18- 1235

No. 18-

IN THE

Supreme Court of the United States

JOE RIBAKOFF,

Petitioner,

v.

CITY OF LONG BEACH, LONG BEACH TRANSIT COMPANY, LONG BEACH TRANSIT BOARD OF DIRECTORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this matter are:

1) Is a rule abridging speech by members of the public at an open public meeting of a city government a presumptively unconstitutional content-based speech regulation under the 1st Amendment if it does not also apply to 'staff' and government invite speakers when the justification for distinction between public and non-public speakers is that 'staff' and invite speakers are experts, while public speakers just create "the potential for endless discussion" [Appendix , pages 38-39] – i.e. that the public speaker's "speech is not worth it" *United States v. Stevens* 559 US 460, (2010)?

2) Does a state court have the power to cure a facially unconstitutional speech regulation of its 1st Amendment infirmities by rewriting it to constitutional standards, or, do separation of powers – the constitutional order that requires the legislature to legislate and the judiciary to adjudicate – bar not just the federal court from rewriting such a law (*Stevens* 559 US at), but also the state courts. Ask alternatively, can a state court make a facially unconstitutional state law into a facially constitutional one without ever changing the statute's face?

PARTIES TO THE PROCEEDINGS

Petitioner is Joe Ribakoff. He was plaintiff in the trial court in the Superior Court of Los Angeles County, State of California. He also was the appellant in the California Court of Appeal and petitioner before the California State Supreme Court.

Respondents are City of Long Beach, Long Beach Transit Co., and Long Beach Board of Directors. These respondents were the defendants in the Superior Court of Los Angeles County, State of California. They were the respondents before the California Court of Appeal. They also were the respondents before the California State Supreme Court.

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CITATION OF OFFICIAL

The citation for the official reporter for Ribakoff v. City of Long Beach is 27 Cal.App.5th 150 (2018).

JURISDICTION

The Second Appellate District of the California Court of Appeal issued its decision in this matter on August 24, 2018. On September 24, 2018, it issued an order modifying and certifying it for partial publication. On January 19, 2019, the California Supreme Court issued an order denying petition for review.

This Court has jurisdiction under 28 USC 1275(a). At issue are questions about whether a California municipal law is repugnant to the 1st Amendment of the US Constitution.

THE CONSTITUTIONAL PROVISION INVOLVED

In the portion of it that is relevant in this matter, the 1st Amendment states: "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people ... to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Long Beach is a California municipality. Long Beach Transit Co. (LBT) is a government corporation wholly owned by Long Beach. As set forth in its bylaws, LBT board are subject to California Government Code Sections

54950 – 54961, the Brown Act. LBT board meetings are also subject to Article 1, Section 3(a) of the State Constitution, which says:

> "The people have the right to instruct their representatives, [and] petition government for redress of grievances ..."

Under Government Code 54950 of the Brown Act, the State's:

> "legislature finds and declares that the public commissions, boards and councils ... in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this State do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

Long Beach also has a law governing its legislative council meetings. It is an ordinance that prohibits the unauthorized person from disturbing their meetings, but it allows the authorized person to disturb them. As Long Beach Municipal Code (LBMC) 2.03.140 states:

> "No person without authority of law shall disturb or break up any meeting or session of the council, or an legally constituted board or commission of the City."

As applied, LBMC 2.03.140 became LBT's board meeting public comment rule, a 3-minute limit if a member of the public addresses the board, but no time limit if you are not a member of the public. In August 2015, the LBT's board meeting public comment rule, in relevant part, was as follows:

> "Any member of the public may approach the lectern and, upon recognition by the Chairperson, state his or her name and address for the record and proceed to address the Board ... Comments shall be limited to three (3) minutes, for all comments, unless different time limits are set by the Chairperson, subject to the approval of the Board."

In August 2015, Petitioner Joe Ribakoff (Joe) attended a 2-hour long open public meeting of the LBT board. A member of the public, he came to speak in opposition to the proposal listed on that day's agenda as item 10.

The meeting that day was 2-hours long, and At the 2-hour long, and Joe was the only member of the public to speak at it. He also was the only speaker to oppose any of proposals on the agenda.

There were 3 speakers who addressed the board on item 10. Debra Johnson, LBT's deputy CEO spoke first, and Kelly Hines, an employee of MTA, a different transit

agency, spoke next. Both spoke in favor of the measure, and they spoke at length without any restrictions.

Joe spoke last. He spoke against the proposal, and, because he was a member of the public, he could speak only for 3-minutes – not including time consumed by identifying himself and where he lived.

After Joe spoke, Johnson spoke again, this time to support the measure in question by rebutting what Joe was giving just 3-minutes to say.

When Joe approached the podium to speak again, the board disturbed their own meeting. They cutoff Joe's microphone, and yelled over him. They instructed him to return to his seat.

Joe returned to his seat on his own accord. Once seated, a Long Beach police officer approached him and ordered him to leave the meeting. Outside the meeting hall, the same officer approached Joe again, and told him that if he disturbed another board meeting, then he would be arrested under LBMC 2.03.140. The officer then gave Joe his business card. On the back of the card, someone wrote in pen the code number at issue.

Long Beach Municipal Code (LBMC) 2.03.140 is an ordinance that prohibits an unauthorized person from disturbing a city council, committee or board meeting, but allows the authorized person to disturb it. It says:

> "No person without authority of law shall disturb or break up any meeting or session of the council, or an legally constituted board or commission of the City."

At the time of the incident in question, LBT had its own board meeting speech rule. It was LBMC, as applied. It restricts the speech rights of members of the public, but not those who are not members of the public. It says:

> "Any member of the public may approach the lectern and, upon recognition by the Chairperson, state his or her name and address for the record and proceed to address the Board ... Comments shall be limited to three (3) minutes, for all comments, unless different time limits are set by the Chairperson, subject to the approval of the Board."

Joe pursued a legal remedy by filing a complaint in the Los Angeles County Superior Court. Filed in February 2016, his complaint alleges that LBMC 2.03.140 is unconstitutional under the 1st Amendment as an overbroad and content-based speech regulation, both facially and as applied – the LBT public comment rule.

In March 2016, Joe applied for a preliminary injunction against 2.03.140 on grounds that it is facially vague and overbroad in violation of the 1st Amendment. The trial court never ruled on it.

A bench trial was held in this matter beginning August 4, 2016. In his trial brief filed on July 19, 2016, Joe argues that 2.03.140 is overbroad and content-based, both facially and as applied.

The trial court admitted in evidence the minutes of the board meeting – a 12-page document. It records the proceedings on agenda item 10 on pages 7 – 11. It records

22 lines of notes of speech by Ms. Hines, extending from page 8 to page10. It records 37 lines of notes for Ms. Johnson which start on page 7 and end on page 10. It has 4 lines of notes for Joe, all of which begin and end on page 7.

Amy Bodek is a former LBT board member. She testified at trial on behalf of respondents. She testified that the LBT public comment 3-minute rule applied to Joe because he is a member of the public. The rule did not apply to either Ms. Johnson or Ms. Hines because they are something she called "staff."

Ms. Johnson is not a board member staff person. She is deputy CEO of LBT. Ms. Hines does not even work for LBT. She works for a different public transit service.

At trial, the respondents offered no evidence as to the purpose of 2.03.140 or the public comment rule. They offered no evidence that it had a problem to solve with their speech regulations. It offered no evidence that it ever had a problem at LBT board meetings with any public comment speaker before the incident in question.

The trial court issued a written tentative decision, which was entered as part of the judgment. In its decision, the trial court held that Joe lacks standing to challenge LBMC 2.03.140. The LBT public comment time limit rule is not a content-based rule, but a reasonable time, place and manner regulation. Appendix pages 67a-72a.

The trial courts written decision is found in the Appendix D & E, pages 60a-73a.

Joe appealed the trial court's decision. Again, he argued in his briefs that 2.03.140 is unconstitutional on its face and as applied. He argued that the LBMC and the public comment rule are content-based speech regulations. Excerpts for his appellate opening brief are below under heading VIII.

In its published decision in this matter, the California Court of Appeal held that:

1) Indeed, LBMC 2.03.140 is facially unconstitutional, but Court cured it of its 1st Amendment infirmity by rewriting it to meet all constitutional standards, except the one that prohibits facially unconstitutional statutes.

The Appellate Court's decision on this issue is found at Appendix B & C – pages 2a-59a.

LBMC 2.03.140 is all but identical to California Penal Code 403. In *In Re Kay* 1 Cal.3d 943 (1970), the California Supreme Court concluded that the statute was facially unconstitutional on 1st Amendment grounds. However, instead of striking down the law, it rewrote.

The Court of Appeal agreed that 2.03.140 is all but identical to PC 403, and, like 403, it also is facially unconstitutional. However, instead of striking the statute, it rewrote it. As it states on page 35 of its decision:

> "As noted, LBMC 2.03.140 is substantially similar to Penal Code Section 403; accordingly, it should be construed in like manner. Thus, Ribakoff's claim that LMC 2.03.140 must be voided because the similar Penal Code section

> had been invalidated rests on an invalid premise. Just as our Supreme Court *upheld* the constitutionality of Penal Code section 403, as construed, we conclude that LBMC 2.03.140 is not unconstitutional when similarly construed." Appendix, pages 42a-43a.

With respect to the Joe's contention that 2.03.140 and the public comment rule are content-based and, therefore, presumptively unconstitutional, the Court of Appeal held that the distinction in speech rights in question is not a presumptively unconstitutional content-based regulation because staff and government invited guests are experts whose speech is more worthy than a public speaker's comments.

The Court of Appeal's holding on this issue can be found on pages 46a-47a of Appendix. It says that:

> "The essence of Ribakoff's argument is that a three-minute limit is presumptively unreasonable, particularly when there is no similar time limit on presentations by staff or invited guests.
>
> Ribakoff's argument rails to recognize the different purposes served by staff/invited guests, on the one hand, and members of the public, on the other. 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. Limiting presentations by staff and guests who are invited to speak based on their expertise to the same extant as members of the public ignores the information function served by staff and invited experts. Truncating such presentations does not promote informed decision making by the legislative body. The chair of the legislative body continues to have the ability to regulate the length of those presentations. Nor is there any reason to think time allocated for those presentations would be unlimited or extend beyond that needed to inform all in attendance concerning the particular agenda item.
>
> On the other hand, having no limit on either the length of any particular presentation by a member of the public or on the number of public speakers (or the total time for public comment) has the potential for endless discussion – given the potential that there will be a far greater number of members of the public who may wish to speak to an issue than there are staff and invited guests who make presentations concerning it."

Joe submitted to the California Supreme Court a petition for review. On December 19, 2018, the petition was denied. Appendix A, page 1a.

This Court should grant certiorari on the issue of the power of the court to cure a facially unconstitutional statute for 3 reasons:

1) The published decision by the California Court of Appeal is contrary to this Court's decision in by the Court of Appeal is contrary to this Court's decisions in: *McCutcheon v. Fed. Election Comm'n,* 572 US 185, 203 (2014); *United States v Stevens* 559 US 460, 470 (2010), and; *Reed v Town of Gilbert* 576 US __, __ (2015), [135 S.Ct. 2218, 2226].

LBMC 2.03.140 is a content-based speech regulation, both facially and as applied through the LBT public comment rule. The government cannot limit speaker's rights at an open public meeting of government because public speakers are less worthy. A court cannot cure a facially unconstitutional law by rewriting it to 1st Amendment standards.

TRIAL & APPELLATE BRIEF EXCERPTS

A. EXCERPTS FROM JOE RIBAKOFF'S TRIAL BRIEF

i. Trial Brief, pages 1-2:

I. Introduction

This is a Bane and Brown Act action challenging the legality of a Long Beach City ordinance legislative council speech ordinance and Long Beach Transit's past and present board meeting speech rule. Plaintiff, Mr. Ribakoff contends that all 3 of the speech rules at issue are:

1) Facially violate speech and petition rights guaranteed under the 1st Amendment of the US Constitution and Article 1 of the California Constitution, and;

2) Violate the Brown Act.

He contends that the City ordinance in question and LB Transit's prior board meeting speech rule violate state and federal constitutional speech and petition rights as applied, as demonstrated by the August 24, 2015 incident at issue in this matter.

ii. Trial Brief pages 9-15:

IV. All 3 Rules In Question Are Facially Unconstitutional

The 1st Amendment of the US Constitution and Article 1 of the California Constitution guarantee us speech and petition rights. With respect to these rights, the 1st Amendment says:

> "Congress shall make no law ... abridging freedom of speech ... or the right of the people ... to petition the government for a redress of grievance."

Respecting speech rights, Article 1 of the California Constitution says in Section 2(a):

> "Every person may freely speak ... his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech ..."

Respecting petition rights, Section 3(a) says that:

> "The people have the right to instruct their representatives, petition government for redress of grievances and assemble freely to consult for the common good."

Speech rights under Article 1 are even broader than those under the 1st Amendment. Pruneyard Shopping Ctr.v. Robins 447 US 74, 88 (1980).

Although speech and petition rights are described as absolutes in the 1st Amendment and Article, they have not been interpreted so broadly. As recently reiterated in McCullen v. Oakley 573 US __ (2014), the 1st allows government to impose reasonable time, place & manner speech regulations, provided that:

> "... the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels of communication of information," McCullen 573 US at ___.

The government carries the burden of proof that its speech regulation is narrowly tailored to achieve a significant governmental interest. As McCullen instructs, efficiency is not a significant governmental interest. Moreover, the government will not meet its burden of proof that its regulation is narrowly tailored unless it can show that a narrower less intrusive regulation was tried and it failed. McCullen 573 US at ___.

All 3 of the rules in question fail as reasonable time, place, and manner regulations. For example, LBMC 2.03.140, the disturbing conduct rule, is not narrowly tailored to achieve a significant government interest as a matter of law. It serves no interest because there already exist adequate laws in the Penal Code (PC 403) and the Brown Act (GC 54957.9) regulating disturbing conduct, and these laws are narrower than the Long Beach ordinance. Because there are no findings justifying it in the rule, LB Transit's new board meeting speech rule, there is no evidence whatsoever justifying or explaining its new speech rule.

All 3 rules fail the reasonable time, place, and manner test because they are content based regulations.

Content based speech regulations that are based on the content of your speech. They are presumptively unconstitutional. To overcome the presumption that they are unconstitutional, the government must prove that the regulations is narrowly tailored to achieve a compelling state interest. As the US Supreme Court recently said in Reed v. City of Gilbert 576 US __ (2015):

> "Content-based laws –those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest."

LBMC 2.03.140 defines disturbing to include whatever the Long Beach Transit Board decides what it finds to be disturbing. Its old rule defined it to mean a member of

the public who spoke more than 3 minutes – something that of course is universally recognized as so deeply and profoundly disturbing. Its new and improved speech code not only find it disturbing if a member of the public speaks for more than 3 minutes – but not someone who it invited to speak in support of whatever it wants to approve -, it now also bars the member of the public from allocating their 3 minutes of speech time to someone else, and vaguely seems to bar you from speaking if it concludes that someone already spoke for you.

A rule that discriminates on the amount of time or quantity of speech that is allowed on the basis of the identity of the speaker is a content based speech regulation. Bank of Boston v. Bellotti 435 US 765, 784 (1978); Citizens United v. Federal Election Comm'n 558 US __ ; Reed v. City of Gilbert 576 US at __. A rule that discriminates on speech rights based on your associational rights is a content based regulation too. Citizens United 558 USS at ___.

If defendants cannot meet their burden of proof under the less exacting significant interest test, then they certainly cannot meet it under the tougher compelling state interest test.

V. The Rules In Question Are Prior Restraints & Facially Unconstitutional As A Matter of Law

LBMC 2.03.140 is a prior restraint ordinance. It allows the authorized person to disturb the city council meeting. However, if the government has not licensed you by authorizing to disturb the meeting, if you disturb the city council meeting, you will go to jail, or, since the law

does not say if it is a felony or misdemeanor, you might wind up in the penitentiary. As the City ordinance says:

> "No person without authority of law shall disturb, interrupt, or break up any meeting or session of the Council, or of any legally constituted board or commission of the City."

As already has been pointed out, LBT's board meeting speech rules define what "disturbing" means under LBMC 2.03.140. Accordingly, if City ordinance at issue is a prior restraint, then so too are the LBT speech codes.

Any rule or regulation that requires you to get government authorization or a license to speak before you can speak is a prior restraint. Southeastern Promotions v Conrad 420 US 546, 553 (1975). Unless the law allows for immediate judicial review of the licensing decision initiated by the government, the prior restraint is facially unconstitutional and void as a matter of law. Bantam Books v. Sullivan 372 US 58, 70 (1963).

None of the speech rules at issue require the government to provide for immediate judicial review of its licensing decision. All of them are facially unconstitutional and void as a matter of law.

VI. The Rules In Question Are Facially Unconstitutionally Vague

The 1st Amendment will not tolerate a vague speech law. NAACP v. Button 371 US 415, 432 (1963). It requires speech laws to be narrow and specific. As the court said in Button 371 US at 433:

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area with narrow specificity."

A vague law is not a narrow regulation. It does not draw a clear line between permissible and impermissible speech. Button 371 US at 432. Instead, it paints a blurry line, which is unconstitutional because it chills permissible as well as impermissible speech. Button 371 US at 433. Worse yet, the vague law is subjective, not objective. It means whatever the opinion of the government official says it means, which is a green light for censorship. And, as the court said in Southeastern Promotions, Ltd v. Conrad 420 US 546, 553 (1975):

> "... the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."

In Hague, the court ruled that a city's "disturbing" conduct ordinance was facially unconstitutional and void as a matter of law on the grounds of vagueness. Hague 307 US at 516. The statute was vague because city officials had unfettered discretion to decide what constituted "disturbing" conduct.

LBMC 2.03.140 has the same vagueness problem as the statute at issue in Hague. Under 2.03.140, LBT's Board chairperson is given unfettered discretion to decide what constitutes disturbing conduct.

The LBT board meeting speech rules are not enacted regulations. There was never a debate regarding them

at an open and public board meeting in which the speech rules were an agenda item. The Board never voted on any of them. It is unknown how they came into existence, except, in October 2015, the rules were suddenly changed, presumably at the direction of the Board Chair.

The problem with a law that allows city officials to define what is "disturbing" conduct that can be regulated is not necessarily that a city official has used it to ban speech that criticizes the government, but that it allows the city officials to interpret that way. Hague 307 US at 516. LBMC 2.03.140 is unconstitutionally vague because it allows the Transit Board to define "disturbing conduct" to mean anyone who criticizes the mayor or the Transit Board.

The speech rules also are unconstitutional vague as criminal speech rules. Although it is crime to violate these rules, there is nothing in them that tells that tell you that. In fact, these rules are so vague that they do not even tell you if you will go to jail or the penitentiary if you violate them. They do not tell you if violating them is a misdemeanor or felony.

VII. The Rules At Issue Are Facially Unconstitutionally Overbroad

A speech law that is substantially overbroad is unconstitutional on its face. Airport Commissioners of Los Angeles v. Jews for Jesus 482 US 569, 574 (1987). A criminal speech law is substantially overbroad and facially unconstitutional unless intent is an element of the crime. Brandenburg v. Ohio 395 US 444, 447 (1969). Moreover, in In Rey Kay, a case involving a "disturbing

conduct" statute that is almost identical to LBMC 2.03.140, e court held that a law that a "disturbing conduct" law was substantially overbroad because the 1st Amendment allows the government to criminalize disturbing conduct only when it substantially disturbs a meeting. In Re Kay 1 Cal.3d at 942.

The rules at issue criminalize everything that "disturbs" a meeting, and is not limited to conduct that is willfully or intentionally disturbing. It makes every a crime that disturbs a meeting, and is not limited to conduct that causes a substantial disturbance. As a matter of law, the rules in question are facially overbroad and void as a matter of law.

B. EXCERPTS FROM JOE RIBAKOFF'S APPELLATE OPENING BRIEF

i. Opening Brief, pages 40-47

F. LBT'S 3-MINUTE PUBLIC SPEECH LIMIT IS AN UNCONSTITUTIONAL CONTENT-BASED SPEECH RESTRICTION

The constitutional questions are the central issues in this matter. Joe stood on a Bane Act platform to raise these questions, but the trial court wrongly concluded that he could not stand there because he had not been arrested. Notwithstanding, it addressed the constitutional challenge to the first of the two LBT speech rules, as if Joe had standing after all. In a ruling with no findings as to "the interest protected ... and the need for protecting that interest ..." the trial court upheld the LBT's 3-minute time restriction on speech by members of the public because:

1) Joe failed to meet his burden of proof that the LBT rule is unconstitutional, and; 2) The Constitution permits time restrictions on speech, therefore, it permits this time restriction.

The trial court erred in its answer Joe's questions regarding the constitutionality of the LBT's time restriction on public speech. Its answer also raises a new constitutional question itself.

LBT's 3-minute time limit is a quantity restriction that only applies if the speaker is a member of the public. Facially, it is a content-based speech restriction. It is presumptively unconstitutional. It is the government that has the burden of proof, not Joe. LBT's rule is constitutional only if LBT meets strict scrutiny standards, which it did not do.

Article 1, Section 3(a)(2) of the California Constitution requires that the trial court include in its ruling in this matter "findings demonstrating the interest protected ... and the need for protecting that interest." However, it does not tell you what happens when the court does not provide the required findings. Joe contends that it renders the court ruling a non-ruling – void.

The 1st Amendment protects speech rights. In the broad and sweeping language of an absolute legal bar, it says in its relevant parts that:

> "Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances."

Nonetheless, there are exceptions to this absolute bar, but they are few and narrow. A content-based speech regulation is rarely among them.

"Content-based [speech] laws are presumptively unconstitutional ..." *Reed v. Town of Gilbert* 576 US ___ (2015); *R.A.V. v. St. Paul* 505 US 377,395 (1992); *Simon & Shuster v. Members of N.Y. State Crime Victims Bd.* 502 US 105, 115, 118 (1991). To overcome the presumption of unconstitutionality, the government must prove that its law is "narrowly tailored to achieve a compelling state interest." *Reed* 576 US at ___ ; *R.A.V.* 505 US at 395; *Simon & Shuster* 502 US at 115, 118.

A law that restricts speech based on the identity of the speaker is a content-based speech law. *Reed* 576 US at ___ ; *Citizens United v. Federal Election Comm'n* 558 US 310, 340 (2010); *City of Madison, Joint School District v. Wisconsin Employment Relations Commission* 429 US 157, (1976). Our constitution prohibits the government from dictating who may speak on a public issue. *Bellotti* 435 US 765, 784-785; *Citizens United* 558 US at ___.

A quantity restriction is another category of content-based speech laws. It is presumptively unconstitutional to restrict your amount of speech. *Buckley v. Baleo* 424 US 1, 19 (1976); *Citizens United* 558 US at ___.

A time limit is a content-based quantity restriction.

LBT's 3-minute time limit for public speakers is a content-based speech law twice over. It imposes a quantity limit based on your identity. It is content-based both facially and as applied.

The LBT's 3-minute rule applies to "any member of the public." It is an undisputed fact based on the testimony by respondents' own witness that it only applies to members of the public, and not to government employees. The law is clear. This rule is presumptively unconstitutional. Respondents have the strict scrutiny test burden of proof. They must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed* 576 US at ___.

Reed involves a city ordinance regulating the time, place, and manner for posting a sign. The law determined where, when and sign dimensions based on the type of information that the signed conveyed. Arguing that its sign ordinance restricted speech on the basis of the identity of the speaker and not the content of the speech, the city argued that its sign ordinance should be reviewed under a less stringent constitutional test as a reasonable time, place, and manner regulation.

The court in *Reed* held that a law that restricted speech rights based on the identity of the speaker is a content-based speech restriction too. It too is presumptively unconstitutional and requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed* 576 US at ___.

City of Madison is an interesting case involving speech rights at a school board meeting. At issue in it is the constitutionality of a labor law that allows their union representatives to speak at public board meeting about an issue before pending collective bargaining negotiations, but prohibits the teachers from speaking who the union

represent. Finding the restriction unconstitutional, the court in *City of Madison* holds that:

> "[W]hen the board sits in public meetings to conduct public business and hear the view of citizens, it may not be required to discriminate between speakers on the basis of their employment or the content of their speech." *City of Madison* 429 US at 175.

The monthly public meetings of the LBT board are public forums. *City of Madison* 429 US at 175; *White v. City of Norwalk* 900 F.2d 1421, 1425 (9th Cir. 1990); *Norse v. City of Santa Monica* 629 F3d. 966, 975 (9th Cir. 2010) [Public city council meetings are limited public forums.] Although LBT has the constitutional authority for reasonable time, place and manner speech regulations, those regulations must be content-neutral. *Norse* 629 F3d at 975.

LBT's 3-minute public speech time limit is a content-based restriction. It is presumptively unconstitutional. Respondents must prove, under strict scrutiny standards, that it is constitutional. They must show that it furthers a compelling interest and is narrowly tailored to achieve that interest.

Respondents presented two witnesses at trial. Their witness list describes the scope of their testimony. Respondents went to trial without any testimony or documentary evidence as to the interest furthered by its speech rule. They offered into evidence any proof that its rule is narrowly tailored to achieve that interest. As a matter of law, they did not overcome the presumption that LBT's content-based speech law is unconstitutional.'

The trial court is right of course that government *may* regulate speech. Joe did not argue otherwise at trial and he does not argue otherwise on appeal. His contention that *this* time restriction is unconstitutional. Because government may regulate speech does not mean that all speech regulations are constitutional.

As a content-based speech restriction, respondents have the burden of proof. They must overcome the presumption that the time limit is unconstitutional. They must prove that it furthers a compelling interest and is narrowly tailored to meet that interest.

The trial court erred by not presuming that the time limit rule is unconstitutional. Instead, it assumed that it was constitutional, and, in error, placed the burden of proof of its unconstitutionality on Joe.

The trial court entered Judgment without any findings regarding the interest protected by the time limit rule or the need to protect that interest. As will be shown below, the trial court acted in violation of Article 1, Section 3(b)(2) of the California Constitution.

The trial court also entered judgment without findings as to the interest served by the time restriction, even though Joe requested timely requested it.

The constitutionality of LBT's time restriction is an issue of law. It is a matter that can be decided on appeal. Considering that the trial court has failed to make factual findings when it had both the opportunity and duty, Joe asks this court to decide the issue at hand and respectively request the court not to remand it back for further deliberation.

ii. Opening Brief pages 48-53

LBMC 2.03.140 IS FACIALLY UNCONSTITUTIONAL

The trial court erred twice in its ruling on LBMC 2.03.140. Its first error was in concluding that Joe lacked standing because he had not been arrested. Its second one was in not sustaining Joe's objections. As a matter of law, 2.03.140 is facially overbroad. As applied, it is vague.

In Re Kay is a speech case challenging the constitutionality of PC 403, a criminal law against disturbing a lawful meeting. In pertinent part, the statute reads as follows:

> "Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character ... is guilty of a misdemeanor." *In Re Kay* 1 Cal.3d at 937-938.

In Re Kay 1 Cal. at 941-942 & 945 holds that this section of the Penal Code is facially overbroad – unconstitutional on 1st Amendment grounds.

LBMC 2.03.140 is all but identical to PC 403. It says:

> "No person without authority of law shall disturb or break up any meeting or session of the council, or any legally constituted board of commission."

If PC 403 is unconstitutionally overbroad in violation of the 1st Amendment, then so is LBMC 2.03.140. The 1st Amendment was not amended after *In Re Kay.*

You have the constitutional right to say something disturbing. In Re *Kay*1 Cal.3d at 939-942; *Hague v. CIO* 307 US 496, 516 (1939); *Texas v. Johnson* 491 US 397, 414 (1989) [flag burning is protected 1st Amendment speech]; *Hustler Magazine v. Falwell* 485 US 46 (1988) [Outrageous cartoon offending a revered religious leader is protected speech]; *Snyder v. Phelps* 562 US ___ (2011) [Demonstration that despicably disturbs the last rights of an American soldier killed in the line duty is protected free speech].

Your constitutional right to say something disturbing includes a right to say something disturbing at a legislative council meeting. *Norse* 629 F.3d at 975-976.

A legislative council meeting is a [limited] public forum. *City of Madison* 429 US at 175; *White* 900 F.2d at 1425. The government's power to restrict speech is itself restricted. Its restrictions are limited to reasonable time, place and manner regulations. *Norse* 629 F.3d at 975. Its restrictions are constitutional only if they:

> " ... are justified without reference to the content of the regulated speech, that ... are *narrowly tailored* to serve a significant governmental interest, and that [leave] open ample alternative channels of communication of information. *McCullen v. Oakley* 573 US ___ (2014). Emphasis added.

A law that prohibits you from disturbing a meeting regulates conduct. It also regulates speech. *In Re Kay* 1 Cal.3d at 938 [Protesting by clapping in violation of a disturbing a meeting law "was closely akin to pure speech." *Norse* 629 F.3d at 975-976 [Idiot who disturbs a city council meeting with a sieg heil salute is engaged in 1st Amendment speech]. A law against disturbing a council meeting is unconstitutional on 1st Amendment substantial overbreadth grounds if it is not circumscribed narrowly to apply only to unprotected conduct. Unless it is narrow enough to apply only to conduct that actually disturbs a meeting, a law against disturbing a council meeting is facially overbroad and unconstitutional. *Norse* 629 F.3d at 976; *White* 900 F.2d at 1424-1426.

Norse involves a Santa Cruz city council's decorum law. If you disturbed the council meeting, then you violated the law. *Norse* arises from an incident in which a public speaker gave the council a Nazi salute, and then successfully challenged the constitutionality of the city's ordinance. In *Norse* 629 F.3d at 976, the court held that the law in question was unconstitutional because actionable disturbance in violation of it was not defined narrowly to conduct that causing an actual disturbance. *Norse* 629 F.3d at 976.

2.03.140 does not define what it means by disturbing a council meeting. There is nothing either in the ordinance itself narrowly defining it to mean only conduct causing an actual disturbance. There are no related rules or laws that narrowly defines it either. Instead, it authorizes the city's legislative councils to use its unfettered discretion and apply it to 1st Amendment protected speech.

2.03.140 is facially substantively overbroad for the same reason that the disturbing rule in *Norse* is facially substantially overbroad. It regulates disturbing conduct as well as 1st Amendment protected speech.

In Re Kay points to LBMC 2.03.140's second overbreadth problem: as applied, it is criminalize 1st Amendment protected speech. Even if there is nothing in the ordinance giving notice that disturbing a council meeting subjects you to criminal sanctions, the evidence is undisputed. A Long Beach police officer, no less than the supervisor of the civic center detail, order Joe to leave a public meeting, then threaten to arrest him if he disturbed another board meeting. He wrote on his business card the law that he intended to charge Joe with. It is an undisputed fact that, as applied, under LBMC 2.03.140, it is a crime to disturb a council meeting.

Because of the 1st Amendment, the government's ability to criminalize speech is narrow and restricted. It is well established that a criminal speech law is substantially overbroad unless intent is an element of the crime. *Brandenburg v. Ohio* 395 US 444, 447 (1969). Without intent as an element, the law would criminalize substantially more protected 1st Amendment than is permissible.

LBMC 2.03.140 does not include an intent element. As a matter of law, it is substantially overbroad.

The statute in question in *In Re Kay* includes an intent element. Notwithstanding, it was held to be substantially overbroad. It was substantially overbroad and facially unconstitutional because it still intrude too broadly into

protected speech. Because of 1st Amendment protection, the government is allowed only to make it a crime when you cause a substantial disturbance at a meeting. *In Re Kay* 1 Cal.3d at 942.

LBMC 2.03.140 makes it a crime to disturb a council meeting. There is no intent element to the crime. There is no restriction in the law that limits its application to conduct that causes a substantial disturbance. The city's ordinance is substantially overbroad under the 1st Amendment. It is facially unconstitutional.

ARGUMENT FOR ALLOWING THE WRIT

This matter involves a published decision by a state court of appeal on the 1st Amendment. It answers two questions with responses that are in conflict with this Court's decisions on these same two 1st Amendment questions. Due to a number of factual distinctions between the matter at hand and those involved in the relevant decisions by this Court, the state court's decision on these issues may also be interpreted as exceptions to the existing law, and thus, a 1st Amendment decision that this Court has not decided, but that it should decide.

Questions regarding our freedom of speech 1st Amendment are always important. The questions at issue in this matter are no exception. However, the one regarding the power of a legislative council to restricts the public's right to speak at an open public meeting of their government because their government determined that their speech is less worthy is foundational. It is a question goes to the heart and soul of the 1st Amendment, or, in the parlance of the Court, it goes to the Amendment's 'intent' and 'design.'

This Court has repeatedly affirmed the principle that the 1st Amendment "is designed and intended to remove government restraints from the arena of public discussion, putting the decisions as to what views shall be voiced largely to the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v California* 403 US 15, 24 (1971); *McCutcheon v. Fed. Election Comm'n,* 572 US 185, 203 (2014). It "safeguards an individual's right to participate in the public debate through political expression and political association." *McCutcheon* 559 US at 203; *Buckley v Valeo* 424 US 1, 15 (1976). It bars the government from limiting your speech because it decided that what you have to say just "is not worth it." *United States v Stevens* 559 US 460, 470 (2010).

Due to the 1st Amendment, the government lacks the power to decide if what we may want to say is sufficiently socially useful. *McCutcheon* 559 US at 205-206. As this Court says in *McCutcheon* 559 US at 206 , "the degree to which speech is protected cannot turn on a legislative or judicial determination that [some] particular speech is [more] useful to the democratic process."

"The right to participate in democracy ... is protected by the First Amendment ..." *McCutcheon* 559 US at 191. Participatory democracy does not get any more immediate and hands-on than citizen participation in local government.

If there is to be an exception that allows the government to impair the speech rights of members of the public because their speech is not worthy enough, then a

state's appellate court should not be making that decision. This court needs to make that decision.

A content-based speech law is presumptively unconstitutional under the 1st Amendment. *Reed v Town of Gilbert* 576 US __, __ (2015), [135 S.Ct. 2218, 2226]. Restricting speech on the basis of the speaker's identity can very well be a rule that is content-based. *Reed v Town of Gilbert* 576 US at __, [135 S.Ct. at 2231]; *Citizens United v. Federal Election Comm'n* 558 US 310, 340 (2010); *Turner Broadcasting Systems, Inc. v FCC* 512 US 642, 658 (1994). Content-based rules that discriminate on the basis of the speaker's identity are impermissible at an open public meeting of government. *Madison Sch. Dist. v. Wisconsin Empl. Rel.Comm'n,* 429 US 167, 175-176 (1976). Indeed, "when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech." *Madison* 429 US at 176.

The decision by the court in California regarding content-based regulations is in conflict this Court's decisions in *Madison* and *Reed.* In that it is a published decision, and that it about speech rights in an open public meeting of government, it is a matter of grave consequence. As a published decision, government bodies in California will rely on it. It will be used as a speech rights guide at their open public meetings. It will impair our democracy. Government bodies throughout California will have a green light to have a public discussion regarding public business and exclude the public from participating in it.

The second question in this matter also involves a 1st Amendment issue. As a 1st Amendment issue, it too is important. It too involves a ruling by the state court that is contrary to this Court's decision on the same issue. It also is important because the state appellate court's decision is somewhat absurd. Particularly because it is published, it compromises the credibility of our courts.

In *Stevens,* this Court expressed its considered opinion regarding its power to cure a facially unconstitutional law by rewriting it and ridding it of its 1st Amendment infirmity. It concluded that it lacked that power. *Stevens* 559 US at 481.

Under our constitutional order of separation of powers, it is the legislature's job to legislate. The judiciary's job is to adjudicate. Rewriting a facially unconstitutional law requires the legislature to exercise its function and legislate. *Stevens* 559 US at 481.

The state court's decision on this question in conflict with *Stevens* 559. According to the state court, it has the power to adjudicate and legislate and rewrite a facially constitutional statute.

One can articulate a meaningful distinction between *Stevens* and the appellate court decision at issue. The matter at hand involves a state, not a federal court. Nevertheless, in *Stevens,* this Court had before it a state law and the question before it was a federal one – is the statute facially unconstitutional under the 1st Amendment.

If separations or powers apply to a federal court on a federal question involving a state law, then it should also apply when a state court has before it a federal question involving a state law.

Moreover, the matter at hand involves the 1st Amendment. If there is an exception to the *Stevens* rule that bars courts from rewriting facially unconstitutional laws, then this Court should address it and settle the question, not a state court of appeal.

There is an absurdity to the court of appeal ruling. It holds that the court can cure a facially unconstitutional statute without changing the face of the statute. It simply issues a ruling that declares it changed, without ever facially changing it.

Most people are not lawyers. Most of them do not read the latest issue of judicial opinions weekly. If a law is facially unconstitutional, how is anyone to know it, except for the handful of lawyers who practice constitutional law?

If a law is facially unconstitutional under the 1st Amendment, then the judiciary correct helps no one, until it is too late. The law as written still impairs freedom of speech. Even after the court rewrites it, the law is facially vague or overbroad or even content-based. On its face, it still prohibits 1st Amendment protected speech. How would you know that you can say something that the law, on its face, says that you are barred from saying?

The question at issue is important. At issue is a troubling and somewhat absurd ruling. It subjects the court to ridicule. It gives a green light to a rule that allows a facially unconstitutional law to be cured of its facially constitutional failings without ever changing the face of the law. It lends itself to a miscarriage of justice and a loss of constitutional rights by the great majority of the population who are not lawyers and have not read the court ruling that rewrote the law.

CONCLUSION

This matter involves a published decision by a state appellate court regarding the 1st Amendment. The state court's ruling of these questions is contrary to this Court's decisions involving these same issues.

Although both of the questions at issue are compelling, one of them is fundamental. It goes to the heart, purpose, and intent of the 1st Amendment.

A state court of appeal has ruled in a published opinion that a law that restricts the public's speech rights at an open public meeting of government, but not government staff or invited speakers, is not a content-based speech regulation because public speech is not as worthy as that of an expert.

Respectfully, this Court should grant certiorari.

Respectfully submitted,

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