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ORDERLY MEETINGS VS. FIRST AMENDMENT

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I. INTRODUCTION.

Dealing with protests and enthused citizens has always been a part of local government politics. As the saying goes, it comes with the territory. However, as civility generally decreases in society, so does decorum at public meetings. Whether it is from an audience member opposed to a certain zoning petition or from a member of the elected body itself, tough, spur of moment decisions often have to be made to keep the meeting on track and from spiraling out of control. Although mayors and chairmen are typically charged with the power to preside, when matters get unruly, they look to their trusted attorney to make the decision. The focus of this paper is to provide a general guideline for local government attorneys and their clients on how best to deal when audience members, protestors and even members themselves, cross the invisible line of what is acceptable in a public meeting.

II. LEVEL OF SCRUTINY: Forum Analysis.

It goes without saying that the location and type of meeting are significant factors in determining the rights of citizens to petition their representatives. In *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 44 (1983), the Supreme Court of the United Sates determined there are three (3) standards by which limitations upon the right to free speech differ depending on the character of the property at issue.

A. Traditional Public Forum: Strict Scrutiny.

The first category the Supreme Court identified covers forums which have been long established as archetypal places of assembly and debate, such as public streets and parks. *Perry Education Association,* 460 U.S. at 44. The government's ability to circumscribe communicative activity in these forums has been highly curtailed. *Id.* at 45. The Supreme

Court held, "[f]or the State to enforce a content-based exclusion [in these quintessential public places] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id*.; *see also Carey v. Brown*, 447 U.S. 455, 461 (1980). Stated another way, "content-based restrictions may be imposed in a traditional public forum where there is a clear and present danger that [the speech] will bring about the substantive evils that [government] has a right to prevent [cit. omitted] and where the restrictions are narrowly drawn to serve that compelling state interest [cit. omitted]." *Steinburg v. Chesterfield County Planning Commission et al.*, 527 F.3d 377, 384 (4th Cir. 2008). However, local governments can impose reasonable time, place, and manner restrictions so long as they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *See Kindt v. Santa Monica Rent Control Board et al.*, 67 F.3d 266, 269 (9th Cir. 1995).

B. Limited Public Forum: Intermediate Scrutiny.

The second category recognized was public property that the government opened for public forum and debate. *Perry Education Association,* 460 U.S. at 45. However, the Supreme Court has not precisely instructed where the limited public forum is located on the *First Amendment* spectrum between the strict test for public forum regulation and the more relaxed test for nonpublic regulation. *See Whiteland Woods, L.P. v. Township of West Whiteland et al.*, 193 F.3d 177, 182 n.2 (3rd Cir. 1999). The opinion rendered in *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981), suggests that content-based restraints on limited public forums must be subject to strict scrutiny, and can survive only if they are supported by a compelling interest. Recently, however, the Court has apparently moved to the

position that regulation of a limited forum may survive under a test that is less strict than that applied in the case of a general open forum. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). Under this refined test for reviewing limited forum restrictions, content-based restraints are permitted, so long as they are designed to confine the "forum to the limited and legitimate purposes for which it was created." *Rosenberger v. Rector & Visitors of the Univ. of Va. et al.*, 515 U.S. 819, 829 (1995); see also *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. Pa. 1992). Two limitations remain: (1) Any restrictions on speech must be viewpoint neutral and (2) must be reasonable in light of the purpose served by the forum. *Eichenlaub et al v. Township of Indiana, Pennsylvania et al.*, 385 F.3d 274 (3rd Cir. Pa. 2004)(citing *Good News Club*, 533 U.S. at 106-07). As succinctly stated by the Fourth Circuit Court of Appeals, "'[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" *Steinburg*, 527 F.3d at 384-385 (citing *Good News Club*, 533 U.S. at 106-07); *see also Eichenlaub*, 385 F.3d at 281.

C. Non-Public Forum.

Lastly, the Supreme Court recognized "[p]ublic property which is not by tradition or designation a forum for public communication," and is therefore, governed by different standards. *Perry Education Association*, 460 U.S. at 46. Under this standard, the Supreme Court recognized that the "*First Amendment* does not does not guarantee access to property simply because it is owned or controlled by the government." *Id*. *quoting United States Postal Service v. Counsel of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). In addition to time, place, and manner regulations, the state may reserve the forum for its intended

purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association*, 460 U.S. at 46. The Supreme Court has stated on several occasions, "[the] State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id*. *quoting United States Postal Service*, 453 U.S. at 129-130.

III. WHERE DO PUBLIC MEETINGS FALL?

As you might imagine, public meetings usually fall within the categories of limited or non-public forums. More specifically, it depends on the unique characteristics of the meeting format used by your governmental entity. For instance, if during a meeting the elected body goes into public hearings or if there is some standing public forum. This changes the dynamic of the meeting from a non-public forum to a limited public forum for those portions of the meeting.

IV. WHAT SHOULD A GOVERNTAL ENTITY DO TO PREPARE FOR DISRUPTION?

The most important factor in running an orderly meeting is the ability of the presiding officer to do so. Of course, because all mayors are not created with the same "thickness of skin", simple steps need to be taken to (1) deal with the disruption and (2) create an unambiguous record in case of potential litigation.

A. Video and Audio Recording.

One of the simplest things a local government can do is to have a recording of the event. Although most large municipalities have this system in place, many smaller ones do not. Simple minutes of a meeting are insufficient at conveying what exactly transpired in a

meeting where emotions are running high. Furthermore, because they are prepared by the governmental entity, they are always subject to impeachment in a subsequent trial.

B. Adoption of Policies and Procedures.

Governmental entities should have policies and procedures governing the conduct of a meeting. First, it provides a simple blueprint for the assembly to follow. Additionally, because certain members of the elected body may be sympathetic to the disruptive audience member, it provides a set of rules that discourage partisan rancor to enter into the presiding officer's decisions. In addition, because audience members are not versed in the legislative process and parliamentary procedure, the policies and procedures should be communicated to the audience in some form or manner. A set of properly communicated rules will simplify the process for the laymen and help him/her understand how to get "their" issue before the elected body.

In *Kathyrn Harris vs. City of Valdosta et al*, 616 F. Supp. 2d 1310, 1315 (M.D. Ga. 2009), the City of Valdosta, Georgia adopted a set of policies and procedures that provided in part, the following: (1) items not on the agenda could not be voted on unless they are of an emergency nature; (2) issues brought up under the Citizensto be Heard portion cannot be voted upon; (3) citizen comments should be brief so everyone has adequate time to express their viewpoint; and (4) citizen comments should be made to council as a whole. When a citizen approached council requesting immediate action on a hot-button non-agenda item, the mayor and council were prepared. Had these policies not been in place, the decision not to take action may have seemed more of an arbitrary rule designed to provide political cover.

C. Make Sure Your State or Local Ordinance Provides For Prosecution.

If an individual becomes disruptive, and police are called to remove him, he/she should be prosecuted for their actions. Because an arrest arguably takes place when they are removed from the meeting hall, the lack of subsequent prosecution exposes the local officials, as well as the arresting officer, to civil liability for which qualified immunity may not apply. While many states have statutes governing the disruption of a public meeting, many do not. Furthermore, the constitutional validity of these statutes should be analyzed.

For instance, in *Kathyrn Harris,* thirteen individuals were arrested at a city council meeting. *Id*. at 1320. The individuals were subsequently charged with a state offense for disrupting a public meeting. *Id*. at 1321. The statute provided: "A person who recklessly or knowingly commits any act which may reasonably be expected to prevent or disrupt a lawful meeting, gathering, or procession is guilty of a misdemeanor." O.C.G.A. § 16-11-34(a). The statute was ultimately struck down by the Georgia Supreme Court as being constitutionally overbroad. *Id*.; see *State vs. Fielden*, 280 Ga. 444 (2006). Of course, with a victory under their belt, the plaintiffs sued the City under a myriad of claims. While the city and its elected officials were granted qualified immunity, certainly a successful prosecution under a valid statute would have made it easier to defend and possibly dissuaded the lawsuit in the first place.

Although local government lawyers may not be able to guarantee that a state statute will be available, local ordinances can be drafted or amended to prohibit such activity. Disorderly conduct ordinances are often the most convenient to amend to prevent this activity. *Fielden, supra*, provides an excellent analysis of what is needed in such an ordinance.

V. INTERNAL DISRUPTION.

A more difficult decision for both the presiding officer and attorney is when a member of the elected body is being disruptive. Although this happens less frequently, it certainly does occur. Most ordinances, statutes or internal policies do not distinguish between audience members and members of the elected body. However, there are differences which are supplied largely by parliamentary procedure. ROBERT'S RULES OF ORDER: NEWLY REVISED (10th Ed), p. 626-30., provides for a series of steps to be a taken prior to removing a member from the meeting hall. Specifically, if a member becomes disruptive and the presiding member cannot prevent same by instructions of being out of order, the next step is to name the offender. *Id*. at 627. Before this action is taken, the chair instructs the secretary to record the obnoxious behavior or words. *Id*. In naming the member, the chair uses the members name and states what he has done wrong. *Id*. If the member sits down at that point, the assembly can choose whether to drop the matter or ask for a penalty. *Id*. Only the assembly can impose a penalty such as removing the member from the hall. *Id.*

A very instructive case in removing members is *Monteiro vs. City of Elizabeth*, 436 F.3d 397 (3rd Cir. 2006). In *Monteiro*, the plaintiff was a member of the Elizabeth, New Jersey, city council. *Id* at 399. On April 10, 2001, the council convened to consider the proposed annual budget. *Id.* at 400. The council members took turns expressing their opinions, and the plaintiff stated his objections to the budget. *Id.* Discussion among the council members ensued, during which the defendant, who was the council's president and presiding officer, "leveled a pointed attack at [the plaintiff] for what she perceived to be his role in the distribution of a pamphlet protesting the budget and inviting citizens to attend

the meeting." *Id.* The plaintiff interrupted her and began to defend himself. *Id.* In response, "[the defendant] swiftly ruled [the plaintiff] out of order, pounding her gavel." *Id.* When the plaintiff continued trying to defend himself, the defendant asked two municipal officers to remove him from the meeting. *Id.* at 400-401. As the officers approached the plaintiff, the defendant continued by stating that the pamphlet was a "lie to the general population" and "beyond deception." *Id.* at 401. The plaintiff then said, "Well, we'll wait for the bills to come out." *Id.* The defendant responded by exclaiming, "This man cannot keep his mouth shut!" and repeated her request that the plaintiff be removed. *Id.* The plaintiff stated that he would not leave the meeting voluntarily, and that if the defendant wanted him to leave, she would have to have him arrested. *Id.*

As the officers approached, one member of the Council requested a legal opinion. *Id.* Although the council's governing rules required a vote to remove a councilperson, the city attorney (erroneously) advised the plaintiff that he was obliged to abide by the orders of the council president. *Id.* After a short recess was taken, the plaintiff was still seated in his chair, so the defendant again asked the officers to remove him. *Id.* When the officers responded that they could not remove the plaintiff unless he was under arrest, the defendant ordered that the plaintiff be arrested and removed. *Id.*

Alleging violations of his *First Amendment*, *Fourth Amendment*, and due process rights, the plaintiff filed a 42 U.S.C. § 1983 claim against the city, the officers who arrested him, and the defendant, in her capacity as president of the council. *Id.* at 402. The district court granted summary judgment in favor of the city and the officers on some of the plaintiff's *Fourth Amendment* and due process claims, and the other such claims were voluntarily dismissed. *Id.* However, the district court denied the defendant's motion for

summary judgment on the plaintiff's *First Amendment* claim finding that the defendant's motivation for removing the plaintiff was a disputed issue of material fact to be determined by a jury. *Id.* at 403-04. The jury found that the defendant acted upon an unconstitutional motive in ejecting the plaintiff, thereby violating his constitutional rights and awarded $10,000.00 in compensatory damages. *Id.* at 399. The jury also awarded punitive damages based upon its determination that the defendant "acted recklessly and with callous indifference to Plaintiff's rights in having him removed[.]" *Id.* at 406-407.

In analyzing the facts, the Third Circuit approved of the district court's determination that the council meeting was a limited public forum. *Id.* at 403. Under this analysis, the court held it to be clearly established that a public official's conduct must conform to the requirements of the *First Amendment* when excluding an elected official or citizen from a public forum. *Id.* at 404. The court also held it to be clearly established that while content-based restrictions on speech in public forums were subject to strict scrutiny, viewpoint discrimination violated the *First Amendment* regardless of whether a valid time, place, and manner interested was also being served. *Id.* The court further held, "if [the defendant] acted with an intent to suppress [the plaintiff]'s speech on the basis of viewpoint, she violated clearly established law and is not entitled to qualified immunity." *Id.*

In reviewing the record, the court found sufficient evidence from which a reasonable jury could conclude that the defendant acted upon an unconstitutional motive in removing the plaintiff. *Id.* This evidence included "[t]he speed with which [the defendant] determined to eject [the plaintiff] from the meeting, her failure to consult her fellow council members [...], and her failure to follow any established procedure[.]" *Id.*

Based upon this analysis, the Third Circuit affirmed the denial of the defendant's motion for judgment as a matter of law. *Id.* at 406.

VI. GENERAL OVERVIEW OF CASES.

A. *Eichenlaub et al v. Township of Indiana, Pennsylvania et al.*, 385 F.3d 274 (3rd Cir. 2004).

Eichenlaub arises from a meeting of the Board of Supervisors of the Township of Indiana, Pennsylvania. A portion of this meeting was entitled "the citizen's forum," which afforded an opportunity for the citizens to address the Township government. *Eichenlaub*, 385 F.3d at 281. In *Eichenlaub*, the plaintiff addressed the Township during the citizen's forum portion of the September 14, 1999 meeting, was "repetitive and truculent, [...] repeatedly interrupted the chairman of the meeting[,]" and was eventually removed. *Id.*[1]

The plaintiff filed a 42 U.S.C. § 1983 claim alleging "that the Township violated his *First Amendment* rights to petition government for redress of grievances when he was limited in his right to speak at a public meeting on September 14, 1999, and was removed from the same meeting." *Id.* at 278. The plaintiff claimed that, during this meeting, he was repeatedly interrupted by the board chairman, and was not allowed to finish his comments before being removed. *Id.* The plaintiff also claimed that the board chairmen called him on August 25, 1999, prior to the meeting in question, and "suggested that he not come back and speak at the Township meetings, at the citizen's forum." *Id*.

The United States District Court for the Western District of Pennsylvania granted summary judgment to all defendants. *Id.* at 279. The Third Circuit Court of Appeals

[1] The opinion is not specific regarding the content of his speech, although it is highly probable that his speech related to an old and ongoing dispute between the Township and the Eichenlaub family over zoning regulations (which is the context within which virtually all claims involved in this case arose).

affirmed the decision with respect to the plaintiff's *First Amendment* claim.[2] *Id.* at 277. The Third Circuit Court of Appeals held:

> Plainly, public bodies may confine their meetings to specified subject matter .... [cit. omitted]. Thus, matters presented at a citizen's forum may be limited to issues germane to town government. [...] With this framework [*referring to the free speech forum analysis described above*], we agree with the District Court that summary judgment against [The plaintiff] on his restraint of speech and petition claims was appropriate. The record of the September 14, 1999 meeting discloses that he was repetitive and truculent, and that he repeatedly interrupted the chairman of the meeting. Restricting such behavior is the sort of time, place, and manner regulation that passes muster under the most stringent scrutiny for a public forum. [...] [T]he chairman of the meeting sought to restrict the discussion to topics of public interest and requested that [The plaintiff] not discuss matters of private concern. To the extent those restrictions were not strictly content-neutral, the chairman's actions served the function of confining the discussion to the purpose of the meeting. As we have observed, speech at a citizen's forum may be limited according to its germaneness to the purpose of the meeting. At any rate, the overwhelming, and wholly sufficient, motive to eject [The plaintiff] from the meeting was the perfectly sustainable and content-neutral desire to prevent his badgering, constant interruptions, and disregard for the rules of decorum.

Id. at 281.

B. *Steinburg v. Chesterfield County Planning Commission et al.*, 527 F.3d 377 (4th Cir. 2008).

This action arose from the October 18, 2005 meeting of the Chesterfield County Planning Commission in Chesterfield County, Virginia. *Steinburg*, 527 F.3d at 379. Prior to that meeting, a land developer had filed an application with the Commission to amend the zoning ordinance governing a certain subdivision. *Id.* at 380. Shortly before the meeting, the developer filed a request that the Commission defer consideration of its application. *Id.* In accordance with its bylaws, the Commission Chairman invited citizens to speak only on

[2] Other claims made by other plaintiffs were reversed and remanded.

the limited issue of whether to grant the developer's request to defer consideration of its application. *Id*.

Although the presiding officer reminded speakers to limit their comments only to the deferral issue, he did not enforce it when the speakers began expressing their general disagreement and/or concerns with the development itself. *Id*. at 380-81. In response, the developer's representative spoke again and stated "this doesn't deal with the deferral, Mr. Chair, but since you have let everybody else speak long past the deferral issue, maybe we can put this one to bed also." *Id.* at 381. In less than one minute, the developer's representative responded to concerns of the previous speakers which did not pertain to the deferral issue. *Id*.

The Chairman then asked for further public comment on the deferral request. *Id.* The plaintiff approached the podium and unlike the previous speakers, made no efforts to limit his speech to the specified topic. *Id*. A commissioner stated that the plaintiff was "abusing [the] podium" and was not addressing the developer's deferral request. *Id.* at 382. An exchange between the plaintiff and the Commissioner ensued, during which the plaintiff began shouting. *Id*. The Chairman interrupted, called the plaintiff out of order, and asked him to take his seat. *Id*. at 382-383. The plaintiff refused and continued to shout, causing the Secretary of the Commission to summon a police officer. *Id*. at 383. The plaintiff was eventually removed by the police officer. *Id*.

Subsequently, the plaintiff filed a 42 U.S.C. § 1983 claim against the commission, its chairman and the commissioner with whom he had argued. *Id*. The plaintiff claimed that his right to free expression had been unconstitutionally infringed by (1) the enforcement of

the Commission's policy against personal attacks,[3] and (2) cutting short his remarks, which he claimed was based upon his viewpoint. *Id.* at 384.

The district court granted summary judgment to all defendants on all counts. *Id.* at 380. The Fourth Circuit Court of Appeals affirmed. *Id.* It rejected the plaintiff's facial challenge to the Commission's policy against personal attacks, as well as his *as applied* challenge, finding insufficient evidence to conclude that the plaintiff was silenced based upon this policy. *Id*. at 387-88. The court also held that there was no evidence that the plaintiff was silenced because of his viewpoint. *Id.* at 388. In particular, the Court of Appeals found:

1. The Commission's public meeting was a limited public forum and "the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business." *Id.* at 385.

2. "The Commission's policy against 'personal attacks' focuses on two evils that could erode the beneficence of orderly public discussion. First, as an insult directed at a person and not speech directed at substantive ideas or procedures at issue, a personal attack is surely irrelevant--unless, of course, the topic legitimately at issue is the person being attacked, such as his qualifications for an office or his conduct. Second, as an insult directed at a person and not the issues at hand, a personal attack leads almost inevitably to a responsive defense or counterattack and thus to argumentation that has the real potential to disrupt the orderly conduct of the meeting." *Id.* at 386-87.

[3] The Commission had a policy against "personal attacks," though no written version of the same is cited.

3. "[D]enying a speaker at the podium in a Commission hearing the right to launch personal attacks does not interfere with what that speaker could say without employing such attacks. […] In the language of *First Amendment* jurisprudence, the Commission's policy in this case has left open 'ample alternative channels for communication of the information.'" *Id.* at 387, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

4. "[T]here is 'no constitutional right to force the government to listen to [one's] views'" *Id.* at 389, *quoting Minnesota. State Board. for Community Colleges v. Knight*, 465 U.S. 271, 283 (1984).

5. The Chairman did attempt to silence the plaintiff – and ultimately excluded the plaintiff from the meeting room – but the Chairman's concern "was explicitly focused on having [the plaintiff] stay on subject and on conforming his manner to the order that was necessary." *Id.*

6. The plaintiff argued that viewpoint discrimination could be inferred from the fact that the Commission allowed other speakers to speak off-topic, but silenced the plaintiff as soon as he began to voice his criticism of the Commission. *Id.* The Court disagreed, however, finding that the Commission reminded all speakers to stay on topic, and that it was only the plaintiff who responded disruptively and argumentatively. *Id.* at 389-90. Only after it became apparent that the plaintiff intended to stay off-topic was he silenced. *Id.* at 390. The Court held that "officials presiding over such meetings must have *discretion* […] to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue

of its irrelevance, its duration, or its very tone and manner." *Id.*, quoting *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990).

C. *Hansen et al. v. Westerville City Sch. Dist., Bd. of Educ. et al.*, Nos. 93-3231, 93-3303, 1994 U.S. App. LEXIS 31576 (6th Cir. Nov. 7, 1994).[4]

This case arose from a series of meetings held by the Westerville, Ohio City School District Board of Education (the "Board"), concerning tax levies proposed by the Board. *Hansen*, U.S. App. LEXIS 31576 at *2. All twelve Plaintiffs were members of an organization called Citizens Against Tax Waste ("CATW"), who campaigned against the Board's levy proposals, attended the series of meeting, and voiced their opposition. *Id*. at *1-2.

On September 12, 1988, a public meeting of the Board took place. *Id.* at *3. Because of the controversy over the levy proposals, recent meetings of the Board had been lengthy and yielded unusually high attendance. *Id.* Accordingly, the presiding officer announced a new policy allotting forty-five minutes for public comment, with five minutes being allotted for each speaker. *Id.* During this meeting, only five citizens spoke because each spoke for more than five minutes. *Id.* After forty-five minutes, the presiding officer announced that the public participation period had come to an end, and called a short recess. *Id.* After the recess, the Board attempted to move to the next agenda item, at which point a plaintiff insisted that additional time be permitted for those in attendance to address the Board. *Id.* Despite being ruled out of order, the plaintiff "continued to pace about the podium and declaim loudly, insisting that 'we'll talk until we're heard.'" *Id.* at *3-4. After another brief recess, the Board then announced that an additional fifteen minutes would be allowed for public comment at the end of the meeting. *Id.* at *4. The Plaintiff interrupted again, saying

[4] This case was not recommended for full text publication which affects its precedential value.

that until those who wished to speak were allowed to do so, the meeting would not continue. *Id.* At this point, another plaintiff approached the podium and began speaking. *Id.* Despite being ruled out of order, she continued to speak and was allowed to finish. *Id.* Following her speech, the Board again attempted to move on to the next agenda item, only to be interrupted again. *Id.* This time, a police officer ejected interrupting plaintiff from the meeting for a short period. *Id.* At the end of the meeting, the additional fifteen minutes for public comment were allowed, which included an additional five speakers, including the ejected plaintiff. *Id.* Of the eleven spectators who were heard that night, at least five were members of CATW. *Id.*

At the next meeting, individuals desiring to speak were asked to sign up in advance. *Id.* At the beginning of the public comment portion, the presiding officer announced there would not be enough time to hear all who signed up to speak and that preference would be given to those who had not previously spoken at earlier Board meetings. *Id.* After eleven citizens had spoken for a total of forty-seven minutes, the presiding officer recognized two final speakers. *Id.* Two plaintiffs that had not been allowed to speak, approached the podium and refused to relinquish the podium. *Id.* at *6-7. They were subsequently escorted out. *Id.* Another plaintiff approached the podium and asked whether those that had signed up to speak would be allowed to do so at the end of the meeting. *Id.* at *8. The presiding officer ruled her out of order and she escorted from the meeting by the police officer. *Id.* A group of plaintiffs followed the police officer into the foyer. *Id.* The group returned to the meeting and another plaintiff took the podium, was ruled out of order, and was escorted from the meeting. *Id.* The police officer was again followed into the foyer by a group of plaintiffs where he asked them, including several who had not spoken, to leave,

allegedly threatening arrest if they reentered the meeting. *Id.* The plaintiffs left the building. *Id.*

In July, 1989, 12 plaintiffs filed an action in the U.S. District Court for the Southern District of Ohio via 42 U.S.C. § 1983 claiming *First Amendment*, *Fourth Amendment*, and *Fourteenth Amendment* violations, plus state charges of false arrest, malicious prosecution, and assault and battery. *Id.* at *9. The district court granted summary judgment to all defendants on all charges. *Id.* The Sixth Circuit Court of Appeals affirmed on the state law claims. *Id.* Turning to the *First Amendment* claim against the police officer, the Sixth Circuit *reversed in part and affirmed in part*, finding:

1. A school board meeting, when opened to the public, is a limited public forum for discussion of subjects relating to the operation of the schools. *Id.* at *19(citing *City of Madison, Madison Joint School District. No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 (1976).

2. "Under the . . . *First Amendment* . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views …. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.*, *quoting Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

3. If the police officer "excluded the plaintiffs from the meeting solely because they wore buttons indicating their association with Citizens Against Tax Waste, his action would be an impermissible content-based restriction on the plaintiffs' right to express themselves in a public forum." *Id.* at *20.

4. "[T]he plaintiffs' wearing of CATW buttons constituted a 'silent, passive expression of opinion.'" [cit. omitted]. Such a symbolic act is protected by the Free Speech Clause of the *First Amendment*. [cit. omitted]. Notwithstanding the expiration of the time for speeches by members of the public, the plaintiffs had a right to attend and to wear CATW buttons." *Id.* at *20-*21.

5. Following a previous decision, it was well-established that members of the public had the right to attend a public school board meeting. *Id.* at *22. "A reasonable police officer in the position of [the defendant-officer] would have known that he could not exclude members of the public from a school board meeting solely on the basis of their viewpoints." *Id.* The grant of summary judgment in favor of the police officer was, therefore, improper. *Id.*

Turning to the 1st Amendment claim against the Board, the court concluded that "this policy was a permissible content-neutral restriction on the time, manner, and place of the plaintiffs' speech and did not violate the plaintiffs' *First Amendment* rights." *Id.* at *31. The Court held:

6. "Where regulation of speech is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative avenues for communication, it is constitutionally valid." *Id.* at *31-*32 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

7. In this case, the board's policy did not limit speech based on its content. All speakers during the public participation period were required to comply with the policy regardless of their viewpoint. The regulation affected the timing of the speech, not its content." *Id.* at *32. Additionally, the board held several meetings to hear public

comment, and citizens were free to write or speak to board members outside the board meetings. *Id.* at *34. Furthermore, [t]he policy did not disproportionately limit the right of members of any particular group to speak. *Id.* at *32-*33.

8. "'[A] city Council meeting is […] a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual *first amendment* [*sic*] antipathy to content-oriented control of speech cannot be imported into the Council chambers intact.'" *Id.* at *34, *quoting White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. Cal. 1990).

D. *Wright v. Anthony et al.*, 733 F.2d 575 (8th Cir. 1984).

This action arose from a public meeting held by United States Representative Beryl Anthony at the county courthouse in Garland County, Arkansas. *Wright*, 733 F.2d at 576. The meeting was held to discuss the issue of Social Security reform. *Id.* Prospective speakers were informally limited to five minutes each, and were so notified. *Id.* The plaintiff attended the meeting and addressed the Congressman by reading a prepared text. *Id.* at 577. After four pages had been read, Congressman Anthony interrupted the plaintiff and "ended his testimony." *Id.*

The plaintiff filed suit against the Congressman, along with numerous other defendants, "alleg[ing] that this action violated his *first amendment* [*sic*] right to freedom of speech … " *Id.* at 576-77. The district court dismissed the plaintiff's complaint for failure to state a claim upon which relief can be granted. *Id.* at 576. The Eighth Circuit Court of Appeals affirmed, noting:

1. "Reasonable time, place and manner restrictions on the exercise of *first amendment* rights are not repugnant to the Constitution." *Id.* at 5779 (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981)).

2. The plaintiff was not prevented from introducing all of his prepared text into the written record; he was merely prevented from reading all of it aloud. Furthermore, there was no indication that the action was precipitated by the content of plaintiff's message but rather a restriction that served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak. *Id.*

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

This case arose from several meetings of the Santa Monica Rent Control Board, an elected public body, occurring in and around 1990. *Kindt*, 67 F.3d at 267. Although the meetings followed a set agenda, the body allowed numerous speakers to discuss issues that were irrelevant to the issue of rent control such as protesting U.S. foreign aid to El Salvador, announcing events for abortion clinic defense sessions, organized labor incidents, etc. *Id*. at 268. If an Audience member desired to speak, he/she could submit a form called a "chit" to speak on a particular topic. *Id.* at 267. Because of these tangents, the flow of Board meetings was often disrupted, and several landlords were inconvenienced by having to wait until these various controversies subsided before they could transact their rent control business before the Board. *Id.* at 268. After several meetings, the Board announced a new policy stating that audience members could only speak during a designated time. *Id.* The plaintiff strenuously objected to this new policy and was ejected from Board meetings "on occasion" for "disrupting the orderly process of the meetings …" *Id.*

Subsequently, the plaintiff filed suit against the Board pursuant to 42 U.S.C. § 1983 alleging that it had violated his *First Amendment* rights by ejecting him from Board meetings, discriminating against him based upon the content of his speech, by improperly preventing him from speaking on certain subjects, and by unduly limiting the time he was allowed to address the Board on other subjects. *Id*. at 267; 271-72. The district court granted summary judgment to the defendants. *Id.* at 267. The Ninth Circuit Court of Appeals affirmed, finding:

1. "Citizens are not entitled to exercise their *First Amendment* rights whenever and wherever they wish." *Id.* at 269, (citing *Adderley*, 385 U.S. at 47-48 (trespass statute that prohibits demonstrating on jailhouse grounds does not violate the *First Amendment*)).

2. "There are three recognized categories of permissible regulation of expressive activity." *Id*. However, "'[p]ublic forum or not, the usual *first amendment* [*sic*] antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the *first amendment* [*sic*] when it restricts public speakers to the subject at hand. While 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.'" *Id.* at 270, *quoting City of Norwalk*, 900 F.2d at 1425.

3. "It seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic forum niche. But, as we intimated in *City of Norwalk,* the important thing is not whether we call the meetings highly regulated limited public fora or nonpublic fora. The fact remains that limitations on speech

at those meetings must be reasonable and viewpoint neutral, but that is all they need to be." *Id.* at 270-271.

4. Limiting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place, and manner restrictions that preserve a board's legitimate interest in conducting efficient, orderly meetings. *Id.* at 271(citing *City of Madison*, 429 U.S. at 175 n.8 ("Plainly, public bodies may confine their meetings to specified subject matter. . . ."); see also *Wright*, 733 F.2d at 577 (five-minute limitation on presentation to congressman was a reasonable restriction and served significant governmental interest in conserving time and ensuring that all had an opportunity to speak).

5. "No invidious regulation of [the plaintiff]'s speech was implicated and content was not a factor - *e.g.,* the fact that the Board's views on the Cambodian regime might or might not be different from [the plaintiff]'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 hearings (Item 7)." *Id.*

6. The plaintiff's ejection was a permissible removal within the Board's rules of decorum for, among other things, yelling and making obscene gestures. *Id.* at 271-272(citing *City of Norwalk*, 900 F.2d at 1424-1426 (upholding ejection of a disruptive citizen from a city council meeting under nearly identical decorum regulations and pointing out that a great deal of discretion must be left to the entity)).

7. Plaintiff's argument that the Board "'exceeded' its jurisdiction by discussing political matters and making announcements unrelated to rent control, [and]

therefore created a situation in which 'the Constitution allows [the plaintiff] the right to oppose [the Board's] views just as freely as if all the parties were on a street corner.' … Is an incorrect reading of the law regarding the meetings of public bodies?" *Id*. at 272. Even if "the Board did have speakers from the community talk to it about the death penalty, the Greyhound bus strike, or the political regime in Cambodia, that did not give [the plaintiff] an unregulated right to respond in kind." *Id.*

F. *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).

In *Jones*, the plaintiff appeared before the Key West, Florida City Commission meeting. *Jones*, 888 F.2d 1329. The plaintiff then began commenting on the spending habits of the Commission. *Id.* The mayor and presiding officer of the meeting reminded the plaintiff to stay on topic. *Id.* The plaintiff retorted, "Let me tell you something Mister, I am on the subject. If you can't stay germane in your mind, that's your problem, not mine." *Id.* The mayor responded that future outbursts would result in his expulsion. *Id.* In response, the plaintiff stated, "I don't think you're big enough." *Id*. The plaintiff was then escorted out of the chambers. *Id.*

A bench trial ensued where the mayor and city were found liable. *Id* at 1330. On appeal of the verdict against the mayor only, the Eleventh Circuit reversed the trial court. *Id*. In analyzing the facts, the court held that the city commission was a public forum "when the commission intentionally opened it to the public and permitted public discourse on agenda items." *Id*. at 1331. The court went further and stated:

> Content-neutral time, place and manner restrictions are permissible if they are narrowly drawn to achieve a significant governmental interest and if they allow communication through other channels. Content-based exclusions must be narrowly tailored to effectuate a compelling governmental interest.

Id.

The Court discussed (1) whether the plaintiff was silenced because of the content of his speech; (2) whether the mayor was advancing a significant government interest; (3) whether the means was narrowly tailored; and (4) whether there was other channels of communication.

The Court disagreed with the trial court's finding that the plaintiff had complied with the time, place and manner restrictions and had been silenced due to the content of his speech. *Id*. at 1332. The court stated the mayor was within his bounds because the comments were both disruptive and not on topic. *Id*. While the court recognized that one could infer from his opening comments that the plaintiff's opinions and questions would be critical, it cautioned against speculating about the mayor's mindset from hindsight. *Id*. The court also stated "the mayor's interest in controlling the agenda and preventing the disruption of the commission meeting is sufficiently significant to satisfy this governmental interest prong of the analysis." *Id*. at 1333.

In analyzing whether the mayor's action was narrowly tailored, the court stated:

> "the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" [cit. omitted]. The analysis does not hinge on the " 'judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted. … This is a judgment call that a presiding officer and parliamentarian must make without the benefit of leisure reflection. *Rock Against Racism* instructs us that our agreement with the mayor concerning the most appropriate method of conducting the meeting is not the test. An erroneous judgment call on the part of a presiding officer does not automatically give rise to liability for a constitutional tort.

Id. at 1333-34.

G. Other Decisions.

Other jurisdictions have faced similar conduct at meetings of public bodies. *See Musso vs. Hourigan et al.,* 836 F. 2d 736 (2nd Cir. 1988)*; Shero vs. City of Grove, Oklahoma et al.,* 510 F. 3d 1196 (10th Cir. 2007)*; Thornton v. City of Kirkwood*, 2008 WL 239575 (E.D. Mo); *Kirkland v. Luken*, 536 F. Supp. 2d 857 (S.D. Ohio 2008); *Gigler v. City of Klamath Falls*, 21 Or. App. 753, (1975); *State v. Smith* 218 A.2d 147 (N.J. 1966*); Montana v. Lowrey*, 233 Mont. 96 (1988).