SUPREME COURT OF THE UNITED STATES

No. 91–538

FORSYTH COUNTY, GEORGIA, PETITIONER *v.*
THE NATIONALIST MOVEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 19, 1992]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, 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.'' Pet. for Cert. i.

The Court's discussion of this question is limited to an ambiguous and noncommittal paragraph toward the very end of the opinion. *Ante,* at 14. The rest of the opinion takes up and decides other perceived unconstitutional defects in the Forsyth County ordinance. None of these claims were passed upon by the Court of Appeals; that court decided only that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets. Since that was the question decided by the Court of Appeals below, the question which divides the courts of appeals, and the question presented in the petition for certiorari, one would have thought that the Court would at least authoritatively decide, if not limit itself to, that question.

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,* 312 U. S. 569 (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, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." *Id.,* at 577 (internal quotation marks omitted). Under the state court's construction, the fee provision was "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." *Ibid.* (internal quotation marks omitted). This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute, saying:

> "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.
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> ``There is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require." *Ibid.*

Two years later, in *Murdock* v. *Pennsylvania,* 319 U. S. 105, (1943), this Court confronted a municpal ordinance that required payment of a flat license fee for the privilege of canvassing door-to-door to sell one's wares. Pursuant to that ordinance, the city had levied the flat fee on a group of Jehovah's Witnesses who sought to distribute religious literature door-to-door for a small price. *Id.,* at 106–107. The Court held that the flat license tax, as applied against the hand distribution of religious tracts, was unconstitutional, on the ground that it was "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *Id.,* at 113. In making this ruling, the Court distinguished *Cox* by stating that "the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." *Id.,* at 116. This language, which suggested that the fee involved in *Cox* was only nominal, led the Court of Appeals for the Eleventh Circuit in the present case to conclude that a city is prohibited from charging any more than a nominal fee for a parade permit. 913 F. 2d 885, 890–891, and n. 6 (1990). But the clear holding of *Cox* is to the contrary. In that case, the Court expressly recognized that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee, as it stated that the fee provision "had a permissible range from $300 to a nominal amount." *Cox* v. *New Hampshire, supra,* at 576. The use of the word "nominal" in *Murdock* was thus unfortunate, as it represented a mistaken characterization of the fee statute in *Cox.* But a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case. The situations in *Cox* and *Murdock* were clearly different; the first involved a sliding fee to account for administrative and security costs incurred as a result of a parade on public property, while the second

involved a flat tax on protected religious expression. 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. *Ante,* at 7–14. 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.

The Court first finds fault with the alleged standardless discretion possessed by the county administrator. The ordinance provides that the administrator "shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." App. to Pet. for Cert. 119. In this regard, the ordinance clearly parallels the construction of the statute we upheld in *Cox.* 312 U. S., at 577 (statute did not impose "a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed"

(internal quotation marks omitted)). The Court worries, however, about the possibility that the administrator has the discretion to set fees based upon his approval of the message sought to be conveyed, and concludes that "the county's authoritative constructio[n] of the ordinance" allows for such a possibility. *Ante,* at 8. The Court apparently envisions a situation where the administrator would impose a $1,000 parade fee on a group whose message he opposed, but would waive the fee entirely for a similarly situated group with whom he agreed. But the county has never rendered any "authoritative construction" indicating that officials have "unbridled discretion," *ante*, at 10, in setting parade fees, nor has any lower court so found. In making its own factual finding that the ordinance does allow for standardless fee setting, this Court simply cites four situations in which the administrator set permit fees—two fees of $100, one of $25, and one of $5. *Ante,* at 9. On the basis of this evidence, the Court finds that the administrator has unbridled discretion to set permit fees. The mere fact that the permit fees differed in amount does not invalidate the ordinance, however, as our decision in *Cox* clearly allows a governmental entity to adopt an adjustable permit fee scheme. See *Cox* v. *New Hampshire, supra,* at 577 ("[W]e perceive no constitutional ground for denying to local governments th[e] flexibility of adjustment of fees"). It is true that the Constitution does not permit a system in which the county administrator may vary fees at his pleasure, but there has been no lower court finding that that is what this fledgling statute creates. And, given the opportunity, the District Court might find that the county has a policy that precludes the administrator from arbitrarily imposing fees. Of course, the District Court might find that the administrator does possess too much discretion. In either case, I believe findings by the District Court on the issue would be preferable.

The Court relies on *Ward* v. *Rock Against Racism,* 491 U. S. 781, 795–796 (1989), for the proposition that the county's interpretation of the ordinance must be considered. In that case, however, we relied upon District Court findings concerning New York City's limiting interpretation of a noise regulation. *Id.* at 795. I would prefer to remand this case so that the Court might rely on such express findings here as well.

The Court's second reason for invalidating the ordinance is its belief that any fee imposed will be based in part on the cost of security necessary to control those who *oppose* the message endorsed by those marching in a parade. Assuming 100 people march in a parade and 10,000 line the route in protest, for example, the Court worries that, under this ordinance, the county will charge a premium to control the hostile crowd of 10,000, resulting in the kind of "heckler's veto" we have previously condemned. *Ante,* at 11–13. But there have been no lower court findings on the question of whether or not the county plans to base parade fees on anticipated hostile crowds. It has not done so in any of the instances where it has so far imposed fees. *Ante,* at 9. And it most certainly did not do so in this case. The District Court below noted that:

> ``[T]he instant ordinance alternatively permits fees to be assessed based upon `the expense incident to . . . the maintenance of public order.' If the county had applied this portion of the statute, the phrase might run afoul of . . . constitutional concerns. . . .
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> ``However, in the instant case, plaintiff did not base their *[sic]* argument upon this phrase, but contended that the mere fact that a $100 fee was imposed is unconstitutional, especially in light of the organization's financial circumstances. *The evidence was clear that the fee was based solely upon the costs of processing the application and*

plaintiff produced no evidence to the contrary.'' App. to Pet. for Cert. 14 (emphasis added).

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.

For the foregoing reasons, I dissent.