No. 07-15814

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NORSE,

Plaintiff and Appellant,

v.

CITY OF SANTA CRUZ, CHRISTOPHER KROHN, TIM FITZMAURICE, SCOTT KENNEDY, and LORAN BAKER,

Defendants and Appellees.

On Appeal from the United States District Court
For the Northern District of California
Honorable Ronald M.Whyte
District Court No. C02-01479 RMW

APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

DAVID J. BEAUVAIS (CA Bar No. 84275)
409 13th Street, 20th Floor
Oakland, California 94612
Telephone: (510) 832-3605

KATE WELLS (CA Bar No. 107051)
2600 Fresno Street
Santa Cruz, California 95062
Telephone: (831) 479-4475

Attorneys for Plaintiff and Appellant
ROBERT NORSE

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I. INTRODUCTORY STATEMENT

Appellant Robert Norse petitions for rehearing and rehearing en banc following the opinion of a divided panel of this court which affirmed the district court's judgment that Santa Cruz city officials did not violate Norse's constitutional rights when they ejected him from a city council meeting in 2002 after he made a Nazi salute. The opinion filed on November 3, 2009 is attached to this petition as Exhibit "A."

Appellant also sued for having been ejected from a meeting in 2004. The panel ruled against him on that claim which he now abandons.

This case should be reheard or reheard en banc because it raises important questions of law and the reasoning of the panel majority is completely at odds with prior decisions of this court and the United States Supreme Court in the following respects:

1. In *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990), the court upheld rules of decorum similar to those adopted by Santa Cruz but only because it construed the rules to require words or conduct that disrupt, disturb or impede the orderly conduct of the meeting. *White* at 1424. For example, in *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995), the court upheld Kindt's ejection because his yelling and speaking off-topic actually caused a disruption. *Kindt* at 272.

In affirming Norse's ejection, the panel majority did not say that Norse disrupted the meeting. Instead it drew a debatable inference that he intended to support disruption of another person. The panel introduces a new watered-down standard at odds with *White* and *Kindt* which allows public officials to expel a person for attempting to cause a disruption.

2. The court's deeply flawed analysis is also at odds with Supreme Court precedent that disfavors viewpoint discrimination as reflected in such cases as *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) and *Cohen v.*

California, 403 U.S. 15 (1971). As articulated in the dissent, the inferences arising from Fitzmaurice's conduct support Norse's contention that he was ejected for having offended Fitzmaurice and not for disrupting the meeting.

3. The intent with which Norse made his gesture is not relevant to the First Amendment analysis, yet his supposed intent is the focal point of the panel majority's holding. Op. 14799-14801. At the same time, the panel majority fails to scrutinize the motives of the public officials who ejected him. It is their motive that are central to the claim that Norse was the target of viewpoint discrimination. Yet, the majority fails to explore them.

4. The panel majority also concluded that Norse's gesture was not protected by the First Amendment because it was not a permissible expression of a point of view and "had little to do with the message content of the speaker whose time had expired." Op. at 14801, 14802. A reasonable person viewing the video would conclude that Norse's objection was to a perceived arbitrary ruling by the mayor and not because Norse supported disruptive conduct by others. The majority fails to explain why Norse's criticism of the mayor for denying the procedural rights of another is somehow outside the scope of the First Amendment like fight words or obscenity.

II. ARGUMENT

A. The Nature of the Case

Norse filed his 42 U.S.C. § 1983 complaint against the City of Santa Cruz, its mayor, council members and a police officer who arrested him after he directed a Nazi salute to the mayor during a city council meeting and then refused to leave when ordered to do so by the mayor. Norse sued for false arrest and violation of his First Amendment rights.

The incident was captured on video and admitted into evidence. There is no dispute about the facts. When Susan Zeman approached the podium, Mayor

Krohn brusquely announced that the period for public communications was over and asked her to step away from the podium. After 14 seconds of back and forth with the Mayor about her right to speak, she walked to the back of the room where Norse was standing. Norse then directed a silent, fleeting Nazi salute toward the mayor. Although the mayor did not see the gesture, council member Fitzmaurice did. The video can be seen here: http://www.youtube.com/watch?v=ZOssHWB6WBI

The mayor had gone on to other business when Fitzmaurice interrupted him with a point of order. Fitzmaurice then asked that Norse be expelled for making a Nazi salute because it was "against the dignity of this body." The mayor ordered Norse to leave. Norse refused saying that he had a right to stay. The mayor recessed the meeting. Norse was then arrested for refusing to leave and announced to those in the room during the recess that he was being arrested for making a gesture protesting Susan Zeman's exclusion from oral communications.

The district court granted the defendants' motion to dismiss on the ground that the face of the complaint showed that Norse disrupted the meeting. On appeal this court in an unpublished disposition overruled Norse's facial attack on the constitutionality of the council's rules of decorum by interpreting them to require a violation coupled with an actual disruption. The court reversed the district court judgment dismissing Norse's as-applied challenge.

On remand and on the eve of trial, the district court held a hearing to determine whether the defendants were entitled to qualified immunity. The court found that Norse's constitutional rights were not violated and that even if they were, no reasonable official would have known that his conduct was unlawful.

The panel majority on this second appeal affirmed the judgment of the district court and adopted its reasoning. The dissent argued that the majority

failed to draw inferences favorable to Norse, as it was required to do, since the district court made its ruling in a summary judgment-like proceeding. Drawing inferences favorable to Norse, the record was adequate to submit the case to a jury.

B. This Decision is in Conflict with Other Decisions of this Circuit

In *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990), the plaintiffs brought a facial challenge to an ordinance defining rules of decorum at city council meetings. The court upheld rules of decorum in Norwalk similar to those adopted by Santa Cruz but only because it construed the rules to require words or conduct that cause disruption, disturb or impede the orderly conduct of the meeting. *White* at 1424. They did not bring an as-applied challenge as does Norse.

In *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995), the court reaffirmed *White* and upheld Kindt's ejection because his yelling and speaking off-topic actually caused a disruption. *Kindt* at 272.

The panel majority in this case did not find that Norse caused a disruption. The majority says, ". . .the behavior that prompted Norse's ejection was his giving a Nazi salute in support of a disruptive member of the audience . . . 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. Op. at 14799.

The court goes on to say, ". . .the salute had little to do with the message content of the speaker whose time had expired. . . . 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. Op. at 14802.

Finally the court finds the district court's ruling correct under the second prong of qualified immunity analysis because "it would not have been clear to a reasonable person in the Mayor or Council's position that the ejection was unlawful given the difficult circumstances and threat of disorder that was presented by the disruptions. Op. at 14801.

The court is wrong on the facts and its conclusions marred by the failure to take notice of the sequence of events that a reasonable viewer of the video would acknowledge are beyond dispute. At the time of the salute, there was no disruption. Susan Zeman had retired to the side of the room where Norse was situated after failing to persuade the mayor to let her speak. The mayor had gone on to other business when Norse made his silent gesture which lasted for between one and two seconds. It caused no commotion in the audience. Given where Norse was standing, most people in the room would not have noticed it. Fitzmaurice who was facing Norse did notice it. He interrupted the meeting with his point of order requesting that Norse be ejected from the meeting. Fitzmaurice's ground for objection was not that Norse was disruptive himself or supporting Zeman but that the gesture was "against the dignity of this body." These are not the words of a politician seeking to return the meeting to order but one who is offended by Norse's accusation, inherent in the salute, that the mayor acted like a Nazi. The majority was clearly wrong when it concluded 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." Op. at 14802. The court ascribes a motive to the defendants that they themselves do not claim. Instead, they ejected Norse for reasons they unabashedly acknowledge. They were offended and insulted. Their dignity had been called into question. Nothing in *White* or *Kindt* supports the notion that a non-disruptive insult to the dignity of a city council or mayor is cause for ejection from a public meeting.

Finally, the court's new standard for this case is at odds with its holding in *Norse I* where it ruled that disruption was required before Norse could be ejected. Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816 (1988) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983). "This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Id.* (citation and quotation marks omitted).

C. This Decision is in Conflict with United States Supreme Court Precedent

Speech cannot be banned simply because some find it distasteful or are offended by it. *Cohen v. California,* 403 U.S. 15 (1971). As Justice Douglas pointed out in his concurring opinion in *Spence v. Washington,* 418 U.S. 405, 416 (1974):

> . . . if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection" (quoting the opinion of the Iowa Supreme Court in the case of *State v. Kool,* 212 N.W.2d 518, 521 (1973).

In *Cohen*, *supra*, the petitioner was arrested for disturbing the peace when he was observed in a courthouse corridor wearing a jacket bearing the words, "Fuck the Draft." The court found that this expression was deserving of constitutional protection and that Cohen's jacket had not caused a disturbance. *Cohen* is controlling here because Norse was excluded from the meeting and arrested simply because in a non-disturbing way he expressed himself in a manner that the defendants found offensive. The court noted:

> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular

> four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric. *Cohen* at 25.

Also closely on point is the case of *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) in which the court reinstated a complaint for injunctive relief brought by public school students who were suspended for wearing black arm bands to protest the Vietnam war. The court noted that "the school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the petitioners." Id. at 508. The court rejected the notion that school officials were justified in banning expression because they feared a disturbance, noting that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion my inspire fear. Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take the risk." Id. at 509.

A city council meeting is a setting bearing some marks of similarity to a classroom for the purpose of defining the contours of permissible First Amendment expression. In both fora, a need for decorum exists to assure that the functions of each are not thwarted, but giving due allowance for that concern, it does not follow that Norse, anymore than the students in *Tinker*, may be stripped of his constitutional rights either because the relevant officials fear disruption or because they seek to impose whimsical notions of etiquette based on personal values. The evidence is sufficient to show a clear attack on the content of Norse's message rather than an even handed enforcement of a neutral set of rules implemented to minimize disruption.

For these reasons, the court's opinion is inconsistent with longstanding U.S. Supreme Court precedent upholding the right of silent, passive expression that does not cause a disturbance.

D. The Opinion Creates New Doctrine that Erodes Traditional First Amendment Protections

While the panel majority pays lip service to the notion expressed in *White* that the discretion of public officials is not unlimited, and that rules may not be enforced to suppress a particular viewpoint, it is hard to imagine a case where this will any longer be true. Given the new standard under which it authorizes an ejection whenever a public official is offended by the message or the manner of its delivery, disruption is no longer required; it will be sufficient that the official reasonably perceives that the offender *intended* to disrupt even if he fails to attain that goal. This probing of intent is troublesome in First Amendment doctrine because it allows officials to thwart speech critical of them based on presumed disruptive intent even where the attempt at disruption is ineffectual.

The court's opinion cites no authority that supports this new construct in First Amendment jurisprudence. It is sui generis, intellectually indefensible and dangerous because it restricts the free flow of ideas and chills exercise of First Amendment rights in a forum specifically designed for expression of those rights within the constraints of that forum. Norse's intent should play no role in the adjudication of First Amendment rights.

The closest analogy to the rule formulated in the opinion is the line of cases dealing with the principle that constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *Brandenburg* deals

with far weightier concerns than are present here. But inherent in the Brandenburg formulation is the idea that the actor must intend to produce imminent lawless action. Nothing about making a one or two second silent Nazi salute rises to the level of advocacy at all, much less unlawful incitement of others to produce imminent lawless action.

The panel majority supports a renegade council that values more its own whimsical notions of propriety and the protection of its egos than the constitutional rights of the citizens it was elected to serve.

Only the most courageous will risk addressing this council about any topic that is controversial particularly if it concerns the conduct of the council or any of its members. This diminishes the free flow of ideas and makes the public less informed. A person willing to risk speaking to the council faces instant removal should the council disagree with the message being conveyed.

The panel majority offers no outer boundary to the rule it announces. This grants officials discretion to shut down legitimate speech and leaves the public without a remedy in this court when they do.

E. The Panel Majority Erred in Concluding that Norse Was Not Expressing a Permissible Point of View

The panel majority states in its opinion, "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." Op. at 14801. Although the opinion fails to address this conclusion any further, and therefore it is difficult to be sure, it appears that the majority is saying that Norse was not engaged in recognizable First Amendment activity when he made his gesture or that if it were recognizable as such, it was not permissible. There can be no question that Norse was expressing an idea. He was not coughing or sneezing. He protested Zeman's exclusion from oral

communications. Everyone understands that, including the panel majority in other portions of the opinion. At the same time, the majority seems to say that because the rules were found valid at an earlier stage of this litigation and because it characterized the Chair as acting in good faith, that Norse's expression conveyed an idea that was wrong-headed and therefore not deserving of protection. Political expression in this country is littered with misleading statements and wrong-headed ideas that are given protection. "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz v. Robert Welch, Inc,* 418 U.S. 323, 339-340. That principle should adhere in this case.

III. CONCLUSION

As petitioner demonstrates, the panel's opinion is a dangerous precedent leaving public officials with unbridled discretion to foreclose speech at public meetings either because their feelings are hurt, their dignity has been insulted or they think that a speaker intends to cause disruption. These new ideas first articulated in this case are inconsistent with prior decisions requiring an actual disruption before rules can be enforced by ejection from the meeting. The consequences of this standard are frightening to the point that they need to be reviewed by the panel or overturned after en banc review.

The panel majority ignored inferences favorable to Norse that demonstrated that his ejection was based on the abhorrence of his message and the manner in which was delivered. There were sufficient indicia in the evidence to send this case to a jury rather than draw conclusion based on inferences against Norse as the dissent points out.

For the foregoing reasons, Norse respectfully requests that the panel rehear the case and reach a decision that comports with long-standing constitutional principles or grant this petition en banc.

Dated: November 17, 2009

/s/ David J. Beauvais
DAVID J. BEAUVAIS
Attorney for Petitioner
ROBERT NORSE

/s/ Kate Wells
KATE WELLS
Attorney for Petitioner
ROBERT NORSE

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for rehearing and rehearing en banc is in compliance with Fed. Rule App. 32(c) and does not exceed 15 pages.

/s/ David J. Beauvais
Attorney for Petitioner
Robert Norse

CERTIFICATE OF SERVICE

I hereby certify that on November 17,2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECFR users will be served by the appellate CM/ECF system.
I further certify that all participants in the case are registered with the CM/ECF system.

/s/ David J. Beauvais