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Supplementary Material

The Reagan Era—Democratic Rights/Free Speech

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)

In 1987, an African-American city council member in Atlanta, Georgia, organized a "March Against Fear and Intimidation" in rural and overwhelmingly white Forsyth County, Georgia. When the civil rights marchers arrived at the county seat for the march, they were met by a much larger crowd of counter-demonstrators that included an affiliate of the white supremacist group, Nationalist Movement. When the crowd turned violent, the police shut down the march. The council member returned to Forsyth County the next week with a vastly larger group of marchers and much-enhanced police presence, which dwarfed the small group of counter-demonstrators who turned out. There was some violence and a large number of arrests, but the march was not interrupted.

The police presence was extremely costly, though most of the necessary funds were provided by the state. The county commissioners subsequently adopted an ordinance authorizing the charge of a fee not to exceed $1,000 for a parade permit, adjustable depending on the expected expenses associated with maintaining "public order" at the event. Two years later, the Nationalist Movement applied for a permit for a march in opposition to the creation of a holiday commemorating Martin Luther King Jr. They were charged a $100 fee, primarily reflecting administrative costs of issuing the permit. The group filed suit in federal district court arguing that the fee violated their First Amendment right to free speech. As applied to the administrative costs, the district court found the fee a constitutionally valid content-neutral regulation. The circuit court reversed, concluding that anything more than a nominal fee unduly burdened free speech. In a 5–4 ruling, the U.S. Supreme Court affirmed that ruling but on different grounds. The majority thought the ordinance gave the county administrators too much discretion to adjust fees in ways that would reflect how controversial the content of the speech was expected to be.

JUSTICE BLACKMUN delivered the opinion of the Court,

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Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." . . .

. . .

Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any "narrowly drawn, reasonable and definite standards," guiding the hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views

and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled discretion. As construed by the county, the ordinance often requires that the fee be based on the content of the speech.

The county envisions that the administrator, in appropriate instances, will assess a fee to cover "the cost of necessary and reasonable protection of persons participating in or observing said . . . activit[y]." . . . The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

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This Court has held time and again: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." The county offers only one justification for this ordinance: raising revenue for police services. While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee.

Petitioner insists that its ordinance cannot be unconstitutionally content based because it contains much of the same language as did the state statute upheld in *Cox v. New Hampshire* (1941). Although the Supreme Court of New Hampshire had interpreted the statute at issue in *Cox* to authorize the municipality to charge a permit fee for the "maintenance of public order," no fee was actually assessed. Nothing in this Court's opinion suggests that the statute, as interpreted by the New Hampshire Supreme Court, called for charging a premium in the case of a controversial political message delivered before a hostile audience. In light of the Court's subsequent First Amendment jurisprudence, we do not read *Cox* to permit such a premium.

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. . . [T]he provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations.

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS joined, dissenting.

We granted certiorari in this case to consider the following question:

> "Whether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the matter licensed, up to the sum of $1,000.00 per day of the activity."

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The answer to this question seems to me quite simple, because it was authoritatively decided by this Court more than half a century ago in *Cox v. New Hampshire* (1941). There we confronted a state statute which required payment of a license fee of up to $300 to local governments for the right to parade in the public streets. The Supreme Court of New Hampshire had construed the provision as requiring that the amount of the fee be adjusted based on the size of the parade. . . . This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute. . . . I believe that the decision in *Cox* squarely controls the disposition of the question presented in this case, and I therefore would explicitly hold that the Constitution does not limit a parade license fee to a nominal amount.

Instead of deciding the particular question on which we granted certiorari, the Court concludes that the county ordinance is facially unconstitutional because it places too much discretion in the hands of the county administrator and forces parade participants to pay for the cost of controlling those who might oppose their speech. But, because the lower courts did not pass on these issues, the Court is forced to rely on its own interpretation of the ordinance in making these rulings. The Court unnecessarily reaches out to interpret the ordinance on its own at this stage, even though there are no lower court factual findings on the scope or administration of the ordinance. Because there are no such factual findings, I would not decide at this point whether the ordinance fails for lack of adequate standards to guide discretion or for incorporation of a "heckler's veto," but would instead remand the case to the lower courts to initially consider these issues.

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. . . The Court's analysis on this issue rests on an assumption that the county will interpret the phrase "maintenance of public order" to support the imposition of fees based on opposition crowds. There is nothing in the record to support this assumption, however, and I would remand for a hearing on this question.

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