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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT NORSE, Plaintiff, vs. CITY OF SANTA CRUZ, et al., Defendants.	No. C02-01479 RMW **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR A NEW TRIAL** [Fed.R.Civ.P. 59] Date: May 31, 2013 Time: 9:00 A.M. Crtrm: 6

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I. INTRODUCTION

On November 7, 2012, following a six-day trial, the jury returned a verdict against Plaintiff, Robert Norse and in favor of the Defendants, City of Santa Cruz, Tim Fitzmaurice and Christopher Krohn. The jury found that the defendants did not violate Plaintiffs First or Fourth Amendment rights in each of two incidents, to wit: on March 2, 2002 and January 14, 2004.

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, Plaintiff now seeks an order granting him a new trial.

Plaintiff submits that the jury verdict was against the great weight of the evidence, that the jury selectively followed some of the jury instructions and ignored others in violation of the rule that all of the instructions are equally important; that the arrest on March 2, 2002 was unlawful in that Plaintiff's gesture was not made "in the presence of" the arresting party, defendant Christopher Krohn; and that the Plaintiff's evidence regarding the January 14, 2004 incident stands unrebutted in that Defendants presented no evidence in opposition to the testimony of Plaintiff and his witnesses establishing that his conduct caused no disruption of the meeting on that date.

For each of these reasons, Plaintiff should be granted a new trial.

II. STATEMENT OF FACTS/TESTIMONY ADDUCED AT TRIAL

A. EVIDENCE REGARDING INCIDENT ON MARCH 12, 2002 (NAZI SALUTE)

A video of the incident admitted into evidence established the following facts:

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, Norse raised his arm for one second in a gesture that mimicked a Nazi salute. He did not utter any words or make any sound.

Krohn did not observe Norse'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 madea Nazi salute." Krohn then instructed Norse to leave the meeting. Norse objected.

Krohn declared a five minute recess. During the recess, Sergeant Baker who was in uniform approached Norse and told him that he would have to leave or be arrested. Norse said that he had not disturbed the meeting and did not intend to leave. He sat down. Baker then told Norse that he was under arrest and ordered him to place his hands behind his back.

Norse stood up and complied with Baker's commands. When Norse 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.

Norse 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.

The video at trial was supplemented with witnesses including Defendants Fitzmaurice and Krohn to establish further context for the events and the motivations for the defendants actions.

1. Tim Fitzmaurice Exhibit 2 pp 139-221

He testified:

a) That he is very knowledgeable about the Brown Act and that he is aware that it specifically permits citizens to criticize council members. Exh. 2, P.142, lines 10-12

b) That it is acceptable for people to clap at a meeting. Exh. 2, P. 146, lines 20-25

c) That not every form of expressive conduct outside of oral communications would be out of order. It would be okay for someone to wear a t-shirt or hold up a sign. Exh. 2, P. 147, lines 17-25

d) That Plaintiff's gesture was quick, silent and conveyed a message and that it was an insult and that it was directed at him. Exh. 2, P.153, lines 1-25

e) That he was offended by the gesture. Exh. 2, P. 154, lines 19-25

f) That the Mayor was carrying on with the business of the city when he made his point of order. Exh. 2, P. 156, lines 18-25.

g) That at the time he made his point of order the meeting was going on, moving forward.

Exh. 2, P.157, lines 8-12.

h) He stated in his point of order that the gesture was against the dignity of the body. Exh. 2, P.163, lines 1-2

i) That when people are behaving in ways that are offensive to the room . . . then he believes they are being indecorous and they are being out of order. Exh. 2, P. 163, lines17-20.

j) In response to the question of what other manner was the meeting being disturbed other than his making the objection, he said it was his decision whether or not the gesture was disturbing. Exh. 2, P. 165, lines 8-12

k) That holding a sign is a form of communication and likewise a Nazi salute is a form of communication. Exh. 2, P. 170, lines13-16

l) That a sign is acceptable but the Nazi salute was not. Exh. 2, P. 170, lines 21-25

m) That if plaintiff had given a pleasant gesture such as a thumbs up he would not have called a point of order. If plaintiff had blown the mayor a kiss he would not have called a point of order. Exh. 2, pp.172-174

n) What he meant by the terms "against the dignity of the body" was that the space should be dignified. Exh. 2, P. 175, lines 11-15.

o) Before someone can be ejected from a meeting, they have to create an actual disruption of the meeting, whether or not the speech is indecorous or decorous. Exh. 2, pp. 178-179

p) Disturbance means interrupting the orderly, legal flow of the meeting and he agree that this was the principle that applied to the March 12, 2002 meeting.. Exh. 2, P.180

q) Some out of order conduct does not merit ejection while other conduct does. Exh. 2, P. 182

r) Plaintiff was clearly sending a message to me. Exh. 2, P. 203

s) The salute was directed to the council and he was observing it. Exh. 2, P. 209

2. Mayor Christopher Krohn Exh. 2, pp 224-235

He testified that:

a) He did not see the gesture that plaintiff made at the meeting so the gesture did not bother him. The gesture itself did not disturb or disrupt him. Exh. 2, P 225

b) He made the citizen's arrest on the plaintiff. Exh. 2, pp. 225-226

c) People regularly hold up signs in the council chambers. If plaintiff had held up a sign that said "Nazi salute" or a sign that had a hand in the form of nazi salute, he would not have ejected plaintiff. Exh. 2, pp. 226-227

d) If plaintiff had truly wanted to get the attention of the council, he could have done lots of things to do so. Plaintiff did not do any of those things. Exh. 2, P. 228

e) After the point of order was made plaintiff approached the podium and at that time he was moving on to the agenda items. Exh. 2, P. 229

f) At the time of this incident, he was aware that a person could not be ejected from the meeting unless they caused an actual disruption of the council meeting. Exh. 2, P. 230

g) -Indecorous behavior is based upon whether or not it causes a disruption. Exh. 2, P. 233

3. Scott Graham Exh. 2 pp 235-247

He campaigned for both Krohn and Fitzmaurice. He witnessed plaintiff's gesture and noticed that there was no reaction from the crowd, no one gasped or made any noises after he made the salute. Most people were not paying any attention. Nothing happened until Ftizmaurice stopped the meeting. No one in the room reacted except for Fitzmaurice. Exh. 2, P. 237

4. Steve Hartman Exh. 1 pp. 110-115

He came all the way from Montana to testify. He does not get along with Norse politically. He was present at the March 2002 meeting and testified that he would not even characterize the gesture as a Nazi salute. There was absolutely no reaction from the crowd. He saw no disturbance whatsoever. The only thing he heard was Fitzmaurice objecting to it. He heard Plaintiff say that he had a right to be at the meeting. Plaintiff was calm and did not resist arrest in any manner. Exh. 1, pp. 110 - 115

5. Mark Halfmoon Exh. 1 pp 116-119

He was at the March 2002 meeting and was there as a representative of Community Television of Santa Cruz as a cameraman for the live feed of the meeting to the public. He saw plaintiff's gesture and noted that there was no reaction from the crowd. It appeared to him that the gesture was for the benefit of the speaker (Susan Zieman) and he thought that maybe she and he (Halfmoon) were the only ones who actually saw it. The Mayor was proceeding with the

meeting when he was interrupted by Fitzmaurice who pointed out that plaintiff had done a Nazi salute and should be removed from the chambers. The Mayor ordered plaintiff to leave and when plaintiff refused, the Mayor ordered that the meeting be recessed. He has no animosity towards Krohn; in fact Krohn appointed him to sit as his representative on the Citizen's Police Review Board. He considers both Krohn and Fitzmaurice to be his friends. Exh. 1 pp. 116-119.

6. Video Tape

Plaintiff requests that the court view the video tape of this incident again.

B. EVIDENCE REGARDING JANUARY 14, 2004 INCIDENT

On January 14, 2004, Norse attended another public meeting of the Santa Cruz City Council. Mayor Kennedy presided over the meeting. Norse entered the council chamber with a dozen others. Some of them carried signs. Norse did not have one. They walked single file past the council and in front of the audience. Kennedy told those with signs to stand next to the wall so that the signs would not block the view of the audience.

Norse left the meeting and sometime later walked back in. Douglas McGrath was seated in the audience. Norse whispered to McGrath that someone outside wanted to speak to him. The whisper did not disrupt any other speaker or interfere with the meeting in any way and was so inaudible that it could not be heard on the official city council tape.

Observing this, Kennedy interrupted the meeting and said to Norse, "Mr. Norse, this is your second warning." When Norse asked Kennedy, "what was my first warning?", he replied, "that's your third warning. Leave the chamber." Norse left but later returned intending to speak during oral communications. When he came back, Kennedy told him he had been expelled and demanded that he leave. When Norse asked the council to overrule Kennedy, he was met with silence. Norse sat down. Kennedy recessed the meeting and Norse was taken into custody.

The video of the January 14 incident was supplemented by witness testimony surrounding Norse's interactions with Kennedy and what actions Norse took during the meeting.

1. Tim Fitzmaurice Exhibit 2 pp 139-223

a) In response to whether or not what plaintiff did (when whispering to the homeless man)

was distracting, he responded "he wasn't looking in that direction." Exh. 2, P 217 line 25

b) He did not recall hearing plaintiff's voice at the meeting and he is very familiar with plaintiff's voice Exh. 2, p 218, lines1-7

c) He generally did not recall exactly what occurred; he deferred to Mayor Kennedy.

2. Coral Brune Exhibit 2 pp 262-268

a) No one complained about the procession. The audience could still watch the meeting on the monitor. The procession took about a minute. She was sitting close to plaintiff during the whispers and could not hear any conversation. There was no disruption of the meeting. Exh 2 P 264

b) People regularly engage in conversations in the audience. Plaintiff was not doing anything different. Exh 2 p. 265

c) She has never seen anyone punished for whispering back and forth, Exh 2 P 266

3. Thomas Leavitt Exhibit 2 pp 247-256

People engage in conversations constantly in the audience with impunity. Norse was reprimanded where others were not. He saw plaintiff named or warned numerous times for behavior that he had seen other people who engaged the city council less often not warned for. Exh 2, P 253

4. Scott Graham Exhibit 2 pp 235-247

a) He worked to get Fitzmaurice and Krohn elected. Exh 2 P 237

b) He had been to 100 council meetings. That day there was no audience just reporters and staff members . No one complained about the procession. Exh 2 P 239

c) There is no custom or usage that prohibits people from walking where the procession was walking. He never saw anyone get in trouble for walking there. There were no signs telling people they could not walk there. He had never heard the mayor telling anyone they could not walk there. He was present when the incident about plaintiff's whispering took place. Exh 2 P 240

d) Norse was not very far away from him. He saw him leaning over whispering in someone's ear. He was not distracting me. He could not hear what plaintiff was saying even though

he was close enough. The whisper lasted a few seconds. Exh 2, P 241

e) In the 100 or so meetings he has attended it happened at every meeting that people in the audience talk to each other as the meeting is going on. The staff talks to each other. He has talked to people himself. He never got in trouble for it. He's never seen anyone get in trouble for whispering. Exh 2 P 242

f) Norse was not doing anything more than other people do. He was singled out. They had a vendetta against him. They were trying to shut him up trying to figure out a way to keep him from talking. They changed things at meetings just to thwart plaintiff. Exh 2 ; P.243

5. Linda LeMaster Exhibit 2 pp. 268-285

a) She was less than 3 feet away from plaintiff when he whispered to the homeless man - with a little leaning, she could have touched his shoulder. Exh 2, P 277 lines 10-24

b) She could not hear what plaintiff was whispering and it lasted less than 10 seconds. Exh 2, P. 278, lines 1-9.

c) She saw other people talking with each other in the audience, it happens a lot, they were engaging in audible whispers, the director of the redevelopment agency was sitting and talking to one or two other people, she was at the opposite end of the bench where she was sitting and she was able to hear what they were saying. There was also another gentleman talking. Exh 2, p. 279

d) In the entire time she had been going to city council meetings she had never seen anyone issued a warning or threatened with eviction for engaging in the type of conduct that plaintiff was engaging in. Exh 2, p. 281

e) - She had seen plaintiff being treated differently by the council than they treated others. Exh. 2, p 281

6. Robert Patton (Exhibit 2, pp 256-262)

a) People talked all the time –Norse did nothing different than others who were not called out. Norse's whisper was not loud – he would have been close enough to hear.

b) Many people were talking to one another throughout the meeting and that was not an un-common occurrence to see someone bending over speaking to someone else that was in the

meeting. Plaintiff was not loud. Exh 2, p. 258.

c) They were sitting where they would have heard plaintiff if he was speaking loudly. He regularly sees people talking and whispering to each other at meetings. It happens at every meeting he has attended. Plaintiff did nothing different than the others. The others were not called out or punished for carrying on conversations. He does not recall that ever happening other than this occurrence with Plaintiff. He himself engages in whispering at meetings and has never been called out for it. Exh 2, p. 259.

III. ARGUMENT

A. THE STANDARD FOR EVALUATING A MOTION FOR A NEW TRIAL

Rule 59(a) states, "A new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed.R.Civ.P. 59(a)(1).

As the Ninth Circuit has noted, "Rule 59 does not specify the grounds on which a motion for a new trial may be granted." *Zhang v. Am. Gem Seafoods, Inc.,* 339 F.3d 1020, 1035 (9th Cir.2003). Rather, the court is "bound by those grounds that have been historically recognized." *Id.* Historically recognized grounds include, but are not limited to, claims "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940).

The Ninth Circuit has held that "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to pre-prevent a miscarriage of justice." *Passantino v. Johnson & Johnson Consumer Prods.,* 212 F.3d 493, 510 n. 15 (9th Cir.2000).

Upon the Rule 59 motion of the party against whom a verdict has been returned, the district court has "the duty ... to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence." *Murphy v. City of Long Beach,* 914 F.2d 183, 187 (9th Cir.1990) (quoting *Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 249 F.2d 246,

256 (9th Cir.1957)).

If there is no reasonable basis, "the absolute absence of evidence to support the jury's verdict makes [refusal to grant a new trial] an error in law." *Urti v. Transp. Commercial Corp.,* 479 F.2d 766, 769 (5th Cir.1973) (quoting *Indamer Corp. v. Crandon,* 217 F.2d 391, 393 (5th Cir.1954)); *see also Hiltgen v. Sumrall,* 47 F.3d 695, 703 (5th Cir.1995) (applying "absolute absence of evidence" standard); *Jones v. City of St. Clair,* 804 F.2d 478, 480 (8th Cir.1986) (same); *Grandison v. Smith,* 779 F.2d 637, 640 (11th Cir.1986) (same), *Molski v. M.J. Cable Inc.,* 481 F.3d 724, 729 (9th Cir. 2007).

B. THE DEFENDANTS VIOLATED NORSE'S FIRST AMENDMENT RIGHTS ON BOTH OCCASIONS

As a general proposition, a legislative body may impose regulations to assure the orderly conduct of business that might be offensive to First Amendment principles if applied in other contexts, particularly in traditional public fora such as parks and streets. See, e.g., *Kindt v. Santa Monica Rent Board,* 67 F.3d 266 (9th Cir. 1995). In *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990), the court held that rules designed to prevent speakers from speaking too long, being unduly repetitious, or engaging in extended discussion of irrelevancies are not foreclosed under First Amendment principles because such conduct prevents the council from accomplishing its business in a reasonably efficient manner and may interfere with the rights of other speakers. *White* at 1426.

But when a "public official excludes an elected representative or citizen from a public meeting, she must conform her conduct to the requirements of the First Amendment." *Monteiro v. City of Elizabeth,* 436 F.3d 397, 404 (3rd Cir. 2006). The right to attend public meetings is implicit in the discussion of First Amendment principles in both *White* and *Kindt, supra*. In California, the right is also protected by statute. Cal. Gov't Code §54953.

While First Amendment rights are more circumscribed in the setting of a city council meeting than on a public street, the power of the chair to regulate speech or conduct is not limitless. Particularly pertinent is the observation in *White, supra,* that while a moderator has a great deal of discretion to maintain order, abuses may occur when a moderator rules speech out of order simply

because he disagrees with it. *Id*.

As a general rule, the First Amendment prohibits state action that regulates speech on the basis of content. *Police Dept. v. Mosley*, 408 U.S. 92, 95-96 (1972). Even if it is permissible to impose reasonable time, place and manner restrictions on speech, the regulation itself must be content-neutral. *Musso v. Hourigan*, 836 F.2d 736, 742 (3rd Cir. 1988).

Despite upholding an ordinance similar in language to the rules of decorum in this case, the court in *White* makes clear that mere failure to adhere to the rules is insufficient to trigger an expulsion from the meeting. The violation must cause a disruption. *White*, *supra* at 1426.

It is clear from the videotape which captures the entire first incident that Norse's fleeting, silent Nazi salute did not disturb the meeting. At the time of the salute, the mayor had the floor. He continued to speak without pause after it occurred until Fitzmaurice interrupted him with a point of order. Had Fitzmaurice remained silent rather than interrupt the mayor, the meeting would have continued uneventfully. These conclusions are amply supported by the videotape. Witnesses corroborate them as well. None of the witnesses observed the any disruption of the meeting.

Fitzmaurice and Krohn could not lawfully exclude Norse from the meeting simply because they disagreed with the content of his message. Significantly, Fitzmaurice did not say that Norse should be removed for causing a disruption but instead because his Nazi salute was "against the dignity of this body." The fact that the salute may have been offensive to Fitzmaurice and Krohn does not defeat Norse's First Amendment rights.

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.

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 highly similar 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, any more 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 allegations in this lawsuit are 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.

As in *Tinker*, the defendants here sought to ban and punish Norse for "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id*. at 508 The second incident similarly involved no disruption by Norse. Kennedy gave him a "second warning" when he whispered to Douglas McGrath and then immediately a third warning and an order to leave after Norse asked what the first warning was. Again, as in the first incident, Norse had not impeded the

meeting in any way. His exclusion was an arbitrary exercise of power and in violation of the principles laid down in *White.*

Factually, this case is far removed from the disruption found in *White,* where the plaintiff was escorted from the Council chambers for refusing to stop talking after the mayor ruled him out of order and asked him to desist. *White, supra* at 1423. Unlike that case, the mayor here did not give Norse any admonishment after he made his fleeting, silent salute and there was no evidence that Norse would continue the behavior that defendants found objectionable. Similarly, this case bears no resemblance to the facts in *Kindt, supra*. There, the plaintiff loudly interrupted meetings when he was not allowed to speak to certain agenda items at the times that he wanted to speak. *Kindt* at 268.

This case therefore goes far beyond anything which *White* or *Kindt* sanctions to serve the interests of order at public meetings.

C. DEFENDANTS DID NOT HAVE PROBABLE CAUSE TO ARREST NORSE

While carrying out Krohn's citizen's arrest of Norse, Sergeant Baker said that he was not sure what the charge was but speculated that it might involve trespass. He told Norse that he would have to check with the city attorney. Thus, he accomplished the arrest without apparently having any clear charge in mind. Afterwards, Norse was advised that he was arrested for disturbing a public meeting in violation of Penal Code section 403.

Section 403 states that any person who disrupts a public meeting is guilty of a misdemeanor. The California Supreme Court acknowledged in the case of *In re Kay* (1970) 1 Cal.3d 930 that the statute if applied literally would be constitutionally infirm.

Accordingly, it adopted a narrowing construction to authorize "the imposition of criminal sanctions only when the defendant's activity itself–-and not the content of the activity's expression– *substantially impairs the effective conduct of a meeting*." (Emphasis added).*Id*. at 942.

The court stated:

> To effectuate section 403 within constitutional limits, we interpret it to require the following showing to establish a transgression: that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known." *Id*. at 943.

Since there was no substantial disruption as defined by the court in *In re Kay*, Norse's conduct did not rise to the level necessary to establish probable cause under Section 403. In this instance, the arrest was not legitimate because Norse merely exercised his constitutional and statutory rights to be present at the meetings. In the absence of evidence that he disrupted them, the defendants had no probable cause to arrest him under Penal Code section 403.

D. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The doctrine of qualified immunity represents a balancing of the right of the plaintiff to recover damages for violation of constitutional rights and the governmental interest in effective and vigorous execution of governmental policies and programs. *Anderson v. Creighton* 483 U.S. 635, 638-639. (1987)

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court adopted an objective test for determining when the defense is available. The Court said:

> We hold that government officials in performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known [citations omitted]". (*Id.* at 818).

Under the formulation in *Saucier v. Katz*, 533 U.S. 194 (2001) a court must first ask, taking the evidence in a light most favorable to Norse, whether a constitutional right has been violated. If the answer is yes (and for the reasons noted above the answer to this question is yes) then the court must decide whether the law as it applies to Norse's case was clearly established at the time of the violation.

At the time of the incidents in this case, the law was well-established that a person has a right to attend a city council meeting open to the public. Both *White* and *Kindt* acknowledge that.

More than 30 years ago, the California Supreme Court decided that Penal Code section 403 may only be applied to conduct that causes substantial disruption of a public meeting. *In re Kay*,

supra.

The holdings in *White* and *Kindt*, *supra*, both predating this incident, make clear that the power to eject members of the public from a meeting is limited to avoiding disruption and that the law conferred no arbitrary privilege to eject persons from public meetings because the moderator disagrees with the message being conveyed. The cases of *Cohen v. California* and *Tinker v. Des Moines School District*, *supra*, although not involving public meetings, make clear that the exercise of First Amendment rights may not be proscribed based on an unsubstantiated fear that the message may cause disruption. In *Mosely*, *supra*, the Court stated that content-based regulation of speech is usually unlawful.

A reasonable pubic official in the position of these defendants would not have thought that their conduct was lawful. The contours of the rights at stake in this case were fully developed in the case law at the time these defendants acted. There is not the slightest doubt as to the operative legal standards governing the defendants' conduct. No reasonable police officer or public official could think that Norse disrupted the meeting when he made his silent and fleeting salute or that he disrupted the meeting by asking the mayor to clarify why he was being warned.

Therefore, the defendants are not entitled to qualified immunity.

E. THE CITY IS LIABLE FOR THE VIOLATION OF NORSE'S RIGHTS

Norse can establish municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Ninth Circuit has noted that there is a "direct path" to municipal liability predicated on a policy, practice or custom of the municipality. *Gibson v. County of Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002). In the absence of an express unconstitutional directive, the plaintiff usually has the burden to demonstrate "practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

But liability may be based on a single decision by municipal policy makers under appropriate circumstances. It is beyond dispute that Krohn, Fitzmaurice and Kennedy are policy makers for the City of Santa Cruz with respect to enforcement of the rules of decorum at city council

meetings. “No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body-whether or not that body had taken similar action in the past or intended to do so in the future-because even a single decision by such a body unquestionably constitutes an act of official government policy. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 479-481 (1986). In accord, *Board of Education of West Windsor-Plainsboro Regional School District v. Besler*, (NJ Supreme Court) 993 A.2d 805, 818 (2010) [affirming that the chair of a public meeting charged with enforcing decorum was the final policy maker and that the plaintiff was not required to show that on multiple other occasions his free-speech rights were infringed before he can seek redress.]*Id.*

F. NO EVIDENCE SUPPORTS THE VERDICT THAT KROHN’S CITIZEN’S ARREST WAS LAWFUL

It is undisputed that Defendant Krohn did not witness the gesture that led to plaintiff’s arrest – he testified to that effect and the videotape of the incident also clearly shows that Krohn was reading and did not see the gesture. It is also undisputed that Krohn made a citizen’s arrest of the plaintiff for disrupting the meeting.

The authority of a private citizen to make an arrest is spelled out in California Penal Code, section 837, as follows: "A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." The term 'public offense' includes misdemeanors (Pen.Code, §§ 15, 17; *Burks v. United States*, 287 F.2d 117 (9th Cir. 1961); *People v. Redmond*, 246 Cal.App. 2d 852). In fact, the jurors in this case were specifically instructed that an offense must be “committed in the presence” of the citizen in order to make a lawful arrest.

In the case of *People v. Sjosten* (1969) 262 Cal.App.2d 539 the court held that they had found no authority construing the term “in his presence” as it relates to California Penal Code Section 837. The court also noted that there is identical language found in California Penal Code section 836 relating to a peace officer’s authority to make arrests and held that the term “in his presence” in section 837 of the Penal Code must be construed similarly with section 836. 'Pres-

ence' has been held to include not mere physical proximity but is to be determined by whether the offense is apparent to the officer's senses (*People v. Brown*, (1955) 45 Cal.2d 640; *People v. Bradley*(1957) 152 Cal.App.2d 527, 532.

In the case of *The People v. Alonzo C.* (1978) 87 Cal.App.3d 707, the court held that although the term "in his presence" is liberally construed, *People v. Lavender* (1934) 137 Cal.App. 582, 586-589; *McDonald v. Justice Court* (1967) 249 Cal.App.2d 960, 963), "the acts must become known to the officer through the sensory perceptions of the officer. The test is whether the misdemeanor is "apparent to the officer's senses." (*People v. Brown* (1955) 45 Cassl.3d 640, 642, 529.) Any and all of the senses are included. (*People v. Bock Leung Chew* (1956) 142 Cal. App. 2d 400. 403 (possession of narcotic, yen shee, shown by smell); *People v. Cahill* (1958) 163 Cal.App.2d 15, (hearing over the telephone a proposition to engage in prostitution); *People v. Lewis* (1963) 214 Cal.App.2d 799, (hearing over a radio transmitter); *Roynon v. Battin* (1942) 55 Cal.App.2d 861, (telescopic observation of fish and game laws violation).) Mere suspicion is insufficient. Likewise, it is insufficient cause to arrest for a misdemeanor outside of the officer's presence (which is often the case). The only recourse in such event is to seek a warrant." At page 733 the court states:

The question of reasonable cause to believe that a misdemeanor is taking place in the officer's presence is measured by the events **observable to the officer at the time of the arrest. If the officer cannot testify, based on his or her senses, to acts which constitute every material element of the misdemeanor, it cannot be said that the officer has reasonable cause to believe that the misdemeanor was committed In his presence.** (See *People v. Garrison* (1961) 189 Cal.App.2d 549, see also *Fobbs v. City of Los Angeles* (1957) 154 Cal.App.2d 464, 468.) *Emphasis added*.

The court in *Sjosten* , supra at 544, held, that since the citizen therein, Mrs. Morales, had actually seen the arrestee prowling in the neighborhood, the offense was committed in her presence and that as such, she had the right to make the arrest pursuant to section 837, subdivision 1.

"Presence" entitling an officer to make a misdemeanor arrest is not merely physical prox-proximity, but occurs only when the offense is apparent to the officer's senses (*People v. Brown*

(1955) 45 Cal.2d 640, 642; *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 725.)

The cases uniformly have held that the act justifying the citizen's arrest must be apparent to the senses of the citizen. It is logical that this would be the case in that an arrest is a drastic measure and must not be taken lightly – it would undermine the law if a citizen could arrest a person simply because another person told them the individual had committed a public offense. This is precisely the situation in the case at hand. Krohn did not see the act – it was not apparent to any of his senses including his hearing or his sight - and as such his act of effecting a citizen's arrest is unlawful and a clear violation of plaintiff's Fourth Amendment rights.

The jury ignored the instruction that the act had to be in Krohn's presence and likewise disregarded the closing argument of plaintiff's counsel where he points out that the arrest was unlawful because Krohn had not seen the act. Exh. 5, pp. 452, 454, 470. Needless to say, it would be a different case if defendant Fitzmaurice, who witnessed the gesture, had made the citizen's arrest – that is simply and uncontrovertibly not the case here. There is a complete lack of evidence to support the jury's finding that the citizen's arrest by defendant Krohn was lawful.

IV. CONCLUSION

The Court should grant Plaintiff a new trial.

DATED: April 10, 2013

/s/ David J. Beauvais
DAVID J. BEAUVAIS
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