IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17386

JASON ADRIAN BEZIS,
Plaintiff – Appellant,

v.

CITY OF LIVERMORE, et al.,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:19-cv-01061-RS
Hon. Richard Seeborg

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appelate Procedure 26.1, *amici curiae* League of California Cities (the "League") and California State Association of Counties ("CSAC") make the following disclosures.

The League has no parent corporation, nor is owned in any part by any publicly held corporation.

CSAC has no parent corporation, nor is owned in any part by any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

I.

INTEREST OF *AMICI CURIAE*

Amici curiae League of California Cities (the "League") and the California State Association of Counties ("CSAC") submit this brief in support of Appellees City of Livermore, *et al.* (collectively "Appellees").

The League is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter affecting all counties.

II.

STATEMENT OF *AMICI* PURSUANT TO FED.R.APP.P. 29(a)(4)(E)

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* certify that no counsel for a party authored this brief in whole or in part, no party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person – other than *Amici*, their members or their counsel – contributed money that was intended to fund preparing or submitting the brief.

III.

STATEMENT OF FACTS

Amici adopt the statement of facts in the Answering Brief of Defendants-Appellees in this matter.

IV.

ARGUMENT

1. Courts Afford Local Legislative Bodies a "Great Deal of Discretion" to Manage Public Comment at their Meetings

In managing their meetings, local legislative bodies, whether elected (such as a city council or county board of supervisors) or appointed (such as a planning commission, a parks and recreation commission, or a public safety commission) are forced to contend with a variety of challenges. These can include lengthy agendas, pressing agenda items, stakeholders having business with the body, and

members of the public wanting to be heard. Ideally, these challenges are handled in a manner that is sensible, from a time management standpoint, for all concerned.

As with all legislative bodies, city councils and boards of supervisors necessarily need to seek and obtain robust input before developing policy and making decisions of any significance. The issues facing legislative bodies often require significant time expenditures, often preceded by enormous staff-level preparation. Examples include policies and ordinances, major real estate development projects, contract approvals, complex or hotly-debated agenda items, and closed session items on pending litigation and labor and personnel matters. The workings of agenda items at local legislative body meetings have been described by one California court as follows:

> The purpose of staff/invited guest presentations to the Board, or any similar body, is to present to the members of that body in their capacity as legislators, and to the public in attendance, what can be detailed—and perhaps lengthy—analyses of the particular agenda item, to inform both the members of the board and the public concerning the item.
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> * * *
>
> The number of staff and invited guests speaking on a topic will clearly be limited; the potential for public speakers is potentially extensive and needs some reasonable limitation.

Ribakoff v. City of Long Beach, 27 Cal.App.5th 150, 172 (2018).

Some boundaries for legislative body meetings are essential, in order to accommodate the various interests at stake. Otherwise, the meeting would serve little purpose if, in every instance, unencumbered speech by members of the public

defeated the right of the body to conduct its business. To that end, this Court has recognized the "highly structured nature" of local legislative bodies. *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995).

Given the substantial government interest in the orderly conduct of public meetings, officials have "a great deal of discretion," and "certainly may stop" a speaker who strays off-topic, where public comment is irrelevant to an agenda item being considered. *See White v. City of Norwalk*, 900 F.2d 1421, 1425-1426 (9th Cir. 1990). The need for discretion is evident because "the point at which speech becomes … largely irrelevant is not mathematically determinable." *Id.* at 1426. Judgment is necessarily involved in making on-topic/off-topic determinations, just as it is in considering whether speech has become unduly repetitive.

California's open meetings law for local legislative bodies (a term defined to include appointed as well as elected bodies),[1] the Ralph M. Brown Act, California Government Code Section 54950 *et seq.*, "is designed to encourage public participation in government." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 807 n.2 (9th Cir. 2013) (citation). "As originally enacted in 1953, the Brown Act did not

[1] "The Brown Act applies to the legislative bodies of local agencies. It defines 'legislative body' [in Government Code Section 54952] broadly to include just about every type of decision-making body of a local agency." League of California Cities, Open & Public V: A Guide to the Ralph M. Brown Act (2016), Chapter 2, available at https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx.

require the opportunity for public comment at either regular or special meetings. In 1986, the Act was amended to include a public comment requirement for regular meetings … It was not until 1993 that the Legislature required an opportunity for public comment at special meetings of legislative bodies." *Preven v. City of Los Angeles*, 32 Cal.App.5th 925, 934-935 (2019) (citations). *Amici* strongly support the right of public comment. It is an established, essential feature of meetings of legislative bodies in California, and serves to better inform the body regarding decisions it must make, while enhancing the ability of speakers to participate in the workings of local government.

The California Legislature recognized competing interests at play when it adopted the 1986 amendments to the Brown Act: "On the one hand, the Legislature declared the importance of open governance and the public's right to participate. On the other, it validated enactment of limits on public speakers so that the business of government could function." *Ribakoff*, 27 Cal.App.5th at 172 (citations).

Federal courts reviewing claims of public speakers outside of California have recognized similar competing interests. *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004) (*per curiam*) (a "city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand"); *Galena v. Leone*, 711 F.Supp.2d 440, 453 (W.D. Pa.

2010) (limitations on public comment are necessary to "preserv[e] order and decorum at meetings"). The tension between the government's interest in managing meetings of its legislative bodies and the right of public comment at meetings has been expressed as follows:

> [At public meetings called by government officials,] the content of speech may properly be the conscious target of state action (where it is cut off for irrelevance or manner of delivery), or its collateral victim (when it is cut off for excessive duration). But this consequence assuredly lies within well-established constitutional principles, once it is accepted, as I think we must, that disruption of the orderly conduct of public meetings is indeed one of the "substantive evils that [government] has a right to prevent."

Collinson v. Gott, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J. concurring). (citation). The Third Circuit has similarly recognized that there are limitations on the utility of (unrestricted) public comment at local government meetings: "[F]or the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants …" *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004).

These competing interests have been highlighted by the COVID-19 pandemic. Several states in the Ninth Circuit continue to be creative in encouraging public comment, even where public meetings may be held remotely,

and not in-person.[2] During an actual local legislative body meeting before the pandemic, members of the public generally could only provide their public comments in person, at the meeting of the body. Members of the public generally could not telephone or e-mail their comments to a city council or county board of supervisors, with such comments being heard or read aloud at the meeting – while it was in progress. Now, in several states, public comments during meetings of legislative bodies are accepted through various means of communication. The states' respective efforts to be creative in encouraging public comment during the COVID-19 pandemic have resulted in public comment periods in some jurisdictions lasting several hours, with hundreds of public speakers.[3] Thus, it is important that legislative bodies continue to have broad discretion to manage that

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[2] In California, local agencies must still allow for public comment at remotely-conducted meetings. Cal. Exec. Order N-29-20 (March 17, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-N-29-20-EO.pdf. Examples of other states imposing similar public comment requirements during the COVID-19 pandemic include Oregon (allowing public bodies to permit the "submission of testimony" by telephone, video, or other electronic or virtual means) and Nevada (requiring public bodies to "provide a means for the public to provide public comment" such as telephone or email). Or. Exec. Order No. 20-16 (April 15, 2020), https://www.oregon.gov/gov/admin/Pages/eo_20-16.aspx; Nev. Declaration of Emergency Directive 006 (March 22, 2020), https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-22_-_COVID-19_Declaration_of_Emergency_Directive_006.

[3] *See, e.g.*, Jeff Horseman, *After 11-hour meeting, plan to rescind Riverside County coronavirus orders delayed*, The Press Enterprise (May 5, 2020), https://www.pe.com/2020/05/05/riverside-county-supervisors-debate-whether-to-lift-coronavirus-health-orders/ (six hours of public comment on whether to rescind COVID-19 health orders).

public comment – including to address comments that might be considered to be off-topic because they are beyond the scope of the agenda item.

In short, the Court should confirm the unexceptional proposition that legislative bodies of local agencies have discretion at their meetings to regulate public comment, in whatever form it is presented, to ensure it is speaks to the item being considered. This Court's decisions in *White*, among others, recognize this rule, and other courts have agreed. A contrary rule could potentially convert every dispute about whether a speaker was on-topic, regarding any agenda item, at any meeting of any local legislative body, into a federal lawsuit. This would hardly be in the interest of cities, counties, or other local agencies, or of the people they represent.

2. The First Amendment does not Prohibit Legislative Bodies from Managing Their Meetings through Points of Order

The discretion that local agencies have in managing their meetings is a key facet of this Court's decision in *White*. To that end, points of order do not have to be raised by the presiding officer of the meeting, alone.

At its core, the question of a point of order is not really a legal issue. It is a question of parliamentary procedure and a management issue, which may be addressed in different ways by the thousands of local legislative bodies within California and the other states of this Circuit. The Brown Act and the First Amendment do not prevent members of a legislative body, other than the presiding

officer, from raising or commenting on a point of order. For example, it is proper for another member of the body to request that the presiding officer direct a member of the public to stay on topic when offering public comment on an agenda item. For example, legislative bodies' rules, including the Livermore City Council here,[4] may even specifically permit an officer of the body to raise a point of order.

Further, from a timing standpoint, the practical purpose of a point of order[5] is to be able to raise it at the time the parliamentary rules of procedure are broken. If a point of order is raised later, it often will be too late. For example, if a speaker is wasting the time of the body – and of other members of the public attending the

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[4] Livermore City Council Rules of Procedure, Rule 14.5.2 ("[a] Council member may ask for a point of order …"), available at https://www.cityoflivermore.net/civicax/filebank/blobdload.aspx?t=71548.95&BlobID=21236; *see also* Vallejo Municipal Code Section 2.02.690 ("[a] councilmember may, without waiting for recognition, rise to a point of order..."); City of Torrance, City Council Rules of Order, Section 8.1 ("[a]ny member may raise a point of order (procedure)"), available at https://www.torranceca.gov/home/showdocument?id=51986; Rules of Procedure of the Board of Supervisors of the County of Mendocino, Rule 17 ("[a] point of order may only be raised by a member of the Board"), available at https://www.mendocinocounty.org/home/showdocument?id=8124.

[5] Though not legally binding, the City of Livermore, like many other cities and counties, conducts its meetings generally in compliance with parliamentary rules such as Rosenberg's Rules of Order: Simple Parliamentary Procedure for the 21st Century (last rev. 2011) (available at https://www.cacities.org/Resources/Open-Government/RosenbergText_2011.aspx) or Robert's Rules of Order. *See* Livermore City Council Rules of Procedure, Rule 3 (Rules of Parliamentary Procedure); *see also* Beaumont Municipal Code Section 2.04.040 (Rosenberg's Rules); Rosemead Municipal Code Section 2.04.060 (Rosenberg's Rules); Beverly Hills Municipal Code Section 2-1-10(E) (Robert's Rules); Monterey County Code Section 2.04.040 (Robert's Rules).

meeting – by going off-topic, it does no good to raise a point of order later in the meeting. By then, the time will have been wasted. Thus, if the purpose of the point of order is to object to a speaker's going off-topic, the point of order will necessarily – and for good reason – involve interrupting the speaker.

A legislative body's discussion of a point of order also can assist members of the public, in reminding them to focus their comments, so they can meaningfully inform the agenda item under consideration, and give the body a clear and complete understanding of the public concern regarding the item.

If a legislative body were forced to receive irrelevancies as public comments, without the ability to raise a point of order, the body, or certain of its members, as well as the public, may have difficulty giving proper weight to legitimate public comment on the agenda item. By that point, the irrelevancies may have diluted the impact of the legitimate public comment, thereby clouding the issue under consideration, and preventing the legislative body from efficiently reaching a decision.

Members of city councils, boards of supervisors, and other legislative bodies should – and do – have the discretion to raise a point of order, and to have a discussion on the point of order. Such discretion involves a question of the body's own parliamentary approach to situations that arise in meetings. The Court should

confirm that such discussions of a point of order do not implicate Brown Act or First Amendment concerns.

3. The Court Should Not Find a First Amendment Violation Based on a Speaker's After-the-Fact Rationalization of the Relevance of Public Comment

Local agencies should not face civil liability claims on the basis that a member of a legislative body temporarily sought to curtail a speaker's public comment to discuss a point of order over whether the speaker is off-topic.

Plaintiff appears to contend that he must be allowed to support his First Amendment claim with after-the-fact explanations of the relevance of his public comment. Plaintiff asserts such post-hoc rationalization is necessary because he would otherwise be required to "provoke actual or threatened police arrest in order to demonstrate a First Amendment free speech claim." AOB at 23 n.3. Not so – a non-exhaustive list of other means of potentially establishing a First Amendment claim arising from public comment at a legislative body meeting, depending on the facts, include being (a) wrongfully told the period for public comment has concluded; (b) arbitrarily stopped from speaking; (c) forcibly removed from the speaker's podium; or (d) forcibly escorted out of the room.

Countless legislative bodies throughout California, like the Livermore City Council, provide a distinct time during the meeting for the public to be heard on any matter within the body's jurisdiction. They also provide a separate opportunity

for the public to comment on each specific agenda item, typically during discussion of each item. That is the time and place for a speaker to express (in clear terms) the relevance of his or her public comments to the agenda item – particularly where the legislative body conveys the speaker is off-topic, and the speaker has an opportunity to convince the body why or how the comment is relevant and on-topic. This is particularly true in the case at bar, where the nexus between the speaker's comment and the agenda item would not be apparent to a reasonable person at the time and where, even in retrospect, any nexus of the comment to the agenda item is not plainly apparent.

Judge Wilkinson of the Fourth Circuit explained the problem with imposing First Amendment liability for regulating public comment:

> Every presiding official in a public meeting must, at some time, make a spontaneous judgment as to whether a speaker is abusing the forum …
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> * * *
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> The threat of personal liability for wielding a gavel in a heated public meeting will not vindicate First Amendment values by instilling in presiding officers the proper deterrent effect … Public meetings inevitably attract a goodly number of garrulous people. Many of them are crucial to robust debate. At times, however, even the champions of democracy need to be ruled out of order on the merciful march to adjournment. I shudder to think how long some public meetings will drag on if speakers can threaten Section 1983 suits unless they are heard to the end.
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> * * *
>
> [Imposing First Amendment liability through Section 1983] would, in my view, exchange the traditional value of town meetings for a

> sanitized contemporary script whose aim may be less the art of politics than the avoidance of personal liability.

Collinson, 895 F.2d at 1005-1007 (Wilkinson, J., concurring).

If a First Amendment claim can be made on these facts in this case, management of public comment at legislative body meetings will become much more difficult, with public comment deteriorating into an unrestricted forum – not even constrained by the subject matter of the agenda item. Such a development would hardly serve the public interest.

4. The Individual Defendants are Entitled to Qualified Immunity

The district court correctly found that the individual defendants are entitled to qualified immunity.

Focusing on the second prong of qualified immunity – whether existing law clearly established the defendants' conduct was unconstitutional – it is apparent that there is no basis for imposing personal liability on the public officials who have been sued here. The issue of a legislative body asking a member of the public to pause his public comment to allow the body to engage in a point-of-order colloquy about the relevance of that comment (to the agenda item) has not been specifically addressed by this Court. But this Court has addressed, in *White*, the almost identical issue of preventing a speaker from going off-topic – and has made clear that this power is within the management prerogative of the body. And, in fact, Plaintiff implicitly admits that the law in this area is <u>not</u> clearly established in

his favor – by essentially seeking this Court to disapprove of its unpublished 2014 decision in *Fitzgerald v. County of Orange*, 570 Fed.Appx. 653 (9th Cir. 2014).

If this Court found qualified immunity for public officials here, that would invite potential liability, going forward, for the tens of thousands of members of legislative bodies in California and throughout other states in the Ninth Circuit who faithfully and frequently conduct – and manage – meetings, often under difficult circumstances. Simply, there is no plausible basis to argue against qualified immunity here.

V.
CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's judgment in favor of Defendants-Appellees.

Respectfully submitted,

Dated: October 30, 2020

/s/ Javan N. Rad

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CERTIFICATE OF COMPLIANCE

1. This brief contains 3,277 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(f). The brief's type size and typeface comply with Fed.R.App.P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I certify that this brief is an *amicus* brief and complies with the word limit of Fed.R.App.P. 29(a)(5), Circuit Rule 29-2(c)(2), or Circuit Rule 29-2(c)(3).

Dated: October 30, 2020

/s/ Javan N. Rad
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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *Amici* are not aware of any related cases pending in this Court.

Dated: October 30, 2020

/s/ Javan N. Rad

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Counsel for *Amici Curiae*
League of California Cities
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CERTIFICATE OF SERVICE

I certify that on this 30th day of October, 2020, the foregoing document was served on all counsel of record, as registered users of the CM/ECF system.

Dated: October 30, 2020

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