

CONTENT-BASED PARK PERMIT DECISIONS UNCONSTITUTIONAL

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Controversy surrounding monuments to the Confederacy in public parks and spaces have drawn increased attention in the popular news media. As illustrated by the "City of Charlottesville" and "Forsyth County" decisions described herein, demonstrations and counter-demonstrations can create challenging First Amendment concerns for public park and recreation agencies, particularly when permits are issued for activities likely to draw potentially hostile crowds.

In the case of *Kessler v. City of Charlottesville*, 2017 U.S. Dist. LEXIS 128330 (W.Dist. Va. 8/11/2017), plaintiff Jason Kessler challenged the City's "eleventh-hour decision to revoke a permit previously issued by the City" which had granted Kessler "the right to hold a demonstration in Emancipation Park on August 12, 2017."

FACTS OF THE CASE

On May 30, 2017, Kessler applied for a permit to conduct a demonstration in Emancipation Park ("the Park") in the City of Charlottesville. Kessler intended to voice his opposition to the City's decision to rename the Park, which was previously known as Lee Park, and its plans to remove a statue of Robert E. Lee from the Park. On June 13, 2017, the City granted Kessler a permit to conduct a demonstration on August 12, 2017. In the following weeks, the City granted organizations, which oppose Kessler's message, permits to counter-protest in other public parks a few blocks away from Emancipation Park.

On August 7, 2017, less than a week before the long-planned demonstration at the Park, the City notified Kessler by letter that his permit to demonstrate in Emancipation Park on August 12, 2017 was being revoked. The City further advised that the permit was being modified to require that the demonstration take place at McIntire Park, which is located more than a mile from Emancipation Park.

At the same time, the City took no action to modify or revoke the permits issued to counter-protestors for demonstrations planned within blocks of Emancipation Park. In revoking Kessler's permit, the City cited "safety concerns" associated with the number of people expected to attend Kessler's rally. However, the City cited no source for those concerns and provided no explanation for why the concerns only resulted in adverse action being taken on Kessler's permit.

On August 10, 2017, Kessler petitioned the federal district court to issue a preliminary injunction to enjoin (i.e., prohibit) the City from interfering with the planned demonstration. In so doing, Kessler claimed the City's decision to revoke the previously granted permit had violated his right to freedom of speech as guaranteed by the First and Fourteenth Amendments.

CONTENT-BASED RESTRICTION

As noted by the federal district court, "a municipal government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." To do so would violate the First Amendment, made applicable to the states and local government through the

Fourteenth Amendment. Moreover, the court acknowledged that "content-based restrictions" by the government are presumed to be unconstitutional. As characterized by the federal district court: "Government regulation of speech is content based if a restriction applies to particular speech because of the topic discussed or the idea or message expressed."

Content-based restrictions are not limited to those that on their face draw distinctions based on the message a speaker conveys. Instead, they include those that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys.

In this particular instance, the federal district court found Kessler had shown that he was likely to prove at trial that "the decision to revoke his permit was based on the content of his speech." In the opinion of the court, Kessler's allegation was supported by the fact "the City solely revoked his permit, but left in place the permits issued to counter-protestors."

The disparity in treatment between the two groups with opposing views suggests that the defendants' decision to revoke Kessler's permit was based on the content of his speech rather than other neutral factors that would be equally applicable to Kessler and those protesting against him. This conclusion is bolstered by other evidence, including communications on social media indicating that members of City Council oppose Kessler's political viewpoint.

Having found sufficient evidence to indicate the City's decision to revoke Kessler's permit constituted a content-based restriction of speech, the federal district court would apply "strict scrutiny" to this decision. In the doing, to pass constitutional muster, the City would have to prove that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."

#### SPECULATIVE CROWD CONCERNS

According to the City, "the decision to revoke Kessler's permit was motivated by the number of people likely to attend the demonstration." The federal district court, however, found the City's concerns about crowd size at Kessler's demonstration were "purely speculative." Based on the record, the court found "no evidence to support the notion that many thousands of individuals are likely to attend the demonstration."

Assuming the City's decision was indeed based on "the number of counter-protestors expected to attend Kessler's demonstration," in the opinion of the court, "merely moving Kessler's demonstration to another park will not avoid a clash of ideologies or prevent confrontation between the two groups." In fact, both sides had acknowledged during the preliminary injunction hearing "critics of Kessler and his beliefs would likely follow him to McIntire Park if his rally is relocated there." Further, "given the timing of the City's decision and the relationship between Kessler's message and Emancipation Park," the court found "supporters of Kessler are likely to still appear at the [Emancipation] Park, even if the location of Kessler's demonstration is moved elsewhere.

Accordingly, the federal district court found "a change in the location of the demonstration would not eliminate the need for members of the City's law enforcement, fire, and emergency

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medical services personnel to appear at Emancipation Park." On the contrary, the court found the change of location for the demonstration "would necessitate having personnel present at two locations in the City."

The federal district court, therefore, concluded the City's "eleventh-hour decision" to revoke Kessler's permit and move his demonstration to another park was not "narrowly tailored to serve compelling state interests." Instead, the federal district court found "the scant record and the undisputed circumstantial evidence weigh substantially against a finding that the relocation of the event furthers a compelling interest and is narrowly tailored to achieve that interest."

Having concluded that Kessler has made the requisite showing of a likelihood of success on the merits of his claim against the City, the federal district also found Kessler would suffer irreparable harm if the City's decision to revoke his permit was allowed to stand.

As noted by the federal district court: "As to irreparable injury, it is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Similarly, the court found protection of Kessler's First Amendment rights were in the public interest. As cited by the court: Injunctions protecting First Amendment freedoms are always in the public interest."

### CONCLUSION

Having found Kessler had demonstrated the requisite likelihood of success, irreparable harm, and public interest necessary to warrant a preliminary injunction, the federal district court issued an order prohibiting the City "from revoking the permit to conduct a demonstration at Emancipation Park on August 12, 2017."

### HOSTILE CROWD PERMIT FEE

Similarly, in the landmark case of *Forsyth County v. Nationalist Movement*, 505 US 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (U.S. 6/19/1992), the Supreme Court of the United States considered the constitutionality of a permit fee based on the estimated cost of maintaining public order for events likely to draw hostile crowds. In this particular instance, the challenged permit ordinance allowed the county administrator to determine what, if any, fee would be imposed for a given activity.

### FACTS OF THE CASE

Hosea Williams, an Atlanta city councilman and civil rights personality, proposed a Forsyth County "March Against Fear and Intimidation" for January 17, 1987. Approximately 90 civil rights demonstrators attempted to parade in Cumming, the county seat. The marchers were met by members of the Forsyth County Defense League (an independent affiliate of The Nationalist Movement), of the Ku Klux Klan, and other Cumming residents. In all, some 400 counterdemonstrators lined the parade route, shouting racial slurs. Eventually, the counterdemonstrators, dramatically outnumbering police officers, forced the parade to a premature halt by throwing rocks and beer bottles.

Williams planned a return march the following weekend which developed into the largest civil

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rights demonstration in the South since the 1960's. On January 24, approximately 20,000 marchers joined civil rights leaders in a parade and rally. The 1,000 counterdemonstrators on the parade route were contained by more than 3,000 state and local police and National Guardsmen. Although there was sporadic rock throwing and 60 counterdemonstrators were arrested, the parade was not interrupted. The demonstration cost over \$670,000 for police protection, of which Forsyth County apparently paid a small portion. The State of Georgia reportedly paid \$579K.

### PUBLIC ORDER PERMIT FEE

"As a direct result" of these two demonstrations, the Forsyth County Board of Commissioners enacted Ordinance 34 on January 27, 1987 "to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes."

The board of commissioners justified the ordinance by explaining that "the cost of necessary and reasonable protection of persons participating in or observing said parades, assemblies, demonstrations, road closings and other related activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible." The ordinance required the permit applicant to defray these costs by paying a fee, the amount of which was to be fixed "from time to time" by the Board.

Ordinance 34 was amended on June 8, 1987, to provide that every permit applicant "shall pay in advance for such permit, for the use of the County, a sum not more than \$1,000.00 for each day such parade, procession, or open air public meeting shall take place." In addition, the county administrator was empowered to "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."

In January 1989, The Nationalist Movement proposed to demonstrate in opposition to the federal holiday commemorating the birthday of Martin Luther King, Jr. In Forsyth County, the Movement sought to "conduct a rally and speeches for one and a half to two hours" on the courthouse steps on a Saturday afternoon. The county imposed a \$100 fee. The fee did not include any calculation for expenses incurred by law enforcement authorities, but was based on 10 hours of the county administrator's time in issuing the permit. The county administrator testified that the cost of his time was deliberately undervalued and that he did not charge for the clerical support involved in processing the application.

The Movement did not pay the fee and did not hold the rally. Instead, the Movement filed a lawsuit in federal district court, requesting a temporary restraining order and permanent injunction prohibiting Forsyth County from "interfering with the Movement's plans."

The federal district court determined that the challenged fee was "based solely upon content-neutral criteria; namely, the actual costs incurred investigating and processing the application." The federal appeals court reversed the federal district court's decision. In the opinion of the appeals court: An ordinance which charges more than a nominal fee for using public forums for public issue speech violates the First Amendment."

### BROAD LICENSING DISCRETION

The Supreme Court of the United States granted certiorari (i.e., a petition to review) to consider "the constitutionality of charging a fee for a speaker in a public forum." As noted by the Court, "in the area of freedom of expression an overbroad regulation" may be invalidated "based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others." In particular, the Court found "an impermissible risk of suppression of ideas" would exist where an ordinance "delegates overly broad discretion to the decisionmaker."

In this particular instance, the Court noted the Forsyth County ordinance would require a permit and a fee before the County would authorize "public speaking, parades, or assemblies in the archetype of a traditional public forum," i.e., public streets and parks. While recognizing a "heavy presumption" against the validity of a prior restraint (i.e., requiring a permit and fee before free speech activities), the Supreme Court acknowledged, "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally." As cited by the Court, a constitutional permit scheme would have to meet the following requirements:

It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.

On appeal, the Movement claimed the county ordinance was invalid because it "did not prescribe adequate standards for the administrator to apply when he sets a permit fee."

According to the Court: "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." To address this risk, the Court would require "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" to contain "narrow, objective, and definite standards to guide the licensing authority" to insure First Amendment rights are preserved:

If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion, by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.

#### REASONABLE FEE JUDGMENT

In pertinent part, the challenged ordinance, as amended, stated the county 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." (Emphasis of the Court.) As interpreted and applied by the county, the ordinance could "apply to any activity on public property -- from parades, to street corner speeches, to bike races -- and the fee assessed may reflect the county's police and administrative costs." Moreover, in any given instance, the county administrator would decide whether "the fee would include any or all of the county's administrative and

security expenses." Further, the county acknowledged that the ordinance could authorize the county administrator to charge no fee.

At trial, the county administrator had testified that he "based the fee on his own judgment of what would be reasonable." In this particular instance, the county administrator chose not to include in the permit fee the cost of county clerical support and staff as an "expense incident to the administration." Further, the county administrator testified that he "chose not to include any charge for expected security expense."

On two prior occasions, the county administrator had assessed a fee of \$100 for a permit for the Movement. In this particular instance, the administrator testified that he assessed the same \$100 fee without specifying whether "the Movement was seeking the same use of county property or that it required the same amount of administrative time to process."

The county administrator further testified that he had "charged bike-race organizers \$25 to hold a race on county roads." In so doing, the county administrator "did not explain why processing a bike-race permit demanded less administrative time than processing a parade permit or why he had chosen to assess \$25 in that instance." Further, the county administrator testified, "in other cases, the county required neither a permit nor a fee for activities in other county facilities or on county land." During oral argument before the Supreme Court, Forsyth County had admitted "the administrator had levied a \$5 fee on the Girl Scouts for an activity on county property."

#### ADMINISTRATIVE DISCRETION

Based on county's own description of the construction and implementation of the ordinance, the Supreme Court could not find any "narrowly drawn, reasonable and definite standards, guiding the hand of the Forsyth County administrator." On the contrary, the Supreme Court found: "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.

#### MEASURING SPEECH HOSTILITY

In the opinion of the Supreme Court, the challenged permit ordinance contained "more than the possibility of censorship through uncontrolled discretion." In particular, the Supreme Court found "the ordinance often requires that the fee be based on the content of the speech."

In order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response. 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.

While acknowledging "the cost of policing relates to content," Forsyth County had claimed the challenged ordinance was "content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order." The Supreme Court rejected the notion that "the fee's justification has nothing to do with content." In the opinion of the Court, the cost of maintaining public order refers to those costs "associated with the public's reaction to the speech." According to the Court: "Listeners' reaction to speech is not a content-neutral basis for regulation."

#### POLICE PROTECTION PAYMENT

In this particular instance, the Supreme Court found Forsyth County "imposed a fee only when it became necessary to provide security for parade participants from angry crowds opposing their message."

The ordinance itself makes plain that the costs at issue are those needed for "necessary and reasonable protection of persons participating in or observing" the speech. Repayment for police protection is the "most important" purpose underlying the ordinance... At no point, in any level of proceedings, has petitioner [Forsyth County] intimated that it did not construe the ordinance consistent with its language permitting fees to be charged for the cost of police protection from hostile crowds... While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee.

In contrast to the Movement's proposed rally, the Court noted Forsyth County had not charged a fee for "police protection for the 4th of July parades, although they were substantial parades, which required the closing of streets and drew large crowds." Accordingly, the Supreme Court reiterated long held precedent: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Moreover, the Supreme Court acknowledged: "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."

Accordingly, the Supreme Court affirmed the judgment of the federal appeals court which had found the challenged ordinance violated the First Amendment.

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