

No. 02-1832

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

DAVID McMAHON,

Petitioner,

v.

ALBANY UNIFIED SCHOOL DISTRICT, JOE DALE HUDSON, ALAN
RIFFER, DIANNE McNENNY, MARSHA SKINNER, and PEGGY
THOMSEN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

Attorney for Petitioner

QUESTIONS PRESENTED

1. Can the recognized speaker in a meeting deemed to be a public forum be arrested for disrupting the meeting by violating “implicit customs” of the meeting, without first being warned he is in violation of those unwritten practices? Is not a criminal statute which prohibits such conduct too vague to stand up to First Amendment protections?

2. Even if such a warning were given, is not such a statute unconstitutionally vague because it vests virtually complete discretion in the hands of meeting officials to determine whether the speaker has violated implied customs of the meeting?

3. Does one meeting official’s statement to another school official that the speaker’s conduct is an “absolutely inappropriate” activity, and directing that other official to call the police, sufficiently warn the speaker that he is out of order and subject to arrest unless he ceases his conduct?

4. Does the “clear and present danger” rule apply to prevent the speaker’s arrest under such circumstances?

5. Is an arrest the least restrictive means consistent with free speech to further a government interest in keeping trash from being displayed on the floor of a schoolroom? Would a request to the speaker to conclude his remarks and pick up the trash have been sufficient to further that interest?

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

David McMahon respectfully petitions for a writ of certiorari to the California Court of Appeal for the First District to review the court's decision affirming a jury verdict in favor of defendants on his First Amendment claim. He contends that the evidence established a prima facie case of false arrest, which was not rebutted by the defendants, and he was entitled to a directed verdict on the issue of liability.

OPINION BELOW

The decision of the California Court of Appeal appears as Appendix A, and is reported at 104 Cal.App.4th 1275, 129 Cal.Rptr.2d 184 (2002). The order by the California Supreme Court denying a petition for review appears as Appendix B, and is unreported.

JURISDICTION

Petitioner sought review of the decision of the California Court of Appeal through a petition for discretionary review to the California Supreme Court. The California Supreme Court denied review on March 19, 2003. This petition is filed within 90 days of that order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State where a right is claimed by petitioner under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

Congress Shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Section 403 of the California Penal Code:

Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character, other than an assembly or meeting referred to in Section 302 of the Penal Code or Section 18340 of the Elections Code, is guilty of a misdemeanor.

STATEMENT OF THE CASE

David McMahan and his family lived across the street from Albany High School. As his two sons approached school age, he began attending school board meetings, voicing his concerns about earthquake safety, vehicle traffic, and the litter which the students deposited in the neighborhood.

When school officials took no action with respect to the trash generated by the students (and indeed denied responsibility for it), McMahan began picking up the trash himself. In addition to numerous paper products, he found empty beer bottles, and little inch-square plastic baggies, which, upon inquiry, the police told him were drug paraphernalia used as “drug containers.” (RT 318.)¹

On April 30, 1996, Mr. McMahan attended another school board meeting, in the multi-purpose room at Cornell school. Still trying to spur the Board to action on the trash problem, he brought with him a number of 13-gallon plastic kitchen garbage bags containing some of the litter he had picked up in the neighborhood. Each bag contained at least one empty alcohol bottle and a little plastic baggie.

¹ Matters which are of record but which are not directly referenced in the opinion of the California Court of Appeal are found in the Reporter’s Transcript (RT) and the Clerk’s Transcript (CT).

The remainder of the trash was described as “papers, perhaps bottles” (RT 941); “wadded up pieces of paper” (RT 750); “[b]ottles, paper cups, trash” (RT 198, 218); “a piece of brown paper, like brown bag . . . a Styrofoam cup and then maybe there was a bottle. ” (RT 181.) None of the bags contained anything hazardous.

All California public agencies are required by law to set aside part of their agenda to allow the public to comment on matters of public concern Calif. Gov. Code § 54954.3(a), and the Albany School Board included such an item on their agenda.

When the chair opened the floor for public comment, the first speaker, a woman told her concerns of how her daughter had obtained drugs at school, and how her daughter had gone from an A-student to failing grades. (CT 244-245.)

The chair then recognized Mr. McMahon. He spoke about earthquake safety, about traffic and about the petition he had been circulating with regards to the new middle school, and then stated he wanted to talk about trash. He brought some of the bags of trash he had collected up to the microphone.

He opened up a tarp and started to put some of the trash on it. (RT 334.) A person in the audience stated, “Excuse me, kids are in this room tomorrow, and I hope you’re not planning on emptying trash out here on the floor.” Plaintiff replied that he certainly was, and the person² said, “Well I hope you’re prepared to clean it up.” (CT 614, 629, RT 467-468.)

At that point a board member, McManus, turned to School Superintendent Hudson, and told him, “Mr. Hudson, will you call the

² The person in the audience, unknown to Mr. McMahon, was the school principal. However, that night he was merely there as a member of the audience. (RT 919.)

police, because this is an absolutely inappropriate activity to do in -- in a schoolroom, because --" (CT 615, 629.) McManus then moved, there was a second, and the Board voted, to adjourn the meeting. (1 CT 615, 629.) Superintendent Hudson and the board members filed out of the room, and Hudson called the police. (RT 243, 399)

While plaintiff waited for the police to come, he and the audience discussed community problems and the school officials' indifference to some of those problems. (RT 403; CT 615-617; 629-632.) During the discussion with the audience he first mentioned that the trash contained what he referred to as "drug paraphernalia." (CT 273.)

Several minutes later the police arrived. Plaintiff was still talking with the audience, with his bag of trash spread out behind him on the tarp.³ (RT 197-198.)

Hudson met the police. At that time he told them that McMahan had exceeded his allotted time to speak and had refused to give up the microphone, despite having been asked several times to do so. (RT 192, 234, 235.) Hudson later admitted at trial that nothing like that had happened at all.⁴ (RT 235.) He also admitted at trial that there were no time limits on speakers at that time. (RT 245.)

California law requires that to make a lawful arrest for a misdemeanor, the offense must have been committed in the presence of the person making the arrest. App. 6; Calif. Pen. Code §§ 836(a)(1), 837, ¶

³ The responding police officers and several members of the audience testified that the trash was all on the tarp. (RT 154.) One of defendants' witnesses testified that some of it spilled off the tarp onto the floor. (RT 938.) We will assume for purposes of this petition that some of the trash did spill onto the floor.

⁴ This was after McMahan had obtained a copy of the official tape recording of the Board meeting.

1. Sgt. Clemons told Hudson that if McMahon had in fact refused to relinquish the microphone, that action appeared to be a misdemeanor committed not in the officers' presence, and if Hudson really wanted plaintiff arrested, he would have to make a citizen's arrest. (RT 195, 227.)

Hudson thereupon made a citizen's arrest of plaintiff for willfully disturbing a public meeting. The police then received plaintiff into custody, see Calif. Pen. Code §§ 847, 142(a), by going up to plaintiff where he was speaking, handcuffing him, leading him out of the building, and taking him to jail. (RT 405-407.)

Following plaintiff's arrest, Hudson and others picked up the tarp and the trash and put it in a receptacle at the back of the room. (RT 942.) The Board then "reconvened" the adjourned meeting. (CT 277.)

After a few hours in jail McMahon was "cited out," and released. (RT 410.) No charges were filed against him.

This lawsuit followed, and the case went to trial on the false arrest/false imprisonment cause of action. The first trial ended in a hung jury. The second trial, after McMahon's motion for a directed verdict was denied, ended in a judgment on the verdict for the defendants. App. 5.

REASONS FOR GRANTING THE PETITION:

I.

THE DECISION BY THE CALIFORNIA COURT OF APPEAL CHILLS THE RIGHT OF PEOPLE TO SPEAK OUT AT PUBLIC MEETINGS FOR FEAR OF ARREST.

A.

McMahon Was Arrested Without a Warrant, Which Fact Made Out a Prima Facie Case of an Unlawful Arrest. The Defendants, to Avoid a Directed Verdict, Had to Prove That McMahon Had Actually Committed a Criminal Offense.

Under California law, a peace officer may arrest for probable cause, but for a citizen's arrest to be legal, a misdemeanor offense must have "actually been committed or attempted in his presence." Cervantez v. J. C. Penney Co. 24 Cal. 3d 579, 587 (1979). An arrest without a warrant creates a prima facie case of wrongful arrest, and the burden of proof shifts to the defendants to justify the arrest. Id. at 592.

The California Court of Appeal properly recognized that it was the defendants' burden to justify the arrest. App. 6. This shift in the burden means that if there was any substantial gap in the evidence necessary to show that an offense was actually committed, McMahon was entitled to a directed verdict.

B.

As Interpreted by California's Highest Court in 1970, Penal Code Section 403 Required That Before a Person Exercising First Amendment Rights at a Public Meeting Can Be Lawfully Arrested, Meeting Officials Must First Warn the Person He Is in Violation of Meeting Customs and Request Him to Cease His Conduct.

California Penal Code § 403 prohibits willfully "disturbing" a public meeting.

The language of the statute, *supra*, p. 2-3, is extremely broad in its literal terms, and its potential for infringing on First Amendment rights is apparent. Some 30 years ago the California Supreme Court observed that “if the section were literally applied with the breadth of coverage that its terms could encompass, the statute would be constitutionally overbroad and could not stand.” *In re Kay*, 1 Cal. 930, 941, 83 Cal. Rptr 686, 464 P.2d 142 (1970).

The *Kay* court therefore set about narrowing the legal interpretation of the statute so it would meet First Amendment requirements. As interpreted by the California high court, a person violates the statute only if he willfully violates explicit rules or implied customs and usages of the meeting, of which he knew or should have known. *Kay* at 943.

But that did not fully resolve the overbreadth issue, for there was still the issue whether the law can punish someone who is exercising First Amendment rights for violating unwritten customs—“implicit” customs, as the *Kay* court characterized them, *Kay* at 943, 946 —by saying he *should* have known about them. Many people—certainly newcomers—are simply unfamiliar with even the written rules of a particular meeting.

There were other practical considerations as well. The *Kay* court recognized that “[m]eeting rules are seldom carefully spelled out or well known to the audience,” and other rules and “tacit understandings” are “cloaked in obscurity and uncertainty.” *Kay* at 945, n. 12. Even if the rules are clear, said the court, meeting officials will “commonly suspend or simply ignore such rules to expedite the work of the meeting.” *Ibid.* In addition, silence of meeting officials in the face of unusual activity “necessarily suggests” that the activity is permitted, or at least that officials do not intend to enforce prohibitory rules to the contrary. *Ibid.*

To meet these very practical uncertainties, the court construed the statute to include a notice requirement. Before a person can be arrested for disturbing a public meeting by violating “implicit customs or usages” of the meeting, Kay at 943, meeting officials must let the person *know* he is in violation of the rules. At page 945 of the Kay decision, the California Supreme Court put it this way:

Generally, if disturbances are occasioned by nonviolent exercise of free expression, section 403 will require that defendants be shown to have engaged in such conduct with knowledge, or under circumstances in which they should have known, that they were violating an applicable custom, usage or rule of the meeting. In instances in which the appropriate standard of conduct lies in doubt, a warning and a request that defendants curtail their conduct, either by officials or law enforcement agents, should precede arrest or citation.” Kay at 945 [Footnotes omitted].

Following the Kay decision, persons exercising their right to speak up at public meetings always knew where the line was drawn between protected free speech and unprotected criminal activity, because the chair of the meeting had to first explicitly draw such a line and tell the speaker where the line had been drawn. Speakers might dispute exactly where the line should be drawn, but they could safely speak out, even provocatively, with the knowledge that they could not be arrested unless and until a line was actually drawn.

C.

The Decision of the California Court of Appeal Now Permits an Arrest of the Speaker in a Public Forum if the Court Determines That It Was “Self-Evident” That His Conduct Was Not Protected by the First Amendment.

Now that has all changed. Now, says the California Court of Appeal, a speaker in a public forum—even the recognized speaker to whom the chair has granted the floor—can be arrested even if no line is drawn. Now the speaker can

be arrested if it is, or should be, “self-evident” where the line *would* have been drawn. App. 14.

No longer does silence by meeting officials in the face of unusual or raucous activity imply that the activity is permitted, as the Kay decision had said. Kay at 945, n. 12. When McMahon announced his intentions to empty the trash out onto the tarp, the chair remained silent; the only response was from a member of the audience, who said, “Well, I hope you’re prepared to clean it up.” App. 3 But acquiescence no longer really means acquiescence.

Now the speaker must assume that a line will *always* be drawn, and he must also calculate accurately exactly where this imaginary line will be drawn. To be sure he is safe from arrest, he must divine not only where *he* thinks the line should be located, but where he thinks the chair of the meeting would draw it, and where a judge or jury, who did not even attend the meeting, will say, months or years later, where the line should have been drawn.

Indeed, our speaker may now not even rely on an *explicit* meeting rule which requires an express warning that the speaker is out of order. Board President Riffer testified that Board meetings were governed according to Robert’s Rules of Order. (RT 823.) A perusal of Robert’s reveals a section [“Guidelines for Chairs”] which sets out specific procedures to be employed when the chair believes a speaker is out of order. 21st Century Robert’s Rules of Order (Philip Lief Group, Inc., 1995) [Exhibit 15 at trial], p. 190-191. The chair should give a warning, such as, “The member is out of order.” Robert’s, *supra*, at 190. If after several attempts a member of the meeting will still not behave in an appropriate manner, the chair can “name” the member, and the chair “explains the offense to the member.” Id., at 193. If the member still does not curtail his conduct, he may be asked to leave the meeting. Ibid.

Only if the member refuses all attempts and admonitions by the chair should the chair consider asking the police to “escort” the member from the meeting. Ibid.

The Court of Appeal’s decision means that now a speaker, in addition to figuring out what others think is appropriate conduct, must also be able to discern when an unwritten rule trumps an explicit rule.

How can a speaker make sense out of this? How does a speaker know what actions are permitted by the First Amendment? Under such circumstances, can it seriously be denied that people who wish to voice their concerns to their elected representatives in a public forum will forego not only illegal activity, but protected speech as well, in order to be sure they do not step too close to an imaginary line that a judge might draw years after the fact? Is not *some* warning to a recognized speaker necessary, whether or not it is the exact warning described in Kay?

Imagine the effect this new standard will have. Imagine the power it gives to meeting officials to cut off unpopular debate—a speaker with an unpopular point of view can simply be arrested, without further warning, and physically removed from the forum.

Imagine the effect on potential speakers. Now in order to protect against a possible miscalculation of how others will view his conduct, the speaker must factor in an off-limits buffer zone which includes *protected* conduct, just to be sure he has taken into account the wide range of sensibilities of any person who might later hear his case.

D.
**The California Court of Appeal Has Substituted a Vague Community Standard
in Place of an Objective Standard Against Which Public Speakers Can
Measure Their Conduct.**

The Court of Appeal has effectively substituted some vague community standard for the objective tests that have previously been required by the courts to ensure adequate “breathing room” for the First Amendment.

But such a “community standard” will vary with the community, and even from person to person in the community. For example, the Court of Appeal thought it was obvious that dumping out the trash constituted a crime. But responding police officers, who saw the same trash, told Superintendent Hudson that McMahon was *not* committing a crime in their presence, and for that reason they could not arrest him. (RT 249.) Even Board Member McManus, the person who directed Hudson to call the police in the first place, testified that he did not think Mr. McMahon had committed a crime. (RT 958.)

Is the conclusion of an appellate court, who was not even present at the meeting, more valid than the persons who were actually there? If so, why?

These diverging opinions as to the legality of McMahon’s actions show the folly of abandoning an objective, bright line test such as the one adopted in the Kay case. A meeting rule based on community standards which depend on how sensitive a person may be, will not work. The First Amendment is too important to allow it to change, chameleon-like, depending on the community and indeed the individual meeting.

E.

A Request to a Third Party to Call the Police Is No Substitute for a Warning and Request to the Speaker to Curtail His Conduct.

The Court of Appeal based its decision primarily on its assessment that it was self-evident that it was a criminal offense to dump out trash on

a meeting room floor that would be used by children the next day. App. 14.

The court's opinion suggests, in the alternative, that even if the First Amendment *does* require that an arrest be preceded by notice to the speaker that he is in serious violation of the rules of the meeting, then the evidence at trial showed that a warning *had* been given. More specifically, the court said that Board Member McManus' statement to Superintendent Hudson, made within earshot of McMahan, saying that Mr. McMahan's conduct was "absolutely inappropriate," and directing Mr. Hudson to call the police, "adequately gave McMahan the notice contemplated in Kay" that he was out of order and subject to arrest. App. 15.

Yet not a single defendant contended that McMahan had been requested to refrain from his activity. Anyone who was specifically asked, agreed that no such request had been made. For example, Alan Riffer, President of the School Board and chairman of the meeting, was questioned whether anyone asked Mr. McMahan not to dump garbage on the floor. He responded, "No. Mr. McManus made a statement, not a request." (RT 826.)

The need for certainty is manifest from the conflicting conclusions of the meeting chairman and the Court of Appeal. A person exercising his First Amendment rights should not be held to a higher standard than the chairman of the meeting itself. Nor should he be required to bet on whether the judge who decides the case will be more sensitive than Mr. Riffer.

It is clear that the reason why Kay court required a warning before an arrest could be made pursuant to Penal Code § 403 when First Amendment rights were implicated was to eliminate any uncertainty as to

whether meeting officials consider the speaker's conduct worthy of an arrest. Now it is immaterial that at least some reasonable persons would not have interpreted Board Member McManus' comment as a warning and request. Now the speaker in a public forum must restrict his conduct to that which is unquestionably safe in the eyes of *every* person who may evaluate his conduct, and thereby steer far wider of the unlawful zone than the First Amendment requires. Long ago this court stated, "Free speech may not be so inhibited." Baggett v. Bullett, 377 U.S. 360, 372 (1964).

F.

The California Court of Appeal's Decision Makes the California Statute Unconstitutionally Vague Under the Fourteenth Amendment.

The California appellate court's decision makes flexible the interpretation of the limits of the First Amendment, and allows government agencies, judges and juries to enforce the criminal law based upon their personal predilections. A law which permits such enforcement is unconstitutionally vague under the Fourteenth Amendment. Kolender v. Lawson, 461 U.S. 352, 358, 361 (1983). The law should give the world a warning of what the law intends to do if a certain line is passed, and to make the warning fair, the line should be clear. McBoyle v. United States, 283 U.S. 25, 27 (1931).

A vague statute is even more dangerous when the First Amendment is involved. The damage to First Amendment protections is "quite costly when the vagueness of a statute may inhibit the exercise of First Amendment freedoms." Baggett v. Bullett, supra 377 U.S. at 379; see also Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

McMahon's non-verbal conduct was sufficiently "expressive" for First Amendment protection because he intended "to convey a particularized message" where the likelihood was great that the message will be understood by those who heard it.⁵ Spence v. Washington, 418 U.S. 405, 410-144 (1974).

II.
**THERE WAS NO CLEAR AND PRESENT DANGER WHICH
WOULD DISPENSE WITH THE REQUIREMENT THAT THE
CHAIR ISSUE A WARNING AND A REQUEST TO THE
SPEAKER. NOR WAS ANY OTHER IMPORTANT STATE
INTEREST AT STAKE.**

The California Court of Appeal thought the illegality of McMahon's actions were so obvious that the court's opinion does not spell out exactly why dumping trash onto a tarp placed on a schoolroom floor should be a "self-evident" violation of the law. There is nothing in the Court of Appeal's opinion saying that the trash contained anything remotely hazardous, even if some of the trash did spill off onto the floor, and even if it was in a room "where children eat lunch" the next day. App. 14. The record itself shows that the specific testimony of the witnesses all described only innocuous waste, mostly paper. They described it as "papers, perhaps bottles" (RT 941); "wadded up pieces of paper" (RT 750); "[b]ottles, paper cups, trash" (RT 198, 218); "a piece of brown paper, like brown bag . . . a Styrofoam cup and then maybe there was a bottle. " (RT 181.) No one described any animal or vegetable matter, or hazardous

⁵ It is likely that McMahon's message *did* get across to at least one member of the board. Immediately after the Superintendent was directed to call the police and the motion to adjourn was made, Board Member Skinner said, "I think the point's been made." (CT 272.)

materials. To the contrary, all persons who were asked the question specifically disclaimed any hazard content in the trash. For example, Craig Boylan, the school principle, testified, “I didn’t see any specific material that I thought was dangerous.” (RT 942.)

Whatever fears the appellate court had for children using the room the next day, the Board does not seem to have shared them. The record shows that after the police took Mr. McMahon away, Superintendent Hudson and others simply picked up the tarp and the trash and put it in a receptacle at the back of the room. (RT 942.) This is not surprising, for the children were likely to be harmed more by whatever was tracked in on the shoes of the audience than they were from a paper cup or an empty bottle which may have fallen off the tarp.

Nor did the Court of Appeal weigh any potential dangers against the means necessary to eliminate such a danger. The court focused on a statement in Kay that a request and warning should be given when the “appropriate standard of conduct lies in doubt,” and reasoned from that language that a warning is not necessary in every case. App. 14.

That conclusion is undoubtedly true, but only in rare cases. The only exception we can think of is when a danger to public safety is created. One cannot yell fire in a crowded meeting. See Schenck v. United States 249 U.S. 47 (1919). But such conduct falls within another, different rule of law which protects against arbitrary arrests—the requirement of a “clear and present danger” before a person exercising First Amendment rights can be arrested.

The Court of Appeal soundly rejected McMahon’s contention that he was entitled to a jury instruction that in order for the defendants to justify the arrest on the basis that McMahon’s conduct created a danger to

anyone, “that the justification must include proof of not only a danger, but a clear and present, i.e., immediate, danger.” App. 18. The court reasoned that although the clear and present danger had been applied to other California criminal statutes, it had never been applied to Penal Code § 403. “McMahon was arrested for a violation of Penal Code section 403, not 415 [the disorderly conduct statute].⁶ Nothing in section 403 or in the Supreme Court’s opinion in Kay imposes a clear and present danger requirement.” App. 13. The court then makes the cryptic statement that the “danger and safety issues” were considered only in deciding whether McMahon’s conduct violated the customs and usages of the meeting “held in a schoolroom where young children are cared for.” App. 13-14; see also App. 18, n.3.

But even if the “danger issues” were considered in the context of meeting rules, does not the First Amendment require that only clear and present dangers be considered? A governmental agency cannot eliminate the protections of the First Amendment, for example, by adopting a “meeting rule” that prohibits protected speech from creating a *possible* danger, or a danger at some *future* time. The First Amendment outweighs governmental interests in unspecified potential dangers at some time in the future.

Not a single witness at the trial voiced any specific concern over the safety of the school children who would use the room the next day. The only concern was the one voiced by the California appellate court, which was a vague undifferentiated fear for the children who ate lunch there.

⁶ One of the cases cited by the court, In re Brown, 9 Cal.3d 612, 623 (1973) also applied the clear and present danger to California’s unlawful assembly statutes (Pen. Code § 407, § 408).

“But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” Tinker v. Des Moines School Dist., 393 U. S. 503, 508 (1969)

This court has recognized that freedom of speech, including expressive conduct, is protected against punishment unless “shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.” Edwards v. South Carolina, 372 U. S. 229, 237 (1963).

In more recent cases this court taken a somewhat different approach. In United States v. O’Brien, 391 U. S. 367 (1968) the court promulgated a four-pronged test, to determine whether a law unduly infringes on the First Amendment. To be valid, (1) the law must be within the constitutional power of the government; (2) the law must further an important governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the restriction can be “no greater than is essential to the furtherance of that interest.” Id. at 377. In a later decision, this court stated that restrictions on speech will be upheld only if narrowly drawn to accomplish a “compelling” governmental interest.⁷ United States v. Grace, 461 U.S. 171, 177 (1983).

The facts of the case at bar clearly do not meet factors (2) and (4) of the O’Brien test. There was no evidence that the trash was hazardous, and the possibility that “other speakers would have had to stand near the trash” and that audience members would have been forced to “peer over a

⁷ These pronouncements by this court are consistent with the California Supreme Court’s decision in In re Kay, *supra*, 1 Cal. 3d 930 where the court said that restrictions on First Amendment rights “must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden” (Kay at 941), and that Penal Code Section 403 can be used only to promote “an *important* state interest.” (Kay at 944 [italics in original].)

mound of garbage in order to watch a public body perform its duty,” App. 17, we submit, are not *important* governmental interests.

California law requires public agencies to devote part of every meeting to comments by the public. Calif. Govt. Code § 54954.3(a). Mr. McMahon was not an interloper who walked into the meeting and dumped out trash onto the floor, as the Court of Appeal treated him. App. 13. In fact he was the recognized speaker whom the chair had granted permission to speak, and who was using the trash to illustrate a problem he was trying to get the Board to resolve. The state’s primary interest, at the moment McMahon was speaking, was that he be permitted to present his views to the Board. Indeed, the California Government Code required it. Mr. McMahon’s display of the trash did not impair the conduct of the meeting; it was a legitimate element of it.

Nor was the arrest of McMahon the least restrictive means to correct whatever government interest the Board thought it was protecting. A simple request to Mr. McMahon to conclude his remarks and pick up his trash would have resolved whatever problem the Board thought existed, in far less time than it took to arrest Mr. McMahon .

None of the other facts justify resort to an arrest. McMahon could not be arrested for continuing to talk to the audience after the meeting was adjourned, nor for failing to pick up the trash “[e]ven after the police arrived.” App. 15. Even if one were to conclude that a meeting was still going on after the adjournment, only “lawful” meetings are protected by Penal Code § 403. Once a meeting of a public agency is adjourned, it cannot be recommenced before its next scheduled meeting unless proper statutory notices are given of a special meeting. Calif. Govt. Code § 54955.

After the meeting was adjourned, there was no “lawful meeting” to disrupt.

**III.
THE RIGHT TO SPEAK FREELY IN A PUBLIC FORUM IS A
FUNDAMENTAL RIGHT. THE COURT OF APPEAL’S OPINION
ALLOWS GOVERNMENTAL BODIES TO EASILY ELIMINATE FIRST
AMENDMENT PROTECTIONS.**

The danger of giving meeting officials such broad power to arrest a speaker in a public forum cannot be overemphasized. It allows government agencies to cut off unpopular debate with no practical remedy to a speaker. It allows government agencies to refuse to respond to the pleas of it’s citizens.

Mr. McMahan’s case is illustrative of what the Court of Appeal’s ruling can do.

McMahan’s concerns had been presented to the Board before, both through his statements at Board meetings and in the form of a petition he had circulated in his neighborhood and which he sought to present to the Board the night he was arrested. The petition detailed McMahan’s concerns that the Board had avoided filing a full environmental impact statement when the Board proposed the new middle school. He presented his petition a total of three times, but each time it was suppressed by the School Board. McMahan sought to prove at his trial that his arrest was nothing more than another attempt to suppress his legitimate concerns. The appellate court’s decision has thwarted his efforts.

Moreover, the entire process in the proceedings before the School board and throughout the court proceedings disregarded the presumption of innocence. The law gives to a person arrested without a warrant a presumption of innocence in a civil lawsuit just like the

presumption afforded a criminal defendant. The proceedings in the case at bar, culminating in the decision of the Court of Appeal, deprived McMahan of this presumption of innocence. The law should presume that the speaker in a public forum is acting within the law. The decision of the Court of Appeal has shifted the burden to the speaker, and now all speakers must take the safe course, instead of the course favored by the principles of free speech.

The expression of one's views on matters of public concern also takes on political overtones. The matters raised by McMahan at the Board meeting and the Board's efforts to suppress his concerns tend to show that what was interrupted was not mere speech, but political speech. Political process should tend toward truth. The Board's reaction by having McMahan arrested are evidence of a political pathology that has supplanted the reasoned debate envisioned by the Framers of the Constitution.

CONCLUSION

There are thousands of state and local boards, agencies and commissions in California. Under California's Open Meeting Law, every one of those government agencies is required to allocate a certain portion of their agenda to allow comment by the public on matters of public concern. Calif. Government Code § 54954.3(a). Every person who steps up to the microphone at one of those meetings, every day, every month, every year hereafter, will be affected by the Court of Appeal's decision in this case. Every one of those speakers will be subject to arrest—without warning—if the discussion becomes heated and one of the meeting officials turns to another official and says, “ Call the police! This is an inappropriate activity!”

Is this *good* for America? Can a statute which requires such prescience on the speaker's part—under pain of arrest—be allowed to govern the actions of speakers in a public forum?

David McMahon waited his turn to address the local School Board about his concerns about matters over which the Board had jurisdiction. His display of trash generated by the students was “evidence” in support of his “testimony” about conditions he sought to correct. The Board's response was to terminate the meeting and arrest Mr. McMahon.

It is eminently reasonable to require that a speaker in a public forum does not have to guess when meeting officials consider him subject to arrest. Such a rule comports with generally accepted meeting rules, as exemplified by guides such as Robert's Rules of Order. It honors the requirement of the California Penal Code that any disruption of a public meeting be willful. See People v. Malone (1913) 156 App. Div. 10, 141 N.Y.S. 149, 152 [speaker did not violate similar New York statute until chairman of meeting asked the speaker to cease her conduct and warned her to sit down]. And it protects free speech in a public forum.

A school board meeting at which the public are permitted to express their ideas is *per se* a public forum. Madison School District v. Wisconsin Emp. Rel. Comm'n, 429 U. S. 167, 178-179 (1976) (Brennan, J., concurring).

Protections of the First Amendment are not dependent on a particular audience's reaction, Cox v. Louisiana 379 U. S. 536, 551 (1965) nor does the law permit a public board to determine what is included within the term “acceptable conduct” in the exercise of free speech. Such would be nothing less than a prohibited “roving commission,” empowering public officials to dispense or withhold permission to speak according to their own opinions regarding the

potential effect of the activity in question. Interstate Circuit v. Dallas, 390 U. S. 676, 688(1968); Shuttlesworth v. Birmingham, 394 U. S. 147, 153 (1969).

“A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly ‘of the people and by the people.’” Board of Education v. Pico, 457 U. S. 853, 891 (1982) (Burger, C. J., dissenting). This decision gives governmental agencies carte blanche to hear or not to hear speakers, to arrest whom they, in their sole discretion, deem to be engaging in “inappropriate” conduct, with no announced standards to guide them or the speakers. Now the government has, according to the California Court of Appeal, been given the power to arrest without warning. Concerned citizens who do not wish to risk arrest are sentenced to silence, or, at best, tepid voices of approval of whatever actions the governmental body might take. No court has ever before permitted such governmental control over speech in a public forum.

What is a “self-evident” violation of the law is still a mystery. The speaker in a public forum has no clearly defined standard by which to gauge his conduct, and judges and juries, who must evaluate what was “self-evident” months or years later, have no standard to guide them.

Is this good First Amendment law? It affects thousands of persons. This court should grant the petition, examine the issues, and decide the question.

Respectfully submitted,

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
Attorney for Petitioner

Opposing counsel is:

T. G. Tadlock
Imai, Tadlock & Keeney
185 Berry Street, Suite 4300
San Francisco, CA 94107