[Exempt From Filing Fee Government Code § 6103]

OFFICE OF THE FRESNO CITY ATTORNEY
ANDREW N. JANZ, City Attorney, State Bar No. 287672
andrew.janz@fresno.gov
BRANDON M. COLLET, Chief Assistant City Attorney, State Bar No. 272056
brandon.collet@fresno.gov
AMANDA B. FREEMAN, Senior Deputy City Attorney, State Bar No. 285614
amanda.freeman@fresno.gov
2600 Fresno Street
Fresno, CA 93721-3620
Telephone: (559) 621-7500

ALESHIRE & WYNDER, LLP
ANTHONY R. TAYLOR, State Bar No. 208712
ataylor@awattorneys.com
MICHAEL R. LINDEN, State Bar No. 192485
mlinden@awattorneys.com
2440 Tulare Street, Suite 410
Fresno CA 93721
Telephone: (550) 445-1580
Facsimile: (949) 223-1180

Attorneys for Respondents CITY OF FRESNO and FRESNO CITY COUNCIL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, a nonprofit corporation, and FIRST AMENDMENT COALITION, a nonprofit corporation, Petitioners, v. THE CITY OF FRESNO, and THE FRESNO CITY COUNCIL, Respondents.	Case No. 23CECG04744 **RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR JUDGMENT** [*Filed Concurrently with Declaration of Michael R. Linden; Declaration of Todd Stermer; and Request for Judicial Notice in Support of Respondents' Opposition to Petitioners' Motion for Judgment*] **Date: August 28, 2024** **Time: 1:30 p.m.** **Dept.: 404** The Hon. Robert M. Whalen, Jr. Action Filed: November 15, 2023 Trial Date: TBD

/ / /

/ / /

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATE STATUTES

STATE RULES

Respondents CITY OF FRESNO ("City") and FRESNO CITY COUNCIL ("Council") hereby submit the following Opposition to the Motion for Judgment ("Motion") of Petitioners AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA and FIRST AMENDMENT COALITION (collectively hereinafter "Petitioners") as to their Verified Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief ("Petition").

INTRODUCTION

Petitioners have brought suit against Respondents alleging that the use of a committee of three (of seven) Council members to advise the Council on budgetary matters during several past fiscal year budgetary cycles since Fiscal Year ("FY") 2019 budget violated the public meeting requirements of the Ralph M. Brown Act ("Brown Act"). On May 30, 2024, Respondents filed a Motion for Judgment on the Pleadings ("MJOP"). On June 10, 2024, Petitioners responded by filing this Motion, with the hearing date set on the same day as the one for the City's MJOP. Petitioners' Motion is fatally flawed, both procedurally and substantively, for each of the following reasons:

1. The Motion does not meet the standards of Code of Civil Procedure section 1094 ("Section 1094"), where a motion for judgment is only allowed when there is an administrative record, or the writ petition presents no triable issue of fact. The Motion is improper because there is no administrative record, and the Petitioners' Motion is based on disputed facts that cannot be decided through the Motion.

2. The Petition is time-barred because Petitioners allege that there has been a singular "standing" budget committee since 2018, and the Brown Act requires a "cease and desist" letter to be sent within nine months of this date.

3. To the extent that Petitioners' action is based on ongoing or threatened violations, there are no allegations of violations currently occurring because no Budget Committee was formed by the Council President for the last budget cycle. As such, the case is moot.

4. Moreover, the Motion also demonstrates that the Petition is meritless. There is not one continuous City budget approval process, and there is no authority for the proposition that if a council president forms a temporary (or "ad hoc") committee for one budgetary cycle, and then has a similar type of committee during a subsequent budgetary cycle (and by a different council

president), a standing committee is created as a matter of law. Petitioners' theory of liability is especially problematic in light of the Fresno City Charter ("Charter"), which provides for a Mayor-Council (or "Strong Mayor") system of government where the City's annual budget is created by the Mayor and can be vetoed. As such, the Motion must be denied.

ADDITIONAL BACKGROUND

Under Fresno's Charter and Municipal Code ("FMC"), the City operates under a Mayor-Council form of government, where the Councilmembers are elected by district and the Mayor is separately elected at-large. (See Request for Judicial Notice ["RJN"] Nos. 1-2, 4-5; [Charter §§ 204, 301, 1503; FMC § 2-101].) For the budget, the Mayor and the Council have separate roles. The Mayor oversees the preparation of the budget each fiscal year (ending June 30). (RJN Nos. 3-4 [Charter §§ 400, 1201-1203].). Each department head furnishes to the Mayor "estimates of revenue and expenditures," which are reviewed and may be revised. (RJN No. 4 [Charter § 1202].). The proposed budget is then submitted to the Council "[a]t least thirty days prior to the beginning of each fiscal year, …" (RJN No. 4 [Charter § 1203].). However, "[t]he Mayor shall have power of veto in all actions of Council relating to the budget, including line item budgetary veto authority over all programs and budgetary units," which includes "the ability to reduce or eliminate the fiscal year funding to any program or budget unit." (RJN No. 3 [Charter § 400(f)].)

The Council reviews the proposed budget and makes revisions as it may deem advisable. (RJN No. 4 [Charter § 1203].) The Council then holds a public hearing on the proposed budget, considers any revisions, and adopts the budget by June 30. (RJN No. 4 [Charter §§ 1204-1205].) "At any meeting after the adoption of the budget, the Council may amend or supplement the budget by motion adopted by the affirmative votes of at least five members so as to authorize the transfer of unused balances appropriated for one purpose to another purpose or to appropriate available funds not included in the budget." (RJN No. 4 [Charter § 1206].)

Under Municipal Code section 2-316, "special committees shall be appointed by the presiding officer, unless otherwise directed by the Council." Since 2018, no Council President has served a consecutive term. (Declaration of Todd Stermer ["Stermer Decl."], ¶¶ 9-11, Exs. G-H.)

ARGUMENT

I. A MOTION FOR SUMMARY JUDGMENT CANNOT CONTAIN DISPUTED FACTS AND ADDITIONAL DISCOVERY

As a threshold matter, Petitioners' Motion does not meet the legal standards for a motion for judgment under Section 1094, which provides in pertinent part that "[i]f a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ." However, to file a motion for judgment, the petition itself has to present "no triable issue of fact" or be "based solely on an administrative record." (See Code Civ. Proc., § 1094.) There is no administrative record, so the action (including the City's affirmative defenses) must involve no triable issues of fact. This is not the case.

A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) While Petitioners may argue that there is no dispute that the Budget Committee(s) referred to in the Petition did not have noticed meetings under the Brown Act, Respondent's Answer denied that the Budget Committee described in the Petition was a single standing committee existing since 2018. (See Petition, ¶¶ 11, 28, 42, 94-95, 97; Answer, ¶¶ 11, 28, 42, 94-95, 97.) Respondents have also denied that any budget committee has "effectively" had "the final word on the City's annual budget, which is typically approved by the Council without significant change to the Budget Committee's proposal." (Petition, ¶ 14; Answer ¶ 14.) Assuming, *arguendo,* that Petitioners have actually plead a valid cause of action, the answer to these questions will require the Court to distill evidence and examine a number of circumstances. Thus, a motion under Section 1094 is not proper because it is not the place for the Court to decide triable issues. (Code Civ. Proc., §§ 1088, 1094, subd. (a).)

For the same reason, the Motion is problematic because it goes beyond the pleadings and attempts to add discovery materials as evidence. (See Declaration of Annie Cappetta ["Cappetta Decl."]; Declaration of Sonya Ledanski Hyde ["Hyde Decl."].) Such evidence presentation is not contemplated by Section 1094, which only allows a motion for judgment with either undisputed

facts or an administrative record. The Petition is for traditional mandate, and the Motion contains discovery within this proceeding. (See Code Civ. Proc., §§ 1085, 2016.020, subd. (a); *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-576.) In addition, Petitioners are also seeking declaratory and injunctive relief, which are separate remedies. (See Code Civ. Proc., §§ 526, 1060.) Therefore, the option under Section 1094 is not available.

Furthermore, the Motion is not motion for summary judgment because such a motion not only requires 75 days of notice, but also requires a separate statement of undisputed material facts, a meet and confer declaration, and a memorandum of points and authorities that addresses the legal standards for summary judgment. (Code Civ. Proc., § 437c, subd. (b); also see Cal. Rules of Court, rule 3.1350.) The Motion falls short of these requirements, so it cannot be heard as a summary judgment motion. Therefore, the Motion must be denied.[1]

II. THE PETITION IS TIME BARRED

The statute of limitations for "[a]n action upon a liability created by statute" is three years. (Code Civ. Proc., § 338, subd. (a).) The Brown Act contains an additional limitation, as an interested person "may file an action to determine the applicability of this chapter to past actions …**only if**" a cease and desist letter is sent to the legislative body "within nine months of **the alleged violation**." (Gov. Code, § 54960.2, subd. (a)(2), bold type added.) A statute of limitations "sets the time within which proceedings must be commenced once a cause of action accrues." (*Giest v. Sequoia Ventures, Inc*. (2000) 83 Cal.App.4th 300, 305.) A cause of action accrues at "the time when the cause of action is complete with all of its elements." (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 397.)

Petitioners represent that "regardless of whether the City in fact dissolved the Budget Committee, which is not conceded, Petitioners seek a judgment 'to determine the applicability' of the Brown Act 'to past actions' of the Budget Committee that occurred within nine months of the cease-and-desist letter." (Memo. of P&A at 18:7-10, citing Gov. Code §§ 54960(a), 54960.2(a).) However, Petitioners allege that numerous meetings of the Budget Committee took place after its creation in 2018, but before December 5, 2022 (nine months prior to the "cease and desist" letter

[1] However, if the Motion is heard and denied, judgment must be entered in Respondents' favor.

sent on September 5, 2023). (Petition, ¶ 83, Ex. U; see also (Gov. Code, § 54960.2, subd. (a)(2).)

In the Petition, the "alleged violation" occurred on June 21, 2018, when the Budget Committee was allegedly created and operated continuously thereafter as a "standing committee with continuing subject matter jurisdiction over matters related to the City's budget." (Petition, ¶ 11.) Petitioners allege that **"[f]rom 2018 to the present**, Respondents have consistently violated the Brown Act by holding Budget Committee meetings in secret, without advance notice, a publicly posted agenda, or opportunity for public comment." (Petition, ¶ 97, bold type added.) Petitioners then allege that "Respondents' numerous violations of the Brown Act evidence a pattern and practice of ignoring the state's open meeting laws, …" (Petition, ¶ 98.) However, a "cease and desist" letter must be sent "within nine months **of the alleged violation**" if a litigant is to maintain suit. (Gov. Code, § 54960.2, subd. (a)(1)-(2), bold type added.) Petitioners unequivocally allege that there has been a standing committee since 2018, which has violated the Brown Act since this time. (Petition, ¶¶ 11, 31, 97-98.) Therefore, the Petition represents that the "cease and desist" letter was sent to the City in violation of not only Section 54960.2, but also the 3-year statute of limitations for "[a]n action upon a liability created by statute." (Code Civ. Proc., § 338, subd. (a).)

Furthermore, there is no basis for altering the time calculation. First, there is nothing in the Petition about "equitable tolling," which requires a litigant to be pursuing a different claim based on the same operative facts. (See *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 924.) There is also no basis for applying the "continuing violation doctrine," such as exists in employment law, because Petitioners are alleging that the actions of the Council and the Budget Committee have "acquired a degree of permanence," in that there is one standing budget committee. (See *Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th 798, 823; see also Petition, ¶ 97.) The same would apply to "delayed discovery, where the inquiry is whether a timely and reasonable investigation would not have disclosed the limitation-triggering information. (See *Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 806-808.) The Petition contains numerous official documents with references to budget committees going back to 2018, so any investigation would have revealed the evidence.

Based on the foregoing, there is no basis for Petitioners to claim that their action only challenges alleged wrongdoing "within nine months of the cease-and-desist letter." (Memo. of

P&A at 18:9-10.) Since the Petition alleges a series of violations starting in 2018, it is fundamentally "litigation to determine the Brown Act's applicability to past actions of the legislative body" and thus Petitioners were required to comply with the mandatory requirements of Government Code section 54960.2. As Petitioners did not do so, their action is time-barred.

III. THERE IS NO BASIS FOR RELIEF BASED ON FUTURE ACTIONS

It has been held that a timely "cease and desist" letter is not required when the action is to apply the Brown Act to ongoing or threatened future actions. (*Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1156-57 ["*Center for Local Government Accountability*"].) According to Petitioners, "[e]ven if the City in fact discontinued the Budget Committee, which is not conceded, it could easily re-form such a committee at any time and continue its meeting." (Memo. of P&A at 18:11-12.) However, to be entitled to injunctive relief there must be a "likelihood that such conduct [will] recur in the future and that injunctive relief [is] warranted." (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917 ["*Shapiro*"].)

An injunction "must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) Thus, for the Brown Act, there has to be "a reasonable expectation the allegedly wrongful conduct will be repeated." (*Center for Local Government Accountability, supra*, 247 Cal. App. 4th at 1157.) As discussed below, Petitioners have no evidence beyond speculation, which does not suffice as a matter of law.

First, nowhere found in the evidence is any suggestion that a budget committee was ever formed for the FY 25 budget that was adopted in June of 2024. (Stermer Decl., ¶¶ 2-8, Exs. A-F.) There is also no indication that such a committee has been formed for the present budget cycle. Petitioners only speculate that the City "could" reform a budget committee. (Memo. of P&A at 18:11-12.) Therefore, Petitioners offer no evidence of a present controversy.

Also, the cases relied on by Petitioners are not helpful to them. In *California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024 ("*California Alliance"*), the petitioners alleged that the city improperly held closed session meetings and made decisions concerning electric utility's obligation under its franchise agreement to devote spending to placing

overhead power lines underground. (*Id*. at 1026-1027.) The appellate court stated that it was "sufficient to allege there is a controversy over whether a past violation of law has occurred." (*Id*. at 1029.) The court then found the controversy was ripe, in part, based on "the city's failure to concede that the facts alleged by plaintiffs constitute a violation of the Brown Act or the city charter." (*Id*. at 1030.) The court of appeal found that even after the city council had adopted the settlement, there were problems to the point where was "more information about the cost of outside counsel was provided to the public than information about the settlement." (*Id*. at 1031.)

The specific findings in *California Alliance* related to the continuing problem with the preparation of Brown Act-compliant agendas, something that must occur for every public meeting. By contrast, the type of committee described in the Petition is not required by law to be formed, and there is no evidence that one currently exists or ever will exist again. Indeed, in his response to the "cease and desist" letter, the City Attorney made no representation that there would be future budget committees, and that the City would continue to operate in the same way. (See Cappetta Decl., Ex. V ["The request at the end of your letter that the City provide assurances that any future Ad Hoc Budget Subcommittee will be a standing committee is a hypothetical situation that does not require a response under Government Code Section 54960.1"].) Therefore, the concern that the court of appeal described in *California Alliance* does not apply to Petitioners' action.

Similar to *California Alliance*, the petitioner in *Shapiro* sought to compel the city to comply with the Brown Act with respect to "closed session discussions with its real estate negotiators, concerning the posting of agenda items and the restriction of discussion within such closed sessions to the posted agenda items." (*Shapiro, supra*, 96 Cal.App.4th at 906.) The appellate court concluded "the Brown Act authorizes injunctive relief that is based on, in relevant part, a showing of 'past actions and violations that are related to present or future ones.'" (*Id*. at 917.) The court upheld the trial court's injunction because the city had engaged in past practices which violated the statute and the city continued to contend it could "interpret and adjust the requirements of the Brown Act as it [saw] fit." (*Id*.) On this issue, the court of appeal made the following observations:

> Nevertheless, the City Council continues to contend on appeal, as it did at trial, that injunctive relief is not justified to prevent the City from posting agendas for closed session that fail to comply with the requirements of a brief general description of each item of

> business to be transacted or discussed. (§ 54954.2, subd. (a), 54954.5, subd. (b).) Similarly, the City Council continues to contend the trial court had no authority to prohibit it from discussing topics in closed sessions which go beyond instructions to its negotiators regarding purchase or sale price and terms of payment of specific real property. (§ 54956.8.) Also, the City Council contends the court could not properly prohibit it from discussing any topic within a closed session that was not contained as a separate item of business in the posted agenda for that section. (§ 54954.2, subd. (b), referring to emergency situations, previous items of business that were continued within five days for action at a particular meaning, or a need for immediate action subsequent to the posting of the agenda.)
>
> (*Id*. at 913.)

No such likelihood can be discerned from either the Petition or the Motion, as there is no evidence of the creation of a committee for FY 25 budget, or beyond, and there is no code section, resolution, policy, or anything else that provides for a budget committee. Therefore, Petitioners can only speculate that another budget committee will be formed.

Petitioners' argument also finds no support in *Center for Local Government Accountability*. In this case, the court of appeal addressed "a long-standing ordinance providing for only one non-agenda public comment period over the course of its two-day regular weekly meetings" that was found to violate section 54954.3. *Center for Local Government Accountability, supra,* 247 Cal. App. 4th at 1149.) The appellate court found that the plaintiff was challenging an ongoing or threatened future action "because the adoption of the ordinance did not have a one-time or determinate effect," but instead "the ordinance's effect extended to every regular weekly meeting and would have continued extending to every regular weekly meeting but for the City's postlitigation [sic] enactment of another ordinance altering the City's practice." *Id*. at 1156.) The matter was not moot because "[t]he City still considers its two-day regular weekly meetings to be one continuous meeting, rather than two separate meetings, for Brown Act purposes." *Id*. at 1157.)

Similar to *California Alliance* and *Shapiro*, *Center for Local Government Accountability* addressed a subject (public comment) that is required for all public meetings. By contrast, there is no ordinance, resolution, or policy requiring a budget committee, or any evidence that a future committee will be formed. Thus, *Center for Local Government Accountability* is not applicable.

In their Motion, Petitioners had to proffer evidence demonstrating that that the matter is not moot. However, Petitioners only surmise that the City "could" put together a budget committee in the future. An injunction "cannot issue in a vacuum based on the proponents' fears about something

that may happen in the future." (*Korean Philadelphia Presbyterian Church v. California Presbytery, supra*, 77 Cal.App.4th at 1084.) Therefore, the Motion fails to demonstrate a threatened or alleged or ongoing activity that violates the Brown Act, and it must be denied as a result.

IV. THE BUDGET COMMITTEES WERE AUTHORIZED BY THE BROWN ACT

A. The Committees Had No Authority and This Were Advisory

The Brown Act is clear that "advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies." (Gov. Code, § 54952, subd. (b).) Petitioners argue that "[a]lthough the City Council formally approved the final budget in open session, the meetings that produced the final budget proposal took place in secret. In effect, the Budget Committee often had the near-final word on annual budgets allocating billions of dollars of public funds. (Memo. of P&A at 6:5-8.) Petitioners do not describe what is meant by the words "near final word," but here there are no facts demonstrating that any Budget Committee has ever acted in a manner other than advisory.

According to Petitioners, on multiple occasions budget committees have "heard, discussed, deliberated, or took action" on matters related to the budget. (Petition, ¶¶ 34, 58, 60.) However, under the Charter, a budget committee cannot take "action" on a budget, or otherwise have "the near-final word." Under the City's "Strong Mayor" form of government, the Mayor oversees the preparation of the City's budget and has veto power in all actions of Council relating to the budget. (RJN No. 3 [Charter § 400].) The City Council is required to hold a public hearing on the proposed budget, and then the Council can consider further revisions on or before June 30, the deadline to adopt the budget. (RJN No. 4 [Charter §§ 1204-1205].) Petitioners admit these facts in their opening memorandum. (Memo. of P&A at 7:4-7.) Therefore, a budget committee could not have given anything other than advice.

Undeterred, Petitioners argue that "[t]he Brown Act guarantees more than the mere right to observe the final vote to approve a budget," but also "grants the people the right to see how the political sausage is made, not just how it is served." (Memo. of P&A at 6:11-12.) This is not the law, especially with a "Strong Mayor" form of government, which is completely different from most cities where the city manager is appointed by the council (a "Council-Manager" form of city

government). (Gov. Code, §§ 34855, 36501, 36801.) The Mayor's office is completely outside of the sphere of the Brown Act, it is therefore not surprising that Petitioners offered no statute or case authority in support of their incorrect view of what the Brown Act requires.

Taking a different position, Petitioners then argue that because the Brown Act applies to advisory bodies, "[i]t is therefore irrelevant whether, as the City contends, the Budget Committee does not 'direct the preparation of the budget' or 'control how City staff prepares the City budget.'" (Memo. of P&A at 13:18-19, n. 5.) Petitioners contend that "[i]f the cost of the approved motions creates a deficit, the Budget Committee then reconciles the mayor's proposed budget with the Council's motions, recommending to fund some programs and de-fund others, to present a balanced budget for Council approval." (Memo. of P&A at 7:7-9.) The evidence presented for this proposition is a statement from the Budget Director in 2023 regarding the FY 24 Budget. (Hyde Decl. ¶ 9, Ex. EE, at 3-4). While the Budget Director did indicate that the budget reconciliation process had taken place in past years, that the "Council's Budget Subcommittee" would work with the Mayor's Office to make recommendations to the Council in order to balance a budget does not mean that this committee had the "near-final word." No matter what was recommended, the matters still had to go back to the City Council in noticed public meetings, where four additional Councilmembers would consider the motions. Therefore, Petitioners' evidence is not probative.

There is authority directly on point that negates Petitioners' characterization of an advisory committee as a *de facto* decision maker. In *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123 ("*City of Malibu*"), the Coastal Commission released a draft of one component of the Malibu's Local Coastal Program, a Land Use Plan ("LUP"). *Id*. at 1125.) Thereafter, two councilmembers "held a number of private meetings with various individuals, constituents, and city staff to 'go over the City's response to the Coastal Commission's draft LUP.'" *Id*. at 1125-1126.) At a council meeting, the two councilmembers submitted their recommendations on the draft LUP. *Id*., at 1126.) The Court of Appeal found that even though these councilmembers were the sole members for the council's standing committee for land use and planning, this committee did not have jurisdiction over Malibu's response to the Coastal Commission. (*Id*. at 1127-1128.) Additionally, the two councilmembers could not bind the city council because the

council kept for itself all future decisions involving the LUP. (*Id*. at 1128-1129.)

The same logic from *City of Malibu* applies here, as any of the budgets could have been passed without the affirmative vote of any budget committee member, and if a budget amendment was ever suggested by a committee, at least two other Councilmembers were needed for approval. (RJN No. 4 [Charter § 1206].) Therefore, a litigant cannot simply make conclusory allegations of a committee having "the final word" on a matter, in contravention of both fact and law. Indeed, the Court of Appeal in *City of Malibu* found that since the two councilmembers were found not to be a legislative body (or "other body"), the allegations that the two councilmembers had "decisionmaking power," and that the council "rubber-stamped" the recommendations of the two councilmembers, were resolved against the appellants. (*Id*. at 1129.)

Based on the foregoing, there is no way that any budget committee could have taken "action" on a budget, or otherwise had the "near-final word" on a budget. What are described in the Petition and shown by the evidence were advisory committees, and nothing more. Therefore, Petitioners' attempt to characterize them as anything else must be rejected.

B. <u>A Standing Budget Committee Was Never Created</u>

Petitioners also argue that even though the Budget Committee may have been advisory, "standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter." (Gov. Code, § 54952, subd. (b).) Petitioners' theory is that there has been a standing committee with "subject matter jurisdiction" over the budget since 2018. (Memo. of P&A at 10:20-22; Cappetta Decl. ¶ 25.) However, the only thing Petitioners have is a series of weak unsupported arguments.

First, Petitioners do not accurately describe the first "Budget Committee" in 2018. (See Memo. of P&A at 8:18-9:5.) This was not a permanent, standing committee. Instead, a motion was made "to create a sub-committee with Council President Soria, and Councilmembers Chavez and Caprioglio to discuss the $3.5 million and $9.9 million and to come back at the next budget hearing for discussion and vote." (Petition, Ex. A [Minutes, p. 21].) On June 28, 2018, the Council voted to approve the FY 2019 budget. (Petition, Ex. L.) The two matters for which the "sub-committee"

was created to discuss were debated, and the votes were not unanimous. (Petition, Ex. L [Minutes, pp. 17-18].) Thus, the purpose for which the committee was created was fulfilled in 2018.

Another theory promoted by Petitioners is that "[s]ince the Committee's creation in 2018, there is no record of the City or Council taking any action to dissolve the Committee; thus, the Committee has remained in existence since its creation." (Memo. of P&A at 10:20-22; also see Cappetta Decl. ¶ 25.) The problem is that each fiscal year has a different City budget, and each budget process ends by June 30. (Charter §§ 1201, 1205.) For example, the committee for the FY 2019 budget had a specific task, which ended when the budget was adopted. Also, under the Municipal Code, the Council President appoints special committees, and there is a different Council President every calendar year. (FMC § 2-316, Stermer Decl., ¶¶ 9-11, Exs. G-H.) Therefore, it makes no sense to suggest that the FY 2019 budget committee continued in perpetuity. Since the task for any budget committee would be connected to a particular budget cycle, there was no reason for formal dissolution. (See Civ. Code, § 3532 ["The law neither does nor requires idle acts."].)

Petitioners claim that the City Attorney "acknowledged in July 2023 that the Budget Committee has been involved in the "budget process . . . going back to at least 2019." (Memo. of P&A at 9:14-16; Cappetta Decl. ¶ 22 & Ex. FC-B.) This is an incorrect assessment of that the City Attorney represented. Instead of admitting that the "budget subcommittee plans to have quarterly meetings with Mayor Dyer's administration going forward," the City Attorney said that Council President Tyler Maxwell "was advised after his June 26 statement that quarterly meetings with the Administration would not be possible given the ad-hoc nature of the committee and as such the committee would dissolve when the budget process ended (the same way as it has going back to at least 2019)." Thus, this evidence only serves to negate Petitioners' theory of a standing committee.

Petitioners also contend that the Budget Committee "has met repeatedly over several years to perform the recurring tasks of reconciling the Council's budget priorities with the priorities of the mayor and proposing a final budget for Council approval." (Memo. of P&A at 15:5-10, citing Hyde Decl. ¶ 9 & Ex. EE, at 4 (description of Budget Committee's purpose); Cappetta Decl. ¶¶ 2, 11, 22 & Exs. A (June 2018 creation); R (May 2021 meeting); FC-C (June 2020 meeting), FC-D (June 2022 meeting), FC-E (June 2023 meeting).) However, these exhibits show that a committee, during

a particular budget cycle, addressed specific items as requested. It is the Mayor's Office that has subject matter jurisdiction over the budget and its preparation, not the budget committee. (Charter § 400; also see Declaration of Michael R. Linden, ¶¶ 2-3, Exs. A-B [executive summaries].)

According to Petitioners, "[t]he Budget Committee has also advised the Council on budgetary matters throughout the year as needed. (Memo. of P&A at 15:11-22, citing Hyde Decl. ¶ 6 & Ex. BB, at 3, 10; Cappetta Decl. ¶¶ 10, 22 & Exs. P (Council directing that an item to appropriate COVID-19 Emergency Response funds go before the Budget Committee in April 2020); FC-F (requesting a Budget Committee meeting in March 2021), FC-G ("A budget committee consisting of (Arias, Soria, Chavez, Quan, Schaad, Orman) had side meeting(s) sometime between [March] 22nd and 29th."), FC-H (City staff stating in February 2022 "Council Budget committee move[d] the request down to $1 million the other day"), FC-I (City staff "reaching out on behalf of the Budget Committee members who are requesting Council Offices please send an updated infrastructure project list for their review" in February 2022), FC-J (emails requesting to schedule a budget committee meeting in March 2022), FC-K (Karbassi stating "I met this morning with my fellow Budget Committee members" on April 17, 2023).) The same as above, this evidence does not show "regular" meetings of a standing committee; instead, the meetings are at random intervals for specific purposes, and for a particular budget that is always adopted in June. Indeed, it is not remarkable that there would be internal staff emails regarding committee meeting scheduling.

Petitioners also argue that "[w]henever the budget yields an unexpected surplus or deficit after the Council passes the budget, the Budget Committee reconvenes to discuss how to allocate it. (Memo. of P&A at 16:2-5, citing Cappetta Decl. ¶¶ 10, 12–13, 22 & Exs. P; S, at 4; T, at 2; FC-H.) However, this is not evidence of a standing committee for the budget generally, as to amend or supplement the budget after its adoption takes a supermajority of five Councilmembers. (RJN No. 4 [Charter § 1206].) Therefore, if a committee for a budget cycle is assigned a matter related to a budget amendment, this does not remove the temporary nature of the committee's assignment. Indeed, Petitioners' point out that instead of a committee that remained in place year after year, new committees were appointed "months after the budget passes." (Memo. of P&A at 16:9.)

Instead of citing any case authority, Petitioners rely on an Attorney General Opinion from

1996 that contains substantially dissimilar facts. In this Opinion, the Attorney General's office considered whether a water district's committee is subject to the Brown Act "if the committee has the responsibility of providing advice concerning budgets, audits, contracts, and personnel matters to and upon request of the legislative body(.)" (Op. at p. 1.) The district's seven member board established a subcommittee of three members to advise the board on administrative matters as needed. (Op. at p. 2.) This committee did not have a fixed meeting schedule but "generally" met monthly, operating under the following rule:

> The Administrative Committee shall consist of the three Directors appointed by the Chair and approved by the Board. This committee shall not exercise continuing subject matter jurisdiction. Its purpose shall be to advise the Board on administrative matters as appropriate. The Board of Directors shall not fix the meeting schedule of this committee. The committee may meet on the call of the chair or as decided by the members. Action taken by the Administrative Committee shall be subject to final Board approval. (Italics added.) (Op., at p. 2.)

Quoting the Webster's Dictionary, the Attorney General noted that a "standing committee" is considered to be "a permanent committee of a legislative body," and that "'Permanent' may be commonly defined as 'to endure, remain.'" (Op. at p. 4, quoting Webster's Third New Internat. Dict. (1971) p. 1683.) In finding a standing committee, the Attorney General found that "this subcommittee **does not have a limited term**, and it **is not** an ad hoc committee charged with **accomplishing a specific task in a short period of time**." (Op. at p. 4, bold type added.)

There are numerous material differences between the committee in this opinion and what the Petition describes. First, instead of a committee to advise on certain aspects of an annual budget, this committee provided advice concerning "budgets, audits, contracts, and personnel matters …" (Op. at p. 1.) Unlike the City's budget, which by law ends no later than June 30 annually, matters such as "audits, contracts, and personnel matters" are not so delineated and thus do not have limited terms. A budget committee cannot be said to be enduring because every budget has a deadline for its adoption each fiscal year. What Petitioners' evidence shows is the creation of new committees that handled specific tasks within the time period of the annual budget (including any possible post-adoption amendments). This is different than a committee with no defined duration that generally met monthly, and could do so its own volition. Therefore, this opinion is not helpful to Petitioners.

Petitioners' lack of legal authority is further demonstrated by their argument that other large cities in California (Los Angeles, San Diego, San Jose, San Francisco, Sacramento, Long Beach, Oakland, Bakersfield, and Anaheim) open their "entire budget process to the public once a draft budget is proposed." (Memo. of P&A at 8:15-17, citing Cappetta Decl. ¶ 23.) Petitioners do not provide the Court with any pertinent information, including their forms of government and the powers and duties of the councils, mayors, and city managers.[2] With a Council-Manager form of government, the danger of undue influence is far greater because the person the committee would meet with serves at the pleasure of the council. Even with other cities with "strong" mayors, no information is provided about the committees. Therefore, Petitioners' argument lacks foundational support and is patently insufficient for a court of law. (See Evid. Code, §§ 210, 702, 800.)

The Brown Act expressly allows temporary advisory committees to be formed and function without the necessity of noticed public meetings. (Gov. Code, § 54952, subd. (b).) This provides public agencies with flexibility without removing the public's right to be notified when a matter is going before the actual decision making body. There is no evidence that the committees described in the Petition met regularly, and the purpose for all of them ended when the budgets were adopted and/or amended. Grouping together temporary committees does not create a "standing" committee. Without any pertinent legal authority supporting Petitioners' position, it must be rejected.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny Petitioners' Motion in its entirety.

DATED: August 13, 2024

ALESHIRE & WYNDER, LLP
ANTHONY R. TAYLOR
MICHAEL R. LINDEN

By: _____
MICHAEL R. LINDEN
Attorneys for Respondents
CITY OF FRESNO, et al.

[2] Over half of these cities (Bakersfield, Anaheim, San Jose, Long Beach, and Sacramento) have city managers who are appointed by the councils, and who prepare the budgets.

PROOF OF SERVICE

American Civil Liberties Union, et al. v. City of Fresno, et al.
Fresno County Superior Court Case No. 23CECG04744

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Riverside, State of California. My business address is 3880 Lemon Street, Suite 520, Riverside, CA 92501.

On August 13, 2024, I served true copies of the following document(s) described as **RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR JUDGMENT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Aleshire & Wynder, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Riverside, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address cgonzalez@awattorneys.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2024, at Riverside, California.

Cecilia Gonzalez

Cecilia Gonzalez

SERVICE LIST
American Civil Liberties Union, et al. v. City of Fresno, et al.
Fresno County Superior Court Case No. 23CECG04744

Angélica Salceda, Esq.
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
E-mail: asalceda@aclunc.org

Attorneys for Plaintiff
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

David Loy, Esq.
FIRST AMENDMENT COALITION
534 4th Street, Suite B
San Rafael, CA 94901-3334
Telephone: (415) 460-5060
E-mail: dloy@firstamendmentcoalition.org

Attorneys for Plaintiff
FIRST AMENDMENT COALITION