

OFFICIAL TRANSCRIPT .  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: FORSYTH COUNTY, GEORGIA, Petitioner V.

THE NATIONALIST MOVEMENT

CASE NO: 91-538

PLACE: Washington, D.C.

DATE: March 31, 1992

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   FORSYTH COUNTY, GEORGIA,                   :

4                   Petitioner                   :

5                   v.   :   No. 91-538

6   THE NATIONALIST MOVEMENT                   :

7   - - - - -X

8   Washington, D.C.

9   Tuesday, March 31, 1992

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:10 a.m.

13   APPEARANCES:

14   ROBERT S. STUBBS III. ESQ., County Attorney for Forsyth  
15                   County, Cumming, Georgia; on behalf of the  
16                   Petitioner.

17   RICHARD BARRETT, ESQ., Learned, Mississippi; on behalf of  
18                   the Respondent.

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ROBERT S. STUBBS III, ESQ.		
On behalf of the Petitioner		3
RICHARD BARRETT, ESQ.		
On behalf of the Respondent		26



1 PROCEEDINGS

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in argument No. 91-538, Forsyth County,  
5 Georgia v. The Nationalist Movement.

6 Mr. Stubbs.

7 Is the name of the county pronounced Forsyth or  
8 Forsyth?

9 MR. STUBBS: Forsyth, Your Honor.

10 QUESTION: Forsyth, very good.

11 ORAL ARGUMENT OF ROBERT S. STUBBS III

12 ON BEHALF OF THE PETITIONER

13 MR. STUBBS: Mr. Chief Justice, and may it  
14 please the Court:

15 Forsyth County, which is a political subdivision  
16 of the State of Georgia, comes before you to ask you to  
17 reverse a decision of the Eleventh Circuit Court of  
18 Appeals which invalidated as unconstitutional on its face  
19 our Ordinance 34, which is our parade ordinance.

20 That ordinance imposes a fee for the use of  
21 county property for expressive purposes. The court below  
22 found that the cap that we have on this fee of \$1,000  
23 exceeded a nominal amount. They based that finding on a  
24 reading of a case of this Court from 1943 called Murdock  
25 v. Pennsylvania.

1           That case, we feel, does not say what the  
2   Eleventh Circuit says it says, and we believe that the  
3   true precedent to rely upon in our case is Cox v. New  
4   Hampshire, a 1941 case of this Court, wherein at the  
5   beginning of the consideration of the fee in the New  
6   Hampshire statute, this Court said that there remains the  
7   question of license fees, which as the court said,  
8   referring to the New Hampshire court, had a permissible  
9   range from \$300 to a nominal amount, a recognition we  
10   believe that indicates there is a difference between \$300  
11   and a nominal amount in 1941.

12           We believe the base upon which this Court  
13   utilized in Cox to reach its conclusion there, may begin  
14   with a review of the Constitution, article 4, section 3 of  
15   the second paragraph which grants Congress, and I quote:  
16   the power to make all needful rules and regulations  
17   respecting property belonging to it.

18           The Tenth Amendment reserves to the States those  
19   powers not otherwise taken away from them by the  
20   Constitution, and this Court then in Cox stated basically  
21   that it was undoubted that there is authority in a local  
22   government to control the use of its property.

23           We believe that if this were not a government,  
24   and if it did not involve the First Amendment, that there  
25   would be no question that charging a fee for the use of

1 one's own property would be accepted as an inherent right  
2 of ownership.

3 What this case represents is a clash between  
4 that inherent right of property ownership and the public's  
5 First Amendment rights to use public property for First  
6 Amendment purposes.

7 QUESTION: Mr. Stubbs, that goes a little far,  
8 doesn't it? I mean, can the county charge me for jumping  
9 up on a soapbox and just all by myself giving a speech,  
10 not causing any interference with traffic, not requiring  
11 any policeman?

12 MR. STUBBS: Our ordinance would not require  
13 you --

14 QUESTION: I know your ordinance wouldn't, but  
15 your principle would allow the county to charge me for  
16 that, it's the county's property after all. Do you think  
17 the Fifth Amendment would allow you to charge for that?

18 MR. STUBBS: I think the Fifth Amendment allows  
19 you to, if you have to administer an ordinance, and if you  
20 have to police demonstrations, to charge a fee to offset  
21 the cost of doing that. To charge you for the privilege  
22 of free speech, that is not allowed and that is not what  
23 we are doing.

24 QUESTION: But that is the principle you were  
25 arguing. You were arguing property rights it seems to me,

1 that just on the basis that it owns the property, the  
2 State, despite the First Amendment, can charge. That  
3 doesn't seem to me right.

4 MR. STUBBS: I don't mean to say that there is a  
5 rental for the use of the property. The fee is designed  
6 to offset time for administration and the policing costs  
7 which may be necessitated depending on the nature of the  
8 demonstration.

9 QUESTION: Now are we dealing here with the  
10 quintessential public forum, the streets and open spaces  
11 in the county?

12 MR. STUBBS: Justice O'Connor, we believe that  
13 for purposes of this case, the courthouse grounds can be  
14 considered as a quintessential public forum; however, we  
15 would note that in an Eleventh Circuit case, which name  
16 escapes me, they took the Richard Russell Federal Building  
17 in Atlanta and basically differentiated the different  
18 types of forum, depending on where you stood in the  
19 plaza --

20 QUESTION: For purposes of our resolution of  
21 this case, you agree that we should decide it on the  
22 grounds that it is a public forum?

23 MR. STUBBS: We have no problem with you  
24 deciding it on that basis.

25 QUESTION: Now do you think that the



1 Constitution requires the county to make any exception for  
2 indigents and those who are unable to pay a fee?

3 MR. STUBBS: Yes, ma'am, we believe that, and we  
4 do --

5 QUESTION: Do you think that this ordinance does  
6 that when it doesn't extend it to a group that has no  
7 assets?

8 MR. STUBBS: We believe we can make that  
9 distinction.

10 QUESTION: How would you justify that, do you  
11 suppose?

12 MR. STUBBS: We justify it because a group,  
13 first of all, a group -- each of the individuals, if they  
14 don't have any assets, that group can then get a waiver of  
15 the fee.

16 QUESTION: But not under the terms of the  
17 ordinance, which would extend only to individuals, I  
18 thought.

19 MR. STUBBS: No, I think the ordinance indicates  
20 that each individual in a group applies for a waiver, then  
21 the fee can be waived.

22 QUESTION: So that if the group organizing a  
23 particular gathering on the public streets in Forsyth  
24 County wanted to get a permit, you would want an affidavit  
25 of indigency from every person participating, is that it?

1 MR. STUBBS: If it was a group that was not a  
2 formal association or a corporation, under the terms of  
3 our ordinance, that is what we are stuck with until we can  
4 get back and fix it.

5 And as the Eleventh Circuit and the district  
6 judge recognized, we have got a cumbersome problem with  
7 that particular feature of our ordinance.

8 QUESTION: And if it were an informally  
9 organized group?

10 MR. STUBBS: We think each individual could come  
11 in and sign an indigency waiver.

12 QUESTION: Do you think that is at all  
13 burdensome on the right of speech?

14 MR. STUBBS: Not on the right of speech. It is  
15 inefficient, it is cumbersome, and we would like to fix it  
16 when we get a chance --

17 QUESTION: What is the principle upon which you  
18 base your conclusion that there must be an indigent  
19 waiver? Why don't the rich have an equal right to speech?

20 MR. STUBBS: Justice Kennedy, we have reviewed  
21 or tried to review this Court's cases, and there are  
22 numerous indications in the past that the constitutional  
23 rights that we all have cannot be denied by lack of funds.

24 QUESTION: I can think of the appellate  
25 transcript case, Griffin and Illinois, and I stop about

1       there. Can you give me some help?

2               MR. STUBBS: The poll tax case. .

3               QUESTION: Pardon me?

4               MR. STUBBS: The poll tax cases, I believe, were

5       only --

6               QUESTION: The poll tax cases? .

7               MR. STUBBS: Or some of them. Where we draw the

8       line, though, is in an organized group like The

9       Nationalist Movement which is a corporation, and we

10      feel --

11              QUESTION: Wait a minute. In the poll tax cases

12      were you allowed to charge poll taxes to rich people but

13      not to poor people? Is that how we defined those cases?

14              MR. STUBBS: As we read them, they invalidated

15      the poll tax because there was a bad motivation there.

16              QUESTION: That's right. Why isn't the same

17      here, you are either entitled to charge or you are not

18      entitled to charge. If you are entitled to charge, you

19      can charge rich and poor alike.

20              MR. STUBBS: There is an alternative way to

21      spread your message than to use county property, and a

22      poll tax situation, if you didn't pay the tax you couldn't

23      vote. There was no alternative way to vote.

24              QUESTION: That's right, you are agreeing with

25      me, then.

1 MR. STUBBS: Yes.

2 QUESTION: You don't have to make this  
3 exception, you have just chosen to make this exception  
4 between the rich and the poor?

5 MR. STUBBS: We have chosen to make the  
6 exception, but we believe that it is required to the  
7 extent that if a poor person or a group of poor people  
8 want to engage in some kind of free speech, that they  
9 should be entitled to do so if they can't afford to pay  
10 the fee.

11 QUESTION: We are not talking about free  
12 speech -- we are talking about only parades, right? Do  
13 they have to do a parade? Can't they stand out on the  
14 street and deliver their message?

15 MR. STUBBS: Yes, but if it is our street, we  
16 would assume that they come under our ordinance and would  
17 have to apply for a permit and would ordinarily be charged  
18 a fee, but we are providing an indigency waiver if they  
19 cannot afford that if they are individuals, whether we  
20 have to or not, we thought we did.

21 QUESTION: That is what we are here to inquire,  
22 I thought that was your submission to Justice O'Connor,  
23 that a indigency waiver is required, but it seems to me  
24 that is a very important part of this case.

25 MR. STUBBS: Justice Kennedy, the Eleventh



1 Circuit didn't reach that issue and it wasn't briefed in  
2 any great detail, and I would assume that whatever happens  
3 to this case, the possibility exists that the Eleventh  
4 Circuit may get to deal with the indigency provision  
5 again.

6 As I have said, argument in the district court  
7 and in the court of appeals and probably here today  
8 indicates how cumbersome and burdensome our indigency  
9 provision is. But until this litigation is ended, we  
10 really have not attempted to make it more workable.

11 QUESTION: Is there some claim by the  
12 respondents here that they were indigent?

13 MR. STUBBS: Yes.

14 QUESTION: How did the lower courts treat that?

15 MR. STUBBS: The Eleventh Circuit didn't reach  
16 it. The district court ruled that they had no right to an  
17 indigency claim based on an analogy to Title 28, U.S. Code  
18 1915, where the Federal courts don't allow corporations to  
19 proceed in forma pauperis.

20 QUESTION: Did the respondent fill out the  
21 necessary affidavit specified in the ordinance?

22 MR. STUBBS: Yes, sir.

23 QUESTION: Did they then get a permit or --

24 MR. STUBBS: They were issued a permit  
25 contingent on payment of a \$100 fee and they would not pay

1 so they did not march, and this is how the case got here.

2 QUESTION: Mr. Stubbs, the county administrator  
3 in this case just considered costs of administration of  
4 the permit application?

5 MR. STUBBS: Yes, ma'am.

6 QUESTION: Why did the administrator not  
7 consider the cost of police required for the march, do you  
8 suppose?

9 MR. STUBBS: Justice O'Connor, in 1985 the  
10 Eleventh Circuit came down with a decision which basically  
11 said that they read -- it didn't have anything to do with  
12 Murdock, they just said that you could not charge a fee  
13 for police activities.

14 We were faced with --

15 QUESTION: Your ordinance refers to the cost of  
16 police.

17 MR. STUBBS: That's correct.

18 QUESTION: But in deference to the Eleventh  
19 Circuit's rulings in some other case --

20 MR. STUBBS: We did not exercise that option.

21 QUESTION: I see.

22 QUESTION: But I take it the principle upon  
23 which you rest here would not limit your right in the  
24 manner in which the Eleventh Circuit did. In other words,  
25 the principle that you espouse here would authorize you to

1 charge for the cost of police, subject to an indigency  
2 exception.

3 MR. STUBBS: Yes, sir.

4 QUESTION: So that in your view, you could have  
5 had an ordinance that would have allowed you to charge  
6 \$700,000 for the civil rights demonstrations or parades in  
7 the earlier instances?

8 MR. STUBBS: Our ordinance puts a cap --

9 QUESTION: I know yours does, but your principle  
10 would allow you to do that, is that correct?

11 MR. STUBBS: Our principle would, Justice  
12 Souter. What we were concerned about is that in New  
13 Hampshire in 1941, their ordinance had a cap and we felt  
14 that therefore, we ought to have a cap --

15 QUESTION: Well, no, I realize that, but I just  
16 want to understand what the rule is that you are  
17 ultimately relying on, subject to the cap. Do you think  
18 you have a problem if you, in effect, are allowed  
19 literally or would be allowed literally to adjust the fee  
20 in accordance with the difficulty of policing the  
21 demonstration because you would thereby have a  
22 relationship between the likely controversial nature of  
23 the message or of the point being made by the parade or  
24 demonstration which would in effect make it content-based  
25 or viewpoint-based?

1 MR. STUBBS: That is one of the reasons why we  
2 thought the cap in New Hampshire, and our cap, is probably  
3 necessary.

4 QUESTION: But can you get out of it that way,  
5 because as I understand it, at least within your \$1,000  
6 limit, you would still be adjusting or you would still be  
7 setting your fee within the \$1,000 limit depending upon  
8 the likely cost, and that would bear a relationship, I  
9 suppose, to the controversial nature of what was being  
10 demonstrated for.

11 MR. STUBBS: Well, we have a balancing of  
12 interests here, obviously. There are cases of this Court  
13 which indicate that sometimes there is an incidental  
14 effect upon First Amendment freedoms when fees are charged  
15 or time, place or manner restrictions are put on  
16 demonstrators.

17 QUESTION: But this isn't a time, place or  
18 manner restriction --

19 MR. STUBBS: We believe it is, Justice Souter,  
20 because --

21 QUESTION: How is it a time, place or manner  
22 restriction if it is varying depending on -- or varying in  
23 relationship to the content of the message?

24 MR. STUBBS: Well, first of all --

25 QUESTION: I mean, by definition, you know, what



1 is allowed under time, place and manner starts with the  
2 assumption that you don't have that kind of a  
3 content-based determination.

4 MR. STUBBS: Well, it's not -- the content  
5 doesn't affect how the ordinance is administered. It  
6 affects costs for policing, that is the only way the  
7 content affects anything.

8 QUESTION: What's the difference?

9 MR. STUBBS: Well, I think --.

10 QUESTION: I mean, if you are going to -- if you  
11 are say that your principle allows you to charge in  
12 relation to the cost of policing, you are saying the same  
13 thing.

14 MR. STUBBS: Well, Justice Souter, the only way  
15 I can answer that question is to say that in Cox v. New  
16 Hampshire we used the same language that they did there.  
17 That was a time, place and manner case. We feel that  
18 where you have a licensing or regulation scheme, that is  
19 what time, place or manner is, you have a permit required  
20 so that somebody knows that somebody is coming to  
21 demonstrate and they can do what needs to be done to  
22 adequately police and take care and prepare for whatever  
23 the demonstration is.

24 And that whole scheme takes money, and we  
25 believe that is what was recognized in Cox --

1           QUESTION: But basically, you are resting on  
2 Cox? I mean, if we think Cox is no longer consonant with  
3 present First Amendment analysis, you do not, as I  
4 understand it, have an argument that nonetheless, your  
5 scheme should survive?

6           MR. STUBBS: We have a problem if Cox is no  
7 longer viable.

8           QUESTION: Mr. Stubbs, am I correct that you not  
9 only did not charge for the police protection which you  
10 were authorized to charge for, but you didn't even charge  
11 the full amount of the administrative costs?

12          MR. STUBBS: That's correct, Your Honor.

13          QUESTION: You reduced what it might have been.

14          MR. STUBBS: The administrator made a  
15 determination that he wanted to charge what had been  
16 charged the year before so that there would be no --

17          QUESTION: That is very generous of him. I  
18 mean, can he pick which organizations he decides to be  
19 generous with? I mean, would he have been as generous if  
20 this were a Communist Party demonstration or some other  
21 group? What kind of an ordinance is that, anyway?

22          MR. STUBBS: I think the generosity was an  
23 attempt to avoid what has happened, to coming up here, and  
24 not out of agreement with the message by any means.

25          QUESTION: Well, how do we know that? I should

1 think you have to charge all groups on some fixed basis  
2 and not -- you make the point in your brief as though it  
3 is a point in your favor that you didn't charge the full  
4 amount that could have been charged. I don't take it as a  
5 point in your favor. It is one of the things I worry  
6 about with this ordinance, that it allows people to scale  
7 the fees as they wish.

8 MR. STUBBS: The ordinance doesn't necessarily  
9 allow it. I think an argument could be made that by  
10 applying it and reducing it, there was some kind of  
11 unequal treatment given The Nationalist Movement as  
12 compared to others who might come in who may not get the  
13 same kind of treatment. I don't think it has anything to  
14 do with the facial constitutionality of the ordinance  
15 though which is, as I understand it, what the issue -- at  
16 least, that is what the Eleventh Circuit ruled on here.

17 They didn't get to the applied aspects --

18 QUESTION: Mr. Stubbs, let's assume that you  
19 could meet Justice Scalia's concern and that the  
20 generosity, or we won't call it generosity, the reduction  
21 was subject to some principle, so that it wouldn't be a  
22 danger of its varying depending on the sympathy or lack of  
23 sympathy with the organization, assuming that the amounts  
24 would be, on some principle basis, reduced down to what  
25 perhaps is a nominal amount in today's values; don't you

1 then encounter a different problem, that what you are  
2 charging really doesn't bear any relationship at all  
3 between, or to, rather, the expense that you are trying to  
4 offset?

5 I mean, if you charged \$100 or even your \$1,000  
6 in the case of the \$700,000 parade, I mean, there just  
7 wouldn't be any significant relationship between what you  
8 were doing and the object which supposedly justifies what  
9 you are doing, i.e., offsetting costs.

10 MR. STUBBS: Justice Souter, we addressed that  
11 in our brief by citing this Court's language in  
12 Massachusetts v. United States where the Court recognized,  
13 and I think that was a supremacy clause case, that the  
14 costs the FAA was charging States and anybody else using  
15 their facilities was negligible in relation to the entire  
16 costs, but the Court indicated that they could  
17 nevertheless be considered, because Congress considered it  
18 that way, as an integral and essential part of the network  
19 of user fees that the Congress had set up.

20 And we feel that the same thing is being  
21 accomplished here. It may be negligible --

22 QUESTION: Is that going to pass First Amendment  
23 muster today?

24 MR. STUBBS: Well, Massachusetts v. United  
25 States is not that old of a case, Your Honor. I think



1 that is '78 or thereabouts, and I don't think we have  
2 moved that far in the last 14 years, but, in other words,  
3 what I am saying is any impact to offset our costs is a  
4 laudable gesture, I think, on the part of local government  
5 or any government.

6 And whether or not it bears an actual  
7 relationship should not be fatal to what we are asking to  
8 be allowed to do.

9 We would reemphasize the fact that, as local  
10 government is wont to do, we have to try, the best we can,  
11 to word these ordinances in view of the First Amendment  
12 considerations, and that is why we utilize the language  
13 from Cox, figuring that if we could not utilize this  
14 Court's language, there is not much way of doing what we  
15 wanted to do legally.

16 We don't believe that the distinction we are  
17 making between utilizing a user fee concept as opposed to  
18 a general taxation is something that should cause any  
19 problem either. I think all local government or any  
20 government has the ability to decide whether they want to  
21 raise revenues by taxing their respective citizens or  
22 assessing fees against those who come in and want to use  
23 their facilities, especially when you have a situation  
24 where most of the people who may be utilizing whatever  
25 facilities are available are not tax-paying citizens.

1           We do believe, in spite of the alleged equitor's  
2 veto which I am sure concerns the Court to some extent,  
3 that we have been as content-neutral as possible. We do  
4 not believe there is any basis to allege, and the district  
5 court found as a matter of fact that we had acted in good  
6 faith with regard to the -- viewing the message of The  
7 Nationalist Movement, and at this point that has never  
8 been seriously attacked, even by the respondent in our  
9 view.

10           The concern that the respondent, The Nationalist  
11 Movement, raises concerning the impact of any kind of fee  
12 on the ability of anyone to express themselves on  
13 important issues in the public, we believe is misplaced.  
14 There are many examples of burdens on resources of those  
15 wishing to spread their message.

16           You don't have free access to radio. The air is  
17 free, but the frequencies are auctioned off and controlled  
18 and people pay for those, and then when you want to buy  
19 time, you have to do that, you have to buy time.

20           Taken to its logical extreme, if The Nationalist  
21 Movement's founder wanted to travel from Mississippi to  
22 Georgia for the one and only purpose of spreading his  
23 message in Forsyth County, the sales taxes on his airplane  
24 ticket or the gas taxes on his automobile would be an  
25 impact on his ability to spread his message, but it is

1 not, it is incidental and it is a burden that we all have  
2 to bear. There is just simply no free lunch.

3 QUESTION: Once again, you wouldn't say that if  
4 it were just, or would you, if it were just an individual  
5 who wants to stop passers-by. He is not parading. He  
6 just wants to speak on the sidewalk.

7 MR. STUBBS: Our ordinance has made a policy  
8 decision --

9 QUESTION: I am not talking about your  
10 ordinance. I am talking about, would you make the  
11 statement that you just made, that it is just like  
12 charging for an airplane ticket, we can charge him for the  
13 sidewalk?

14 MR. STUBBS: If there is really no  
15 administrative cost to the county and there is no policing  
16 requirement in that situation, there is no need for any  
17 fee because there would be no basis for it, and it would  
18 be struck down.

19 QUESTION: I see, and is that the case with  
20 radio time too? You can't charge for it if it is not  
21 costing you anything?

22 MR. STUBBS: Apparently, the Government --

23 QUESTION: I mean, suppose I have all this empty  
24 radio time, with cable channels I suppose there is a lot  
25 of dead time, if it doesn't cost you anything you can't

1 charge for it?

2 . MR. STUBBS: As we understand the way the FCC  
3 operates, you pay to be able to have one of those channels  
4 or those frequencies, and therefore, after that it is your  
5 decision what you charge. I don't know how much  
6 Government involvement goes on after that, but it does and  
7 you do have to pay. It is not free unless they, out of  
8 the goodness of their heart, those who have frequencies,  
9 want to give you the time.

10 QUESTION: And you think streets are the same?

11 MR. STUBBS: I don't think they are the same,  
12 but it impacts on First Amendment expression, whether it  
13 is the same or not, and therefore we don't necessarily see  
14 why there should be any great concern if the fees are  
15 reasonable and are not related to content, and are related  
16 to direct costs. If there is no cost then there should be  
17 no fee, and we don't charge one.

18 QUESTION: Why isn't this case like the instance  
19 where a municipality charged ink used by the press?

20 MR. STUBBS: Excuse me, I didn't hear that.

21 QUESTION: Why isn't this a case like the one  
22 where the Minnesota Star was challenging the ordinance in  
23 which the city taxed ink used by the press? I mean, it  
24 seems to me that that is much closer to this case than  
25 your hypothetical about a sales tax on a air ticket that



1 everybody has to pay. This is a tax that has a particular  
2 bearing on speech.

3 MR. STUBBS: I am trying to remember the facts  
4 of the Minnesota Star, but I believe it had something to  
5 do with where you put your papers.

6 QUESTION: Suppose you had a tax on ink.

7 MR. STUBBS: On ink?

8 QUESTION: On ink, that is used by the print  
9 media, and the whole bearing of the tax, the whole burden  
10 of the tax falls on the media. We have ruled that that is  
11 unconstitutional, have we not?

12 MR. STUBBS: I am not familiar with the case,  
13 Justice Kennedy, I apologize. I don't -- if there is a  
14 tax on ink and anybody that buys that ink has to pay that  
15 tax, I would not see anything particularly wrong --

16 QUESTION: Suppose the whole burden of the tax  
17 falls on the press because there was an exemption in that  
18 case for small purchases of ink, just ink in bulk. Isn't  
19 that what this case is? This is a tax that has a real  
20 burden on speech and expression and on nothing else. Am I  
21 wrong about that? Does it apply to company picnics or  
22 something?

23 MR. STUBBS: We don't believe it is. It is a  
24 tax -- it is not a tax at all, it is a fee to offset our  
25 costs in providing access, property, policing and

1 administering an ordinance, for people who wish to do free  
2 expression. It has nothing to do with content, other than  
3 sometimes increasing the cost of policing, which we have  
4 tried to cap.

5 Therefore, we don't believe it is a tax on free  
6 speech. It is not like Murdock.

7 QUESTION: I am not saying it is a tax on free  
8 speech. I am saying the burden falls on speech.

9 MR. STUBBS: But there are other burdens on  
10 speech, any time, place or manner --

11 QUESTION: But they are general burdens. This  
12 is a specific one.

13 MR. STUBBS: It is specific in that it's money,  
14 but it is not specific in that it offsets out-of-pocket  
15 expenditures or time by salaried employees for the county,  
16 and therefore, we believe we are entitled to recoup it  
17 based on the Cox v. New Hampshire case, which we believe  
18 was reasonable and logical and has not been -- and there  
19 appears to be no reason that we can see why it should not  
20 still have vitality --

21 QUESTION: Do you make charges for bike races,  
22 either a marathon or a bike race in town --

23 MR. STUBBS: That's correct, we do.

24 QUESTION: You do, under a different ordinance?

25 MR. STUBBS: No, this ordinance.

1 QUESTION: Under this ordinance?

2 MR. STUBBS: Under this ordinance. Anybody who  
3 wants to use county property for any reason --

4 QUESTION: I thought it just applied to parades,  
5 processions or open air public meetings.

6 MR. STUBBS: Well, a parade, a procession --

7 QUESTION: You consider a bike race a parade or  
8 a procession?

9 MR. STUBBS: We would.

10 QUESTION: Wow.

11 MR. STUBBS: It is just an attempt to make sure  
12 we know what is going on, where it's going on, and that we  
13 can take care of it properly, and we have charged the fee,  
14 to numerous types of different activities that have  
15 occurred in the county, on county courthouse property, or  
16 on the streets.

17 QUESTION: Does the record tell us  
18 whether -- what variation in the fees there has been for  
19 these other events like bike races and so forth?

20 MR. STUBBS: I hesitate, Justice Stevens,  
21 because there were two cases and in one of them, the  
22 record would reflect that. I don't know whether it is  
23 this one or the one that happened before this in the  
24 district court, where there was testimony about different  
25 fees that had been charged for other activities.

1 QUESTION: So it is a matter of public record in  
2 one of the two cases?

3 MR. STUBBS: Yes, sir.

4 QUESTION: What does the record show?

5 MR. STUBBS: I know the administrator testified,  
6 I think he has charged the Girl Scouts \$5.00 for a little  
7 activity that they had. We have a little gazebo that sits  
8 on the courthouse corner --

9 QUESTION: At least it is not a flat \$100.00  
10 from everybody --

11 MR. STUBBS: No, sir.

12 QUESTION: -- even though I suppose the  
13 administration is pretty much the same, the cost of  
14 administration probably is pretty much the same?

15 MR. STUBBS: It depends, Justice Stevens,  
16 because if it is a very simple thing like the Girl Scouts,  
17 then he simply does what he does and issues a permit and  
18 away we go. If it something that requires his  
19 coordination with the sheriff and the FBI, as in this  
20 case, the obviously that is a greater time.

21 Thank you.

22 QUESTION: Thank you, Mr. Stubbs.

23 Mr. Barrett, we'll hear from you.

24 ORAL ARGUMENT OF RICHARD BARRETT

25 ON BEHALF OF THE RESPONDENT



1 MR. BARRETT: Mr. Chief Justice, if it please  
2 the Court:

3 If the right of the people to peacefully  
4 assemble to petition the Government becomes only a  
5 privilege then the county becomes a kingdom. The  
6 courthouse is a castle and the citizen is a subject. The  
7 moat around this castle, if you will, is the \$1,000 permit  
8 fee for those seeking to assemble on the steps, and there  
9 is no drawbridge for either the poor who have no fee to  
10 pay for the steps, or for the free, who refuse to kneel  
11 upon the steps.

12 Here is the battering ram against the palace of  
13 privilege, it is the inalienable and universal rights of  
14 man, and here is the crossbow against the ramparts of  
15 tyranny. It is the First Amendment.

16 And here are the keys to the kingdom: 1943,  
17 Murdock. There can be no charge for the enjoyment of a  
18 right guaranteed by the Federal Constitution. 1944,  
19 Follett. There may not even be a \$1.00 per day fee to  
20 exercise rights under the First Amendment.

21 QUESTION: Mr. Barrett, do you think those cases  
22 overruled Cox?

23 MR. BARRETT: Cox was adopted, Your Honor, at a  
24 time --

25 QUESTION: Will you answer my question?

1 MR. BARRETT: They were consistent with Cox,  
2 Your Honor.

3 QUESTION: But Cox, Cox spoke of a fee ranging  
4 from a nominal amount to \$300.00 in 1941 and said there  
5 was nothing unconstitutional about that fee.

6 MR. BARRETT: First of all, Your Honor, in 1941  
7 there was no public forum doctrine. That was developed  
8 recently --

9 QUESTION: You said Cox was consistent with  
10 Follett and the other case.

11 MR. BARRETT: Yes, Your Honor.

12 QUESTION: Okay.

13 MR. BARRETT: I will tell you why if I may.

14 QUESTION: Yes, please do.

15 MR. BARRETT: First of all, Cox spoke  
16 specifically that it was distinguished from holding an  
17 open public meeting. Jameson v. Texas a year later said  
18 that Cox dealt with the convenience of the traveling  
19 public. It stood for the idea that you would have a  
20 permit so that competing interests wouldn't occupy the  
21 same space at the same time, we have no quarrel with that  
22 argument.

23 However, Your Honor, in Murdock --

24 QUESTION: Cox just dealt with a parade, I mean,  
25 with a meeting in the streets, and specifically noted that

1 there was no question of passing out literature or  
2 solicitation or anything like that.

3 MR. BARRETT: Correct.

4 QUESTION: So we are just talking about a -- and  
5 Murdock was something else again.

6 MR. BARRETT: Murdock, Your Honor, if it please  
7 the Court, laid down the rule to qualify Cox so that it  
8 said that when there was no right for there to be a charge  
9 or a tax upon the poor, it also --

10 QUESTION: Yes, but Murdock didn't deal with a  
11 parade.

12 QUESTION: It didn't say that.

13 QUESTION: It didn't deal with a parade at all,  
14 Murdock.

15 MR. BARRETT: No, Your Honor, it simply  
16 stated --

17 QUESTION: This was handing out literature.

18 MR. BARRETT: Yes, Your Honor.

19 QUESTION: The case in point here is Cox because  
20 this is a parade and Cox dealt with a parade. Murdock  
21 didn't deal with the situation you have here or with the  
22 situation that Cox dealt with.

23 MR. BARRETT: If it please the Court, Your  
24 Honor, this is not a parade. There is no march involved  
25 here. This is simply using the traditional quintessential

1 public forum for an open-air meeting. It is not a parade..

2 QUESTION: It entails the same sort of expenses  
3 for the county as a parade would.

4 MR. BARRETT: Well, Your Honor, perhaps the  
5 expense is the right of the poor to assemble in public,  
6 and I submit that the expense is cutting off the right of  
7 the poor; also under Terminello in 1949 which is the  
8 classic case of the heckler's veto, because the cost then  
9 would be if the demonstrator says --

10 QUESTION: I am not at all sure Terminello is  
11 even good law.

12 MR. BARRETT: I am sorry, Your Honor.

13 QUESTION: I said I am not at all sure  
14 Terminello is even good law anymore.

15 MR. BARRETT: Perhaps I can tell you how in  
16 Forsyth County when demonstrators threatened, and also in  
17 Atlanta which is cited somewhat in the appendix, when  
18 demonstrators said they were going to come and throw rocks  
19 and throw bricks, then the police had to respond to that  
20 emergency and then under the county's argument, the  
21 would-be assemblers or paraders as the case may be, are  
22 then to be charged for the cost of defending against the  
23 hecklers?

24 I submit Your Honor that that simply is a  
25 heckler's veto. It is as onerous today as it is in 1949.



1               Next of course was the Alabama case, 19 --

2               QUESTION: I am not sure of the theory of your  
3 case. Suppose that an individual or a group that wanted  
4 to use the public square could afford the fee. Could the  
5 municipality charge that fee consistent with the  
6 Constitution?

7               MR. BARRETT: No, Your Honor.

8               QUESTION: Well, then it has nothing to do with  
9 the poor.

10              MR. BARRETT: Nothing to do with which?

11              QUESTION: Then it has nothing to do with the  
12 distinction in rich and poor.

13              MR. BARRETT: I would agree with that, Your  
14 Honor.

15              QUESTION: So then we shouldn't be talking about  
16 the poor, and that was the whole thrust of your argument  
17 as I understood it from --

18              MR. BARRETT: We are talking about the poor  
19 because we have a group of individuals who were denied  
20 under --

21              QUESTION: But the principle of the case that  
22 you are arguing has nothing to do with that, then why  
23 don't we proceed to the principle that you are arguing,  
24 and I would like to know what that principle is.

25              MR. BARRETT: Well, we have several, Your Honor.

1 The poor is one of them, and I cite the poll tax cases,  
2 the cases where people applied to run for office and were  
3 waived a fee. In this particular case, I --

4 QUESTION: Were they allowed to charge poll  
5 taxes to the rich?

6 MR. BARRETT: Certainly, Your Honor.

7 QUESTION: Is that right?

8 MR. BARRETT: I would think.

9 QUESTION: I didn't know --

10 MR. BARRETT: I mean before the Court's decision  
11 they could, of course.

12 QUESTION: No, I mean afterwards.

13 MR. BARRETT: No, sir.

14 QUESTION: So once again, as Justice Kennedy  
15 says, it doesn't support your poor argument. What  
16 supports your poor argument?

17 MR. BARRETT: In this particular case, Your  
18 Honor, the assets of the organization were \$90 and some  
19 cents. It simply couldn't pay the fee, even if it would  
20 have paid the fee.

21 QUESTION: Right, and if it could have paid the  
22 fee, you would have no problem.

23 MR. BARRETT: Yes, we would, Your Honor. We  
24 would have paid the fee.

25 QUESTION: Then why don't you talk about your

1 problem instead of raising this poverty thing which has  
2 nothing to do with your case, does it?

3 MR. BARRETT: It does in this respect --

4 QUESTION: Especially since there is a waiver  
5 for poverty in the ordinance.

6 MR. BARRETT: May I address that, Your Honor?

7 QUESTION: Sure.

8 MR. BARRETT: Let's say for a moment that you  
9 see, here is the courthouse green. The question is,  
10 someone comes up, a veteran from another State. He says I  
11 want to march today or I want to assemble. He says, well,  
12 you didn't fill out an affidavit of poverty. What about  
13 his rights to travel, Your Honor?

14 Let's say then that someone comes up and they  
15 say, I don't want my name to be known. I don't want to  
16 sign an affidavit of poverty under the privacy provisions  
17 of the Constitution. He can't assemble then.

18 What about someone that comes up and says, all  
19 right, I want to sign --

20 QUESTION: Whoa, what are the privacy provisions  
21 of the Constitution?

22 MR. BARRETT: Well, I am speaking of Brown v.  
23 Socialist Workers' Party, the '74 nuclear freeze campaign  
24 of Ohio which -- and of course, the NAACP v. Alabama that  
25 based it on freedom of association, that says that the

1 right of people to protect their freedom of association is  
2 a privacy right, Your Honor.

3 So someone comes up and says I --

4 QUESTION: Counsel, you have 30 minutes. You  
5 can use the time any way you want I suppose; we still  
6 haven't gotten to your theory of the case.

7 MR. BARRETT: All right, Your Honor, I was  
8 trying to --

9 QUESTION: I would like to know why this  
10 ordinance is invalid if someone can afford to pay the fee.

11 MR. BARRETT: In this particular case, the  
12 convenience that I am speaking of, I would like to perhaps  
13 finish what I was saying and then I will address that the  
14 best way I can, Your Honor.

15 Someone comes up and you have to sign an  
16 affidavit, well, who is going to pay the notary and what  
17 is the notary fee? The county has said that if you have  
18 2,000 members in your organization, let's say all across  
19 the country, do they all have to be notified? Do they all  
20 have to respond and then, do they all sign affidavits?  
21 Who is going to pay the notary fee for that? It is a tax  
22 and a burden on the poor.

23 Also, Your Honor, I cited the poll tax case,  
24 that was the Harper decision in 1966, and I might as well  
25 mention Shuttlesworth in 1969 which ruled that the right



1 of assembly is reaffirmed. In 1972, Bullock, there can be  
2 no fees on the poor to abridge constitutional rights.

3 Then in 1983, Grace, the public forum defined,  
4 and here you have it, Your Honor, and also in 1988, the  
5 Boos, case which stood for the proposition that there  
6 can't be regulations as a guise to abridge speech.

7 Perhaps this is the classic Stamp Act rebellion  
8 as the Forsyth County rebellion. It was said at the time  
9 of the Stamp Act that if you simply paid a fee, a nominal  
10 fee, you could write whatever you wanted, but you had to  
11 pay for the paper to put the printing on, as was said,  
12 Your Honor --

13 QUESTION: But newspapers don't impose a burden  
14 on a little town or a little county. Your group wants to  
15 come in and stage a march that is going to impose enormous  
16 expenses upon the citizens of this little town. I don't  
17 see any relationship at all to a stamp tax, a tax for  
18 documents that aren't causing any burden. This little  
19 county is simply trying to not be burdened by your  
20 organization who wants to stage a parade.

21 Now you are welcome to stage a parade they say,  
22 but it is going to cost us some money and since it is your  
23 parade, you ought to pay for it. It seems reasonable to  
24 me.

25 MR. BARRETT: And they said the same thing in

1 the Stamp Act, and here they are in essence saying, all  
2 you have to do is pay a fee to stand on the steps.

3 QUESTION: There were no expenses involved in  
4 the Stamp Act. They are not charging you an arbitrary  
5 fee. They are saying your causing us a good deal of  
6 expense for your parade.

7 I suppose they could give you the option of  
8 perhaps -- would that satisfy you if they say you can  
9 waive police protection?

10 MR. BARRETT: I hadn't thought of that, Your  
11 Honor.

12 QUESTION: Is that the only thing wrong with  
13 this statute, that it doesn't permit you to waive police  
14 protection?

15 MR. BARRETT: If it means that you would waive  
16 your own life to appear in public in the United States of  
17 America to deliver a speech in the quintessential public  
18 forum --

19 QUESTION: This is a little tiny county, they  
20 have one policeman, and you want to bring in 10,000 people  
21 to march. What are they supposed to do, hire a police  
22 force for you?

23 MR. BARRETT: No more than they would at the  
24 Capitol of the United States, Your Honor, which has no  
25 charge, no more than they would on the steps of this very

1 Court.

2 QUESTION: I don't understand what you mean, no  
3 more than they would --

4 MR. BARRETT: There is no fee under the  
5 Constitution in freedom, and we would submit, Your Honor,  
6 there is no pay-as-you-go in patriotism.

7 QUESTION: I don't see anything in the  
8 Constitution that says that reasonable costs cannot be  
9 assessed against people, just like the radio. If you want  
10 to use it, you have to pay for it.

11 MR. BARRETT: That was the decision in *Murdock*,  
12 Your Honor, there can be no fee for a right enjoyed under  
13 the Constitution.

14 QUESTION: We are not talking about a fee. We  
15 are talking about covering the expenses that you produce.

16 MR. BARRETT: And of course, we respond that is  
17 the heckler's veto, Your Honor, that if the expenses are  
18 occasioned by having hostile counterdemonstrators, then  
19 the fee escalates beyond calculation and then the right of  
20 assembly is abridged, and the right of the people to  
21 assemble will not be abridged, Your Honor.

22 QUESTION: And you don't think that the monetary  
23 limit stops that problem?

24 MR. BARRETT: Well, actually, there isn't a  
25 monetary limit. You notice there is the toilet charge,

1 Your Honor. There is the medical charge. Since the  
2 county has already said in its brief that they regard this  
3 speech as deficient and they say that the only reason for  
4 the permit fee in their brief is to rid the public forum  
5 of unwelcome harassment, well, then this speech must be so  
6 nauseating that they would have to charge for more toilets  
7 for the public that is going to vomit at the assembly that  
8 is wanting to be put on.

9 QUESTION: Mr. Barrett, I think you better calm  
10 down a little and address the issues. I think we have  
11 heard enough rhetoric.

12 MR. BARRETT: It's an emotional issue based on  
13 humanity, Your Honor.

14 QUESTION: I suggest you try to keep your  
15 emotions under control and try to discuss the merits of  
16 the case.

17 MR. BARRETT: Certainly, Your Honor.

18 QUESTION: I still don't quite understand why  
19 the \$1,000 limit does not apply. You say the \$1,000 limit  
20 is not applicable?

21 MR. BARRETT: Under the ordinance it really  
22 isn't a cap at all, Your Honor, and it is a --

23 QUESTION: Why is it not a cap?

24 MR. BARRETT: Because they have the toilet fees,  
25 the medical fees, the miscellaneous fees, which they say



1 in the administrator's opinion --

2 QUESTION: They had nothing to do hecklers. You  
3 are talking about the heckler's veto.

4 MR. BARRETT: Yes, sir.

5 QUESTION: You say the more hecklers you have,  
6 the more police there will have to be, so the fee could be  
7 enormous. But there is a \$1,000 limit on the police  
8 charges, isn't there?

9 MR. BARRETT: That is not what I stated, Your  
10 Honor, I thought we were talking about two separate  
11 things.

12 QUESTION: What did you say then?

13 MR. BARRETT: I said that there is not a \$1,000  
14 cap, there can be more than \$1,000 under some provisions  
15 in the ordinance.

16 QUESTION: But not for hecklers.

17 MR. BARRETT: No, sir, not for hecklers.  
18 Although, supposedly --

19 QUESTION: So your heckler's fee argument is  
20 gone.

21 MR. BARRETT: Supposedly, if there were more  
22 hecklers there might have to be more toilets, there might  
23 have to be more --

24 QUESTION: Hecklers produce toilets?

25 MR. BARRETT: Hecklers produce more than

1 toilets, Your Honor. Notice, Your Honor, that the other  
2 additional fees are couched in what they call the  
3 administrator's opinion, and there simply seems to be too  
4 much discretion in that, Your Honor.

5 And then, Your Honor, for example, let's say  
6 that --

7 QUESTION: Mr. Barrett, let me just clear up one  
8 thing.

9 MR. BARRETT: Yes, Your Honor.

10 QUESTION: You have not, though, in this case,  
11 challenged these other fees, have you?

12 MR. BARRETT: Which other fees, Your Honor?

13 QUESTION: The toilet fees, and you mentioned  
14 there are a bunch of others than could get the cap over  
15 \$1,000.

16 MR. BARRETT: We have challenged the entire  
17 thing, Your Honor, saying that there shouldn't be any fee  
18 at all, not a nominal fee, any more than there should be  
19 on the right to vote or the right for a candidate to run  
20 for a public office because he is indigent, or the right  
21 of a Jehovah's Witness to hand out literature without  
22 having to pay \$1.00 a day.

23 QUESTION: Are you willing to have us decide the  
24 case, so the only fee at issue is this potential fee of up  
25 to \$1,000.

1 MR. BARRETT: Although that is the issue before  
2 the Court as it came from the Eleventh Circuit, Your  
3 Honor, of course, if the Court in its wisdom sees fit, we  
4 would like to be able to say that the Court has said that  
5 the modern free speech cases have ruled out fees or taxes  
6 that burden the First Amendment.

7 QUESTION: But all I am saying, if I understand  
8 your argument correctly, you would make the same argument  
9 even if there were no other fees at all?

10 MR. BARRETT: Yes, we would, Your Honor. And  
11 then as a follow-up to that, Your Honor, let's say that  
12 the \$1,000 is said to be reasonable perhaps. Well, if  
13 it's reasonable, then of course it could be \$2,000 or  
14 \$5,000, and then there is the city jurisdiction which has  
15 the streets around the courthouse. So there is another  
16 \$2,000 or \$3,000 or \$4,000 or more, and then of course  
17 there is the State, its gormandizing attitude toward its  
18 potential user fees, and then you have to cross the State  
19 highway perhaps, another.

20 And there is the burden, there is the burden,  
21 outlawing if you will, demonstrators who are not able to  
22 pay to speak or to assemble.

23 QUESTION: I assume that the rule, your no  
24 charge allowed, it doesn't just apply to political groups  
25 such as yours, I suppose it would apply to entertainment,

1 if you wanted to have an open air rock concert, I suppose  
2 you couldn't charge.

3 MR. BARRETT: The cases have distinguished that  
4 to some extent, Your Honor, because that would be a  
5 commercial enterprise, whereas this is not a commercial  
6 enterprise. This is purest speech in its most  
7 quintessential form.

8 QUESTION: What do you mean commercial  
9 enterprise --

10 QUESTION: Mr. Barrett, in an opinion for the  
11 Court that Justice Kennedy wrote, Ward against Rock  
12 Against Racism, I think the Court said a concert like that  
13 did have, did come under protection of the First  
14 Amendment.

15 MR. BARRETT: Yes, Your Honor, and it was  
16 distinguished from this case because it simply meant the  
17 volume could be turned down and in the lower courts, the  
18 original court said that that was the --

19 QUESTION: You have no quarrel with that --

20 QUESTION: It wasn't distinguished on the basis  
21 that you suggested a moment ago, commercial versus other  
22 kinds of speech.

23 MR. BARRETT: No. That is not our argument, but  
24 that is an argument that has been made by some, we don't  
25 make that argument, Your Honor.



1 QUESTION: .You just made it.

2 MR. BARRETT: I was saying it could be made,  
3 but I am simply just saying, we are not a commercial  
4 enterprise, and so therefore, in no sense would we say  
5 that --

6 QUESTION: Then I still don't know the answer to  
7 Justice Scalia's question. Why couldn't a rock concert be  
8 required to pay this fee? Please don't say that it is a  
9 commercial enterprise, because we have now gone through  
10 colloquy and established that that is not a valid ground  
11 for distinguishing the case.

12 MR. BARRETT: Yes, Your Honor. '

13 QUESTION: So do you have a valid ground for  
14 distinguishing the case?

15 MR. BARRETT: This case from Ward v. Rock  
16 Against Racism?

17 QUESTION: From the hypothetical of a rock  
18 concert wanting to come in and use this facility and  
19 having to pay the charge.

20 MR. BARRETT: If it is the public forum, I would  
21 say the First Amendment and the right to petition the  
22 Government, the right to speak, the right to assemble bars  
23 any fees in that public forum, Your Honor.

24 QUESTION: We just have to hope that it isn't  
25 our little town that they pick on to have the next big

1 rock concert.

2 MR. BARRETT: Well, perhaps, Your Honor, if  
3 someone, let's say Luke Perry of Beverly Hills comes to  
4 town and he is on the courthouse steps surrounded by young  
5 ladies seeking autographs, he would be welcomed with  
6 bureaucratic hosannas, but on the other hand, Jerry Brown,  
7 not the one running for President, but the leader of the  
8 Forsyth County parade, he is on the steps wanting to  
9 collect signatures to petition the Government. He meets  
10 with bureaucratic boondoggles. That is the content  
11 neutrality that we object to.

12 On the other hand, the county says, well, he can  
13 meet in the basement of the courthouse. Your Honor,  
14 spiderwebs and fluorescent lights don't suffice for open  
15 air and fresh air of freedom.

16 QUESTION: Now the Eleventh Circuit didn't  
17 decide the case on the basis that the ordinance wasn't  
18 content-neutral, did it?

19 MR. BARRETT: They said simply that on its face,  
20 \$1,000 was not nominal and they read Murdock to say that  
21 it must be nominal.

22 QUESTION: Do you defend that result here  
23 entirely apart from content neutrality and that sort of  
24 thing?

25 MR. BARRETT: I have to defend it because we

1 want to win the case --

2 QUESTION: Well, sure. .

3 MR. BARRETT: But I also argue alternatively,  
4 Your Honor, in our brief, we say that any fee, nominal or  
5 otherwise, abridges the First Amendment in this case.

6 Your Honor, my mind is in torment because I am  
7 looking for the compelling reasons which may be  
8 permissible to abridge freedom of speech and assembly in  
9 the quintessential public forum. Is it the suppression of  
10 vice? No one is bringing placards that are obscene to the  
11 courthouse.

12 Is it the suppression of litter? Is it not  
13 suggested here by the record. Is it the suppression of  
14 subversion? Are the secrets of the Patriot missiles being  
15 read on the steps? Is the courthouse decrepit to where  
16 bricks are falling down and safety is an issue? None of  
17 these issues, Your Honor. There might be some compelling  
18 reasons there, but not here.

19 QUESTION: Do you object to having to get a  
20 permit?

21 MR. BARRETT: Not, Your Honor, if it is simply  
22 to notify the authorities, to prevent competing interests  
23 from occupying the same space at the same time, as Cox  
24 said, for control.

25 QUESTION: Let's assume that that costs the

1 county some money. Do you think -- you would apply here,  
2 alternate ground, no fee whatsoever?

3 MR. BARRETT: The record will show, Your Honor,  
4 that we --

5 QUESTION: Right?

6 MR. BARRETT: The record shows we offered to pay  
7 \$1.00 or \$2.00 to the county for whatever charge --

8 QUESTION: But you would not think that  
9 they -- let's assume that they could prove beyond a  
10 reasonable doubt that it was going to cost them \$50.00 to  
11 process your permit and you would say they could not  
12 charge that money?

13 MR. BARRETT: That's correct, and I cite in the  
14 brief, we did a random survey --

15 QUESTION: That certainly is inconsistent with  
16 Cox.

17 MR. BARRETT: Cox was confined, if it please the  
18 Court, to a very limited fact circumstance, and in  
19 Murdock --

20 QUESTION: They were talking about a parade.  
21 They weren't talking about handing out literature or  
22 making speeches. And that is what is involved in this  
23 case, is an occupation of the streets.

24 MR. BARRETT: They mentioned, for example, a  
25 circus where they had spectators, but Your Honor, the



1 differentiation here is we are talking about hostile  
2 counterdemonstrators that are threatening the safety of  
3 those exercising their First Amendment rights.

4 QUESTION: But you wouldn't apply -- you  
5 wouldn't acknowledge the permit requirement anyway. How  
6 can you get a permit if you not willing to give me your  
7 name?

8 You say you don't have to give anybody your  
9 name. Who do they make the permit out to?

10 MR. BARRETT: We have no problem giving them our  
11 name, Your Honor. We are saying that that --

12 QUESTION: But that is part of your First  
13 Amendment argument, you can't ask anybody his name.

14 MR. BARRETT: Well, Your Honor, if it please the  
15 Court, if there is someone that wants their name not to be  
16 divulged, there should be some way in the ordinance to  
17 protect their confidentiality as an individual. We have  
18 no problem because we are registered with the State and we  
19 are a corporation.

20 QUESTION: But the facial challenge to the  
21 statute is it is invalid because it would require somebody  
22 to give a name to get a permit, that make the whole thing  
23 bad, doesn't it?

24 MR. BARRETT: If there is a valid exception  
25 where the confidentiality could be respected, Your Honor,

1 then there would be no challenge.

2 I find no acknowledgement, Your Honor, in the  
3 county's argument whatsoever of the public forum, and I  
4 noticed a bit of a Freudian slip on counsel when he said  
5 it is a tax, and he corrected himself. But it is a tax,  
6 Your Honor, and I simply draw the Court's attention in  
7 what meager abilities I have to Forsyth County or any  
8 county and ask what do we see here when this assembly  
9 takes place, and how valuable is that to America?

10 I see Americana and I see the stump speech. I  
11 can't put a price on it, but I see the furrowed brow of  
12 labor listening. I see the tender graces of motherhood  
13 feeling. I hear the assertion of youth speaking out.

14 QUESTION: I see the mother paying out in  
15 municipal taxes what she might be buying food for her  
16 child with.

17 (Laughter.)

18 MR. BARRETT: Balance that if you will, Your  
19 Honor, between perhaps the sharpening right there of  
20 democracy's rusty instruments. Can I speak of the spoken  
21 work and the sparks that come from it? Can I speak of  
22 reason and the glitter that lightens our minds? Can I  
23 speak of the shiny sword of reason that ousts tyranny from  
24 among us?

25 Your Honor, they have spoken of money. May I

1 speak of freedom? They have spoken of convenience. May I  
2 speak of happiness? Someone asked if I would pay a fee.  
3 Your Honor, write this epitaph, if you will, on my tomb:  
4 The road not taken, but not the speech not given.

5 I have been asked if it applies to the rich --

6 QUESTION: How about the argument not made?

7 (Laughter.)

8 MR. BARRETT: Perhaps. As the Bible says, Your  
9 Honor, faith comes from hearing. And as Martin Luther  
10 said, here I stand, I can do nothing else.

11 To the weight of the coin, if you will, of King  
12 George III; Rockefeller's greenbacks; Jose Williams'  
13 coffers -- the ones who, by the way, the record will show,  
14 could march, perhaps could afford the fee, there must be  
15 the fulcrum to that weight, and that is the First  
16 Amendment.

17 And I think it says to us over the ages, no  
18 dearth of purse shall curse our birth; who picks the  
19 pockets of the poor or the nationalist, gets no recoupment  
20 whatsoever, Your Honor; but who weans the humblest of our  
21 citizens on that mother's milk of the First Amendment  
22 makes us a stronger Nation and an ennobled people.

23 If we were to freeze this Court in the ice of  
24 1941, Your Honor --

25 QUESTION: Rock concerts too, go with all of

1 this, right?

2 MR. BARRETT: Well, Your Honor, I am a classical  
3 music fan, but I am prepared to let Mick Jagger play so  
4 long as Jerry Brown can petition the Government in the  
5 traditional public forum, yes, Your Honor.

6 If I were speaking about law that is laid low in  
7 a cold coffin, Your Honor, then I would speak of the past  
8 and the glories of the law that were. But I came here  
9 today, Your Honor, because I regard the law as youthful  
10 and zealous, and therefore, may I give you my simple  
11 invocation to glories of the law yet to come, and it is  
12 this: Toward the uplands where the American people  
13 assembles without fees; where the American Nation speaks  
14 without fear; and where the American way of life proceeds  
15 without end.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Barrett.

18 Mr. Stubbs, your time has expired.

19 The case is submitted.

20 (Whereupon, at 11:08 a.m., the case in the  
21 above-entitled matter was submitted.)  
22  
23  
24  
25



## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 91-538 - FORSYTH COUNTY, GEORGIA, Petitioner V. THE NATIONALIST  
MOVEMENT

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)