UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 11-01355-JVS (MLGx)	Date	July 20, 2012
Title	William D. Fitzgerald v. Orange County, et al.		

Present: The Honorable	James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER Denying Plaintiff's Motion for Partial Summary Judgment (fld 6-18-12) and Granting in Part and Denying in Part Defendants' Motion for Summary Judgment or in the alternative Summary Adjudication (Fld 6-18-12)**

Plaintiff William Fitzgerald ("Fitzgerald") brings this 42 U.S.C. § 1983 action against Defendants Orange County, Bill Campbell ("Campbell"), John Moorlach ("Moorlach"), Janet Nguyen ("Nguyen"), and James C. Pena ("Pena")[1] (collectively, "Defendants"), alleging that Defendants violated Fitzgerald's constitutional rights by denying his right to speak for an allotted time during two city council meetings. (Second Amended Compl. ("SAC"), Docket No. 35.) The parties have brought cross motions for summary judgment. (Defs.' Mot., Docket No. 47; Pl.'s Mot., Docket No. 54.) Fitzgerald seeks partial judgment against Orange County, finding that the Orange County Board of Supervisors Rule of Procedure 46 ("Rule 46") and the Orange County Board of Supervisors Speaker Guidelines ("Speaker Guidelines") are facially unconstitutional. Defendants move for summary judgment against Fitzgerald on all claims and as to all Defendants. For the following reasons, Defendant's Motion is GRANTED in part and DENIED in part, and Fitzgerald's Motion is DENIED.

I. Factual Background

This cases arises out of Fitzgerald's participation in two Orange County Board of Supervisors ("Board") meetings on July 27, 2010 and August 23, 2011, respectively.

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[1] Fitzgerald has sued each individual in his or her individual and official capacity.

The Board regularly holds meetings, which are open to the public. (Pl.'s Statement of Uncontroverted Facts ("Pl.'s SUF") ¶ 2, Docket No. 55-1.) Members of the public are invited to speak for up to three minutes per agenda item during a certain allotted time in the Board meeting. (Id. ¶¶ 3-4.) At all relevant times, Campbell, Moorlach, and Nguyen were Board Supervisors and agents of Defendant Orange County. (Id. at ¶ 1.) Pena was the Sergeant-at-Arms on duty during the meetings at issue. (Defs.' SUF ¶ 2, Docket No. 49.)

The Board has adopted Rules of Procedure that govern Board meetings.[2] (Pl.'s SUF ¶ 5.) Some of the Rules relate to the procedure for members of the public who wish to address the Board. (See Declaration of Bardis Vakili ("Vakili Decl."), Ex. H, Docket No. 54-2.) For example, Rule 44 establishes the procedure for a civilian to request to speak, and it provides that no member of the public may speak for more than three minutes on a single item before a vote is taken. (Id.) Rule 45 provides that during the "public comment" section of the meeting, members of the public may address the Board on issues that are not on the agenda but which are in the subject matter jurisdiction of the Board. (Id.) Individual public comments are limited to three minutes, and the entire public comment session may be limited to 20 minutes total. (Id.) The Rule at issue in this case, Rule 46, provides in relevant part:

> Each person who addresses the Board shall refrain from making personal, impertinent, slanderous or profane remarks to any member of the Board, staff or the general public. Any person who makes such remarks, or who utters loud, threatening, personal or abusive language, or engages in other disorderly conduct which disrupts, disturbs or otherwise impedes orderly conduct of any Board meeting shall, at the discretion of the Chair, or a majority of the members, be barred from further addressing the Board at the meeting. If such conduct thereafter continues so as to disrupt the orderly conduct of the public's business, the Chair shall order the person removed from the

[2] These Rules were promulgated pursuant to California Government Code section 54953(a), commonly referred to as the Brown Act, which requires local governing bodies to adopt rules allowing for member of the public to address their governing Board of Supervisors.

meeting room.

(Id.) The Clerk of the Board monitors the time for public speakers, and the speakers can track their own time through a video display on the speaker's podium that shows a clock with three minutes running. (Deposition of John Moorlach ("Moorlach Dep.") 52:5-25, Docket No. 50-5.) Each of the Board members have a video display where they can request to speak by tapping an icon on the screen. (Id. at 57:10-21.) After the member hits the "request to speak" icon, a button appears that allows the member to indicate that the request is "urgent." (Id.) Typically, if the Board member expresses an urgent desire to speak, the Chair will interrupt the speaker to allow the member to speak. (See Deposition of Darlene Bloom ("Bloom Dep.") 45:8-18, Docket No. 50-5.) The Clerk of Board's practice as the time keeper is to pause the speaker's time while the Board member interjects with a question or comment. (Bloom Decl. ¶ 4, Docket No. 56; see Declaration of Susan Novak ("Novak Decl.") ¶ 4, Docket No. 50-2.) The speaker's time is stopped to ensure that the speaker receives the balance of his or her time after the Board member has finished the comment or question. (Bloom Decl. ¶ 4.)

The Speaker Guidelines are published in a one-page brochure that was created by the Clerk of the Board's Office between 2005 and 2007. (Bloom Decl. ¶ 3; Novak Dep. 20:19-21:2, Docket No. 54-3.) The Speaker Guidelines are available to the public on the Clerk of the Board's website, in the Clerk of the Board's Office, and at Board meetings. (Novak Dep. 78:15-20; Pl.'s SUF ¶ 10.) Unlike the Rules of Procedure, the Speaker Guidelines are not formally adopted by the Board; they are intended to provide guidance to the public who wish to address the Board at a public meeting. (Bloom Decl. ¶ 3.)

Fitzgerald attended several Board meetings, two of which are at issue in this case. The Court has reviewed the videotapes of the portions of the meetings multiple times. (Bloom Decl., Ex. 1.) That evidence renders the Court's following findings of fact necessarily uncontroverted.

During the July 27, 2010 meeting, Fitzgerald spoke during the public comments portion. Before Fitzgerald's three minutes expired, Nguyen, the then-Chair of the Board, attempted to interrupt Fitzgerald to yield the floor to Moorlach. (Bloom Decl., Ex. 1.) Moorlach tried to obtain Fitzgerald's attention when

Fitzgerald continued to speak over Nguyen. (Id.) As Fitzgerald continued to speak over the Supervisors, Deputy Sheriff Pena approached him and advised him to "stand down" and said, "heed your voice." (Id.) Fitzgerald briefly stopped speaking long enough for Moorlach to begin speaking, but then Fitzgerald interrupted Moorlach, stating "Alright, let me take the three minutes and then you can make your comments." (Id.; Bloom Decl. ¶ 6.) After a brief exchange with Moorlach, Fitzgerald left the Board meeting. (Bloom Decl., Ex. 1.)

At the August 23, 2011 meeting, Fitzgerald requested to speak during the public hearing on redistricting. Before his three minutes expired, Campbell, the then-Chair of the Board, attempted to interrupt Fitzgerald to yield the floor to Nguyen. (Id.) Campbell told the Clerk of the Board to "stop his time" (referring to Fitzgerald) when Campbell attempted to yield the floor to Nguyen. (Id.) Fitzgerald's time was stopped. (Novak Decl. ¶ 4.) Fitzgerald continued to speak over Campbell, at which point Nguyen tried to interrupt Fitzgerald. (Bloom Decl., Ex. 1.) Fitzgerald continued to speak over Nguyen. (Id.) Campbell advised Fitzgerald that "your time is being stopped right there." (Id.) Fitzgerald stopped speaking long enough for Nguyen to begin her comment, but then he walked away from the podium and out of the meeting just seconds later. (Id.)

Fitzgerald filed a complaint against Defendants on September 7, 2011 seeking injunctive and declaratory relief. (Compl., Docket No. 1.) Fitzgerald filed his First Amended Complaint ("FAC") on October 27, 2011. (FAC, Docket No. 22.) He filed his SAC on March 22, 2012. Fitzgerald has alleged violations of the First and Fourteenth Amendments of the United States Constitution, and Article I of the California Constitution.

II. Legal Standard

Summary judgment is appropriate when the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment,

"[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. If the moving party satisfies its initial burden, the nonmoving party "may not rest upon the mere allegations or denials" of the moving party's pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Furthermore, "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 323. Thus, if the nonmoving party does not make a sufficient showing to establish the elements of its claims, the Court must grant the moving party's motion.

Where the parties have made cross-motions for summary judgment, as they have in this case, the Court must consider each motion on its own merits. Fair Hous. Council v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. See id. at 1137.

"In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 56-3.

III. Discussion

Fitzgerald asserts that Rule 46 and the Speaker Guidelines are unconstitutional under the First and Fourteenth Amendment, and Article I of the California Constitution. Defendants' counter is threefold: they argue that (1) Fitzgerald does not have standing to challenge the constitutionality of Rule 46 and the Speaker Guidelines, the latter of which were neither promulgated nor officially adopted by the Board; (2) that even if Fitzgerald had standing, binding precedent

shows that Rule 46 is constitutional; and (3) that even if Rule 46 is unconstitutional, qualified immunity applies to the individual defendants. The Court addresses each argument in turn.

A. Standing to Challenge Rule 46 and the Speaker Guidelines

As a threshold matter, the Court must determine whether Fitzgerald has standing to challenge Rule 46 and the Speaker Guidelines.

This Court's Article III jurisdiction over the case "depends on the existence of a 'case or controversy.'" GTE California, Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994). A "case or controversy" exists only if a plaintiff has standing to bring the claim. Nelson v. NASA, 530 F.3d 865, 873 (9th Cir. 2008), rev'd on other grounds, Nat'l Aeronautics and Space Admin. v. Nelson, 131 S. Ct. 746 (2011). To have standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that their injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Nelson, 530 F.3d at 873 (9th Cir. 2008).

As the party seeking to invoke federal jurisdiction, Fitzgerald bears the burden of demonstrating that he has standing in this action. Lujan, 504 U.S. at 561. Fitzgerald must demonstrate standing "for each claim he seeks to press" and for "each form of relief sought." Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). "The plaintiff bears the burden of proof to establish standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" Oregon v. Legal Servs. Corp., 552 F.3d 965, 969 (9th Cir. 2009) (quoting Lujan, 504 U.S. at 561).

In this case, Defendants argue that Fitzgerald does not have standing to challenge the Rules of Procedure and Speaker Guidelines because (1) the Speaker Guidelines were not adopted by the Board, and thus they do not have any force or effect as Board regulations; and (2) Fitzgerald was not penalized under the Speaker Guidelines or the Rules of Procedure, and thus he did not suffer an injury in fact.

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The Court addresses each in turn.

Though the Speaker Guidelines were not formally ratified by the Board, they have been implicitly adopted as a custom or policy by virtue of their appearance as an official County document and their availability in Board-affiliated outlets. The Speaker Guidelines are printed on a brochure with the "County of Orange" seal, and the front page reads, "Orange County Board of Supervisors Speaker Guidelines." (Vakili Decl., Ex. I.) Furthermore, the Speaker Guidelines are distributed through the Clerk of Board's Office, and they are available at Board meetings and on the Clerk of Board's website. By allowing the Speaker Guidelines to be printed on paper with the County's seal, calling them the "Board of Supervisors" Speaker Guidelines, and having them available through several Board-affiliated outlets, the Board has implicitly adopted the Guidelines, or has at least given the impression that public participants must follow these Guidelines. That the Board never formally adopted the Guidelines does not insulate the Guidelines from constitutional challenge. Indeed, § 1983 authorizes suit "for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell v. Dept. of Social Servs., 436 U.S. 658, 690-91 (1978); see also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) (finding that a school district invocation policy was unconstitutional because it involved both "perceived and actual endorsement of religion"). Because the Guidelines are a government custom or would be reasonably perceived as such by the public, they are subject to challenge under § 1983.

Finding that both the Speaker Guidelines and the Rules of Procedure can be challenged in a § 1983 action, the Court considers whether Rule 46 or the Speaker Guidelines were invoked and whether Fitzgerald consequently suffered an "injury in fact." The Court finds that genuine issues of material fact exist as to both of these questions, and thus the Court cannot determine as a matter of law whether Fitzgerald has standing to challenge Rule 46 or the Speaker Guidelines. To show he suffered an "injury in fact" pursuant to Rule 46, Fitzgerald must present evidence that he was effectively silenced or removed from the Board meeting as a result of engaging in disruptive speech or conduct. The parties present conflicting evidence on this point.

As Defendants assert, neither Rule 46 nor the Speaker Guidelines were invoked by name during the Board meetings at issue. Furthermore, neither the Rules nor the Guidelines were invoked by their terms, as Fitzgerald was not told that he was being "disruptive" or that he was "impeding" the "orderly conduct" of the meeting. Fitzgerald was never told at either meeting that he would be precluded from finishing his remarks. In fact, before Fitzgerald left the August 2011 meeting, the Board Chair told the Clerk of the Board to stop Fitzgerald's time and told Fitzgerald, "your time is being stopped right there," which suggests that he would have been invited to use his remaining time after the Board member's comment. While Fitzgerald contends that he understood Pena's instruction to "stand down" to mean that he was not permitted to stay at the lectern to finish his statement (Pl.'s Statement of Genuine Issues of Material Fact ¶ 73), video footage of the July 27, 2010 meeting shows that Fitzgerald stayed at the lectern and continued to talk over the Board members after Pena admonished him. Moreover, Pena told Fitzgerald, "heed your voice," immediately after he told him to "stand down," and Fitzgerald replied, "not so loud?," thus showing that he did not take Pena's order to mean he had to leave the lectern. Fitzgerald also asserts that he left the meeting room "per Defendant Pena's" instructions out of fear that he would be arrested (id. ¶ 75), but at the hearing on these Motions, Fitzgerald conceded that there was no evidence of an objective threat of arrest.

On the other hand, Fitzgerald has presented some evidence suggesting that he was effectively removed from the Board meetings at issue, and thus was unable to use the balance of his time to speak. First, the Deputy Daily Log for the July 27, 2010 meeting contains an entry which states, "Fitzgerald was escorted for [sic] the BOS meeting after making inappropriate comments about Clerk of the Board Darlene Bloom. After several attempts to get Fitzgerald to comply, Supervisor J. Moorlach requested he be escorted from the facility. Deputy Pena escorted him from the facility without further incident." (Declaration of Lucero Chavez ("Chavez Decl."), Ex. N, Docket No. 60-16) (emphasis supplied). This entry suggests that Fitzgerald was removed from the Board meeting as a result of his speech, and was thereby denied his remaining time. This evidence is sufficient to create a genuine dispute of fact as to whether Fitzgerald suffered an "injury in fact" at the July 2010 meeting. Second, in an internal email from Susan Novak dated August 25, 2011, she notes that the video of the meeting that day does not capture Fitzgerald's exit. Describing the events, she states that Fitzgerald "keeps on ranting

[and] [Pena] tells him to stand down multiple times [and] when he doesn't, he escorts him out of the room." (Chavez Decl., Ex. O, Docket No. 60-17) (emphasis supplied). Like the Daily Log entry, the use of "escorts" creates a genuine dispute as to whether Fitzgerald was removed from the Board meeting. Given that Fitzgerald may have been removed as a result of disruptive speech, as suggested by the Log entry and the email, the substance of Rule 46 and the Speaker Guidelines could be implicated. Thus, there is a genuine dispute as to whether Fitzgerald suffered an "injury in fact" pursuant to Rule 46 and the Speaker Guidelines.

Accordingly, the Court cannot determine as a matter of law whether Fitzgerald has standing to challenge Rule 46 and the Speaker Guidelines as they were applied to him.

Fitzgerald appears to argue that even if he lacks standing to make an "as applied" challenge to Rule 46 and the Speaker Guidelines, he has standing to make a facial challenge. (Pl.'s Opp. Br. 8, Docket No. 60.) Fitzgerald cites the overbreadth doctrine, which provides that a litigant may challenge the constitutionality of a law even if it is constitutional as applied to that litigant, but a conceivable application of the law could be unconstitutional. See Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause another not before the court to refrain from constitutionally protected speech or expression."). The overbreadth doctrine has been applied in the First Amendment realm to give it the "breathing space" it requires, and to avoid the chilling of protected speech. Id. The doctrine, however, is invoked sparingly, and courts must bear in mind that it is a narrow "exception to our traditional rules of practice." Id. at 613-15 (internal citation omitted). A statute "may be invalidated on its face . . . only if the overbreadth is substantial." Board of Airport Commrs. of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987). While some law "may deter protected speech to some unknown extent, there comes a point where that effect–at best a prediction–cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." Id. at 615.

In this case, the Court cannot determine whether Fitzgerald has standing to

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make a facial overbreadth challenge because there is a genuine dispute of fact as to whether Rule 46 or the Speaker Guidelines were applied to him. If they were applied to him, Fitzgerald may have standing to challenge the Rule and the Guidelines even if they were applied to him in a constitutional manner. Fitzgerald may be able to invoke the overbreadth doctrine to challenge the constitutionality of the Rule and the Guidelines as they could be applied to third parties not before the Court. See, e.g., Schad v. Borough of Mt. Emphraim, 452 U.S. 61, 66 (1981). On the other hand, if Rule 46 and the Guidelines were not applied to Fitzgerald, he would not have standing to bring an overbreadth challenge. Get Outdoors II, LLC v. San Diego, 506 F.3d 886, 891 (2007) ("Even when raising an overbreadth claim, however, we ask whether the plaintiff has suffered an injury in fact and can satisfactorily frame the issues on behalf of these non-parties. Without this bare minimum of standing, the overbreadth exception would nullify the notion of standing generally in First Amendment litigation.") Accordingly, the Court cannot find as a matter of law that Fitzgerald lacks standing to challenge Rule 46 and the Speaker Guidelines.

Fitzgerald also alleges that his First Amendment rights were violated when he was interrupted during his statements to the Board. (SAC ¶¶ 23, 27, 40.) Fitzgerald asserts that his was interrupted because of the viewpoint he expressed and he claims that he suffered an "injury in fact" because the interruption chilled his future speech. (See id.) Because there is no genuine dispute that Fitzgerald was interrupted at the Board meetings, he has demonstrated an "injury in fact." The interruption was fairly traceable to the Board members, and it is likely to be redressed by a favorable decision. Accordingly, Fitzgerald has standing to challenge the interruption as a First Amendment violation. However, as discussed infra, a momentary interruption during one's statement to the Board does not amount to a constitutional violation. The Board routinely interrupts speakers to ask questions or make comments during public hearings on agenda items. (Moorlach Dep. 56:9-15.) Public participants do not possess a right to speak without interruption during Board meetings. Thus, while Fitzgerald has standing to challenge the interruptions as First Amendment violations, his claim is unavailing.

In sum, the Court cannot determine as a matter of law whether Fitzgerald has standing to make an "as applied" or facial challenge to Rule 46 or the Speaker Guidelines, but the Court finds that Fitzgerald has standing to challenge the

interruptions of his statements to the Board as First Amendment violations.

B. Constitutionality of Rule 46 and the Speaker Guidelines

Assuming arguendo that Fitzgerald has standing to challenge Rule 46 and the Speaker Guidelines, the Court considers Fitzgerald's facial and "as applied" challenges. The Court finds that the Rule and Guideline at issue are constitutional as applied to Fitzgerald; however, there are genuine disputes of fact bearing on the facial constitutionality of the Rule and the Guideline.

1. Facial Challenge

The Court cannot determine as a matter of law whether Rule 46 and the Speaker Guidelines are facially constitutional because there are conflicting facts regarding the County's interpretation of Rule 46.

Defendant argue that the holding in White v. Norwalk, 900 F.2d 1421, 1424 (9th Cir. 1990), is dispositive on the facial constitutionality of Rule 46 because it found a materially identical regulation to be constitutional. In White, two plaintiffs sued Norwalk claiming that their First and Fourteenth Amendment rights were violated on three occasions when they had been removed from city council meetings while addressing the council. Id. at 1423. The plaintiffs made a facial constitutional challenge to a rule of decorum pertaining to addressing the city council during public meetings.[3] Id. at 1423-24. The rule of decorum at issue provided:

> Each person who addresses the Council shall not make personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public. Any person who makes such remarks, or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any council meeting shall, at the

[3] The plaintiffs challenged the ordinance solely on its face and did not lay foundation for attacking it "as applied." Id.

> discretion of the presiding officer or a majority of the Council, be barred from further audience before the Council during that meeting . . . .

Id. at 1424. The White plaintiffs argued that the proscription against "personal, impertinent, slanderous or profane remarks" was an impermissible content-based restriction that was void for vagueness and overbreadth. Id. at 1423-24. Norwalk proposed a far narrower construction than that set forth by plaintiffs, asserting that the ordinance did not permit discipline, removal or punishment of a person who merely utters "personal, impertinent, slanderous or profane" remarks. Rather, the ordinance provided that a speaker could be disciplined only if the speaker's remarks or conduct actually disrupted, disturbed or otherwise impeded the orderly conduct of the Council meeting. Id. The court agreed that the ordinance was not fatally overbroad or vague because it was "readily susceptible" to Norwalk's interpretation. Id. Thus, the court adopted Norwalk's narrower construction. Id.

Although the White ordinance restricted the content of speech in a city council meeting, it was facially constitutional because it was viewpoint-neutral and proscribed only speech that was actually disruptive to city council meetings. See id. at 1425. City council meetings are limited public forums, id.; see also Norse v. Santa Cruz, 629 F.3d 966, 975 (9th Cir. 2010), and it is well established that content-based restrictions are permissible in such forums, provided that the limitation is viewpoint-neutral and reasonable in light of the purpose of the forum, see e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Cogswell v. Seattle, 347 F.3d 809, 815 (9th Cir. 2003). For example, a city council can limit discussion to agenda items, and may adopt certain rules of order and decorum. White, 900 F.2d at 1425, n. 3. In White, the speech limitations were reasonable because overly long, unduly repetitious, or irrelevant remarks could disrupt a meeting by preventing the city council from accomplishing its business in a reasonably efficient manner. Id. at 1425-26.

Essential to the White holding was the fact that Norwalk construed its ordinance to penalize a speaker only if the speaker's speech or conduct was actually disruptive. Id. at 1424-25. That Rule 46 conceivably could be construed as narrowly as the White ordinance is not dispositive in this case. While courts can narrowly construe federal statutes to avoid finding unconstitutional overbreadth,

they do not possess such authority with local ordinances. Adamian v. Jacobsen, 523 F.2d 929, 932 (9th Cir. 1975). Rather, courts must base their judgment of a statute's facial validity "only on its meaning as authoritatively construed by a state court or agency." Id. Thus, the White holding is not dispositive in this case unless the County shows that it construed Rule 46 to penalize a speaker only if the speaker's speech or conduct actually disrupts a Board meeting. While Defendants presented some evidence that the County construed Rule 46 in a manner consistent with White, Fitzgerald has furnished evidence showing the County had a broader interpretation.

Defendants contend that the County construed Rule 46 consistent with the White interpretation. For instance, during her deposition Susan Novak ("Novak"), the County's 30(b)(6) witness, was asked, "So if a member of the public in addressing the Board makes any personal, impertinent, slanderous, or profane remarks to any member of the Board, staff, or general public, would they–could they be deemed to be disorderly or disruptive?" (Novak Dep. 68:7-11.) She replied, "They could be, but that's not enough information to determine that." (Id. at 68: 14-15.) Novak's answer suggests that under the County's interpretation of Rule 46, speakers who make personal, impertinent, slanderous, or profane remarks are not per se disruptive or disorderly. That Ms. Novak required more information to make that determination suggests that the County construes the Rule narrowly to apply only to speech that is actually disruptive.

On the other hand, Fitzgerald presented evidence that County officials interpreted Rule 46 broadly, finding that speakers could violate the Rule without actually being disruptive. For example, at his deposition, Moorlach answered affirmatively when asked, "And so is it considered disorderly conduct if a person makes personal, impertinent, slanderous, or profane remarks?" (Chavez Decl., Ex. F. ("Moorlach Dep. II") 71:5-8, Docket No. 60-8.) Pena was asked a substantively identical question during his deposition and answered affirmatively as well. (Chavez Decl., Ex. A ("Pena Dep.") 81:1-8.) Further, when asked about his understanding of Rule 46, Pena agreed that speakers are not allowed to make "derogatory remarks about any member of the board, staff, or general public." (Chavez Decl., Ex. A ("Pena Dep.") 81:1-8.) Moorlach and Pena's responses indicate that at least two County officials construe "personal, impertinent, slanderous, or profane remarks" to be disruptive per se, which is inconsistent with

the White interpretation. Similarly, Nguyen was asked, "So if a person that was addressing this Board made personal, impertinent, slanderous, or profane remarks, would they be in violation of Rule 46?" Nguyen answered, "Yes, because you just read the rule." (Chavez Decl., Ex. D. ("Nguyen Dep.") 59:21-24, Docket No 60-6.) Nguyen's response suggests that she construes Rule 46 to proscribe certain speech regardless of whether it is actually disruptive, which is also at odds with the White interpretation. These examples suggest that the County officials did not interpret Rule 46 as narrowly as Norwalk interpreted its ordinance in White.

The conflict between Novak's testimony on one hand, and Moorlach, Nguyen, and Pena's testimony on the other, creates a genuine dispute as to the County's interpretation of Rule 46. Given these conflicting accounts, the Court cannot determine as a matter of law that the County adopted a narrow construction of Rule 46 that was consistent with the White interpretation. Accordingly, the Court cannot decide on summary judgment whether Rule 46 is constitutional on its face.

Similarly, the Court cannot determine whether the Speaker Guidelines are facially constitutional as a matter of law because they derive meaning from the interpretation of Rule 46. Specifically, the Speaker Guideline at issue is identical to the first clause in Rule 46, providing that speakers "shall refrain from personal, impertinent, slanderous, or profane remarks to any member of the Board, staff or the general public." (Vakili Decl., Ex. I.) The Speaker Guidelines do not adopt or present any rules that are not included in the Rules of Procedure; rather, they are a layman's summary of the Rules. (Novak Dep. 20:19-21:11.) It follows that the interpretation of Rule 46 necessarily informs the interpretation of the Speaker Guidelines. Because there is a genuine dispute as to the County's interpretation of Rule 46, the meaning of the corresponding Speaker Guideline is likewise unclear. Thus, the Court cannot determine as a matter of law whether the Speaker Guidelines are facially unconstitutional.

Conflicting evidence of the County's interpretation of Rule 46 also precludes summary judgment on Fitzgerald's challenge under the California Constitution. The California Constitution guarantees that "[e]very person may freely speak, write and publish his or his sentiments on all subjects." Cal. Const. art. I, § 2(a). The Brown Act allows cities to adopt "reasonable regulations" of

public testimony at city council meetings, provided that the regulations do not "prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body." Cal. Gov. Code § 54954.3(b)-(c). Given the conflict between Novak's testimony and the testimony of Moorlach, Nguyen, and Pena, there is a genuine dispute of fact as to whether Rule 46 prohibits public criticism in violation of California law.

In sum, given the conflicting evidence of the County's interpretation of Rule 46, the Court cannot determine as a matter of law whether Rule 46 and the Speaker Guidelines are facially constitutional. Nor can the Court determine whether they violate the California Constitution. Accordingly, summary judgment is inappropriate on these issues.

2. "As Applied" Challenge

Fitzgerald also argues that Rule 46 is unconstitutional as applied, though only Defendants move for summary judgment on this issue. Assuming arguendo that Rule 46 was applied to Fitzgerald, the Court finds that it was not applied in an unconstitutional manner. Rule 46 proscribes speech that is actually disruptive or that impedes the orderly conduct of a Board meeting. From the video footage of the Board meetings, it is clear that Fitzgerald's conduct was constitutionally proscribable under Rule 46 because he actually impeded the orderly progression of the meeting. At both meetings, Fitzgerald was instructed several times to yield the floor to the Board members who sought to interject a question or respond to Fitzgerald's comments. Fitzgerald repeatedly failed to yield and continued to speak over the Board members. By failing to recognize the Board members' authority and by disregarding their legitimate instructions, Fitzgerald interfered with the Board's ability to accomplish its business in a reasonably efficient manner. Such interference is precisely the type of conduct the White court contemplated in finding that city councils can adopt reasonable, viewpoint-neutral ordinances that proscribe actually disruptive speech and conduct. Further, as the White court noted, city councils may adopt rules to prevent speakers from interfering with the rights of other speakers. Here, Fitzgerald's failure to yield the floor also interfered with the rights of other speakers, such as the Board members who tried to respond to Fitzgerald's comments. In sum, the uncontroverted evidence shows that Fitzgerald's failure to yield when instructed to do so amounted

to disruptive conduct that is lawfully proscribed under Rule 46.

While Fitzgerald's SAC seems to challenge Rule 46 under the California Constitution (SAC ¶¶ 45, 50, 51), Fitzgerald's pleadings address only the facial constitutionality of Rule 46, (Pl.'s Mot. Br. 10-13; Pl.'s Reply Br. 7-8, Docket No. 64). That is, Fitzgerald does not present evidence showing that the Board violated his rights under the California Constitution. Though Fitzgerald correctly asserts that the California Constitution provides "more expansive free speech protection," (Pl.'s Reply Br. 8), "article 1, section 2(a) tolerates content neutral speech restrictions commensurate with the First Amendment." Rosenbaum v. San Francisco, 484 F.3d 1142, 1167 (9th Cir. 2007). Because the Court finds that Rule 46 is constitutional under the First Amendment as applied to Fitzgerald, Rule 46 is also constitutional as applied to Fitzgerald under the California Constitution. Furthermore, as discussed in the previous section, California law allows city councils to adopt "reasonable regulations" of public testimony at city council meetings. Cal. Gov. Code § 54954.3(b)-(c). Fitzgerald has not demonstrated that Rule 46 was unreasonable as applied to him.

Accordingly, to the extent Rule 46 was applied to Fitzgerald, it was done so constitutionally pursuant to the United States and California Constitutions.

C. Qualified Immunity

Fitzgerald's § 1983 claim is unavailing because he has not shown that his federal rights were violated; however, even if could make this showing, the individual defendants are shielded by qualified immunity.

Section 1983 "provides a remedy to individuals whose constitutional rights have been violated by persons acting under color of state law." Burke v. County of Alameda, 586 F.3d 725, 731 (9th Cir. 2009) (internal quotation marks and citation omitted). Thus, to prove a claim under § 1983, Fitzgerald must show that (1) some person deprived him of a federal right, and (2) the person who deprived him of that right "acted under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640 (1990). As discussed supra section B.2, Fitzgerald was not deprived a federal right because Rule 46 was constitutionally applied to him (if it was applied to him at all). The Board could properly act within its removal power under Rule

46 because Fitzgerald's conduct was actually disruptive.[4] Accordingly, Fitzgerald does not have a colorable § 1983 claim.

Even if Fitzgerald could make out a § 1983 claim, qualified immunity would apply to the individual defendants. Qualified immunity shields government officials from liability for § 1983 claims when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court summarized the purpose of qualified immunity:

> Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal citations omitted).

Evaluating qualified immunity claims involves two considerations. Saucier v. Katz, 533 U.S. 194 (2001), overruled in part by Pearson, 555 U.S. at 235-36. Courts must "consider whether a constitutional right was violated by the [official's] conduct," and must "ask whether the right was clearly established." Graves v. City of Coeur D'Alene, 339 F.3d 828, 846 (9th Cir. 2003) (citing Saucier, 533 U.S. at 200-201). Although the Saucier Court insisted the first consideration must be resolved before the second, this ordering of the analytical steps is no longer mandatory. Pearson, 555 U.S. 235-36. Courts should address the two prongs in the sequence that is most sensible given the circumstances of the case. Id.

A right is "clearly established" if a reasonable government official would

[4] There is no evidence that any of the individual defendants caused harm to Fitzgerald by the mere existence of Rule 46 and the Speaker Guidelines. There is no vicarious liability under § 1983. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

know that his or her conduct was unlawful in that particular situation. Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1129 (9th Cir. 2002). Whether a federal right is "clearly established" is a question of law that is decided, in the first instance, by reference to case law of the United States Supreme Court and of the Circuit in which the district court sits. Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004) ("The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury. . . . In the Ninth Circuit, we begin our inquiry by looking to binding precedent."). Thus, when a right is clearly established by Supreme Court or Ninth Circuit case law, this Court need not, and should not, be guided by the case law of other judicial Circuits that may not be in accord. Id. ("If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end.").

In this case, the individual defendants did not violate Fitzgerald's federal rights because they did not unlawfully impinge on his right to free speech. By speaking in a limited public forum, Fitzgerald was lawfully subject to certain rules of decorum as well as the Board's general practices for holding meetings. For instance, the Board occasionally interrupts speakers to interject comments or questions. This practice does not abridge a speaker's rights because speakers do not possess a right to speak without interruption in a city council meeting. Cities may impose time limitations and content-based (but viewpoint-neutral) restrictions on speech in city council meetings without running afoul of the First Amendment. As discussed supra section B.1, rules proscribing speech are permissible provided that they are limited to speech that is actually disruptive. In this case, uncontroverted evidence shows that Fitzgerald actually disrupted the Board meetings by failing to yield the floor when instructed to do so. Moreover, the content of his remarks, which Fitzgerald argues is entitled to constitutional protection, is separate and apart from his refusal to yield the floor. Said another way, protected speech does not give the speaker the right to use such speech in a manner that is disruptive. Thus, to the extent Fitzgerald was removed from the meetings pursuant to Rule 46 or the Speaker Guidelines, the removal was constitutional.

Even if Fitzgerald's constitutional rights were violated when he was supposedly removed from the Board meetings, his right to continue speaking

notwithstanding his disruptive behavior was not "clearly established." The White opinion makes clear that city councils can institute rules of decorum and can remove speakers who are actually disruptive. Fitzgerald has offered no case law to the contrary. Thus, if an unfettered right to speak for one's allotted time in a city council meeting existed, it certainly was not "clearly established." A reasonable supervisor would not have understood that the First Amendment affords a right to be disruptive.

For these reasons, the individual defendants are shielded by qualified immunity. Accordingly, they are not liable on Fitzgerald's claims, and they are entitled to judgment as a matter of law.

IV. Conclusion

For the foregoing reasons, Defendants' Motion is GRANTED as to (1) all claims against the individual defendants; and (2) the federal and state constitutional challenges "as applied" to Fitzgerald. Defendants' Motion is DENIED as to the facial constitutional challenges to Rule 46 and the Speaker Guidelines under the United States Constitution and the California Constitution. Fitzgerald's Motion is DENIED.

IT IS SO ORDERED.

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