No. 07-1500

IN THE

Supreme Court of the United States

TIMOTHY SULLIVAN and LAWRENCE E. DANSINGER,

Petitioners,

—v.—

CITY OF AUGUSTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. THIS COURT HAS ALREADY RECOGNIZED THE GENUINE CIRCUIT SPLIT CONCERNING THE CONSTITUTIONALITY OF GOVERNMENTAL FEES ON CORE FREE SPEECH ACTIVITIES

Respondent argues that there is no genuine circuit split concerning the constitutionality of the government charging large fees for free speech activities on public streets. This Court, however, has already unanimously recognized the circuit split. In 1992, this Court "granted certiorari to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). The majority in *Forsyth* ultimately found it unnecessary to decide that issue, but all four dissenters agreed with the majority that "the question which divides the Courts of Appeals" is whether "the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets." *Id.* at 138 (Rehnquist, C.J., dissenting).

In *Forsyth* this Court identified both the Eleventh Circuit and the Second Circuit as part of the circuit split on this issue, citing the same two rulings relied upon by Petitioners in their Petition for Certiorari. *Id.* at 128-29 & n.8 (citing *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985) and *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir.

1983)). This Court clearly considered those rulings in favor of free speech claims to be in conflict with the Sixth Circuit's ruling denying free speech claims in *Stonewall Union v. Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991). *Forsyth*, 505 U.S. at 129 n.8. Although Respondent contends that *Stonewall* and *Walsh* "do not reflect a circuit split as to controlling legal principles," this Court in *Forsyth* concluded otherwise. This Court did not view the holding in *Stonewall* as limited to circumstances where there was an adequate alternative means of expression, but instead summarized *Stonewall's* holding more broadly, as "permitting greater than nominal fees that are reasonably related to expenses incident to the preservation of public safety and order." *Id.* Similarly, neither the Eleventh Circuit itself nor this Court has ever interpreted the Eleventh Circuit's holding in *Walsh* as reconcilable with the Sixth Circuit's ruling in *Stonewall*.

Respondent also unpersuasively argues that the Second Circuit ruling cited in the Petition, *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983), is irrelevant to the circuit split. Once again, this Court in *Forsyth* reached a different conclusion, and expressly identified the Second Circuit ruling as part of the circuit split. 505 U.S. at 129 n.8. Since *Forsyth* was decided, *Powers* has also been cited as precedent for the conclusion that when a First Amendment challenge is made to more than nominal government fees for engaging in core free speech activities, "in virtually all such cases, the courts have concluded

that the requirement was unconstitutional as applied to the plaintiff unable to pay." *Van Arnam v. Gen. Serv. Admin.*, 332 F. Supp. 2d 376, 406 (D. Mass. 2004) (citing *Powers*, *inter alia*, and summarizing its holding as follows: "$200 fee and insurance requirements were not narrowly tailored as applied to those 'demonstratively unable to comply and whose speech is therefore chilled by state action'").

Finally, a majority of judges on the First Circuit also disagrees with Respondent's position that the issue in this case whether the First Amendment requires an indigency exception is not worthy of review by this Court. The majority in the panel opinion below concluded their analysis on the indigency exception issue with the observation that whether "an indigency exception is constitutionally required . . . is for the Supreme Court to decide in the first instance." Pet.App. at 58a. In addition, two of the five active judges of the First Circuit voted to rehear the case *en banc*, and a third judge stated that "the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court." *Id.* at 182a.

II. THE CIRCUITS ARE CLOSELY AND DEEPLY DIVIDED ON THE PROPER STANDARD OF APPELLATE REVIEW IN CASES UPHOLDING FIRST AMENDMENT RIGHTS

Respondent incorrectly asserts that the First Circuit's application of a *de novo* standard of appellate review to the district court's factual

findings "is adhered to by the vast majority of appellate courts," Brief in Opposition at 2, and that nine federal appellate courts "decline to apply the asymmetrical standard of review." Brief in Opposition at 11 (emphasis added). Rather, as stated in the Petition, there is a 4-3 split, with three other circuits definitively ruling consistently with the First Circuit and three other circuits definitively ruling the other way.

Petitioners' description of the circuit split, not Respondent's, is consistent with how it is perceived by the other federal appellate courts. In 2006, Judge Torruella of the First Circuit discussed the circuit split in a concurring opinion. *United States v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring). He identified the Fourth, Seventh, and Ninth Circuits as applying *de novo* appellate review only when the lower court ruling denied free speech claims and the Fifth and Eleventh Circuits as adopting the contrary position. *Id.* He did not identify any of the other five circuits that the Respondent claims to be on its side, even though most of them were decided long before 2006. Similarly, in a decision just handed down three months ago, the Tenth Circuit discussed the circuit split but did not identify any of the five circuits relied upon by the Respondent as having taken a position on the issue yet. *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008).

There is good reason for the absence of any supporting authority for Respondent's characterization of the circuit split as one-sided in its favor. In

all five of those cases cited by Respondent there is no discussion whatsoever of the conflicting authority or the possibility of applying the asymmetrical standard. Thus, Respondent is plainly incorrect to describe these circuits as deciding to "decline to apply the asymmetrical standard of review" when they do not even mention, much less discuss, that standard of review.

For example, the Third and Sixth Circuit rulings cited by Respondent were appeals of summary judgment decisions. *See Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984); *Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520 (6th Cir. 2007). In that setting, of course, there is never any deference on appeal to fact findings of the trial court and the clearly erroneous standard of Rule 52(a) has no application. The Second Circuit case cited by the Respondent is also inapt. *See Bronx Household of Faith v. Bd of Educ.*, 331 F.3d 342 (2d Cir. 2003). That case concerned the review of the grant of a preliminary injunction, and the Second Circuit expressly applied the 'clearly erroneous" standard for reviewing the factual findings of the trial court. *Id.* at 348. In other cases, the Second Circuit has suggested that it would apply the asymmetrical standard of review, but because there was no definitive holding on the issue, Petitioners did not cite this case as part of the circuit split. *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("In the present case, *since appellants seek vindication of rights protected under the First Amendment,* we are required to make an

independent examination of the record as a whole without deference to the factual findings of the trial court.") (emphasis added) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) and *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995)). The Eighth Circuit case cited by the Respondent has no discussion whatsoever of the standard of review for factual findings by the trial court and its ruling is based on the purely legal issue whether an airport terminal was a public forum. *See Jacobsen v. City of Rapids, S.D.*, 128 F.3d 660, 662 (8th Cir. 1997). Finally, the D.C. Circuit case cited by the City was vacated and replaced with an *en banc* ruling. *See Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), *vacated by and rehearing granted en banc*, 763 F.2d 1472, 1481 (D.C. Cir 1985), *superseding opinion at* 817 F.2d 762, 767 (D.C. Cir. 1987) (*en banc*). In any event, that case is irrelevant to the standard of review issue here because the only factual findings at the trial level were made by a jury that rejected the free speech defense claims of the newspaper and other defendants in a libel case.

The cases cited by Respondent contradict its claim that there is "a clear and definite trend away from adopting the asymmetrical standard of review urged by the Petitioners." Brief in Opposition at 13. For example, a 2006 case cited by the Respondent identifies the circuit split on the standard of review, but declines to resolve it, hardly a sign of any obvious trend. *T & D Video, Inc. v. City of Revere*, 848 N.E. 2d 1221, 1232 (Mass. Ct. App. 2006).

Rather, the court in that case found that the federal circuit split was both deep and ongoing: "The Federal circuit courts of appeals *currently* disagree, however, on whether independent review should be applied to decisions affirming constitutional expressive rights." *Id.* (emphasis added) (citing three federal circuits supporting clear error standard and two federal circuits applying de novo review).

Although the Respondent argues that this Court's 1995 decision in *Hurley* resolves the circuit split in favor of a symmetrical standard of review, no court or commentator has adopted that same interpretation. None of the three circuits supporting the clearly erroneous standard of review has given any indication that they are likely to reverse their position on this issue. For example, after this Court's 1995 decision in *Hurley*, the Ninth Circuit reaffirmed its rule that "when the district court strikes down a restriction on speech, as in the current case, this court reviews the findings of fact for clear error." *Lovell v. Poway Unified Sch. Dis.*, 90 F.3d 367, 370 (9th Cir. 1996) (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1998)).

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The standard of review circuit split dates back over 20 years and is clearly presented in this case. In its ruling below, the First Circuit expressly rejected "plaintiffs' contention that plenary review is reserved only for district court decisions denying

First Amendment challenges." Petition at 13a n.1. The proper standard of review is a pure legal issue that has been well ventilated in both federal appellate rulings and academic writings. *See* Petition at 17-21. Thus, there would be no benefit from further percolation of this issue before it is resolved by this Court.

The trial court's ruling in favor of Petitioners' free speech claims was supported by historical facts and expert factual findings normally accorded deference on appeal under Rule 52(a). For example, the record is clear that the Augusta, Maine sidewalk at issue is unusually narrow, about 36 to 42 inches wide, and would fit at most two to three people walking side by side. Plaintiffs' Statement of Material Facts, ¶ 62 (citing deposition testimony of Augusta Deputy Police Chief Major Gregoire at p. 39). Moreover, portions of this sidewalk are immediately adjacent to the road traffic. *Id.* This information in the record clearly constitutes facts and not, as the Respondent asserts, legal conclusions. Moreover, these facts support the finding of the trial court – rejected by the panel majority – that the sidewalks "were insufficient because they are too narrow and marginal as compared with main streets." Pet.App. at 55a. The dissent specifically identified the unusually narrow width of the sidewalk as supporting the district court's conclusion that "the sidewalk option here is particularly limiting." *Id.* at 75a n.22.

Not only did the panel majority fail to give deference to the facts supporting the district court's

findings about the greater safety and logistical advantages of street marches, but it also chose to give greater weight to other historical facts in the record. For example, the majority discounted the expert testimony relied upon by the district court concerning the serious disadvantages of a sidewalk march, and instead chose to rely on the testimony of the City's Deputy Police Chief, "that several groups have used sidewalk marches to engage in expressive activities, indicating the availability of the sidewalk alternative and its appeal to some persons." *Id.* at 55a. Once again, it cannot reasonably be disputed that the panel majority relied on historical facts in the record and not legal conclusions.

Although the Plaintiffs' expert witness did not provide factual information about Augusta, Maine, he did provide specific facts that supported the district court's findings that the sidewalk was not a safe or logistically adequate alternative to a street march. For example, the dissent cited the expert witness's testimony that "social movements have none or very few alternative methods to communicate their message other than low-cost demonstrations in public spaces and streets." *Id.* at 78a-79a (quoting Declaration of Expert Witness). Expert testimony about social science is still factual, even if not based on observation of unique circumstances concerning the parties, and still entitled to Rule 52(a) deference on appeal. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-236, 255-256 (1989) (affirming factual finding of district court as supported in part by testimony of

social science expert who based her opinion on a review of comments by decisionmakers "without having met any of the people involved in the decisionmaking process").

Because the panel majority openly conducted a de novo weighing of the evidence in the record without any deference to the facts supporting the trial court findings, a decision of this Court in favor of Petitioners on the standard of review issue would require that the decision of the First Circuit be either reversed or vacated.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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