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NO THREAT OF UNCONSTITUTIONAL CENSORSHIP IN PARK PERMIT ORDINANCE

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In the case of *Thomas v. Chicago Park District*, No. 00-1249, 534 U. S. ____ (2002), the Supreme Court of the United States considered the constitutionality of a park district ordinance requiring individuals or groups to obtain a permit before conducting “a public assembly, parade, picnic, or other event involving more than fifty individuals,” or engage in an activity which created or emitted any amplified sound in a public park. Chicago Park Dist. Code, ch. VII, §§ C.3.a(1), C.3.a(6). Moreover, the ordinance provided that the Chicago Park District could deny a permit for any of thirteen specified grounds, including the following:

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place...

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public...

The ordinance provided further that applications for permits would be processed in order of receipt, and the Park District would either grant or deny an application within 14 days. The Park District could, however, extend this period an additional 14 days by providing written notice to the applicant.

If the Park District denied an application, the ordinance required that the grounds for denial to be clearly set forth in writing and, where feasible, the denial had to “propose measures to cure defects in the application.” Moreover, when the denial was based upon “prior receipt of a competing application for the same time and place, the ordinance required the Park District to suggest alternative times or places.”

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Under the ordinance, an unsuccessful applicant had seven days to file a written appeal to the general superintendent of the park district. The ordinance required the general superintendent to act on an appeal within seven days. If the general superintendent affirmed a permit denial, the applicant could then seek judicial review in state court.

On several occasions, Caren Cronk Thomas and the Windy City Hemp Development Board (hereinafter referred to collectively as "Thomas") had applied for park permits to hold rallies advocating the legalization of marijuana. Thomas was dissatisfied that the Park District had denied some, though not all, of their applications for permits. Accordingly, Thomas filed suit against the Park District, alleging the above described park permit ordinance was unconstitutional.

The federal district court granted summary judgment to the Park District, effectively dismissing Thomas' lawsuit. The federal appeals court affirmed the judgment of the district court. The Supreme Court of the United States subsequently granted Thomas' petition to review these actions by the lower courts.

SUBJECT MATTER CENSORSHIP?

As noted by the Supreme Court, "a scheme conditioning expression on a licensing body's prior approval of content presents peculiar dangers to constitutionally protected speech":

The First Amendment's guarantee of "the freedom of speech, or of the press" prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the "evils" of the printing press in 16th- and 17-century England.

The Printing Act of 1662 had "prescribed what could be printed, who could print, and who could sell." It punished the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be "heretical, seditious, schismatical, or offensive." The English licensing system expired at the end of the 17th century, but the memory of its abuses was still vivid enough in colonial times that Blackstone warned against the "restrictive power" of such a "licenser" -- an administrative official who enjoyed unconfined authority to pass judgment on the content of speech...

The censor's business is to censor, and a licensing body likely will overestimate the dangers of controversial speech when ... whether speech is likely "to incite" or to

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"corrupt morals"

In response to these grave "dangers of a censorship system," the Supreme Court reiterated its requirement that a licensing process must contain the following procedural safeguards in order to avoid constituting an invalid prior restraint on free speech:

- (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;
- (2) expeditious judicial review of that decision must be available; and
- (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

As characterized by the Supreme Court, the specific issue in this case was, therefore, whether a municipal park ordinance requiring individuals to obtain a permit before conducting large-scale events must, consistent with the First Amendment, contain [the above cited] procedural safeguards."

In this particular instance, Thomas claimed that the challenged ordinance was unconstitutional because it lacked such procedural safeguards. Specifically, Thomas contended that the Park District was required to initiate litigation every time it denies a permit. Moreover, Thomas claimed that an expeditious judicial review process required the ordinance to "specify a deadline for judicial review of a challenge to a permit denial." The Supreme Court rejected this argument. In so doing, the Supreme Court found "the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum":

The Park District's ordinance does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to all activity conducted in a public park.

The picnicker and soccer-player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event...

[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.

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Moreover, the Supreme Court noted that it had “never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements” described above, requiring an expedited judicial review process for denied applications.

A licensing standard which gives an official authority to censor the content of a speech differs... from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.

The permit required is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved.

Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties but are one of the means of safeguarding the good order upon which civil liberties ultimately depend.

As a result, the Supreme Court concluded that “[s]uch a traditional exercise of authority does not raise the censorship concerns that prompted us to impose the extraordinary procedural safeguards” to avoid an unconstitutional prior restraint and censorship of free speech.

PATTERN OF UNLAWFUL FAVORITISM?

Having characterized the challenged ordinance as a “content-neutral permit scheme regulating free speech in a public forum,” the Supreme Court acknowledged the potential danger that “[a] content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression”:

Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.

However, under the circumstances of this particular case, the Supreme Court found the specified grounds in the ordinance for denying a permit application were “reasonably specific and objective, and do not leave the decision to the whim of the administrator.”

[The thirteen specified grounds enumerated in the ordinance for denying a park permit

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application] provide narrowly drawn, reasonable and definite standards to guide the licensor's determination...

[T]he Park District may deny a permit only for one or more of the reasons set forth in the ordinance. It may deny, for example, when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit. See Chicago Park Dist. Code, ch. VII, § C.5.e.

Moreover, the Park District must process applications within 28 days, § C.5.c, and must clearly explain its reasons for any denial, § C.5.e.

[The thirteen specified grounds enumerated in the ordinance for denying a park permit application] are enforceable on review -- first by appeal to the General Superintendent of the Park District, see Chicago Park Dist. Code, ch. VII, § C.6.a, and then by writ of common-law certiorari in the Illinois courts, which provides essentially the same type of review as that provided by the Illinois administrative procedure act.

On appeal, however, Thomas had contended that “the criteria set forth in the ordinance are insufficiently precise because they are described as grounds on which the Park District ‘may’ deny a permit, rather than grounds on which it must do so.” Accordingly, Thomas claimed that such language would allow the Park District the discretion “to waive the permit requirements for some favored speakers, while insisting upon them for others.” The Supreme Court rejected this argument. On balance, the Supreme Court found “the permissive nature of the ordinance furthers, rather than constricts, free speech.”

[To favor some speakers over others] is certainly not the intent of the ordinance, which the Park District has reasonably interpreted to permit overlooking only those inadequacies that, under the circumstances, do no harm to the policies furthered by the application requirements.

Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.

On petitioners' theory, every obscenity law, or every law placing limits upon political

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expenditures, contains a constitutional flaw, since it merely permits, but does not require, prosecution. The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid.

As a result, the Supreme Court affirmed the summary judgment of the federal district court in favor of the Chicago Park District.