No. 07-15814

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NORSE,

Plaintiff and Appellant,

vs.

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

Defendants and Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California
Honorable Ronald M. Whyte
U.S. District Court Case No. CV-02-01479-RMW

APPELLEES' RESPONSE TO APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

George J. Kovacevich, SBN 48125
ATCHISON, BARISONE, CONDOTTI & KOVACEVICH
333 Church Street
Santa Cruz, California 95060
Telephone: (831) 423-8383
Fax: (831) 576-2269

Attorneys for Defendants and Appellees
CITY OF SANTA CRUZ, CHRISTOPHER KROHN, TIM FITZMAURICE, SCOTT KENNEDY, and LORAN BAKER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

FEDERAL STATUTES

I.

INTRODUCTION

Appellant's petition consists merely of a re-argument of the issues. The only difference is that Appellant uses the dissenting opinion in this case as a catalyst for remaking and rearguing the matters. This is not the purpose of a re-hearing. *United States v. Molina-Tarazon*, 285 F.3d 807, 808 (9th Cir. 2002). *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986) ("Rule 40 of the Fed. R. App. P. was not promulgated, in the absence of demonstrable mistake, to permit reconsideration of the same matters….")

Nor does the petition state "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed.R. App. P. 40(a). Instead, Appellant simply argues the majority is wrong. See Petition, p.5. "The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision." *Armster v. United States Dist. Court for Cent. Dist*., 806 F.2d 1347, 1356 (9th Cir. 1986). Appellant does not contend the majority overlooked relevant information but argues the majority's view is incorrect.

Nor does Appellant meet the standard for a rehearing en banc.

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35(a). The decision in this case does not jeopardize uniformity nor does it involve an issue of exceptional importance. Rather, it is in line with case law (and, indeed, based on it), and its substance has been handled previously by this court.

Contrary to Appellant's assertion, the majority's decision comports with other Ninth Circuit decisions. The decision is not inconsistent with the United States Supreme Court cases cited by Appellant and the dissenting opinion which cases involve facts that are distinguishable from the City Council meeting involved in this case.

Moreover, en banc review is an "extraordinary" manner of review, generally not favored. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987). Appellant presents nothing that warrants such an extraordinary review.

II.

ARGUMENT

Riding the coat tails of the dissenting opinion, Appellant reargues that there was no disruption and that Appellant's ejection was based on view point discrimination. These are the same points Appellant made in his opening brief at pages 13-14. There, Appellant makes these various statements:

(1) "the evidence in this lawsuit is sufficient to show a clear attack on Norse for the content of his message rather than an even handed enforcement of a neutral set of rules implemented to minimize disruption."

(2) "the district court was wrong in concluding that Norse's gesture caused actual disruption." Appellant goes on to contrast the disruption in *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) ("*White*") and *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995) ("*Kindt*.")

(3) "the Mayor acting in response to a request of Councilmember Fitzmaurice, ordered Norse to leave the meeting simply because he disagreed with Norse's message and the style with which he conveyed it."

(4) "the undisputed evidence shows that Norse was excluded from the meeting and arrested because his gesture was offensive and not because he disrupted the meeting."

These very issues were also raised at the oral argument where the position was stated that this case was controlled by *Kindt*. The majority has ruled that *Kindt* controls and Appellant simply cannot accept that answer and tries to argue the issues again.

In his appellate brief, Appellant even raised the issue of fear of disruption which he repeats again in his petition. [1] There he also relied on and argued *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969) ("*Tinker*") and *Cohen v. California*, 403 U.S. 15 (1971) ("*Cohen*"), [2] both of which he cites again even though they remain inapposite. See *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266, 272, n.5 (9th Cir. 1995). There the court found the cases cited by Kindt inapposite as they did not deal with speech at a public board meeting. One of the cases the court referenced was *Cohen*. Similarly *Tinker* does not deal with speech at a public board meeting. [3] For this same reason, the dissenting opinion improperly relies upon *Tinker*. Since these cases are inapposite, Appellant erroneously claims that the majority's analysis and decision is at odds with the United States Supreme Court.

The only oversight and misapprehension are by Appellant and the dissent.

(1) Neither wants to accept that the period for oral communications during which the public could speak at large had been closed. This important undisputed fact greatly affects the First Amendment equation. This fact is rightfully recognized by the majority and supports the

---

[1] At page 13, he writes "…it does not follow that Norse, any more than the students in *Tinker*, may be stripped of his constitutional rights because the relevant officials fear disruption…"

[2] Appellant's Opening Brief, pp. 12-13.

[3] The distinction was made evident by language of the court in *Tinker* to the effect that "(t) he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools…the classroom is peculiarly the 'market place of ideas.' " *Tinker v. Des Moines Indep. Cmty Sch. Dist*, 393 U.S. 503, 512 (1969).

majority's summation that "the salute had little to do with the message content of the speaker whose time had expired" and exposed it for what it was as "a condemnation of the efforts of the Mayor to enforce the rules of the meeting." [4] The point is that Appellant spoke at a time he had no right to speak and on a nonexistent matter before the council which strips him of any First Amendment right to speak and make his speech off topic, irrelevant, and disruptive. See *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266, 270 (1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).[5]

When *Kindt* and *White* were upholding the restriction of public speakers to the subject at hand and curtailment of speech that becomes irrelevant or repetitious, they addressed speech occurring at a time that speech was permissible. Here, no member of the public had a right to speak at all at the time of the incident. Therefore, content was never the issue. That it was not an issue is further confirmed by the undisputed video evidence, further overlooked, that at other times when Appellant made the Nazi gesture at a time he had a right to speak during oral communications, he was not ejected. Both Appellant and the dissent try to avoid these undisputed facts and inferences by referencing the Council's sign policy. In the dissent's view, Appellant had a right to speak by a silent gesture under this policy. The dissent misapplies that policy to a gesture of defiance following other disruptions and Appellant's ensuing conduct consisting of verbal challenges and protests, all of which cannot compare to a signage rule or have license under it.

---

[4] Cf. *Smith v. Cleburne County Hospital*, 870 F.2n 1375, 1383, 1384 (8th Cir. 1989) (noting purpose of personal attacks in that case "was a calculated effort to disrupt the efficiency of the (proceeding)").

[5] Accordingly, the majority need not explain, as Appellant complains, why Appellant's "criticism of the mayor… is somehow outside the scope of the First Amendment like fight words or obscenity." (Petition, p.2.) As the court in *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990) observed, "the nature of a council meeting means that a speaker can become 'disruptive' in ways that would not meet the test of actual breach of the peace… or of 'fighting words' likely to provoke immediate combat."

Much is made by Appellant and the dissent of Councilmember Fitzmaurice's statement about "dignity of this body." What the undisputed evidence shows in the video is that Councilmember Fitzmaurice first stated that Appellant was "out of order." And that is precisely the point; he was out of order because he was speaking at a time he had no right to speak. Accordingly, the following language in *Kindt* is instructive: "(w)hile a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious." *Kindt v. Santa Monica Rent Control Board* 67 F.3d 266, 270 (9th Cir. 1995). As pointed out above, this is not a situation where Appellant had a right to speak on an agendized topic or even during the time for general public comment and was stopped at a time it was evident the moderator disagreed with what he was saying. Here he was stopped because he should not have even been speaking at all. He then proceeded to continue speaking with no right to do so when he challenged Councilmember Fitzmaurice.

Appellant and the dissent also overlook the undisputed evidence that on other occasions where Appellant has made the same gesture during oral communications when he has had a right to speak, he has not been ejected for making that gesture. This can only indicate that his ejection on March 12 was due to him being out of order and disrupting the meeting as opposed to the content of his speech. The evidence of the many other meetings illustrate that Appellant's criticism, if not excoriation of Councilmembers at a time he had a right to speak, brought no ejection. In view of all of these facts and circumstances, the inference the dissent attempts to draw is completely unreasonable and not justified by the evidence.

Kindt is also relevant in this respect. There the court noted that "Kindt was not refused the right to speak when he spoke at the properly allotted time." *Kindt v. Santa Monica Rent*

Control Board, 67 F.3d 266, 268 (9th Cir. 1995). Likewise, Appellant was allowed to criticize the Council including making his Nazi salute when he spoke during the time for general public commentary. *Kindt* also made the relevant and comparable observation:

> No invidious regulation of Kindt's speech was implicated and content was not a factor – e.g. the fact that the Board's views on the Cambodia Regime might or might not be different from Kindt's **was not the point at all**. Whether he wanted to speak in favor of those views or against them, his chit had to be heard under Item 13, which was the time set aside for public comment on all but such special matters as public hearing (Item 7).
>
> Again Kindt was not kept from speaking because of the content of his speech, but because he submitted chits for items that were not held open for public commentary until Item 13 on the agenda. When the Board heard comments during Item 13, Kindt was never denied an opportunity to speak about any subject he wished. In fact, several times he addressed personally derogatory remarks to individual Board members and was not silenced. Nor was he silenced before his time expired. In general, when Kindt was actually ejected from the Board meetings he was disrupting the proceedings by yelling and trying to speak when it was not time for an Item 13 matter . . . . (First Emphasis Added.)

Kindt v. Santa Monica Rent Control Board, 67 F.3d 266, 271 (9th Cir. 1995).

The very same thing can be said about the incident at hand. Appellant's tiff with the Council "was not the point at all," in the words of *Kindt*. Whether he wanted to criticize the Council or not, such criticism could only be heard during the time allotted for oral communications. The evidence of other appearances of Appellant at Council meetings establishes undisputedly that he, in fact, availed himself of that opportunity during such allotted times to not only criticize the Council but make his Nazi salute in the process. Indeed, he did so unabated at a subsequent meeting.

This is the precise point made by the majority when it pointed out as referenced above, that "the salute had little to do with the message content of the speaker whose time had expired.

Rather, it was a condemnation of the efforts of the mayor to enforce the rules of the meeting." The appropriate time for such condemnation was not then but at a different time when such comment was allowed, as *Kindt* observes.

In effect, both Kindt & Appellant were each ejected for speaking when they had no right to speak and off topic and disrupting the meeting, not for the content of their speech.

(2) Appellants and the dissent make the repeated mistake of focusing solely on Appellant's gesture and ignore the full extent of his conduct which consisted of repeatedly challenging verbally Councilmember Fitzmaurice's point of order. The majority rightfully recognizes the full context. The offending conduct was not limited to only a second or two of a silent salute. It was immediately followed by Appellant speaking to the lady who the Mayor admonished as she passed by Appellant. It also included Appellant's repeated approaches to the podium and challenges of Councilmember Fitzmaurice. Thereafter, the evidence is undisputed that all council members, including the Mayor, were aware of Appellant's antics in taking on Councilmember Fitzmaurice. It also cannot be disputed that this interrupted and delayed the proceeding.[6]

(3) Appellant and the dissent also err in editing the scope of the incident to exclude the surrounding disruptions at the time. As the majority correctly points out, immediately preceding Appellant's conduct, there had been simultaneous disruptions caused by various members of the audience. One of those was a lady who refused to leave the podium and wanted to speak after the period of oral communications had been closed. While the Mayor was trying

[6] It is incorrect for Appellant or the dissent to label Councilmember Fitzmaurice the interrupter or disrupter when he is a councilmember with every right to make a point of order and Appellant had no right to speak in silence or aloud, at the podium or away from it.

to deal with her, other members of the audience became vocal, causing a disruption and leading to the ejectment of one of the members who leveled threats at the Mayor as he exited.

This backdrop is important particularly in view of the great discretion presiding officers are given in enforcing reasonable rules for the orderly conduct of meetings as cited by the majority. Ignoring for the moment that Appellant's entire conduct was disruptive in itself, the action of Councilmember Fitzmaurice and the Mayor were appropriate considering the disruptions at hand.

The dissent erroneously makes light of the situation at that time. The dissent comments, "(m)ost reasonable persons would conclude, after viewing the same video, that this meeting was no more 'difficult' or 'disorderly' than any other small-town Council meeting." It stretches reality to believe that such meetings commonly have people repeatedly defying the presiding officer and, also, making threats to the officer. If this is what our small-town council meetings have become, upholding the discretion of the presiding officers to manage these unruly atmospheres is of major importance.

(4) Also overlooked are the other comparisons with *Kindt* and *White*. Both *White* and *Kindt* stressed the "great deal of discretion" involved in the role of the moderator. *Kindt* sanctioned the ejection of Kindt and his cohort after a board member thought the cohort had made an obscene gesture towards him. This was sanctioned even though Kindt was sitting docilely at that particular moment. In contrast, here we have Appellant undisputedly making the silent gesture directly. He then aggressively charged the podium to persistently challenge and verbally interrupt Councilmember Fitzmaurice during his attempt to make a point of order. Appellant's conduct consisted of much more than Kindt's whose ejection passed muster. Surely, in comparison, so, too, should the ejection of Appellant.

The court in *Kindt* noted that "Kindt bridles at the fact that he cannot debate the Board's flag salutes (Item 1) and special agenda items (Item 4) at the very time that they occur. Similarly here, Appellant believes he has a right to challenge the Council's actions at the very time they occur even though as Appellant's history in the video of his other appearances demonstrate, he is aware of the appropriate option to raise his objections at the time allotted to public commentary. As stated in *Kindt* at page 272, "(m)eetings of a public body do not become free-for-alls simply because the body goes beyond what a member of the public believes (even correctly) to be the body's proper purview." This language fits exactly the circumstances here. There is no patience in Appellant's intolerance towards the Council. His tempestuousness erupts on the spot with speech and conduct of one nature or another. When within his rights under the Rules of Decorum, he is tolerated. When not, the Rules are applied appropriately as they were throughout in *Kindt.*

In his petition on page 1, Appellant complains again that an attempt to cause a disruption is not constitutionally actionable. He incorrectly claims that such a principle is "at odds with *White* and *Kindt*." The court in *Kindt* addressed precisely this situation and in a manner that supports the ejection of Appellant. There in reference to Kindt's cohort's suspected obscene gesture, the court stated that it "threatened to start the disruption all over again" [7] and on that basis, the court found Kindt's removal permissible. Very similarly here, and as the majority states, Appellant's salute in support of and following the disruptions fostered disruption of the meeting and threatened further disruption. See *Jones v. Heyman*, 880 F.2d 1328, 1332-1333 (9th Cir. 1989); *Collison v. Gott* 895 F.2d 994, 1000 (4th Cir. 1990) (concurring opinion).

[7] *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266, 271 (9th Cir. 1995)

In this regard, Appellant and the dissent overlook the distinction made by the court in *Tinker* that the conduct of wearing arm bands in the circumstances of the case before it "was entirely divorced from actually or **potentially** disruptive conduct by those participating in it." *Tinker v. Des Moines Indep. Sch Dist.* 393 U.S. 503, 506 (1969) (emphasis added.) While the dissent specifically quotes *Tinker*, it misses this distinction where in the case at hand, there exists actual and potentially disruptive conduct. In discussing *Tinker* in the context of the surrounding circumstances at the meeting on March 12, 2002, the dissent writes: "As the Supreme Court has reminded us, 'in our system, **undifferentiated** fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' " (emphasis added.) What the dissent appears to fail to recognize is that the Supreme Court was speaking of "undifferentiated fear or apprehension or disturbance," whereas here the undisputed facts show multiple immediately preceding disruptions followed by a rebuke and demonstrative challenge of the ruling body which presented a defined and grounded fear or apprehension of disturbance. Adding to that differentiated fear is the Councilmembers' familiarity with Appellant's disruptive history at Council meetings which was part of the undisputed evidence before the trial court and something else the Appellant and the dissent overlooked. [8]

III.

CONCLUSION

Appellant does not meet the requirements for either a rehearing by this court or en banc. Nor is there any error by the majority. Its ruling is completely consistent with *Kindt* as demonstrated above. It involves a completely different situation than what was involved in

[8] The court in *Kindt* also noted the history of Kindt and his cohort. *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266, 269 (9th Cir. 1995).

*Tinke*r and *Cohen* so it is not inconsistent with the Supreme Court. Therefore, the petition should be denied.

ATCHISON, BARISONE, CONDOTTI & KOVACEVICH

Dated: December 11, 2009

By: _____/s/_____
GEORGE J. KOVACEVICH
Attorneys for Defendants/Appellees

9th Circuit Case Number(s) 07-15814

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) December 11, 2009 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) _____/s/_____ JENNIFER PASQUINI

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)