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12

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF FRESNO**
15

16 AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, a nonprofit
17 corporation, and FIRST AMENDMENT
COALITION, a nonprofit corporation,
18

19 Petitioners,

20 v.

21 THE CITY OF FRESNO, and THE FRESNO
CITY COUNCIL,
22

23 Respondents.
24

Case No. 23CECG04744

**RESPONDENTS' REPLY TO
PETITIONERS' OPPOSITION TO
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date: August 28, 2024
Time: 1:30 p.m.
Dept.: 404
The Hon. Robert M. Whalen, Jr.

Action Filed: November 15, 2023
Trial Date: None

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1 Respondents CITY OF FRESNO (“City”) and FRESNO CITY COUNCIL (“Council”)
2 (collectively “Respondents”) hereby submit the following Reply to the Opposition of Petitioners
3 AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA and FIRST
4 AMENDMENT COALITION (collectively hereinafter “Petitioners”) to Respondents’ Motion for
5 Judgment on the Pleadings (“Motion”) as to the Verified Petition for Peremptory Writ of Mandate
6 and Complaint for Injunctive and Declaratory Relief (“Petition”) of Petitioners AMERICAN CIVIL
7 LIBERTIES UNION OF NORTHERN CALIFORNIA and FIRST AMENDMENT COALITION
8 (collectively hereinafter “Petitioners”).

9 INTRODUCTION

10 In their Petition, Petitioners made numerous and repeated allegations about City’s “Budget
11 Committee” having “heard, discussed, deliberated, or took action” on the budget, so much so that it
12 “effectively” had “the final word on the City’s annual budget, ...” (Petition, ¶¶ 14, 34, 58, 60.)
13 However, absent from the Petition were any provisions from the Fresno City Charter (“Charter”).
14 To give an accurate portrayal of the City’s Mayor-Council (or “strong Mayor”) form of government,
15 Respondents requested judicial notice of relevant provisions of the Charter and Municipal Code
16 (“FMC”) demonstrating that the preparation of the City’s budget is exclusively under the subject
17 matter jurisdiction of the Mayor’s office, not the Council, and only at the end of the annual budget
18 cycle does the Council receive the budget and consider a budget for adoption. (See Request for
19 Judicial Notice [“RJN”] Nos. 3-4 [Charter §§ 400, subd. (a)-(d), 1201-1204].) These provisions
20 demonstrate that there is no way that a committee of Councilmembers had subject matter jurisdiction
21 and “heard,” “deliberated,” or “took action” on the preparation of the specific budget items, when
22 that is the exclusive subject matter jurisdiction of the Mayor’s office.

23 Not surprisingly, in their Opposition Petitioners distance themselves from these baseless
24 allegations, and instead point out that the Brown Act applies to advisory committees. Petitioners
25 concede that the “Budget Committee” never could have had any “final say” on any budget items.
26 In fact, Petitioners alleged that a “Budget Committee” is among the many committees that are
27 annually created by the Council President. However, even if it could be assumed that multiple
28 temporary committees equal a standing committee (a proposition for which no pertinent authority

1 has been cited), Petitioners’ fundamentally misconstrue the concept of subject matter “jurisdiction.”
2 The Mayor is not subject to the Brown Act in a “strong Mayor” form of municipal government (as
3 in the City of Fresno), and under the Charter the Mayor has the exclusive subject matter jurisdiction
4 for the creation of the budget.

5 Moreover, the Mayor can veto the budget either in whole or in part. (RJN No. 3 [Charter §
6 400(f)].) Therefore, it did not matter that committees of Councilmembers met with the Mayor’s
7 office, for there was no obligation on the Mayor’s part to meet with any committee, and the Mayor
8 can veto any line item of the budget.

9 Furthermore, even assuming any question as to the Petition’s merit, this action is time-
10 barred with respect to applying the Brown Act to past actions because the “cease and desist” letter,
11 sent in 2023, challenges an alleged wrongful act in 2018, well beyond both the 9-month limitation
12 period in the Brown Act. As for threatened future actions, Petitioners have nothing beyond
13 speculation that a budget committee could be formed in the future, which is insufficient for
14 injunctive relief because there is nothing to enjoin. Therefore, there is no basis for Petitioners’
15 lawsuit, and the instant Motion should be granted without leave to amend.

16 **ARGUMENT**

17 **I. THE BUDGET COMMITTEES HAD NO JURISDICTION OVER THE BUDGET**

18 Petitioners attempt to convince the Court that there has been a standing “Budget Committee”
19 since 2018 because there was “formal action” to establish it. (Opp. at 11:3-4.) This characterization
20 is contradicted by the Council meeting minutes to the Petition, which state that “Councilmember
21 Chavez motioned to move estimated \$9.9 million August 2019 Sales Tax into the Reserve Fund and
22 move estimated \$3.5 million General Fund Reserve Revenue across each Council District’s
23 Infrastructure fund,” and that the amendment was “to create a sub-committee with Council President
24 Soria, and Councilmembers Chavez and Caprioglio to discuss the \$3.5 million and \$9.9 million and
25 to come back at the next budget hearing for discussion and vote.” (Petition, Ex. A [Minutes, p. 21].)
26 This was a specific task for a specific budgetary matter for the FY 19 budget. The same can be said
27 for the which included the “budget update” in November of 2018 regarding proposed funding from
28 a budget carryover for City parks. (Petition, ¶ 40.) Therefore, the Council did not create a

1 “standing” budget committee in 2018.

2 Petitioners also allege that “[t]he Budget Committee met from 2020 to 2023 during the
3 preparation of the City budget for FY 2021, 2022, 2023, and 2024 to hear, discuss, deliberate, or
4 take action on matters related to the budget for the relevant fiscal year.” (Petition, ¶ 60.) For
5 example, “[o]n or about April 23, 2020, before budget deliberations began,” the Council President
6 “directed the Budget Committee” to meet with “City staff” about a “resolution to create a
7 community grant program using COVID-19 appropriations.” (Petition, ¶ 63.) On or about May 6,
8 2021, a budget committee met “to hear a proposal to establish appropriations for a “Homeless
9 Housing Project.” (Petition, ¶ 75.)

10 Petitioners argue that because the budget committee “has regularly met to address budgetary
11 matters for several years,” it is a standing committee with subject matter jurisdiction. (Opp. at 11:8-
12 10.) However, it is not enough to describe a committee as a “standing committee.” Because there
13 was no set meeting schedule, there also has to be “a continuing subject matter jurisdiction” for the
14 committee. (Gov. Code, § 54952, subd. (b).) The fatal flaw with Petitioners’ allegations is that
15 during the time period when the budget is created, the matter is exclusively in the hands of the
16 Mayor’s office, and Petitioners’ arguments ignore the Mayor’s power to veto the Council
17 concerning budget matters. (RJN No. 3 [Charter § 400(f)].)

18 In analyzing this issue, the form of government is the controlling factor when it comes to
19 subject matter “jurisdiction.” In a council-manager form of government in a general law city, the
20 city manager is appointed by the council, and typically creates the budget. (See Gov. Code, § 34851,
21 et seq.)¹ Therefore, if the council established a committee to meet with the city manager about the
22 budget, the city manager would be duty bound to receive this committee’s input.

23 By contrast, the Fresno City Charter unambiguously states that “[t]he Mayor shall prepare
24 or cause to be prepared the proposed annual City budget, and shall submit the same to the Council
25 for its deliberation and approval.” (RJN No. 3 [Charter § 400(d).) This is a power that the Council,
26

27 _____
28 ¹ Petitioners argue that nine other large cities in California have more open budget processes, but
in five of those cities the city manager who creates the budget is appointed by the council.

1 but for the Charter, would otherwise possess. (See *Belli v. Board of Supervisors of San Francisco*
2 (1932) 123 Cal.App. 44, 46-47.) Also, the Mayor has the sole authority to appoint the City Manager
3 (described in the Charter as the “Chief Administrative Officer”), and the Mayor “shall exercise
4 control” over the City Manager. (RJN No. 3 [Charter § 400(b)-(c).] Neither the Council nor any
5 committee of the Council has any role under the Charter in preparing the budget, as “[i]n preparing
6 the proposed budget, the Mayor shall review the estimates, hold conferences thereon with the Chief
7 Administrative Officer and respective department heads and may revise the estimates as he or she
8 may deem advisable.” (RJN No. 4 [Charter § 1204].) The Mayor has until June 1 of each year to
9 “submit to the Council the proposed budget as prepared for him or her.” (RJN No. 4 [Charter §
10 1203].) Until this time, the matter is in the exclusive jurisdiction of the Mayor’s Office, and the
11 Mayor has no obligation to meet with any Councilmember. Thus, any budget committee was not
12 materially different than a group of citizens approaching the Mayor.

13 Petitioners’ fallback position is that the “Budget Committee did not in fact perform a specific
14 one-off task for a limited time period,” but “performed the same recurring task for at least five
15 years—the fundamental governing task of preparing a final budget for City Council approval and
16 considering mid-year budget adjustments.” (Opp. at 13:9-12.) It is true that “[a]t least thirty days
17 prior to the beginning of each fiscal year, the Mayor shall submit to the Council the proposed
18 budget,” and that the Council “may make such revisions as it may deem advisable.” (RJN No. 4
19 [Charter § 1203].) Also, [a]fter the conclusion of the public hearing the Council shall further
20 consider the proposed budget and make any revisions thereof that it may deem advisable and on or
21 before June 30, it shall adopt a balanced budget.” (RJN No. 4 [Charter § 1203].) However, there
22 are two fundamental problems with Petitioners’ theory.

23 First, there is nothing in the Petition demonstrating that a budget committee ever performed
24 the “fundamental governing task of preparing a final budget for City Council approval.” This is
25 merely an unsupported characterization that Petitioners are attempting to have the Court adopt. The
26 only allegations in the Petition about a budget committee giving advice about the final budget come
27 from 2023, where this committee allegedly met with the Mayor’s office “several times” starting on
28 June 16, 2023, and “made” more than 75 changes and amendments. (Petition, ¶¶ 75-78.) There

1 has to be some level of authority for a committee to rise to the level of a “legislative body,” and
2 without such authority a committee of councilmembers does not become a legislative body. (See
3 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1126-1129.)
4 As discussed above, no budget committee can adopt a change to the budget, as this has to be done
5 by the Council subject to the Mayor’s possible veto. Thus, no budget committee had a “fundamental
6 governing task.”

7 Furthermore, assuming that a budget committee met with the Mayor’s office during the
8 budget approval process, this would only serve to show the limited nature of the task. On this
9 subject, Petitioners’ cited authority, 79 Ops. Cal. Att’y Gen. 69 (1996), is inapposite. First, the
10 opinion concerned a committee of the governing board of a water district, which did not have the
11 type of strong executive that the City has with respect to its budget. (Opinion at p. 1.) Therefore,
12 the board that the committee came from had exclusive jurisdiction over the budget. Furthermore,
13 the committee also advised about “audits, contracts, and personnel matters.” (Opinion at pp. 1-2.)
14 In addition, the water district board’s committee could meet on its own volition. (Opinion at p. 2.)
15 Such features are not ascribed to any budget committee in the Petition.

16 If anything, the Attorney General opinion supports Respondents’ position, as it states that a
17 temporary committee is one that performs a “specific task in a short period of time.” (Opinion. at
18 p. 4.) If a budget committee met with the Mayor’s office after the initial budget hearings, this is a
19 “specific task in a short period of time” because the budget is required to be adopted by June 30.
20 Once adopted, unless there are post-adoption amendments, the budget cycle is done. While
21 Petitioners argue that the committees were never formally dissolved by the Council, they point to
22 no provision of law or policy requiring formal dissolution for an ad hoc committee. Indeed, a special
23 committee can be formed by the Council President. (RJN No. 7 [FMC § 2-316].) Thus, it makes
24 no sense to conclude that an ad hoc committee required formal dissolution.

25 Petitioners also attempt to paint a picture of the public being left in the dark about the budget.
26 This is also wrong. First, after the proposed budget is submitted, there has to be notice of the budget
27 hearing(s) “not less than ten days prior to the time fixed therefor, by publication of such notice at
28 least once in a newspaper of general circulation in the City.” (RJN No. 4 [Charter § 1203].) Also,

1 “[c]opies of the proposed budget shall be available for inspection by the public in the office of the
2 City Clerk at least ten days prior to the hearing.” (RJN No. 4 [Charter § 1203].) The Council then
3 holds the public hearing for the budget, where “interested persons desiring to be heard shall be given
4 such opportunity.” (RJN No. 4 [Charter § 1204].) Therefore, the notion that the public is left out
5 of the process is completely incorrect.

6 In this case, whether the “Budget Committee” is described as one committee, or a series of
7 committees, no committee ever had any power, authority, or control over the budget. Moreover,
8 the Mayor’s office is not subject to the Brown Act, and the Petition does not allege otherwise. (See
9 Cal. Const., art. XI, § 3(a) [authorizing home rule cities].) Yet, according to Petitioners, if the Mayor
10 meets with three councilmembers, who have no authority to control how the budget is drafted by
11 the Mayor’s office, the Brown Act somehow requires noticed meetings. There is simply no authority
12 for this proposition, and it should be emphasized that the Brown Act specifically allows legislative
13 bodies to have advisory committees. (Gov. Code, § 54952, subd. (b).) Therefore, the instant Motion
14 should be granted without leave to amend.

15 **II. THE PETITION IS TIME-BARRED AS TO PAST ACTIONS**

16 To determine the legality of past actions, a “cease and desist” letter must be sent to the
17 legislative body within nine months **of the alleged violation.**” (Gov. Code § 54960.2(a)(2), bold
18 type added.) In the Petition, the “alleged violation” occurred on June 21, 2018, when the Budget
19 Committee was allegedly created and operated continuously thereafter as a “standing committee
20 with continuing subject matter jurisdiction over matters related to the City’s budget.” (Petition, ¶
21 11.) Petitioners allege that “[f]rom 2018 to the present, Respondents have consistently violated
22 the Brown Act by holding Budget Committee meetings in secret, without advance notice, a publicly
23 posted agenda, or opportunity for public comment.” (Petition, ¶ 97, bold type added.) Petitioners
24 then allege that “Respondents’ numerous violations of the Brown Act evidence a pattern and
25 practice of ignoring the state’s open meeting laws, ...” (Petition, ¶ 98.)

26 In their Opposition, Petitioners argue that their action involves a “continuing wrong,” so the
27 statute never began to run until June of 2023. (Opp. at 17:18-27, comparing to *Pugliese v. Superior*
28 *Court* (2007) 146 Cal.App.4th 1444, 1452 [*“Pugliese”*].) While Petitioners, by use of the “cf”

1 abbreviation, do not exactly rely on *Pugilese*, an examination of the facts and circumstances of this
2 case illustrates the inappropriateness of Petitioners’ comparison.

3 In *Pugilese*, the Court of Appeal examined the three-year statute of limitations for seeking
4 damages for acts of domestic abuse where the lawsuit must be commenced within three years “from
5 the date of the last act of domestic violence ...” (*Id.* at 1451, citing Code Civ. Proc., § 340.15, subd.
6 (a)(1).) The Court of Appeal found that domestic violence was a tort of a “continuing wrong”
7 because the victims are subjected to “an ongoing strategy of intimidation, isolation, and control,”
8 and pursuing a remedy in such an environment would expose the victim “to considerable risk of
9 violence.” (*Id.* at 1452.) Needless to say, the Petition involves no such issues, so there is no reason
10 to deviate from the general rule that “a limitations period begins to run upon the occurrence of the
11 last fact essential to the cause of action.” (*Id.* at 1452, citing *DeRose v. Carswell* (1987) 196
12 Cal.App.3d 1011, 1017.)

13 Furthermore, there is no other basis for altering the time calculation. First, there is nothing
14 in the Petition about “equitable tolling,” which requires a litigant to be pursuing a different claim
15 based on the same operative facts. (See *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917,
16 924.) There is also no basis for applying the “continuing violation doctrine,” such as exists in
17 employment law, because Petitioners are alleging that the actions of the Council and the Budget
18 Committee have “acquired a degree of permanence,” in that there is one standing budget committee.
19 (See *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823; see also Petition, ¶ 97.) With “delayed
20 discovery, the inquiry is whether a timely and reasonable investigation would not have disclosed
21 the limitation-triggering information. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th
22 797, 806-808.) The Petition contains numerous official documents with references to budget
23 committees going back to 2018, so any investigation would have revealed the evidence. Therefore,
24 Petitioners are not entitled to have the Court apply the Brown Act to past actions of the Council.

25 **III. THE CASE IS MOOT AS TO ALLEGED THREATENED FUTURE ACTIONS**

26 Petitioners also contend that so long as there is a possibility that a budget committee could
27 be formed in the future, their action is not moot. (Opp. at 18:1-19:20.) This is not the law. In order
28 for injunctive relief to be appropriate, there must be “actual evidence that there is a realistic prospect

1 that the party enjoined intends to engage in the prohibited activity.” (*Korean Philadelphia*
2 *Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) Thus, for the
3 Brown Act, there has to be “a reasonable expectation the allegedly wrongful conduct will be
4 repeated.” (*Center for Local Government Accountability v. City of San Diego* (2016) 247
5 Cal.App.4th 1146, 1156-57 [“*Center for Local Government Accountability*”].)

6 The only thing that the Petition represents is that when responding to the “cease and desist”
7 letter, the City Attorney stated that “[t]he request at the end of your letter that the City provide
8 assurances that any future Ad Hoc Budget Subcommittee will be a standing committee is a
9 hypothetical situation that does not require a response under Government Code Section 54960.1”
10 (Petition, Ex. V.) There is no allegation that for FY 25, the City Council included a budget
11 committee as part of the list of the City’s committees, and there is no allegation that the Council
12 President has taken the initiative to establish such a committee. The FY 25 budget was adopted in
13 June of 2024, and the Petition was not amended to add allegations regarding the FY 26 budget
14 creation cycle. Therefore, Petitioners can only speculate as to a future budget committee.

15 The defects in Petitioners’ position is illustrated by the fact that they cite two cases, *United*
16 *Farmworkers of America v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1164, and *Marin County Bd.*
17 *of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 929, that involve neither the Brown Act nor public
18 entities generally. The case law that does address the Brown Act contain specific findings about the
19 threat of a future violation that are not contained in the Petition. For example, in *California Alliance*
20 *for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024 (“*California Alliance*”),
21 the petitioners alleged that the city improperly held closed session meetings and made decisions
22 concerning electric utility’s obligation under its franchise agreement to devote spending to placing
23 overhead power lines underground. (*Id.* at 1026-1027.) The Court of Appeal found that even after
24 the city council had adopted the settlement, there were problems to the point where was “more
25 information about the cost of outside counsel was provided to the public than information about the
26 settlement.” (*Id.* at 1031.)

27 The petitioner in *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904 (“*Shapiro*”)
28 sought to have the city to comply with the Brown Act with respect to “closed session discussions

1 with its real estate negotiators, concerning the posting of agenda items and the restriction of
2 discussion within such closed sessions to the posted agenda items.” (*Id.* at 906.) The matter was
3 not considered moot because “the City Council contends the court could not properly prohibit it
4 from discussing any topic within a closed session that was not contained as a separate item of
5 business in the posted agenda for that section.” (*Id.* at 913.)

6 In *Center for Local Government Accountability*, the Court of Appeal addressed “a long-
7 standing ordinance providing for only one non-agenda public comment period over the course of its
8 two-day regular weekly meetings” that was found to violate section 54954.3. (*Center for Local*
9 *Government Accountability, supra*, 247 Cal. App. 4th at 1149.) The matter was not considered moot
10 because “[t]he City still considers its two-day regular weekly meetings to be one continuous
11 meeting, rather than two separate meetings, for Brown Act purposes.” (*Id.* at 1157.)


12 The specific findings in the cases above involved the agenda and public comment
13 requirements of the Brown Act, which must be adhered to for every public meeting. By contrast,
14 the type of committee described in the Petition is not required by law to be formed, and there is no
15 evidence that one currently exists or ever will exist (or be formed by a future Council President).
16 Therefore, without anything beyond speculation, Petitioners’ action fails as a matter of law since
17 there is no ongoing budget committee and the lawsuit is moot.

18 **CONCLUSION**

19 Based on the foregoing, as well as the original moving papers, Respondents respectfully
20 request that the Court grant the instant Motion in its entirety, with prejudice and without leave to
21 amend, and that the Court enter Judgment in Respondents’ favor.

22 DATED: August 21, 2024

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

25 By: 
26 MICHAEL R. LINDEN
27 Attorneys for Respondents
28 CITY OF FRESNO, et al.

1 **PROOF OF SERVICE**

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

4 **STATE OF CALIFORNIA, COUNTY OF FRESNO**

5 At the time of service, I was over 18 years of age and not a party to this action. I am
6 employed in the County of Fresno, State of California. My business address is 2440 Tulare Street,
Suite 410, Fresno, CA 93721.

7 On August 21, 2024, I served true copies of the following document(s) described as
8 **RESPONDENTS’ REPLY TO PETITIONERS’ OPPOSITION TO MOTION FOR
JUDGMENT ON THE PLEADINGS** on the interested parties in this action as follows:

9 Angélica Salceda, Esq. *Attorneys for Plaintiff*
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17 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
18 persons at the addresses listed in the Service List and placed the envelope for collection and mailing,
19 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
20 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 Fresno, California.

21 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s)
22 to be sent from e-mail address rramirez@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.

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

25 Executed on August 21, 2024, at Fresno, California.

26 
27 Shelly Ramirez