions in such a context, reasoning that "[i]t takes but a moment of time to hurl a vile epithet at a judge or jury, but such conduct in a courtroom will not be tolerated, and may properly be addressed summarily." *Id.* at 199.[7] The Maryland court drew on this Court's

[7] The *Mitchell* court remanded the case because "as a matter of Maryland nonconstitutional criminal law" the defendant should have been "given an opportunity to explain or deny the conduct observed by the judge, or to speak to the matter of an

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teachings about "the need for immediate penal vindication of the dignity of the court," in the absence of which "demoralization of the court's authority will follow." *Id.* at 199-200 (quoting *Cooke v. United States*, 267 U.S. 517, 536 (1925)).[8]

2. This Court should provide guidance on the First Amendment's limitations on a city's authority to structure discussion and preserve order during city council meetings

Like criminal contempt cases involving contumacious speech, municipal ejectment cases involving the First Amendment are common.[9] Unlike contempt

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appropriate sanction, before adjudication was made and sentence pronounced." 580 A.2d at 201, 203.

[8] A legal scholar has concluded that while the "contumelious single-finger gesture" at issue in *Mitchell* should be protected in public forums such as streets and parks, it should not be protected in schools or in the courts. According to this authority, "courts perform an essential public function . . . the integrity of which can be threatened when an individual behaves in a disruptive and disrespectful manner." Ira P. Robbins, Digitus Impudicus: *The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403, 1477 & n.488 (2008) (citing *Pennsylvania v. Williams*, 753 A.2d at 863). *See id.* at 1476-83 & nn.484-525 (collecting contempt of court cases involving contumacious behavior).

[9] *See, e.g., Scroggins v. City of Topeka*, 2 F.Supp.2d 1362, 1372-73 (D. Kan. 1998) (collecting federal and state ejectment cases). *See also Steinburg v. Chesterfield Cty. Planning Commn.*, 527 F.3d 377 (4th Cir.) (ejectment upheld), *cert. denied*, 129 S.Ct. 632 (2008); *Eichenlaub v. Indiana Twp.*, 385 F.3d 274 (3d Cir. 2004) (ejectment upheld); *Rowe v. City of Cocoa, Florida*, 358 F.3d 800 (11th Cir. 2004) (per curiam) (upholding city council rule

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cases, however, the absence of guidance from this Court has resulted in analytical confusion in the lower courts.

The legal morass is epitomized by *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990). At first glance the case seems simple: it arose out of "a citizen's claim that his first amendment rights were violated when the president of a board of county commissioners ruled him out of order while he was addressing a called public meeting and then had him evicted." *Id.* at 995 (per curiam). But there the simplicity ends. After a scrum of motions and rulings in the district court, the case went up to the Fourth Circuit, where none of the three members of the panel, Judges Phillips, Wilkinson, and Butzner, could agree on a legal theory for deciding the case and each wrote a lengthy opinion. *See id.* at 997 (per curiam).[10]

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limiting speech of non-residents); *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995) (upholding ejection from municipal rent control board meeting for "an obscene gesture toward a Board member"). *See generally* Robbins, 41 U. C. Davis L. Rev. at 1405 ("These days, 'the bird' is flying everywhere."). *Cf. Smith v. Cleburne Cty. Hosp.*, 870 F.2d 1375, 1383 (8th Cir. 1989) ("when a person does initially engage in protected First Amendment speech on matters of a public concern, they may not use this protection, in the guise of public concern, to also level personal attacks on the various officials and employees of a public institution which causes disruption, disharmony, [and] dissention").

[10] *See also Eichenlaub*, 385 F.3d at 280 ("The Supreme Court has not precisely instructed where the limited public forum is located on the First Amendment spectrum between the strict

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The precedent of this Court most often cited by the lower courts in ejection cases is *City of Madison Jt. Sch. Dist. No. 8 v. Wisconsin Empl. Rel. Commn.*, 429 U.S. 167 (1976), a highly idiosyncratic First Amendment challenge to a restriction on access to a routine school board meeting by a teacher who wanted to speak against collective bargaining.[11] Chief Justice Burger's majority opinion is relied upon primarily for

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test for public forum regulation and the more relaxed test for nonpublic regulation."); *Rowe*, 358 F.3d at 803 ("As a limited public forum, a city council meeting is not open for endless public commentary speech but is simply a limited platform to discuss the topic at hand."); *Kindt*, 67 F.3d at 270 ("It seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic forum niche. But . . . the important thing is not whether we call the meetings highly regulated limited public fora or nonpublic fora."); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("It is doubtless partly for this reason that such meetings, once opened, have been regarded as public forums, albeit limited ones. On the other hand, a City Council meeting is still just that, a governmental process with a governmental purpose.") (citation omitted); *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989) (ejectment analysis is controlled by reasoning in Justice Stewart's single-justice concurring opinion in *City of Madison Jt. Sch. Dist. v. Wisconsin Empl. Rel. Commn.*, 429 U.S. 167, 180 (1976)).

[11] The other precedents in this area are *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984) and *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (Holmes, J.). These cases stand for the propositions that "[t]he Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Minnesota State Bd.*, 465 at 284 (quoting *Bi-Metallic*, 239 U.S. at 445), and that "[t]here must be a limit to individual argument in such matters if government is to go on." *Id.* at 285 (quoting *Bi-Metallic*, 239 U.S. at 445).

a footnote that reads in its entirety: "Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business. See n.6, *supra*." *Id.* at 175 n.8.

Justice Stewart's two-paragraph concurring opinion in *City of Madison* may be the closest this Court has come to providing concrete guidance to lower courts dealing with ejectment cases. In the first paragraph he notes his agreement with the Court's holding. *See* 429 U.S. at 180 (Stewart, J., concurring in the judgment). The second paragraph begins with a reference to Justice Holmes's *Bi-Metallic* opinion and adds:

> A public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public. Such a body surely is not prohibited from limiting discussion at public meetings to those subjects that it believes will be illuminated by the views of others. And in trying to best serve its informational needs while rationing its time, I should suppose a public body has broad authority to permit only selected individuals – for example, those who are recognized experts on a matter under consideration – to express their opinions.

429 U.S. at 180 (Stewart, J., concurring in the judgment). Justice Stewart concluded by emphasizing "that we are not called upon in this case to consider

what constitutional limitations there may be upon a governmental body's authority to structure discussion at public meetings." *Id.*

This case provides the Court with an opportunity to develop Justice Stewart's jurisprudence by holding that a citizen's hate gesture made during a city council meeting is not protected by the First Amendment. Petitioners respectfully request the Court to grant their petition for certiorari and reverse the ruling of the court of appeals denying them judgment as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD RUDA
108 Newlands Street
Chevy Chase, MD 20815
(301) 656-0982

GEORGE J. KOVACEVICH
Counsel of Record
ATCHISON, BARISONE,
CONDOTTI & KOVACEVICH
333 Church Street
Santa Cruz, CA 95060
(831) 423-8383

Counsel for Petitioners

June 6, 2011

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NORSE,

Plaintiff-Appellant,

v.

CITY OF SANTA CRUZ; CHRISTOPHER KROHN, individually and in his official capacity as Mayor of the City of Santa Cruz; TIM FITZMAURICE; KEITH A. SUGAR; EMILY REILLY; ED PORTER; SCOTT KENNEDY; MARK PRIMACK, individually and in their official capacities as Members of the Santa Cruz City Council; LORAN BAKER, individually and in his official capacity as Sergeant of the Santa Cruz Police Department; STEVEN CLARK,

Defendants-Appellees.

No. 07-15814

D.C. No.
CV-02-01479
RMW

OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, Senior District Judge, Presiding

Argued and Submitted
June 22, 2010—Pasadena, California

Filed December 15, 2010

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Pamela Ann Rymer, Sidney R. Thomas, M. Margaret McKeown, William A. Fletcher, Raymond C. Fisher, Ronald M. Gould, Richard C. Tallman, Richard R. Clifton and Carlos T. Bea, Circuit Judges.

Opinion by Judge Thomas;
Concurrence by Chief Judge Kozinski

COUNSEL

David J. Beauvais, Oakland, California; and Kate Wells, Law Office of Kate Wells, Santa Cruz, California, for plaintiff-appellant Robert Norse.

George J. Kavacevich, Atchison, Barisone & Condotti, Santa Cruz, California, for defendants-appellees City of Santa Cruz et al.

OPINION

THOMAS, Circuit Judge:

When Robert Norse gave the Santa Cruz City Council a silent Nazi salute, he was ejected and arrested. He sued city officials for violating his rights under the First Amendment. On the eve of trial, the district court sua sponte granted judgment against him, holding that the city officials were entitled to qualified immunity. Because the district court failed

to provide Norse adequate notice and opportunity to be heard, among other procedural errors, we reverse the judgment of the district court.

I

On March 12, 2002, Robert Norse was ejected from a Santa Cruz City Council ("City Council") meeting and arrested after an incident in which he gave the Council a silent Nazi salute. Two weeks later, he filed a complaint in the District Court of Northern California, challenging the constitutionality of the City Council's decorum policy on its face and as applied to his conduct at the 2002 meeting. He named as defendants the City of Santa Cruz; Christopher Krohn, the Mayor ("Mayor"); Tim Fitzmaurice and Scott Kennedy, members of the Santa Cruz City Council; Loran Baker, the sergeant-at-arms of the meeting (and also a member of the Santa Cruz police force); and several others (collectively "the City").

The district court granted the City's motion to dismiss. Norse appealed. A panel of this court affirmed dismissal of Norse's facial challenge, but reversed dismissal of the as applied challenge. *Norse v. City of Santa Cruz* ("*Norse I*"), 118 Fed. App'x. 177 (9th Cir. 2004). Construing the City's rules to proscribe only disruptive conduct, the panel held the rules were facially valid under controlling circuit case law. *See id.* at 178 (citing *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990)). The panel was not able to determine from the pleadings whether the Nazi salute was disruptive, however, and thus had "no way of assessing the

reasonableness of the Mayor's conclusion that Norse should have been ejected." *Id.* It reversed and remanded the as-applied challenge.

On January 13, 2004, while his appeal was pending before this Circuit, Norse again was ejected from another Santa Cruz City Council meeting and arrested, this time for whispering to another meeting attendee. On remand, Norse amended his complaint to challenge this ejection, as well. In June 2005, the district court entered a case management order giving the parties just less than six months to conduct limited discovery, and requiring that all dispositive motions be heard no later than December 16, 2005.

Neither party filed any dispositive motions.[1] The district court scheduled a jury trial for March 26, 2007. The parties filed trial briefs, motions in limine, evidentiary objections, proposed voir dire questions and jury instructions, and otherwise prepared for trial. In one motion in limine, Norse objected to the City's efforts to introduce evidence of his participation in City Council meetings other than the 2002 and 2004 meetings discussed in the complaint. At a pretrial hearing on March 15, Norse also objected to the admissibility of meeting minutes that purported to describe his conduct at these meetings.

On Thursday, March 22, 2007, the district

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[1] At oral argument before the district court, the City indicated its decision not to file a motion for summary judgment was a tactical choice. The district court noted at the commencement of the hearing that "it would have been helpful if there had been a summary judgment motion."

court issued an order regarding trial proceedings in which it stated that rather than hold trial on the 26th, it would "consider the question of whether any of the individual defendants . . . is entitled to qualified immunity." The order also indicated the court was likely to deny, in part, Norse's motion in limine to exclude evidence of his actions at other City Council meetings, but stated that it would consider the specific evidence that the City wished to have admitted and would make evidentiary rulings on the 26th as well.

That Monday, Norse and the City appeared for a hearing. Norse objected to what he saw as an unorthodox procedure, arguing that he had been preparing for trial and did not have time to produce what in effect needed to be an opposition to summary judgment. He argued that videotapes of the 2002 and 2004 meetings were not accurate portrayals of the meetings inasmuch as they were only excerpts. He continued to object to the admissibility of evidence regarding other City Council meetings. He argued that he had witnesses to call who could give context to the videos. He opposed qualified immunity on the merits. The district court did not permit Norse to submit further evidence or present testimony.

On March 28, the district court entered a summary judgment order. *See LaLonde v. Cnty. of Riverside*, 204 F.3d 947,953 (9th Cir. 2000) ("The court's pretrial order granting qualified immunity amounted to a sua sponte summary judgment."). It determined that the individual defendants were entitled to qualified immunity and that there was no independent basis to hold Santa Cruz liable.

Although the district court appeared to consider evidence of Norse's conduct at two 2001 City Council meetings, it did not rule on Norse's motion in limine, nor did it resolve all pending evidentiary questions.

Norse appealed. The original panel retained jurisdiction over the case, and it affirmed. *Norse v. City of Santa Cruz* ("*Norse II*"), 586 F.3d 697, 700 (9th Cir. 2009). This time, Judge Tashima, dissenting in part, argued that "the record supports the inference that the Mayor and members of the City Council excluded Norse from the 2002 meeting because they disagreed with the views he expressed by giving his silent Nazi salute." *Id.* at 701 (Tashima, J., dissenting).

A majority of nonrecused active judges voted to rehear this case en banc pursuant to Circuit Rule 35-3. After reviewing the case, we conclude that the procedure the district court used in summarily disposing of Norse's claims was deficient and unfair to Norse.

II

District courts unquestionably possess the power to enter summary judgment sua sponte, even on the eve of trial.[2] However, the procedural rules

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[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). While the Federal Rules of Civil Procedure have not expressly granted district courts this power, it nonetheless derives from Federal Rule of Civil Procedure 56. *Ind. Port Comm'n v. Bethlehem Steel Corp.*, 702 F.2d 107, 111 (7th Cir. 1983). Effective December 1, 2010, Rule 56 will make the power explicit. *See* Fed. R. Civ. P. 56(f) (explaining that the district court may

governing Rule 56 apply regardless of whether the district court is acting in response to a party's motion, or sua sponte. *See Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989); *Ind. Port Comm'n*, 702 F.2d at 111. Here, the district court erred in granting summary judgment sua sponte without providing Norse adequate notice and opportunity to be heard and without ruling on Norse's evidentiary objections.

A

[1] "*Sua sponte* grants of summary judgment are only appropriate if the losing party has reasonable notice that the sufficiency of his or her claim will be in issue." *United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008) (internal quotation marks omitted). "Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Portsmouth Square, Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985).

[2] A district court that "does not comply with the advance notice and response provisions of Rule 56(c) has no power to enter summary judgment." *Ind. Port Comm'n*, 702 F.2d at 111. At the time the district court acted, Rule 56 required that summary judgment motions "be served at least 10 days before the day set for the hearing," even when the court was

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grant summary judgment "for a nonmovant," "on grounds not raised by a party," or "on its own").

acting sua sponte. Fed. R. Civ. P. 56(c) (1987);[3] *see Routman*, 873 F.2d at 971.[4]

[3] In this case, the district-court-imposed deadline for filing dispositive motions had passed some fifteen months before trial. On the Thursday before the Monday trial, the district court notified the parties of its intent to hear summary judgment arguments on the day set for trial. Under the rules operative at the time, Norse was only afforded two-days' notice before the hearing. *See* Fed. R. Civ. P. 6(a)(2) (1985 amendments) (weekend days excluded from calculation). Two-days' notice did not comply with the requirements of Rule 56, and it did not afford Norse adequate time to prepare for the

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[3] The local rules for the Northern District of California in effect at that time were more stringent, requiring summary judgment motions to be served at least 35 days before the hearing date (although allowing district courts discretion to hear motions filed in accordance with the timeline in the Federal rules). See Local Rule 7-2(a) (March 2007), 56-1.

[4] *See also Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 223 (3d Cir. 2004) (holding that the 10 day notice requirement in then-Rule 56 governs sua sponte grants of summary judgment); *Stella v. Town of Tewksbury, Mass.*, 4 F.3d 53, 55 (1st Cir. 1993) (same); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 n.7 (5th Cir. 1993) (same); *Capuano v. United States*, 955 F.2d 1427, 1432 n.16 (11th Cir. 1992) (same); *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 945 F.2d 53, 55 (2d Cir. 1991) (same); *U.S. Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n,* 873 F.2d 731, 735 (4th Cir. 1989); *cf. Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993) (holding more generally that the conditions of Rule 56 must be satisfied).

hearing, notwithstanding the proximity of the trial date. *See Stella*, 4 F.3d at 55 ("[T]rial preparation is neither the same as, nor an acceptable substitute for, the special sort of preparation, e.g., securing affidavits, needed to oppose a motion for summary judgment.").

[4] Because adequate notice was not given within the period specified by the rules, the district court was without power to enter summary judgment sua sponte.[5]

B

[5] Additionally, Norse did not have a "full and fair opportunity to ventilate the issues prior to the district court's summary judgment on the [his] claims." *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 990 (9th Cir. 2008) (internal quotation marks omitted).

Norse told the district court that he wanted to call attendees of the Council meetings as witnesses

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[5] We are mindful that the 10-day requirement specified in Rule 56 will be removed in December 2010. The revised rule does not establish a specific time requirement unless "set by local rule . . . or court order[ ]," but it requires a district court contemplating sua sponte judgment to provide "notice and a reasonable time to respond." We need not decide what effect the court's order or the Northern District local rules would have in the absence of a specific national rule. Nor do we need to decide whether the notice would have been "reasonable" under the revised rule. In all cases, however, district courts should exercise special care in providing notice when contemplating granting summary judgment sua sponte on the eve of trial after the dispositive motion deadline has passed.

to testify about whether Norse actually disrupted them. In particular, Norse wanted to present testimony about whether the 2004 whisper was audible. And he wanted to present evidence that other people acting similarly to him were not ejected from the 2004 meeting. He explained that he had not been able to prepare deposition testimony or otherwise create a record in time for the hearing but was prepared to call witnesses at trial concerning these issues.

[6] The district court rejected Norse's requests and did not permit him the time to compile evidence for the court. Norse received neither the 10-days notice nor a full and fair opportunity to ventilate the issues, so we must reverse the district court's grant of summary judgment. *See United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989).

C

[7] Before ordering summary judgment in a case, a district court must not only provide the parties with notice and an opportunity to respond to adverse arguments, it must also rule on evidentiary objections that are material to its ruling. *See Sanchez v. Aerovias De Mexico, S.A. De C.V.*, 590 F.3d 1027, 1029 (9th Cir. 2010) (acknowledging this rule, but noting it is subject to harmless error analysis). In this case, the district court failed to rule on Norse's evidentiary objections material to its ruling.

Rule 56 requires the parties to set out facts they will be able to prove at trial. While the evidence

presented at the summary judgment stage does not yet need to be in a form that would be admissible at trial, the proponent must set out facts that it will be able to prove through admissible evidence. *See* Fed. R. Civ. P. 56(e) ("A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated."); *Celotex Corp.*, 477 U.S. at 324. This requirement is no less applicable where the district court's summary judgment is granted sua sponte.

Norse had stated three relevant evidentiary objections. First, he filed a motion in limine, seeking to exclude all evidence related to all incidents involving him at city council meetings—other than the 2002 and 2004 meetings—as irrelevant, prejudicial, and improper character evidence. Second, he objected to the City's attempt to introduce evidence of some of these incidents via written minutes as double hearsay. And third, he objected that the videos did not accurately portray the meetings because they were only excerpts. The district court failed to issue a final ruling on any of these objections.[6] In fact, the court considered video evidence not only of the 2002 and 2004 meetings but also of what happened at other meetings.

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[6] The district court stated that the parties agreed that the videotapes "depict what occurred at the meetings." But Norse's objection was that they were incomplete, and therefore did not *accurately* depict what occurred at the meetings. Whether or not this objection had merit as an evidentiary matter, the district court was required to rule on it.

[8] The district court's failure to rule on Norse's evidentiary objections contributed to a greater problem that we face in this case, which is that we do not know what evidence to consider on appeal. The parties did not file any affidavits, depositions, answers to interrogatories, or any other material after the district court scheduled the qualified immunity hearing. We know from the minutes of the pretrial hearing and the qualified immunity hearing that the City gave the district court two DVDs that contained different video recordings of the 2002 and 2004 meetings, as well as excerpts from untold other meetings, and copies of the City Council Rules of Decorum in effect during the 2002 and 2004 meetings. But it is also clear that the district court did not decide which portions of the DVDs were admissible, leaving that question for later resolution. The parties were (and continue to be) confused on precisely what constitutes the actual record and dispute what evidence we should actually consider. Because the record on appeal is inadequate, we are unable to engage in meaningful appellate review. *See Dikeman v. Nat'l Educators, Inc.*, 81 F.3d 949, 954 (10th Cir. 1996) (concluding that court of appeals is unable to review an issue if the record is not adequate); *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995) (remanding issue of qualified immunity when appellate record was inadequate to assess the defense).

D

Most procedural Rule 56 errors are subject to harmless error analysis. *See, e.g., Kistner v.*

Califano, 579 F.2d 1004,1006 (6th Cir. 1978) (per curiam) (discussing timing of notice and noting that the error is waivable). The error here is not harmless, though, because we do not know what evidence Norse would have presented if he had been afforded adequate notice and opportunity to present his case. As we do not know what admissible evidence forms the record, we cannot conduct an independent review of the record to see whether genuine issues of material fact exist.

[9] The district court apparently relied on the videos of the council that were submitted to it as a basis for its decision.[7] However, there are genuine issues of material fact apparent from the recordings, which would entitle Norse to a trial on the merits.[8] A mayor's entitlement to qualified immunity for ejecting a person from a city council meeting "depends on whether a reasonable person in his position, acting on his information *and motivated by his purpose*, would have known that ejecting [the attendee] violated his clearly established rights." *Hansen v. Bennett*, 948 F.2d 397, 400 (7th Cir. 1991) (emphasis added); *see also Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) ("In cases

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[7] In its order directing the parties to appear to argue qualified immunity, the court stated that: "In this case, there are video tapes of the incidents in question and both parties have agreed that they are admissible and presumably agree they accurately depict what occurred. Therefore, the facts appear undisputed."

[8] As indicated earlier, we are uncertain as to what portions of the DVDs the court considered in making its ruling. For the purposes of this discussion, we assume that some portions of the DVDs submitted to us contained the same footage of the two council meetings as viewed by the district court.

in which a constitutional violation depends on evidence of a specific intent, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law." (internal quotation marks omitted)). The DVDs show triable issues of fact as to whether Norse was impermissibly ejected because of his viewpoint rather than his alleged disruptiveness.

As the Seventh Circuit wrote in a very similar case,

> [T]he defendants argue that their appeal cannot present a factual question because the record includes a tape recording and transcript of the city council meeting. As a result, the parties do not disagree about what [the attendee] said or did, what [the Mayor] said or did, or what generally transpired at the meeting. Be that as it may, the record does not enable us to determine the factual issue of [the Mayor]'s intent; we would need a transcript of his thoughts for that. In so holding, we are mindful that "[s]ummary judgment is not defeated merely because issues of motive or intent are involved." *Jackson v. Elrod*, 881 F.2d [441,] 443 [(7th Cir. 1989)]. We do not hold that [the Mayor]'s intent is metaphysically unknowable, but that there is a genuine factual dispute on the question.

Hansen, 948 F.2d at 400 (fifth alteration in *Hansen*).

[10] Of course, different viewers of the tape may draw different conclusions, and that is precisely why summary judgment was inappropriate here—at the summary judgment stage, the non-moving party is entitled to have permissible inferences drawn in his or her favor. Here, applying our traditional summary judgment analysis, we conclude there are genuine issues of material fact present on the video that preclude summary judgment.[9]

III

The City argues, in the alternative, that it is entitled to judgment as a matter of law, either on the pleadings or based on other undisputed facts. We may, of course, affirm the district court on any basis supported by the record. However, we must reject the City's arguments, except as to one defendant.

A

The City contends that only certain portions of

[9] We do recognize that the proximity of trial may have led the district court to believe that summary judgment rules did not apply, and we are aware that the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991). This opinion is not intended to limit the times at which a district court might address the question of qualified immunity, sua sponte or otherwise. But, whether the district court is ruling before trial or after trial, it must carefully consider its role in construing evidence and the applicable law, abide by the normal procedural requirements associated with that stage of litigation, and ensure that the parties have had a full and fair opportunity to be heard.

its meetings are limited public forums and that no members of the public have any First Amendment rights at all once the public comment period has concluded. The City cites no support for this proposition, and there is none.

[11] In *City of Norwalk*, we held that city council meetings, once open to public participation, are limited public forums. 900 F.2d at 1425. A council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as content-based regulations are viewpoint neutral and enforced that way. *Id.; see also Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 270-71 (9th Cir. 1995) ("[L]imitations on speech at [city council] meetings must be reasonable and viewpoint neutral . . . ."); accord *Steinburg v. Chesterfield Cnty. Planning Comm'n,* 527 F.3d 377, 385 (4th Cir. 2008); *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 281 (3d Cir. 2004).

[12] What a city council may not do is, in effect, close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed. As we explained in *Norwalk*, the entire city council meeting held in public is a limited public forum. But the fact that a city may impose reasonable time limitations on speech does not mean it can transform the nature of the forum by doing so, much less extinguish all First Amendment rights. A limited public forum is a limited public forum. Perhaps nothing more, but certainly nothing less. The City's theory would turn the entire concept on its head.

[13] Thus, even though we can tell from the face of the amended complaint that Norse's provocative gesture was made after the public comment period closed, Norse still had a First Amendment right to be free from viewpoint discrimination at that time.[10]

The City's argument proves the danger of its theory. The City contended at oral argument before us that, because the public had no First Amendment rights after the public comment period had closed,

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[10] We note that we have been unable to find a single First Amendment case where a person has the right to be in a place but has no First Amendment rights once there. Rather, the First Amendment test itself accounts for the nature of the forum and, at its most restrictive, only permits viewpoint neutral restrictions that are "reasonable in light of the purpose served by the forum." *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (internal quotation marks omitted); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); see also *Morse v. Frederick*, 551 U.S. 393, 406 n.2 (2007) ("[S]tudent First Amendment rights are applied in light of the special characteristics of the school environment." (internal quotation marks omitted)); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.").

the Council could legitimately eject members of the public who made a "thumbs down" gesture, but allow members of the public who made a "thumbs up" gesture to remain.[11]

We decline the City's invitation to rewrite First Amendment law to extinguish the rights that citizens have when they attend public meetings.

B

We also decline the City's invitation to rewrite the rule announced in Norwalk. 900 F.2d at 1424-26. There, we held that a city's "Rules of Decorum" are not facially over-broad where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting. *Id.*

In this case, the City argues that cities may define "disturbance" in any way they choose. Specifically, the City argues that it has defined any violation of its decorum rules to be a "disturbance." Therefore, it reasons, *Norwalk* permits the City to eject anyone for violation of the City's rules—rules that were only held to be facially valid to the extent that they require a person actually to disturb a meeting before being ejected. We must respectfully reject the City's attempt to engage us in doublespeak. Actual disruption means actual disruption. It does not mean constructive disruption,

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[11] When queried at oral argument whether that action would constitute classic viewpoint discrimination, the City responded that it was "just human nature."

technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk*.

C

[14] The city officials are not entitled to absolute immunity. Local legislators are absolutely immune from liability under § 1983 for their legislative acts. See *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). But "not all governmental acts by . . . a local legislature[ ] are necessarily legislative in nature." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. Thus, we must determine whether the actions of the Council members, when "stripped of all considerations of intent and motive," were legislative rather than administrative or executive. *Id.* at 55.

[15] In this Circuit, we have developed a four-part test to determine whether an action is legislative in nature. We consider "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Kaahumanu v. Cnty. Of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (internal quotation marks omitted). "Whether an act is ad hoc can depend on whether it is aimed at a few people or many, and

whether an act bears all the hallmarks of traditional legislation can depend on whether it is ad hoc." *Id.* at 1220 n.4.

[16] In this case, we are dealing with city officials who ejected one individual from City Council meetings. Separately, and with regard to his argument for municipal liability, Norse argues that the officials were formulating policy. We need not determine whether the ejections "effectuate[d] policy," however, *see id.* at 1220, because the second, third, and fourth factors clearly point to this being an administrative rather than legislative act. Thus, Krohn, Kennedy, and Fitzmaurice are not entitled to absolute immunity for their part in removing Norse from the meetings. Although the record is incomplete, it appears that in both 2002 and 2004 Norse was singled out for expulsion and arrest. Mayors Krohn and Kennedy did not take any formal legislative action, but rather ordered Norse out of the room. And both expulsions lacked the hallmarks of the legislative process. With respect to the 2002 arrest, Krohn ordered Norse to leave on Fitzmaurice's motion without any debate. The motion was predicated on the "dignity" of the council rather than the council's performance of its obligations to the citizens of Santa Cruz. *See id.* at 1223. And with respect to the 2004 arrest, the record does not reveal a motion based even on dignity, let alone a legislative decisionmaking process. Thus the decisions to expel Norse were administrative, not legislative, so the defendants are not entitled to absolute immunity. *See Vacca v. Barletta*, 933 F.2d 31 (1st Cir. 1991) (holding that the Chair of a school committee was not absolutely immune from suit over

his actions in removing another committee member from a meeting).

D

[17] The district court dismissed the case against Santa Cruz based on its determination that Norse's constitutional rights were not violated. The City urges us to affirm this dismissal on the basis that Norse failed to allege any facts that could support municipal liability under *Monell v. Department of Social Services,* 436 U.S. 658 (1978). Norse argues that municipalities can be liable under § 1983 for single decisions taken by municipal policymakers. But the question of whether the two ejections constituted an act or acts of official government policy is a question of fact appropriately decided on a more fully-developed record. The City is not entitled to summary judgment on this question.

E

As against officer Baker, Norse alleges claims of false arrest and excessive force. The City argues that Baker is immune from suit if reasonable officers in his position could have disagreed on the issue of probable cause. We agree with the City. The existence of probable cause is dispositive as to false arrest and excessive force claims.

[18] "To prevail on [a] § 1983 claim for false arrest . . . [a plaintiff must] demonstrate that there was no probable cause to arrest him." *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (per curiam). Moreover, a government official

is entitled to qualified immunity on a false arrest claim if a reasonable officer in his position could have believed that probable cause existed. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009). While Norse alleges in his pleadings that there was no probable cause to arrest him in 2002 or 2004, he nonetheless alleges facts that could have led a reasonable officer to believe that probable cause existed for his arrest. In both 2002 and 2004, Norse actually spoke verbally, in violation of the Rules of Decorum, in response to Council members' attempts to eject him from the Council chambers. Based on these facts, a reasonable officer could have believed that probable cause existed to arrest Norse for violation of California Penal Code § 403, disturbance of a public assembly or meeting. Therefore, Baker is entitled to judgment on the false-arrest claim.

Norse also alleges he was subject to excessive force. An excessive-force claim that arises in the context of an arrest is properly characterized as one invoking the protections of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989). "To determine if a Fourth Amendment violation has occurred, we must balance the extent of the intrusion on the individual's Fourth Amendment rights against the government's interests to determine whether the officer's conduct was objectively reasonable based on the totality of the circumstances." *Espinosa v. City & Cnty. of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010). The only force alleged in the complaint was Baker's order that Norse place his hands behind his back at the 2002 meeting. Even though Norse was being arrested for, at most, a minor misdemeanor offense, we cannot say that a

reasonable officer in Baker's position would have known that this limited use of force was unreasonable: Norse had refused to leave the meeting of his own accord, a fact also alleged in the complaint, and a reasonable officer could have believed that probable cause existed for the arrest. Therefore, judgment must be entered in favor of Baker on the claims asserted against him.

IV

For the foregoing reasons, we reverse the dismissal of Norse's § 1983 claim as to his First Amendment claims. We affirm the dismissal of Norse's claims against Baker. We remand with instructions for the district court to rule on Norse's pending motion in limine to exclude evidence of Council meetings other than the 2002 and 2004 meetings mentioned in his complaint, and to hold the trial that it had originally scheduled for March 26, 2007. In accordance with our precedent, the district court may entertain a post-trial motion for judgment as a matter of law on the issue of qualified immunity after the facts are resolved at trial. *Tortu v. Las Vegas Metro. Police Dep't,* 556 F.3d 1075, 1083 (9th Cir. 2009).

We need not, and do not, reach any other issues urged by the parties. Each party shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS.

Chief Judge KOZINSKI, with whom Judge REINHARDT joins, concurring:

I join Judge Thomas's opinion because it's clearly right. I write only to observe that, even after the procedural irregularities that deprived Norse an opportunity to present evidence, it's clear that the council members aren't entitled to qualified immunity. In the Age of YouTube, there's no need to take my word for it: There is a video of the incident that I'm "happy to allow . . . to speak for itself." *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007); *see* http://www.youtube.com/watch?v=ZOssHWB6WBI (last visited Nov. 16, 2010). This video (also found in the record) clearly shows that Norse's sieg heil was momentary and casual, causing no disruption whatsoever. It would have remained entirely unnoticed, had a city councilman not interrupted the proceedings to take umbrage and insist that Norse be cast out of the meeting. Councilman Fitzmaurice clearly wants Norse expelled because the "Nazi salute" is "against the dignity of this body and the decorum of this body" and not because of any disruption. But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech. *See Cohen v. California,* 403 U.S. 15 (1971); *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990).

The Supreme Court long ago explained that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Even in a limited public forum like a city council meeting, the

First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive.

We've said so twice. In *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990), we explained that speech must "disrupt[,] disturb[ ] or otherwise impede[ ] the orderly conduct of the Council meeting" before the speaker could be removed. *Id.* at 1426. And in *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995), we upheld a spectator's ejection from a public meeting only because he was "disrupting the proceedings by yelling and trying to speak when it was not time for" discussion. Id. at 271. Had he been given a chance, Norse could no doubt have presented lots more evidence that he never disrupted the Santa Cruz council meeting, but what would have been the point? The video speaks for itself: Norse raises his hand in a brief, silent protest of the mayor's treatment of another speaker. The mayor ignores Norse's fleeting gesture until Councilman Fitzmaurice throws a hissy fit.

"Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be . . . punished or banned[ ] simply because it might offend a hostile" member of the Santa Cruz City Council. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). The council members should have known that the government may never suppress viewpoints it doesn't like. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Though defendants point to Norse's reaction to Councilman Fitzmaurice as the "disruption" that warranted carting him off to jail,

Norse's calm assertion of his constitutional rights was not the least bit disruptive. The First Amendment would be meaningless if Councilman Fitzmaurice's petty pique justified Norse's arrest and removal.

Even viewing the facts most favorably to the city council members, their behavior amounts to classic viewpoint discrimination for which they're not entitled to qualified immunity. And that's what the district court should have held when it set about resolving qualified immunity as a matter of law. If it was going to take it upon itself to grant summary judgment to anyone on that issue, it should have been to Norse. On remand, the district court can set things right by holding, as a matter of law, that the city council members are not entitled to qualified immunity, and proceeding to assess damages.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT NORSE, Plaintiff-Appellant, v. CITY OF SANTA CRUZ, et al., Defendants-Appellees.	No. 07-15814 D.C. No. CV-02-01479-RMW Northern District of California, San Jose ORDER

Before: KOZINSKI, Chief Judge, REINHARDT, RYMER, THOMAS, McKEOWN, W. FLETCHER, FISHER, GOULD, TALLMAN, CLIFTON, and BEA, Circuit Judges.

The parties' petitions for rehearing are DENIED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NORSE,

Plaintiff-Appellant,

v.

CITY OF SANTA CRUZ; CHRISTOPHER KROHN, individually and in his official capacity as Mayor of the City of Santa Cruz; TIM FITZMAURICE; KEITH A. SUGAR; EMILY REILLY; ED PORTER; SCOTT KENNEDY; MARK PRIMACK, individually and in their official capacities as Members of the Santa Cruz City Council; LORAN BAKER, individually and in his official capacity as Sergeant of the Santa Cruz Police Department; STEVEN CLARK,

Defendants-Appellees.

No. 07-15814

D.C. No.
CV-02-01479-RMW

OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
June 12, 2009-San Francisco, California

Filed November 3, 2009

Before: Mary M. Schroeder, Diarmuid F. O'Scannlain and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Schroeder;
Partial Concurrence and Partial Dissent by Judge Tashima

COUNSEL

David Beauvais, Oakland, California, for the plaintiff-appellant.

Kathleen Wells, Santa Cruz, California, for the plaintiff-appellant.

George J. Kovacevich, Santa Cruz, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Plaintiff-Appellant Robert Norse was ejected from two meetings of the Santa Cruz City Council, one in 2002 and one in 2004. He filed this 42 U.S.C. § 1983 action against the City and its Mayor and Council members alleging violation of his First Amendment rights. In a 2004 unpublished, non-precedential disposition, we unanimously upheld the validity of the Council rules that were being enforced at the time of the ejections. *Norse* v. *City of Santa Cruz*, No. 02-16446, 2004 WL 2757528 (9th Cir. Dec. 3, 2004) *("Norse I"),* at *1. The rules authorize removal of "any person who interrupts and refuses to keep quiet ... or otherwise disrupts the proceedings of the Council." We observed that the rules are materially similar to the regulations we upheld in *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990). *Id.*

A majority of us, however, reversed and remanded the district court's dismissal on the pleadings, holding that there was no way of assessing the reasonableness of the Mayor's actions, particularly his action in ordering Norse's 2002 ejection after Norse gave a Nazi salute to protest the Mayor's administration of the Council's rules. *Id.* at *2.

On remand, the district court ruled that the Mayor acted reasonably in ordering both of Norse's ejections, because Norse was supporting the conduct of persons in the meeting who were causing a disruption. Our consideration of the case has been delayed because of the difficulty in obtaining the factual record underlying the district court's rulings. This record consists principally of the video tapes of the two episodes in question, so the underlying facts are not disputed. There is no doubt that ordering Norse's ejection in 2004 was a reasonable application of the rules of the Council. The vid-eotape shows that Norse was engaged in a parade about the Council chambers protesting the Council's action, and his conduct was clearly disruptive.

With respect to the March 12, 2002 meeting, the behavior that prompted Norse's ejection was his giving a Nazi salute in support of a disruptive member of the audience who had refused to leave the podium after the presiding officer ruled that the speaker's time had expired, and that the portion of the Council meeting devoted to receiving oral communications from the public had ended. Two members of the audience in the rear were creating a disruption. When the Mayor told the speaker at the

podium that her time had expired, the speaker was visibly unhappy with the ruling, and Norse directed a Nazi salute in the presiding officer's direction. The salute was obviously intended as a criticism or condemnation of the ruling.

The Mayor had resumed Council business by reading announcements and did not notice Norse's Nazi salute until another Council member called the Mayor's attention to it. The district court accurately described the proceedings, as portrayed on the video, as follows:

> Since he was reading, [the Mayor] did not notice Norse's gesture but within seconds council member Fitzmaurice called his attention to the fact that Norse had made a Nazi salute.... [The Mayor], ... as the presiding officer in charge of running the meeting, was suddenly faced with a meeting that had been interrupted by an offended council member. [The Mayor] had just finished dealing with two disruptive members of the public, at least one of whom Norse was supporting with his salute. [The Mayor] also knew that two Council members in the previous months had expressed to Norse their abhorrence of his Nazi gestures which reasonably suggests that Norse intended his salute at the March 12, 2002 meeting to be disruptive. Further, Norse had begun to verbally challenge Fitzmaurice's comments.

Under those circumstances, the district court found that the Mayor's action in evicting Norse from the chambers was reasonable, and that the Mayor and council members were all entitled to qualified immunity.

[1] Our well-settled law gives great discretion to presiding officers in enforcing reasonable rules for the orderly conduct of meetings. *In Kindt v. Santa Monica Rent Control Board,* 67 F.3d 266, 269 (9th Cir. 1995), we upheld the Santa Monica Rent Control Board's action in ejecting a speaker several times because his conduct disrupted the orderly processes of meetings. We have long recognized that First Amendment rights of expression are more limited during a meeting than in a public forum, as, for example, a street corner. *See White*, 900 F.2d at 1425. Thus, we reaffirmed in *Kindt* what we said in *White*, that a council "does not violate the first amendment when it restricts public speakers to the subject at hand," and that a chair of a meeting may stop a speaker "if his speech becomes irrelevant or repetitious." *Kindt*, 67 F.3d at 270 (quoting *White*, 900 F.2d at 1425).

[2] Government officials performing discretionary functions are entitled to qualified immunity where they reasonably believe their actions to be lawful. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The interpretation and the enforcement of rules during public meetings are highly discretionary functions. *See White*, 900 F.2d at 1426 ("[T]he point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The

role of a moderator involves a great deal of discretion.").

[3] Our law is also clear, however, that discretion is not unlimited, and that rules may not be enforced in order to suppress a particular viewpoint. *See White*, 900 F.2d at 1426. A majority of us remanded this case years ago because, on the basis of the pleadings alone, Norse's ejection after the salute may have been on account of a viewpoint that was contrary to that of the Council. Now, on the basis of the undisputed factual record of the videotaped proceedings, it is clear that the salute was in protest of the chair's enforcing the time limitations and in support of the disruption that had just occurred in the back of the meeting room. We agree with the district court that the ejection was not on account of any permissible expression of a point of view. Norse was protesting the good faith efforts of the Chair to enforce the Council's rules, which we have already determined were valid, in order to maintain order. *See Norse I*, 2004 WL 2757528, at *1.

[4] Accordingly, we agree with the district court that the defendants did not violate Norse's constitutional rights. In addition, even if, in retrospect, we were to hold that Norse's First Amendment rights were violated, it would not have been clear to a reasonable person in the Mayor and Council's position that the ejection was unlawful, given the difficult circumstances and threat of disorder that was presented by the disruptions.

[5] We also agree with the district court that Norse's refusal to comply with the ejection order

established probable cause for his arrest. Even if the ejection itself violated Norse's rights, there would have been no basis for a reasonable police officer to believe that Norse was defying anything other than a lawful order. The Rules of the Body provided that the Sergeant at Arms "shall carry out all orders and instructions of the Presiding Officer." Our decision in *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994), relied upon by the district court, fully supports granting qualified immunity to arresting officers who have probable cause to believe that valid rules have been violated.

[6] In sum, the salute had little to do with the message content of the speaker whose time had expired. Rather, it was a condemnation of the efforts of the Mayor to enforce the rules of the meeting. The Council member who called the salute to the Mayor's attention could reasonably have interpreted it as intended to support and to further the disruption that had just been occurring in the room. Officers presiding over public meetings are not required to condone conduct fostering disruption of a meeting. The district court correctly ruled that the individual defendants were entitled to immunity when they reasonably acted on the belief that disruptive behavior was occurring and was fostered by the Nazi salute.

[7] Because the individual defendants were reacting reasonably to the specific situations that confronted them in both 2002 and 2004, and because the rules of the body they enforced were constitutionally valid, there is no basis for municipal

liability. See *White*, 900 F.2d at 1424-25; *Kindt*, *67* F.3d at 271-72.

AFFIRMED.

TASHIMA, Circuit Judge, concurring in part and dissenting in part:

In a proceeding akin to summary judgment, on the date set for the commencement of a jury trial, the district court held as a matter of law that defendants were entitled to qualified immunity from liability. It held, first, that plaintiff's First Amendment rights had not been violated, and, second, even if they were, those rights were not clearly established. Two incidents are at issue in this case, one in 2002 and the other in 2004, both involving plaintiff Norse's ejection from meetings of the Santa Cruz City Council. I agree that Norse's conduct at the 2004 meeting, as a matter of uncontroverted fact, was disruptive. I therefore concur in the portion of the majority opinion affirming the district court's dismissal of that claim.[1] I disagree, however, with the majority's holding "that the defendants did not violate Norse's constitutional rights" in ejecting him from the 2002 Council meeting. Maj. op. at 14801 (agreeing with the district court so holding).

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[1] I also agree with the majority that, whether or not there was probable cause for Norse's arrest at the 2002 meeting, the police officer (who was acting as Sergeant at Arms for the Council meeting), acted reasonably in carrying out the direct orders of the Presiding Officer *(i.e.*, the Mayor) in ejecting Norse from the meeting.

While it is clear under our case law that local public officials conducting public meetings can restrict speech at such meetings according to subject matter, duration, and method, *see Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 272 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990), it is equally clear that public officials may not restrict speech according to the viewpoint of the speaker, *see id.* at 1425. In order to avoid any constitutional problems, in a prior appeal, we construed the rules of the Santa Cruz City Council "to proscribe only disruptive conduct." *See Norse v. City of Santa Cruz*, 118 F. App'x 177, 178 (9th Cir. 2004) *("Norse I").*[2] That limitation on what conduct the Council rules proscribe is the law of the case. Yet, the record supports the interference that the Mayor and members of the City Council excluded Norse from the 2002 meeting because they disagreed with the views he expressed by giving his silent Nazi salute.[3]

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[2] This narrowing construction was necessary because the Council rules authorized, *inter alia*, the "removal ... of any person who uses 'language tending to bring the council or any council member into contempt....' " *Norse I*, 118 F. App'x at 178 (quoting the Council rules).

[3] The district court's qualified immunity ruling was based primarily on viewing a video, which we have also viewed. No witnesses were called or subject to cross-examination. The district court purported to make no findings of fact, something it was not authorized to do because a jury trial had been demanded and was about to commence. Thus, the evidence on which the district court's and the majority's ruling were based is uncontroverted (and untested). What remains controverted, however, are the reasonable inferences that a fact finder can draw from this evidence.

It is uncontroverted that Norse's Nazi salute lasted only a second or two and, in the course of rendering that salute, Norse uttered no word or other sound - he was silent. It is also undisputed that the Council permits silent, visual speech, such as the displaying of signs at its meetings, so long as such speech does not block the view of or otherwise interfere with other meeting attendees. Thus, the salute comported with the Council's rule permitting silent, non-verbal messages at the Council meeting. That it was not, itself, disruptive, is evidenced by the fact that the Mayor was not even aware of it - he continued with his reading of announcements - until Councilmember Fitzmaurice called his attention to it. And, as the video demonstrates, no member of the audience reacted to Norse's silent salute. Drawing all reasonable inferences in Norse's favor, as we must, I submit that there is no way to conclude that, as a matter of law, Norse's conduct in rendering a fleeting, silent Nazi salute was disruptive.

In fact, a close reading of the majority opinion shows that it does not hold that Norse's conduct was, itself, disruptive. Thus, there was no justification for the Mayor to eject Norse from the meeting for being disruptive. On the contrary, the record clearly supports the inference that Norse was ejected from the 2002 meeting because the Mayor and Council disagreed with (and intensely and overtly disliked) his viewpoint. The portion of the district court's ruling quoted by the majority admits as much. First, the district court noted that the Mayor was "suddenly faced with a meeting that had been interrupted by

an *offended* council member."[4] Maj. op. at 14799 (emphasis added). It then notes the Council's hostility to Norse's viewpoint. "[The Mayor] also knew that two Council members in the previous months had expressed to Norse their abhorrence of his Nazi gestures ...." *Id.* Further, as the district court also noted, when Norse made his Nazi salute gesture at past Council meetings, he was warned that Council members found the gesture to be offensive and that he would be removed from the meeting if he engaged in such conduct again. Thus, there is ample evidence in the record to support a finding that Norse was removed because of his viewpoint - because Council members detested being characterized as acting Nazi-like.

The majority attempts to elide the point by sidetracking the issue. It says that Norse's action was "in support of the disruption that had just occurred ...." Maj. op. at 14801. That the Mayor was acting "in good faith" to "enforce the Council rules ...." *Id.* That Norse's Nazi salute "could reasonably have [been] interpreted [ ] as intended to support and to further the disruption that had just been occurring the room." *Id.* at 14802 But Norse's speech cannot be suppressed because of the actions of others. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (holding that black armbands worn by high school students in protest of the Vietnam war were not disruptive, and that they could not be suppressed on account of the fact that the armbands might cause others to react in

[4] Note that the "interruption," or disruption, is caused, not by Norse, but by the council member.

disruptive ways). Nor is Norse's intent relevant, so long as his speech comports with the Council's rules, as it did. In sum, the district court erred in holding as a matter of law that the Mayor and Council's action in ejecting Norse from the 2002 meeting for rendering a silent Nazi salute did not violate his First Amendment rights. It could do so only by drawing all inferences against Norse, as the majority does.

Alternatively, the majority further holds that "even if, in retrospect, we were to hold that Norse's First Amendment rights were violated, it would not have been clear to a reasonable person in the Mayor and Council's position that the ejection was unlawful ...." Maj. op. at 14801. This holding also is just plain wrong. Our case law had clearly established by 1990, twelve years before the 2002 Council meeting, that speech at a municipal meeting could not be suppressed unless it was actually disruptive. *See White*, 900 F. 2d at 1424. That this was the law of the circuit was confirmed five years later, in 1995, in *Kindt*, 67 F.3d at 270. Just as importantly, our First Amendment jurisprudence on the limited public fora of municipal meetings is in accord with decades-old, clearly-established Supreme Court case law that speech in such fora cannot be "prohibited ' "merely because public officials disapprove the speaker's view." ' " *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result))); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983) (noting that

the State may regulate speech at a limited public forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view"). Thus, this First Amendment principle that the Mayor and City Council violated (and the majority ignores) has been the law of the land for over a half century.

As I noted earlier, the district court's procedure in granting judgment to defendants on qualified immunity was akin to a summary judgment proceeding.[5] That being the case, we are required to draw every reasonable inference in favor of the opposing party, here Norse. But the majority does exactly the opposite. First, the majority "agree[s] with the district court that the ejection was not on account of any permissible expression of a point of view." Maj. op. at 14801. But this view rejects the reasonable inference that the Mayor was acting to enforce the Council's stated "abhorrence of [Norse's] Nazi gesture." The majority also agrees with the district court's view "that Norse intended his salute ... to be disruptive." *Id.* at 14800. This, too, is an inference drawn against Norse. And again, the majority infers that "[t]he Council member who called the salute to the Mayor's attention could reasonably have interpreted it as intended to support

[5] The district court never specified what procedure it was following, only that it was holding a "hearing" to resolve the issue of qualified immunity. Neither does the majority acknowledge the district court's unusual procedure, nor indicate what legal standard applied to that procedure, nor what standard of review it is applying.

and to further the disruption that had just been occurring [by others] in the room." *Id.* at 14802. But why, at this stage, should such an inference be drawn against Norse? All these are issues of controverted fact which should have been submitted to the jury - the trier of fact.

From all this, the majority concludes that "it would not have been clear to a reasonable person in the Mayor and Council's position that the ejection was unlawful, given the difficult circumstances and threat of disorder that was presented by the disruptions." *Id.* at 14801. I have viewed the same video of the 2002 Council meeting on which the majority bases its conclusion, and to conclude that the circumstances were "difficult" and that there was a "threat of disorder," as the majority does, is hyperbolic, to say the least. Most reasonable persons would conclude, after viewing the same video, that this meeting was no more "difficult" or "disorderly" than any other small-town Council meeting. In any event, this too is a question of fact. But, even if the majority's "findings" are taken at face value, the threat of disruption by others does not excuse the denial of Norse's clearly established First Amendment rights. As the Supreme Court has reminded us, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

If the reasonable inferences are drawn in favor of Norse, as should have done in this summary-judgment-like proceeding, Norse was deprived of his First Amendment right silently to protest the

Council's action by his Nazi salute because the Mayor and Council carried out their previously voiced threat - that Norse would be removed from the meeting if he engaged in rendering his Nazi salute again. What's more, this law has been clearly established for decades. There is nothing ambiguous or "iffy" about this aspect of First Amendment law. No reasonable local public official could believe that he could lawfully remove a member of the public from a public meeting because he found that person's silent speech to be abhorrent or personally offensive.

I respectfully dissent from that portion of the majority opinion which grants the Mayor and Council members qualified immunity from liability on Norse's First Amendment claim for being ejected from the 2002 Council meeting. Because the law was clearly established and the evidence supports the inference that the Mayor and Council members acted to suppress speech they found to be abhorrent and offensive, even though it was not disruptive, it was error to grant qualified immunity to defendants as a matter of law. I would reverse the grant of qualified immunity as to the 2002 meeting and remand this claim for trial.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROBERT NORSE, Plaintiff, v. CITY OF SANTA CRUZ, et al. Defendants.	ORDER DISMISSING PLAINTIFF'S COMPLAINT UPON FINDING OF QUALIFIED IMMUNITY OF DEFENDANTS

This matter came on regularly for trial on March 26, 2007. Pursuant to the court's pretrial order dated March 22, 2007, the court set the first day of trial to determine whether the issue of defendants' entitlement to qualified immunity could be determined based upon undisputed facts. After considering the undisputed facts and hearing the arguments of counsel, the court finds that the individual defendants are entitled to qualified immunity and that there is no basis for independent liability of the City. Therefore, the court will enter judgment in favor of defendants.

I. UNDISPUTED FACTS

Plaintiff Robert Norse claims damages under 42 U.S.C. § 1983 for alleged violations of his civil

rights under the First and Fourth Amendments of the Constitution based upon incidents occurring at Santa Cruz City Council meetings on March 12, 2002 and January 13, 2004. The parties agree that the council meetings were videotaped, that the videotapes are admissible and depict what occurred at the meetings. The parties also agree as to the content of the City's rules for Decorum in Council Meetings and Norse's knowledge of them.

A. March 12, 2002 Incident

On March 12, 2002 Norse was ejected from the council meeting following his Nazi salute protesting Mayor Christopher Krohn's refusal to allow an individual to speak after the "oral communication" session, a period of time when members of the public are allowed to address the council, had ended. Immediately prior to Norse's Nazi salute, Mayor Krohn had instructed a boisterous, somewhat threatening individual objecting to the end of open communications to leave and had instructed the individual who was insisting that she be allowed to speak after the end of oral communications to step away from the microphone and be seated. After being instructed twice to step away from the microphone and warned that, if she did not, she would have to leave, she stepped away and walked over to Norse who then gave the Nazi salute. Before the salute, Mayor Krohn had resumed reading some announcements and thus did not see the salute. Council member Tim Fitzmaurice then interrupted Mayor Krohn, advised him that the Nazi salute had been given, stated that he felt the salute was against the "dignity of the body" and requested that Krohn

instruct Norse to leave the chambers. Norse started to challenge Fitzmaurice's statements and Mayor Krohn immediately instructed Norse to "please leave the chambers." Norse, who was then standing by the entrance to the chambers, refused and took a seat in the chambers. A recess was taken and Loran Baker, a police officer acting as the sergeant-at-arms for the council, asked Norse if he was going to voluntarily leave and Norse said he would not. Baker then placed Norse under arrest without incident except for Norse's calling attention to the fact he was being arrested.

The videotape of a June 26, 2001 council meeting shows that then Mayor Fitzmaurice advised Norse that any future Nazi salute would be considered "indecorous behavior." The videotape of a July 10, 2001 meeting reflects that council member Keith Sugar asked Norse not to use Nazi gestures.

B. January 13, 2004 Incident

On January 13, 2004 Norse was ejected from the council meeting by Mayor Scott Kennedy following certain conduct by Norse. The city council was discussing a proposed housing development in an industrial area of the city. Certain individuals were parading between the public seating area and the dias where the council members were seated. Norse was one of those in the parade but he was not carrying a sign. Mayor Scott Kennedy interrupted the proceedings, asked that people not block the view of the members of the audience by walking between the public seating area and the dias and that this was a warning that further disruption could lead to

expulsion. Later, during comments by council member Ed Porter, Mayor Kennedy interrupted Porter and asked Norse, who, according to Norse, was whispering to another individual, to "please take your conversation outside." Mayor Kennedy also advised Norse that this was his second warning. Norse then asked what was his first warning and Kennedy replied that this was his third warning and asked him to leave the chamber. Norse apparently walked outside and then Porter resumed his discussion after pausing to regain his train of thought. After discussion on the project concluded, Mayor Kennedy discussed the decorum rules and listed Norse, who had returned to the chambers, as one of several that had been warned and asked him again to leave as he had been asked one-half hour earlier. Norse insisted to no avail that a council vote be taken on his ouster[1]. Norse then refused to leave, a recess was taken and Norse was arrested after he maintained his refusal to leave.

C. Rules for Decorum in Council Meetings

The City of Santa Cruz has written procedural rules for Decorum in Council Meetings. The rules provide that:

> While the Council is in session, all persons shall preserve order and

[1] The Decorum Rules do allow a majority of the council to give permission for continued attendance despite the decision of the presiding officer to bar an individual. However, the rules do not provide for the individual to call for a vote.

> decorum. Any person making personal, impertinent, or slanderous remarks, or becoming boisterous shall be barred by the presiding officer from further attendance at said meeting unless permission for continued attendance is granted by a majority vote of the Council.

The rules also require all speakers to "avoid[] all indecorous language and references to personalities and abid[e] by the following rules of civil debate.

1. We may disagree, but we will be respectful of one another

2. All comments will be directed to the issue at hand

3. Personal attacks should be avoided"

Finally, the rules provide that the chief of police, or representative, shall act as ex-officio sergeant-at-arms of the Council and "shall carry out all orders and instructions of the presiding officer for the purpose of maintaining order and decorum in the Council Chambers."

> Upon instructions of the presiding officer it shall be the duty of the sergeant-at-arms or any police officer present to eject from the Council Chambers any person in the audience who uses boisterous or profane language, or language tending to bring the

> Councilor any Councilmember into contempt, or any person who interrupts and refuses to keep quiet or take a seat when ordered to do so by the presiding officer or otherwise disrupts the proceedings of the Council.

Norse, who frequently attends and speaks at council meetings, was familiar with the decorum rules at the time of the incidents.

II. NATURE OF CLAIM AND QUALIFIED IMMUNITY

Plaintiff filed this lawsuit under 42 U.S.C. § 1983 seeking to recover compensatory and punitive damages, as well as injunctive relief based upon the March 12, 2002 incident. Plaintiff originally challenged the constitutionality of Santa Cruz's written rules regarding decorum during city council meetings, both on their face and as applied. However, the court of appeals, although agreeing with plaintiff that the court should not have granted defendants' motion to dismiss on the pleadings, construed the decorum rules to proscribe only disruptive conduct and thus held that the rules are facially valid. *Norse v. City of Santa Cruz*, 118 Fed. Appx. 177, 178 (9th Cir. 2004). Norse, therefore, limits his claim to one that his constitutional rights were violated by the manner in which the decorum rules were applied to him. After the appellate court decision, Norse amended his complaint to assert that his constitutional rights were also violated by the way the rules were applied to him at the council meeting on January 13, 2004.

Defendants contend that the rules were appropriately applied to Norse and, in any event, the individual defendants are immune from suit because it would not have been clear to a reasonable officer in any of the defendants' positions that the action taken was unlawful in light of the situation that the defendant confronted. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996).

III. ANALYSIS

A. Qualified Immunity Should Be Resolved As Early As Possible

"[Because [t]he entitlement is an *immunity from suit* rather than a mere defense to liability," the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *see Saucier*, 533 U.S. at 200-01. Qualified immunity is effectively lost if a case is allowed to go to trial where the defendant is entitled to qualified immunity. *Saucier*, 533 U.S. at 201.

B. Qualified Immunity Analysis

The determination of whether qualified immunity is applicable involves a two step inquiry. The first question is whether the undisputed facts show that the action of the defendant violated a constitutional right. In the present case, therefore, the issue is whether Krohn, Fitzmaurice, Baker or Kennedy violated a constitutional right protecting Norse. *Id.* at 201. If so, the next question is whether

that right was clearly established in the specific context of the case. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

The determination of qualified immunity on facts not genuinely at issue is one of law for the court. *See Thompson v. Mahre*, 110 F.3d 716, 721 (9th Cir. 1997); *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993).

1. The March 12, 2002 Meeting

a. Norse's Constitutional Rights Were Not Violated When He Was Removed from the Council Meeting Following His Nazi Salute

The Ninth Circuit has upheld decorum rules similar to those adopted in Santa Cruz against a facial constitutional challenge based upon an interpretation of the rules that requires an individual who engages in proscribed conduct be acting in a way that actually disturbs or impedes the meeting. *White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990); *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995). As noted above, the Ninth Circuit upheld the Santa Cruz rules against a facial challenge in this case. *Norse, supra.* Rules governing public participation at council meetings will be upheld as long as the rules are reasonable and viewpoint neutral. *Kindt*, 67 F.3d at 270-71. Rules such as those involved here seek to further the government's legitimate interest in

conducting orderly and efficient meetings of the city council by prohibiting disruptive comments and behavior. *See White*, 900 F.2d at 1421. The presiding officer's enforcement of the rules "involves a great deal of discretion." *Id.* at 1426. Therefore, with respect to the March 12, 2002 meeting, the first question in the two step *Saucier* test for qualified immunity is whether the ejection of Norse was objectively reasonable because his conduct was disruptive (impeded the council from accomplishing its business in a reasonably efficient manner) or was based upon the mere content of his speech.

The salute occurred after the oral communication portion of the meeting had concluded. After dealing with two individuals who were clearly disruptive, Mayor Krohn resumed the council's business by reading some announcements. Since he was reading, he did not notice Norse's gesture but within seconds council member Fitzmaurice called his attention to the fact that Norse had made a Nazi salute. Fitzmaurice's concern, at least as expressed, seems to have been with the content of the expression ("below the dignity of the body") rather than with any interference with the orderly conduct of the meeting. Krohn, however, as the presiding officer in charge of running the meeting, was suddenly faced with a meeting that had been interrupted by an offended council member. Krohn had just finished dealing with two disruptive members of the public, at least one of whom Norse was supporting with his salute. Krohn also knew that two council members in the previous months had expressed to Norse their abhorrence of his Nazi gestures which reasonably suggests that Norse

intended his salute at the March 12, 2002 meeting to be disruptive. Further, Norse had begun to verbally challenge Fitzmaurice's comments. Under these circumstances, the court finds that Krohn's action in ejecting Norse from the chambers was a reasonable means within his "great deal of discretion" controlling the conduct of the meeting and was not merely action taken based upon the content of Norse's speech. Therefore, Norse's First Amendment rights were not violated.

b. A Reasonable Mayor Would Not Have Believed that the Ejection of Norse Was Unlawful in the Situation He Confronted

Assuming *arguendo* that Norse's Nazi salute was not disruptive, the next question is whether the right to express oneself by a Nazi salute was clearly established in the specific context of the case. *Id.* The dispositive inquiry in determining whether a right is clearly established is whether it would have been clear to a reasonable mayor in the situation he confronted that his act of ejecting Norse for making a Nazi salute was a violation of his First Amendment rights. *Id.* at 202. The law is clearly established that an individual may be ejected from a council meeting for disruptive behavior, in other words behavior that interferes with a council's accomplishing its business: However, the determination as to what constitutes disruptive behavior in the situation confronted by Krohn is not so clear. The discussion in *White* was limited to the question of whether the ordinance was unconstitutional on its face. It did not deal with the particular conduct that led to the plaintiffs' ejections. The court, however, observed:

> A more fundamental flaw in plaintiffs' position is that their first amendment arguments do not take account of the nature of the process that this ordinance is designed to govern. We are dealing not with words uttered on the street to anyone who chooses or chances to listen; we are dealing with speech that is addressed to that Council. Principles that apply to random discourse may not be transferred without adjustment to this more structured situation.

White, 900 F.2d at 1425.

In *Kindt*, the court affirmed the dismissal of a § 1983 action in which plaintiff claimed that the rent control board violated his First Amendment rights when it ejected him from public board meetings and by discriminating between speakers who supported the board's views and speakers who opposed them. The court gave guidance on the type of limitation of speech allowed. "It seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic niche. . . . The fact remains that limitations on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be." *Kindt*, 67 F.3d at 270-71. However, the *Kindt* court provides little help on what conduct can be considered disruptive and therefore justifies ejection. Kindt's conduct was described as

abandoning "all sense of decorum." *Id.* at 273.[2]

The court concludes based upon the undisputed facts that it would not have been clear to a reasonable mayor in Mayor Krohn's position that his ejection of Norse was unlawful in the situation he confronted. Therefore, even if Norse's First Amendments rights were violated, Krohn is entitled to qualified, immunity.

c. Council Member Fitzmaurice Did Not Eject Norse

Although council member Fitzmaurice requested Mayor Krohn remove Norse from the meeting, only Krohn had that power and, in fact, made the order of ejection. Therefore, regardless of the validity of Fitzmaurice's stated reason for his request, he cannot be held responsible for Norse's removal. Further, even if Fitzmaurice were responsible for Norse's removal and was improperly motivated, he would nevertheless be entitled to qualified immunity. Evidence concerning the defendant's subjective intent is simply irrelevant to the question of qualified immunity. *See, e.g., Morgan v. Woessner,* 997 F.2d 1244, 1260 (9th Cir. 1993).

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[2] On one occasion Kindt was asked to move when he and others were disturbing another member of the public addressing the board. On that occasion, a board member stomped out because he thought Kindt and others should have been ejected. On another occasion Kindt and a cohort were ejected after a board member thought the cohort had made an obscene gesture toward him. *Kindt*, 67 F.3d at 268-69.

d. Probable Cause for Arrest

Defendants contend that there was probable cause to arrest Norse. The order ejecting him was a lawful order and his refusal to comply with the lawful order established probable cause to arrest him. The complaint alleges that Sergeant Baker, at the Mayor's instruction, informed plaintiff that he would have to leave or he would be arrested. Plaintiff refused to leave. Sergeant Baker then placed plaintiff under arrest. Plaintiff contends that the ejection order was unlawful because he had not disrupted the meeting. As discussed above, however, the meeting was in fact disrupted. Thus, the order to remove plaintiff was lawful. Plaintiff's refusal to leave the chambers provided probable cause for his arrest. Thus, there was no constitutional violation by Sergeant Baker.

In addition, Sergeant Baker has qualified immunity. The decorum rules provide that the sergeant-at-arms of the Council "shall carry out all orders and instructions of the presiding officer . . . ." There was no clearly established law pursuant to which Sergeant Baker should have known that the Mayor's order was unlawful. The City's decorum rules and their application were not so obviously unconstitutional that a reasonable police officer would have refused to enforce Mayor Krohn's direction to remove Norse from the council meeting. *See Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994). A reasonable officer in Sergeant Baker's position would not have believed that arresting plaintiff for refusing to comply with an apparently lawful order to depart from the council

meeting violated any clearly established right. Sergeant Baker has qualified immunity for his actions in arresting plaintiff.

2. The January 13, 2004 Meeting

a. Norse's Constitutional Rights Were Not Violated When He Was Removed from the Council Meeting For His Disruptive Behavior

Plaintiff argues that there is a question of fact as to whether Norse's conduct at the January 13, 2004 meeting was disruptive and that individuals who were at the meeting would testify that Norse was not disruptive and that his conversations were no louder than those engaged in by others. The court accepts for the purposes of its analysis that plaintiff could offer such testimony—a qualified immunity analysis must be based upon undisputed facts or facts viewed in the light most favorable to plaintiff. However, the videotape of the January 13, 2004 meeting shows plaintiff participating in the parade of individuals walking between the public seating area and the dias where the council members were seated, talking into a handheld recorder as the picketers entered the council chambers, initiating conversation with an individual (possibly a city staff person) while another individual was making a presentation to the council, demanding to know what his first warning was when the mayor advised him of his second warning and insisting that a council vote be taken concerning Mayor Kennedy's decision to eject him. Even accepting the testimony that plaintiff says he could offer, the undisputed evidence shown by the

videotape supports without legitimate dispute, that Norse's ejection was within the "great deal of discretion" a presiding officer has in enforcement of decorum rules. Norse's participation in the parade of protesters was clearly disruptive. The videotape shows that he was talking into a recorder during tire meeting, that he initiated conversation with someone when another was making a presentation to the council and that he engaged in verbal challenges to Mayor Kennedy's warnings to him. The fact that some individuals who were at the meeting did not consider him disruptive does not negate the fact that Mayor Kennedy reasonably viewed his conduct as disruptive. The court finds that the undisputed evidence, with consideration of the, additional evidence plaintiff says he could present, shows no violation of Norse's constitutional rights. That finding ends the inquiry under *Saucier* and Mayor Kennedy's entitled to qualified immunity from Norse's claim.

b. A Reasonable Mayor Would Not Have Believed that the Ejection of Norse Was Unlawful in the Situation He Confronted

Since the evidence establishes without question that Norse's constitutional rights were not violated by his ejection from the January 13, 2004 meeting, a reasonable presiding officer in Mayor Kennedy's position would not have believed that ejecting Norse from the meeting was unlawful. Kennedy is entitled to qualified immunity.

C. No Independent Basis for Liability of the City

Since the undisputed facts show no violation of Norse's constitutional rights, there is no basis for liability of the City.

IV. ENTRY OF JUDGMENT

Since the individual defendants are entitled to qualified immunity and there is no basis for independent liability of the City since no constitutional violation occurred, judgment shall be entered in favor of all defendants and plaintiff is entitled to no relief by way of his complaint.

DATED: 3/28/01

RONALD M. WHYTE
United States District
Judge

THIS SHALL CERTIFY THAT NOTICE OF THIS ORDER WAS PROVIDED TO:

Counsel for Plaintiff:
David J. Beauvais davebeau@pacbell.net

Kate Wells lioness@got.net

Counsel for Defendants:

George J. Kovacevich admin@abc-law.com

DATED: 3/28/01 SPT
Chambers of Judge Whyte

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NORSE, Plaintiff - Appellant, v. CITY OF SANTA CRUZ; CHRISTOPHER KROHN, individually and in his official capacity as Mayor of the City of Santa Cruz; TIM FITZMAURICE; KEITH A. SUGAR; EMILY REILLY; ED PORTER; SCOTT KENNEDY; MARK PRIMACK, individually and in their official capacities as Members of the Santa Cruz City Council; LORAN BAKER, individually and in his official capacity as Sergeant of the Santa Cruz Police Department, Defendants - Appellees.	No. 02-16446 D.C. No. CV-02-01479-RMW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted September 10, 2003
San Francisco, California

Before: SCHROEDER, Chief Judge, O'SCANNLAIN, and TASHIMA, Circuit Judges.

Robert Norse appeals the district court's dismissal of his complaint under 42 U.S.C. § 1983. The complaint alleged that his First Amendment rights were violated when he was removed from the meeting of the Santa Cruz City Council. According to the complaint, the Mayor ordered Norse's removal from the meeting after he made a "Nazi salute" in protest of the Mayor's ruling that the time for open comment had expired and further speakers would be out of order. The complaint further alleged that a council member observed Norse's gesture and interrupted the proceedings to inform the Mayor. The Mayor, as the presiding officer, ordered the Sergeant at Arms to remove Norse from the meeting as authorized by the rules of the Council.

Norse first challenges the procedural rules authorizing his removal as a systematic abridgment of the constitutional rights of persons appearing before the Council. He argues the rules are facially invalid. The procedural rules adopted by the council for the conduct of its meeting authorized removal by the Sergeant at Arms of any person who uses "language tending to bring the council or any council member into contempt, or any person who interrupts and refuses to keep quiet...or otherwise disrupts the proceedings of the council." The rules are materially similar in all respects to the regulations concerning disruptive conduct that we upheld in White v. City of

Norwalk, 900 F.2d 1421 (9th Cir. 1990). Here, as in White, we construe the rules to proscribe only disruptive conduct. The regulations are facially valid.

Norse also challenges the constitutionality of the rules as applied when the Mayor ordered him to be removed. Because the district court dismissed Norse's complaint for a failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), we assume that all well-pleaded allegations of fact in the complaint are true, and construe them in the light most favorable to the plaintiff. Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001). Citizens have a strong First Amendment interest in speaking about public interest issues to those who govern their city. White, 900 F.2d at 1425. At the same time, however, we must recognize that "citizens are not entitled to exercise their First Amendment rights whenever and wherever they wish." DeGrassi v. City of Glendora, 207 F.3d 636, 646 (9th Cir. 2000), citing Kindt v. Santa Monica Rent Control Board, 67 F.3d 266,269 (9th Cir. 1995).

Norse's Nazi salute to protest the Mayor's administration of the council's rules was expression that would have been protected if it were performed in a public forum. See,e.g., Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37,45 (1983). We have held, however, that meetings of city councils and boards are not public fora. See DeGrassi, 207 F.3d at 646; see also Kindt, 67 F.3d at 270-71. The presiding officers of those meetings may enforce reasonable and viewpoint neutral procedural rules for the orderly conduct of the meeting. White, 900 F.2d at 1425-26. Such enforcement "involves a great

deal of discretion." Id. at 1426. Moreover, government officials performing discretionary functions are entitled to qualified immunity from liability under 42 U.S.C. § 1983. Immunity attaches if the official allegedly violated a right that was not clearly established, or if a reasonable official would have thought the defendant's actions were constitutional. Torvino v. Gates, 99 F.3d 911, 916 (9th Cir. 1996).

If Norse's salute prevented the Council from "accomplishing its business in a reasonably efficient manner," then it was disruptive. White, 900 F.2d at 1425. Norse, however, argues that his salute was not disruptive because it lasted one second, and the Mayor did not even notice it until another council member informed him of its occurrence. Based solely on the allegations in the complaint, there is no way of assessing the reasonableness of the Mayor's conclusion that Norse should have been ejected. Norse's complaint thus alleges a violation of his First Amendment rights which he is entitled to pursue beyond the pleading stage. Dismissal was not appropriate at this stage of the litigation.

REVERSED and REMANDED.

Norse v. City of Santa Cruz, No. 02-16446
O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the court's decision to remand Norse's as-applied First Amendment challenge, I must respectfully dissent from that portion of the disposition. As the majority correctly recognizes, "[i]f Norse's salute prevented the Council

from 'accomplishing its business in a reasonably efficient manner,' then it was disruptive." (quoting *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990)). Even when the factual allegations are construed in the light most favorable to Norse, however, it cannot be doubted that his Nazi salute did occasion a significant disruption in the City Council's proceedings.

This disruption is apparent from the face of the complaint, which alleges that Mayor Krohn discontinued the normal course of public business and instructed Norse to leave the meeting after being informed of his inappropriate gesture. The complaint further alleges that Norse refused to comply with this instruction and that the Mayor subsequently ordered a five-minute recess during which the Sergeant at Arms–acting at the Council's behest–arrested Norse. This unscheduled interlude in the Council's agenda is inconsistent with the well-recognized "need for civility and expedition in the carrying out of public business." *See Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266,272 (9th Cir. 1995). The fact that Norse chose not to provide a verbal accompaniment to his Nazi salute in no way ameliorates the commotion engendered by his conduct. *See id.* at 271 (holding that it was permissible for board members to remove an observer who made an obscene gesture during a rent control board meeting). The Council members therefore did not infringe upon Norse's First Amendment rights when they quelled the disruption by ordering his removal.

Moreover, even assuming *arguendo* that

Norse's gesture was not disruptive, a remand would still be unnecessary because the Council members and Sergeant at Arms are entitled to qualified immunity. We have previously emphasized that public bodies have a "legitimate interest in conducting efficient, orderly meetings," *see id.*, and that moderators have "a great deal of discretion" in responding to disruptive behavior, *see White*, 900 F.2d at 1426. It therefore cannot be said that Norse had a clearly established First Amendment right to direct a Nazi salute at the Council members while they were attempting to conduct an efficient and civil public meeting. In light of our precedent, it would not have been clear to a reasonable public official that it was unlawful to order Norse's removal or to arrest him when he failed to comply with that directive. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). Qualified immunity's expansive contours protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and there is an insufficient showing in this complaint to raise such an inference.

E-filed on 6/14/02

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROBERT NORSE, Plaintiff, v. CITY OF SANTA CRUZ, et al., Defendants.	No. C 02-01479 RMW ORDER GRANTING DEFENDANTS' MOTION TO DISMISS **[Re Docket Nos. 16-18]**

Defendants' motion to dismiss was heard on May 31, 2002. Plaintiff opposes the motion. Having considered the papers submitted by the parties, and having had the benefit of oral argument, for the reasons set forth below, defendants' motion is granted.

This lawsuit arises out of an incident that occurred during a public meeting of the Santa Cruz City Council. Plaintiff has sued the City of Santa Cruz, Mayor Krohn, the members of the City Council, and Sergeant Baker of the Santa Cruz

Police Department, alleging that his constitutional rights have been violated as a result of his arrest during a meeting of the Santa Cruz City Council. The operative facts are alleged in paragraph 9 of the complaint:

> On March 12, 2002, plaintiff attended a public meeting of the Santa Cruz City Council. During oral communications, a period when members of the public are allowed to address the Council, a woman stood at the podium and began to speak. Defendant Krohn [the Mayor] told her that the time for public comment was over and that she would not be permitted to address the Council. When the woman objected, Krohn told her to step away from the podium or she would be expelled from the Council chamber. As she walked away in compliance with this order, plaintiff raised his arm for one second in a gesture that mimicked a Nazi salute. Plaintiff did not utter any words or make any sound. Krohn did not observe plaintiff's gesture and continued on with the meeting, but [Councilmember] Fitzmaurice interrupted Krohn as he was speaking and stated, "A point of order, Mr. Mayor. Mr. Norse just made a Nazi salute. ' Krohn then instructed plaintiff to leave the meeting. Plaintiff objected to the order that he be removed. Krohn declared a five minute recess. During the recess, defendant

> Baker who was in uniform approached plaintiff and told him that he would have to leave or be arrested. Plaintiff sat down. Baker then told plaintiff that he was under arrest and ordered him to place his hands behind his back. Plaintiff stood up and complied with Baker's commands. When plaintiff asked Baker the reason he was being arrested, Baker said that he wasn't sure, that the charge might be trespass but that he would have to check with the city attorney.

Complaint ¶ 9. Plaintiff was detained for approximately five and one-half hours, was cited for violation of California Penal Code § 403, disrupting a public meeting, and was released. Id. ¶ 10.

Attached to the Complaint is a copy of the City of Santa Cruz's written policy for Decorum in Council Meetings. The policy provides that:

> While the Council is in session, all persons shall preserve order and decorum. Any person making personal, impertinent, or slanderous remarks, or becoming boisterous shall be barred by the presiding officer from further attendance at said meeting unless permission for continued attendance is granted by a majority vote of the Council.

Complaint, Exh. A. The policy also requires all speakers to "avoid[] all indecorous language and

references to personalities and abid[e] by the following rules of civil debate.

> 1. We may disagree, but we will be respectful of one another
>
> 2. All comments will be directed to the issue at hand
>
> 3. Personal attacks should be avoided"

Id. Finally, the policy provides that the chief of police, or representative, shall act as ex-officio sergeant-at-arms of the Council and "shall carry out all orders and instructions of the presiding officer for the purpose of maintaining order and decorum in the Council Chambers." Id. Furthermore,

> [u]pon instructions of the presiding officer it shall be the duty of the sergeant-at-arms or any police officer present to eject form the Council Chambers any person in the audience who uses boisterous or profane language, or language tending to bring the Council or any Councilmember into contempt, or any person who interrupts and refuses to keep quiet or take a seat when ordered to do so by the presiding officer or otherwise disrupts the proceedings of the Council.

Id.

Plaintiff filed this lawsuit under 42 U.S.C. § 1983 seeking to recover compensatory and punitive

damages, as well as injunctive relief. Among other things, plaintiff challenges the constitutionality of Santa Cruz's written policy regarding decorum during City Council meetings, both on its face and as applied. Plaintiff also contends that his constitutional rights were violated by his ejection from the City Council meeting and his subsequent arrest and detention.

DISCUSSION

Defendants have moved to dismiss the complaint on several grounds, among them that the decorum policy is not unconstitutional on its face or as applied and that the Mayor, the councilmember defendants and Sergeant Baker have immunity.

1. Facial Challenge to the Decorum Policy

Defendants first seek dismissal of plaintiff's constitutional challenge to the City's Decorum Policy. The Ninth Circuit has upheld similar decorum policies against facial challenges. White v. City of Norwalk, 900 F.2d 1421, 1424 (9th Cir. 1990); Kindt v. Santa Monica Rent Control Board, 67 F.3d 266 (9th Cir. 1995). Rules governing public participation at council meetings will be upheld as long as the rules are reasonable and viewpoint neutral. Kindt, 67 F.3d at 270-71.

The Santa Cruz decorum policy is very similar to the policy at issue in City of Norwalk; it is not unconstitutional on its face. First, the decorum policy is also not directed to the content of speech. By its terms, the policy seeks to further the government's legitimate interest in conducting orderly and efficient

meetings of the City Council by prohibiting disruptive comments and behavior. In addition, like the policy at issue in City of Norwalk, the decorum policy may be construed to prohibit conduct which actually disrupts the council meetings. Persons may be removed from the council meeting who "use[] boisterous or profane language, or language tending to bring the Council or any Councilmember into contempt, or ... who interrupt[] and refuse[] to keep quiet or take a seat when ordered to do so by the presiding officer or otherwise disrupts the proceedings of the Council." Complaint, Exh. A (emphasis added). The "or otherwise disrupts the proceedings" language expressly requires actual disruption of the meeting. The language "or otherwise disrupts" also implies that the categories preceding the phrase also require actual disruption of the meeting. So construed, the policy is not facially unconstitutional.[1] City of Norwalk, 900 F.2d at 1426.

2. Propriety of Order Ejecting Plaintiff: The Decorum Policy As Applied

Defendants next argue that the statute is not unconstitutional as applied because plaintiff was properly evicted from the City Council meeting. Defendants contend that plaintiff's Nazi salute was an offensive gesture during the non-public-comment portion of the hearing that violated the decorum

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[1] The policy could also be read in a way that does not require actual disruption of the meeting. The court need not reach the constitutionality of that construction, however, nor would any court need reach the issue if the city would clarify the language of the policy to more clearly require actual disruption.

policy's prohibitions. Here, however, the parties' views of the facts differ. The complaint alleges that the incident occurred during the public comment portion of the meeting. Defendants contend that the incident occurred after the time for public comment had ended. In addition, the complaint alleges that plaintiff did not utter any words or make an sounds, but merely raised his arm for one second in a gesture that mimicked a Nazi salute. The council's business continued, with plaintiff's gesture unnoticed except by one council member who then interrupted the meeting to note plaintiff's gesture. Reading the facts most favorably to the plaintiff, he made his gesture during the public comment portion of the hearing, and his gesture was relatively unnoticed. Nevertheless, the meeting was in fact disrupted as a direct result of plaintiff's gesture. There is little dispute that a Nazi salute is a gesture that is offensive and could be viewed as a personal attack on the Mayor and/or members of the City Council. There is also little dispute that a Nazi salute is conduct that could "otherwise disrupt" the council proceedings. The allegations reveal that the meeting was in fact disrupted:

> plaintiff raised his arm for one second in a gesture that mimicked a Nazi salute. Plaintiff did not utter any words or make any sound. Krohn did not observe plaintiff's gesture and continued on with the meeting, but [Councilmember] Fitzmaurice interrupted Krohn as he was speaking and stated, "A point of order, Mr. Mayor. Mr. Norse just made a Nazi salute." Krohn then instructed

> plaintiff to leave the meeting. Plaintiff objected to the order that he be removed. Krohn declared a five minute recess.

Complaint ¶ 9. Thus, the facts alleged in the Complaint reveal that the proceedings were disrupted by plaintiff's offensive, out-of-order gesture. Thus, there was no constitutional violation in ordering plaintiff to be removed from the meeting.

3. Probable Cause for Arrest

Defendants contend that there was probable cause to arrest plaintiff—the order ejecting him was a lawful order, his refusal to comply with the lawful order established probable cause to arrest him. California Penal Code § 148 prohibits willfully resisting, delaying or obstructing a peace officer in the performance of his duties. The crime is a general intent crime. In re Muhammed C., 95 Cal.App.4th, 1325, 1130 (2002). The complaint alleges that Sergeant Baker, at the Mayor's instruction, informed plaintiff that he would have to leave or he would be arrested. Plaintiff refused to leave; Sergeant Baker then placed plaintiff under arrest. Plaintiff contends that the ejection order was unlawful because he had not disrupted the meeting. As discussed above, however, the complaint reveals that the meeting was in fact disrupted. Thus, the order to remove plaintiff was lawful. Plaintiff's refusal to depart provided probable cause for his arrest. Thus, there is no constitutional claim stated for the order to remove plaintiff or the subsequent arrest of plaintiff for failure to comply with the lawful order of Sergeant Baker to depart.

In addition, Sergeant Baker has qualified immunity. The decorum policy provides that the sergeant-at-arms of the Council "shall carry out all orders and instructions of the presiding officer . . . ." There was no clearly established law pursuant to which Sergeant Baker should have known that the Mayor's order was unlawful. The City's decorum policy is not so obviously unconstitutional that a reasonable police officer would have refused to enforce the Mayor's direction to remove someone from the council meeting. See Grossman v. City of Portland, 33 F.3d 1200, 1209-1210 (9th Cir. 1994). A reasonable officer in Sergeant Baker's position would not have contemplated that arresting plaintiff for refusing to comply with apparently lawful order to depart from the council meeting violated any clearly established right. Sergeant Baker has qualified immunity for his actions in arresting Plaintiff.

4. Qualified Immunity

Alternatively, defendants assert that the councilmember defendants have qualified immunity because their conduct did not violate a clearly established constitutional right of which a reasonable official in their position would have known. Trevino v. Gates, 99 F.3d 911, 916 (9th Cir. 1996), cert. denied 117 S. Ct. 1249. To determine whether the councilmembers have qualified immunity, the court must first determine whether the law is clearly established given the facts of the case. If and only if plaintiff makes this first showing, the court then considers whether a reasonable person in the defendants' position would have known that

his conduct violated the clearly established right. Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988).

Defendants assert that there is no clearly established First Amendment right of the public to act in the manner plaintiff acted during the course of a city council meeting. Moreover, even if there was such a clearly established right, defendants are still immune from suit so long as a reasonable official in their position would not have recognized that their conduct was unlawful. "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting' all but the plainly incompetent or those who knowingly violate the law. '" Hutner v. Bruant, 502 U.S. 224, 233 (1991). While plaintiff had a right to attend a public meeting of the City Council, he had no First Amendment right to disrupt the meeting. There is no clearly established law supporting plaintiff's right to act in the manner in which he acted and no clearly established law prohibiting the Mayor from ordering plaintiff to be ejected from the meeting, following his Nazi salute, in order to maintain decorum. Accordingly, both the

Mayor and the councilmember defendants[2] are entitled to qualified immunity.[3]

ORDER

For the foregoing reasons, defendants' motion to dismiss is GRANTED.

DATED: 6/14/02

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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[2] The councilmembers are also entitled to dismissal of the claims against them because the complaint does not allege any facts under which they could be liable to plaintiff. The complaint does not allege that any of the councilmembers did anything, with the exception of Councilmember Fitzmaurice who made note of plaintiff's Nazi salute. Plaintiff has identified no law which imposed a duty upon the councilmembers to act to prevent plaintiff's ejection or arrest. Accordingly, the complaint fails to state a claim against councilmembers Fitzmaurice, Sugar, Reilly, Porter, Kennedy and Primack.

[3] Because the court finds that the individual defendants have qualified immunity, the court will not reach the issue of whether or not the Mayor and councilmember defendants also have legislative immunity.

THIS SHALL CERTIFY THAT NOTICE OF THIS ORDER WAS PROVIDED TO:

Counsel for Plaintiff:

David J. Beauvais davebeau@pacbell.net

Kate Wells lioness@got.net

Counsel for Defendants:

George J. Kovacevich admin@abc-law.com

Date: 6/14/02 /s/ TER
Chambers of Judge Whyte

DAVID J. BEAUVAIS (CA Bar # 84275)
1840 Woolsey Street
Berkeley, California 94703
Telephone: (510) 845-0504
Facsimile: (510) 540-4821

KATHLEEN WELLS (CA Bar # 107051)
2600 Fresno Street
Santa Cruz, California 95062
Telephone: (831) 479-4475
Facsimile: (831) 479-4476

Attorneys for Plaintiff
ROBERT NORSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT NORSE, *Plaintiff,* V. CITY OF SANTA CRUZ; CHRISTOPHER KROHN, individually and in his official capacity as MAYOR OF THE CITY OF SANTA CRUZ; TIM FITZMAURICE,	No. C02-01479 **COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF** Violation of Civil Rights Title 42 USC § 1983

individually and in his official capacity as MEMBER OF THE SANTA CRUZ CITY COUNCIL; KEITH A. SUGAR, individually and in his official capacity as MEMBER OF THE SANTA CRUZ CITY COUNCIL; EMILY REILLY individually and in her official capacity as MEMBER OF THE SANTA CRUZ CITY COUNCIL; ED PORTER, individually and in his official capacity as MEMBER OF THE SANTA CRUZ CITY COUNCIL; SCOTT KENNEDY individually and in his official capacity as MEMBER OF THE SANTA CRUZ CITY COUNCIL; MARK PRIMACK, individually and in his official capacity as MEMBER OF THE SANTA CRUZ CITY COUNCIL; LORAN BAKER, individually and in his official capacity as SERGEANT OF THE	Jury Trial Demanded

SANTA CRUZ POLICE DEPARTMENT,

Defendants.

Plaintiff alleges:

JURISDICTION AND VENUE

1. This court has jurisdiction over the subject matter of this action pursuant to Title 28, United States Code Sections 1331, 1332 and 1343.

2. The conduct upon which this suit is based occurred in this judicial district.

3. Plaintiff is informed and believes and on that basis alleges that each of the named defendants resides in this judicial district.

PARTIES

4. Defendant CITY OF SANTA CRUZ is a local public entity situated in the State of California and organized under the laws of the State of California.

5. Defendant CHRISTOPHER KROHN is, and was at all times mentioned herein, the MAYOR OF THE CITY OF SANTA CRUZ and in doing the

things hereinafter alleged, acted under color of state law as an agent of the CITY OF SANTA CRUZ and with its full consent and approval.

6. Defendants TIM FITZMAURICE, KEITH A. SUGAR, EMILY REILLY, ED PORTER, SCOTT KENNEDY and MARK PRIMACK are, and were at all times mentioned herein, MEMBERS OF THE SANTA CRUZ CITY COUNCIL and in doing the things hereinafter alleged, acted under color of state law as agents of the CITY OF SANTA CRUZ and with its full consent and approval.

7. Defendant LORAN BAKER is, and was at all times mentioned herein, a SERGEANT OF THE SANTA CRUZ POLICE DEPARTMENT and in doing the things hereinafter alleged, acted under color of state law as an agent of the CITY OF SANTA CRUZ and with its full consent and approval.

8. In doing the things herein alleged, the defendants, and each of them, acted as the agent, servant, employee of the remaining defendants and acted in concert with them.

STATEMENT OF FACTS

9. On March 12, 2002, plaintiff attended a public meeting of the Santa Cruz City Council. During oral communications, a period when members of the public are allowed to address the

Council, a woman stood at the podium and began to speak. Defendant Krohn told her that public comment was over and that she would not be permitted to address the Council. When the woman objected, Krohn told her to step away from the podium or she would be expelled from the Council chamber. As she walked away in compliance with this order, plaintiff raised his arm for one second in a gesture that mimicked a Nazi salute. Plaintiff did not utter any words or make any sound. Krohn did not observe plaintiff's gesture and continued on with the meeting, but Fitzmaurice interrupted Krohn as he was speaking and stated, "A point of order, Mr. Mayor. Mr. Norse just made a Nazi salute." Krohn then instructed plaintiff to leave the meeting. Plaintiff objected to the order that he be removed. Krohn declared a five minute recess. During the recess, defendant Baker who was in uniform approached plaintiff and told him that he would have to leave or be arrested. Plaintiff said that he had not disturbed the meeting and did not intend to leave. Plaintiff sat down. Baker then told plaintiff that he was under arrest and ordered him to place his hands behind his back. Plaintiff stood up and complied with Baker's commands. When plaintiff asked Baker the reason he was being arrested, Baker said that he wasn't sure, that the charge might be trespass but that he would have to check with the city attorney.

10. Plaintiff was detained for approximately five and one half hours and was then released on his own recognizance. He was given a citation for

violation of California Penal Code section 403, disrupting a public meeting

11. Plaintiff is informed and believes and on that basis alleges that Baker acted under the direction of the other individual defendants.

12. None of the individual defendants had probable cause to believe that plaintiff had violated California Penal Code section 403 or any other statute.

13. In arresting plaintiff, defendant Baker acted under the direction and with the approval of the other individual defendants and pursuant to a written policy of the City of Santa Cruz formulated and enforced by defendants Krohn, Fitzmaurice, Sugar, Reilly, Porter, Kennedy and Primack. The policy consists of a systematic abridgement of the rights of persons appearing before the Council to freedom of expression, right to petition for a redress of grievances, the right to assemble and the right to be free of arbitrary exclusion from public meetings and arbitrary arrest. A true copy of the written policy is annexed to this complaint as Exhibit "A"

STATEMENT OF DAMAGES

14. As a direct and proximate result of the incident alleged in this complaint, plaintiff sustained injuries and damages including, but not limited to: pain, suffering, loss of liberty, as well as severe

emotional distress, fear, anxiety, embarrassment and humiliation, all to his general damage in an amount according to proof.

15. The conduct of the individual defendants as alleged in this complaint was willful, malicious, oppressive and/or reckless and therefore plaintiff is entitled to punitive damages according to proof.

16. Plaintiff has been compelled to engage the services of private counsel to vindicate his rights under the law. Plaintiff is therefore entitled to reasonable attorney's fees pursuant to Title 42, United States Code § 1988.

COUNT ONE
Violation of Civil Rights
(Title 42 U.S.C. Section 1983)

17. Plaintiff realleges and incorporates herein by reference the allegations set forth in Paragraphs 1 through 16 of this complaint.

18. In doing the acts complained of herein, the individual defendants acted under color of state law to deprive plaintiff as alleged herein, of certain constitutionally protected rights including, but not limited to:

(a) the right not to be deprived of liberty without due process of law;

(b) the right to be free from invasion or interference with plaintiff's zone of privacy;

(c) the right to be free from unreasonable searches and seizures;

(d) the right to freedom of speech;

(e) the right to freedom of association;

(f) the right to petition for a redress of grievances;

(g) the right to equal protection of the law;

(h) the right to be free from police use of excessive force;

(i) the right to be free from discriminatory law enforcement:

(j) the right to be free from arrest without probable cause.

19. In doing the acts complained of herein and in their official capacities as policy makers for defendant City of Santa Cruz, defendants Krohn, Fitzmaurice, Sugar, Reilly, Porter, Kennedy and Primack acted with a design and intention to deprive plaintiff of his rights secured by the Constitution of the United States and acted with deliberate indifference to plaintiffs rights.

20. The expulsion and arrest of plaintiff constituted part of a pattern and practice of the City of Santa Cruz to curtail debate on public issues and to ban criticism of the defendant elected public officials under threat of unlawful expulsion and arrest pursuant to a written policy that prohibits "personal, impertinent, or slanderous remarks", speech that is "indecorous", and "language tending to bring the Council or any Councilmember into contempt." The written policy is violative of the First Amendment and unconstitutional on its face and as applied to plaintiff's conduct. The policy is overinclusive because it reaches speech and conduct that is not disruptive of public meetings and vague in that it fails to give persons of reasonable intelligence notice of what speech or conduct is proscribed.

21. Plaintiff has no speedy and adequate remedy at law in that he regularly attends city council meetings, addresses the council and intends to continue to express disagreement with the council's political positions. Plaintiff fears that he will be chilled in the exericise of his first amendment rights and expelled and arrested again unless this court enjoins the defendants from continuing to enforce the policy.

22. The defendant elected public officials have enforced the policy on other occasions against plaintiff and others in a manner that violates their constitutional rights and will continue to do so unless prohibited by this court.

23. Plaintiff is entitled to preliminary and permanent injunctive relief against enforcement of the policy.

24. As a direct and proximate result of the acts complained of herein, plaintiff has suffered general damages as set forth in this complaint.

25. The conduct of the individual defendants was willful, malicious, oppressive, and/or reckless, and was of such a nature that punitive damages should be imposed in an amount commensurate with the wrongful acts alleged herein.

JURY TRIAL DEMAND

26. Plaintiff demands a jury trial in this matter.

PRAYER

WHEREFORE, plaintiff prays for judgment against the defendants, and each of them, as follows:

1. General damages according to proof;

2. Punitive damages against the individual defendants according to proof;

3. Preliminary and permanent injunctive relief banning enforcement of the policy annexed hereto as Exhibit "A".

5. Attorneys' fees pursuant to statute;

6. Costs of suit; and

7. For such other and further relief as the court deems appropriate.

DATED: March 26, 2002.

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DAVID J. BEAUVAIS
Attorney for Plaintiff