QUESTION PRESENTED

Is a licensing scheme which acts as a prior restraint required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision?

PARTIES TO THE ACTION BELOW

The parties indicated in the caption are and have been the only parties to this action.

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OPINIONS BELOW

The unpublished order of the Supreme Court of Wisconsin, entered on January 18, 2000, is reproduced in the Appendix to the Petition for Writ of Certiorari. (A-54.[1]) The decision of the Wisconsin Court of Appeals, entered on October 20, 1999, is published as *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d 93, 604 N.W.2d 870 (Ct. App. 1999). The Court of Appeals' decision is also reproduced in the Appendix to the Petition for Writ of Certiorari. (A-1.)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATUTES AND ORDINANCES

Chapter 68 of the Wisconsin Statutes governs municipal administrative procedure and review of administrative decisions. The provisions of Chapter 68 are reproduced in the Appendix to the Petition for Writ of Certiorari. (A-85.) The City regulates adult entertainment establishments under Waukesha Ordinance § 8.195, also reproduced in the Appendix. (A-95.)

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[1] All references to the Appendix to the Petition for Writ of Certiorari will hereafter be shown as, e.g., A-1.

STATEMENT OF THE CASE

Introduction

This case involves a facial constitutional challenge to a municipal ordinance establishing procedures for the renewal of licenses to engage in constitutionally protected expression. As will be shown, under the Waukesha ordinance, the owners of an ongoing expressive business may timely file their renewal application but then find that their license has expired even before completion of all diligently-pursued mandatory administrative review. Because completion of such administrative review is a prerequisite to judicial review, it is clear that this ordinance, on its face, allows the suppression of expression prior to even the *possibility* of any judicial review, regardless of whether the eventual judicial review is in fact "prompt."

Under such a scenario, the First Amendment inquiry of whether "prompt judicial review" requires a prompt judicial "determination" or, alternatively, merely requires the ability to promptly file a lawsuit, but with no guarantee of its prompt consideration, is beside the point, as an ongoing business required to shut down temporarily could quickly be forced into permanent closure before there is a possibility of even *seeking* judicial review.

Facts

Waukesha Municipal Code ("the Ordinance") § 8.195(2) states: "[N]o adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City . . . ." (A-101.) Petitioner City News & Novelty, Inc. (hereinafter "City News") operated a duly licensed adult bookstore in

Waukesha[2] (A-3), and was required by § 8.195(7) to renew its license annually. (A-104.)

Section 8.195(7)(a) requires that a renewal application must be filed not later than 60 days before the license expires, and under § 8.195(3)(c), the City Clerk is required to notify the license-holder of the approval or denial of the renewal application within 21 days of that filing.[3] (A-102.) Pursuant to § 8.195(4)(a)-2, the license application will be denied if the licensing authority finds that the applicant has committed a single violation of any provision of this ordinance within the prior five years. The ordinance allows the administrative licensing officials to make all factual determinations whether the ordinance has been violated, and does not require proof of any prior judicial convictions.

The ordinance then establishes two alternative routes for administrative appeal of such an order.

Specifically, § 8.195(11) compels the denied applicant to follow all administrative review procedures which are available under city ordinances and state law. (A-109.) As the Wisconsin Court of Appeals held, the "primary method of review" lies under Chapter 68 of the Wisconsin Statutes. (A-28.) This state statute (entitled "Municipal Administrative Procedure") establishes a sequence of administrative review procedures that an applicant must exhaust before seeking judicial review of a municipality's

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[2] The store sold and rented sexually explicit materials, including magazines and videotapes, and had on-premises booths for viewing videotapes. There is no suggestion or evidence in the record that any of these items were obscene or otherwise undeserving of full First Amendment protection.

[3] The 21-day notification requirement of § 3 of the ordinance is in the section which governs new license applications. The City construes its ordinance as requiring the same notification procedure for renewal applications. (A-17.)

nonrenewal decision. Pursuant to Wisconsin Statutes § 68.13(1) (*see* A-93), an applicant may seek judicial review only of a "final determination" which, as defined in § 68.12, contemplates exhaustion of all of the various administrative appellate remedies otherwise provided in Chapter 68. Those administrative procedures are both cumbersome and time consuming.

First, under § 68.08, an aggrieved individual is given 30 days within which to request review of the initial determination (i.e., the one to be rendered by the City Clerk). The aggrieved party must "state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed." *Id.*

This requested review of the initial determination may be carried out by the very same entity that *made* the initial determination, or by a different person or group. Section 68.09(2). Under § 68.09(3), the reviewing entity then has 15 additional days within which to complete its review.

In order to exhaust all mandatory administrative review, the denied applicant must next pursue what § 68.10 refers to as an "administrative appeal." (A-90.) Pursuant to § 68.11(1), this "administrative appeal" hearing must begin within 15 days of the notice of appeal. No provision limits the duration of the hearing or prevents its being continued. Section 68.11(2) provides that this administrative appeal may be heard by a variety of candidates, including even an individual appointed by the municipality who may be, *inter alia*, any officer of the governing body who did not participate in making or reviewing the initial determination. (A-92.) Under the Waukesha ordinance, the entirety of administrative appellate review can be conducted exclusively by local members of the City Council.

If the municipality takes advantage of the maximum time limits discussed above, and if the applicant files all relevant appeals on the very same day that the appealed ruling is filed, 51 days will have elapsed before there is any requirement that this administrative hearing begin.

Thereafter, Chapter 68 neither compels the hearing on the administrative appeal to be concluded in a single day, nor does it prevent it from being continued, either repeatedly or indefinitely. Although the statute sets no time limit for completion of the hearing on the administrative appeal, § 68.12(1) requires a final determination within 20 days after the *completion* of *both* the hearing, *and* any post-hearing briefing. The statute imposes no deadline for completion of briefing.

Accordingly, assuming the applicant filed all relevant appeals on the same day that the appealed decision was rendered, assuming further that the hearing on the administrative appeal was started and concluded on a single day and was not continued for any reason, and assuming also that all briefing was completed and submitted on or prior to the hearing date, on the face of the City ordinance and state statutes, the municipality is *still* allowed a *minimum* of 71 days within which to render a final administrative decision on the license renewal application.[4] However, as noted above, a renewal application is deemed timely if filed 60 days before the expiration of the license. Consequently, on its face, the ordinance fails to guarantee completion of administrative review of a timely filed renewal application before the currently-held license will expire.

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[4] Again, the time could *substantially* exceed this 71-day period if the City exerts its unfettered discretion to continue the hearing for as long as it deems necessary, or if the City's attorneys require any considerable time for their briefing.

An alternative method of administrative review is established by § 8.195(3)(d) of the Ordinance, which provides that an applicant who receives an adverse initial determination may seek a hearing before the City Council or its designated committee.[5] This route appears to be a more direct path to judicial review, because it eliminates the middle "request for review" step in the Chapter 68 procedures established by §§ 68.08-09, and the decision issued after such a hearing would probably qualify as a final decision pursuant to § 68.12(2) triggering an applicant's right to judicial review. However, this alternative builds in an open-ended delay. Because the ordinance does not provide any time limit within which the tribunal must rule following such a hearing, the Wisconsin Court of Appeals held this alternative sequence of administrative review facially invalid and severed it from the remainder of the ordinance. (A-24-28.) Since the ruling of the Wisconsin Court of Appeals renders this provision – which the parties did not elect to follow in any event – a nullity, and there has been no appeal from that ruling, it is not considered hereafter in any aspect of petitioner's facial constitutional challenge.

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[5] The City is not *compelled* to follow the administrative procedures set forth by the state statute. Section 68.16 expressly allows municipalities to enact ordinances or resolutions which opt out of the procedures established by Chapter 68 of the Wisconsin statutes. However, as that "opt out" language was construed by the Wisconsin Court of Appeals in *Tee & Bee, Inc. v. City of West Allis*, 214 Wis.2d 194, 571 N.W.2d 438 (Ct. App. 1997), the mere enactment of parallel municipal administrative review provisions (as was done here) does not constitute sufficient evidence of opting out of the state administrative appeal provisions. Rather, the municipality must enact an ordinance or resolution which affirmatively elects to "opt out" of the state procedures of Chapter 68. 214 Wis.2d at 204, 571 N.W.2d at 443.

Although a Chapter 68 review sequence can easily extend beyond the date upon which the license of an applicant who has timely filed for renewal has expired, § 8.195(2) of the Ordinance prohibits operation of any adult-oriented business without a license, and makes no exception for businesses whose licenses have expired while they seek administrative or judicial review of a decision denying renewal.

Finally, the duration of judicial review is itself essentially open-ended. Section 68.13 of the Wisconsin Statutes establishes the relevant judicial review procedures.[6] (A-93.) It provides that an aggrieved party may seek judicial review through a statutory certiorari action. However, it does not include a provision to maintain the status quo during the review process, nor does it impose any effective time limits on the reviewing court for completion of an initial decision on the merits.[7] It does, however, stipulate that before there can be a judicial

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[6] All references in this brief are to the 1995-96 Wisconsin Statutes.

[7] While the City may argue that Wisconsin Supreme Court Rule 70.36(1)(a) supplies a constitutionally adequate guarantee of prompt judicial review, that is not the case. That Rule states that circuit judges must issue decisions in matters consigned to them within 90 days of the time a case is in "final form," meaning that all briefs and other submissions have been filed. On its face, this provision contains a big escape hatch; all a judge needs to do to get another 90 days is to file a one-sentence certification to the chief judge of the district that he or she has been unable to complete a decision within 90 days. These certifications are so common in the Wisconsin circuit courts that the parties are not even sent copies of them.

Moreover, given the lack of any deadline for preparation of necessary transcripts (discussed below) there is no guarantee of any limited period within with such a case should be in "final form" so as to trigger the illusory 90-day review provision.

decision, either a transcript or synopsis of the administrative proceedings must be provided to the court. Wis. Stat. § 68.13(2). Although the statute requires the municipality to supply a transcript at the appellant's expense, it does not impose any time limit upon the municipality for completion and delivery of the transcript. Under the statute, it is also possible that there will be no final judicial determination even after the court has ruled on the certiorari petition. Specifically, the circuit court is authorized to "affirm or reverse the final determination, *or remand to the decision maker for further proceedings* consistent with the court's decision." Section 68.13(1), Wis. Stats. (emphasis added). Those "further proceedings" could add months to the process, during which time the business remains closed.

These relevant *facial* provisions of the ordinance and statutes comprise the legally operative facts of this case. A brief description of how the City actually implemented those procedures in the present case follows, however, simply to illustrate one example of how this scheme has in fact functioned.

In years past, City News had annually renewed its license to operate as an adult business under the provisions of § 8.195 of the Municipal Code of the City of Waukesha. Its most recent license was due to expire on January 25, 1996. (A-7.) On November 15, 1995, City News applied for renewal of its license. (A-72.)

Although the ordinance provides that the City Clerk is to make the initial decision to grant or deny a license, City News' 1995 application was initially considered at a meeting of the Common Council's Ordinance and License Committee on December 18, 1995.[8] The Committee

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[8] Record of Administrative Proceedings filed with Circuit Court in certiorari action below.

recommended nonrenewal, and the next day, the Common Council of the City of Waukesha issued a Resolution finding that City News had committed violations of the ordinance, and denied the renewal of its license. (A-82-84.) The violations cited included past municipal court convictions for permitting minors on the premises (some of which were later vacated, A-70), failing to keep one side of each movie-viewing booth totally open to a public lighted aisle, and patrons having engaged in solitary lewd conduct in the booths.[9] (A-82-84.) While court convictions were offered in evidence in the current case, the ordinance on its face and as specifically construed by the Court of Appeals, allows the administrative agencies unfettered discretion to determine whether violations occurred, and does not require them to base such findings on any prior judicial convictions. (A-42.)

The Council's December 19, 1995 resolution informed City News that it had 30 days to request a review by the Council of its own decision.[10] (A-84.) City News then

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[9] There was never any suggestion that City News encouraged or condoned minors on the premises or deviant behavior in the movie booths. Indeed, on one occasion it was City News that called the police when an unstable patron exposed himself in the store. Transcript of Board Hearing I (April 2, 1996), 126. The movie booths had been removed by the time of the Board hearing. Testimony of Officer Dennis Angle, Tr., III, 87; Stipulation of counsel, Tr. I, 169-170.

[10] If the Council Resolution of December 19, 1995 can be read as the City Clerk having advised City News in writing of the reasons for the nonrenewal, then City News could have requested, within 10 days, a public hearing before the Council or its designated committee pursuant to § 8.195(3)(d) of the Ordinance. (A-102.) This option, if it existed, was not mentioned in the December 19, 1995 Council Resolution (*see* A-84), which was required by law to inform the applicant of the available avenues and time limits for appeal. *See* Wisc. Stat. § 68.07 (A-89.)

filed a timely Request for Review pursuant to Section 68.08 of the Wisconsin Statutes, dated January 17, 1996. Section 68.09(3) requires that such a review be completed within 15 days. (A-90.) On January 22, 1996, the Waukesha Common Council reviewed its own decision, and on January 23, it issued a Decision on Review affirming its previous nonrenewal decision. (A-72.)

Since City News had not yet been afforded a due process hearing, § 68.10 Wis. Stats. then gave the bookstore 30 days within which to file a compulsory Administrative Appeal from the Decision on Review of the "Initial Determination." (A-90-91.)

On January 25, 1996, City News' existing license expired.[11] (A-72, ¶ 1.)

City News filed a timely Notice of Appeal dated February 15, 1996. Section 68.11(1) of the Wisconsin Statutes then gave Waukesha 15 days within which to convene a hearing. (A-91.) City News waived this time limit. (A-73.)

Section 68.11(2) required the City to provide "an impartial decision maker" who "did not participate in making or reviewing the initial determination" to conduct the hearing. (A-92.) The first hearing session was

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In any event, § 8.195(3)(d) of the Ordinance was declared unconstitutional by the Wisconsin Court of Appeals in this case because its failure to set a deadline for completing the hearing and rendering a ruling created a "risk of indefinite delay." (A-26-27.)

[11] As applied in this case, the City exercised its discretion to *not* enforce its licensing requirement against petitioner while all relevant administrative and judicial review was proceeding. However, under the ordinance, the City has full power to enforce the license requirement immediately upon a license's expiration, should it choose to exercise that power. Since this is a *facial* challenge to the license renewal procedures, the City's gratuitous non-enforcement decision is immaterial.

convened on April 2, 1996, before an Administrative Review Appeals Board (hereinafter "Board"), consisting of the Mayor, an Alderman, and a citizen, pursuant to § 2.11 of the Municipal Code. (A-72-73.) The City Attorney represented the Council and advocated nonrenewal. City News challenged the impartiality of the mayor and the alderman who sat on this three-person Administrative Review Appeals Board, but the Board rejected this challenge, concluding that they were not disqualified under the state statute because neither one had previously voted or participated in the prior Initial Determination, nor in the subsequent Decision On Review. (A-73, ¶ 8.)

Subsequent hearing sessions were convened on April 9, May 7 and May 8, 1996, after which City News and the City Attorney's office submitted briefs, proposed findings of fact and conclusions of law, and responses to each other's submissions. The last brief was submitted by the City Attorney's office on June 7, 1996. While § 68.12(1) required the Board to issue a decision within 20 days of the completion of briefing (A-92), no provision of the municipal code or the state statute fixed a date by which the Board had to conclude the hearing, nor by which post-hearing briefing had to be completed.

On June 28, 1996, the Board affirmed the City's denial of the license. (A-72-81.) Pursuant to § 68.12 of the Wisconsin Statutes, this was a final determination. Since judicial review is available under § 68.13(1) only to a party to a final determination (A-93), this was the first time judicial review was available to City News. City News sought judicial review in state circuit court by means of a statutory certiorari action. There, City News argued that the City's action in failing to renew its license was unlawful because the license renewal procedures were *facially* unconstitutional, regardless of the application of those procedures to City News. (A-56.) In a decision filed April

2, 1997, the circuit court confirmed that City News had properly preserved its constitutional arguments for judicial review, but rejected those arguments on the merits and affirmed the Board's decision. (A-57, 70-71.)

City News appealed the circuit court decision to the Wisconsin Court of Appeals. Two of the numerous challenges City News raised there were that the ordinance failed to require the preservation of the status quo during the administrative and judicial review process (A-19), and that it failed to provide for prompt judicial review. (A-20.) City News also asserted that the ordinance scheme for administrative review of an initial decision (including its incorporation of the administrative review provisions of Chapter 68 of the Wisconsin Statutes) had open-ended time limits.[12]

After receiving briefs, the Court of Appeals certified the appeal to the Wisconsin Supreme Court. (A-44.) By order dated April 21, 1998, the Wisconsin Supreme Court refused certification. (A-53.)

The Court of Appeals then decided the case, issuing its decision on October 20, 1999. (A-1.) As noted above, the court found unconstitutional and severed the administrative hearing procedure established by § 8.195(3)(b) of the Ordinance, but found the remainder of the renewal

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[12] This issue was raised by City News below, including in its brief filed in the Wisconsin Court of Appeals. *See* Principal Brief And Appendix Of Plaintiff-Appellant filed by petitioner in the Wisconsin Court of Appeals on or about July 17, 1997, at pp. 23-24 where, under the heading "Waukesha's Licensing Ordinance Is Unconstitutionally Defective In Regard To Time Limits," petitioner raised the open-ended nature of administrative review under Chapter 68.

provisions (e.g., those found in Chapter 68 of the Wisconsin Statutes) constitutionally unobjectionable.[13] (A-25-26.) Accordingly, it upheld the remainder of the ordinance and in significant part affirmed the decisions of the lower court and the Board. (A-42.)

The Court of Appeals rejected City News' argument that the renewal scheme was unconstitutional for failing to preserve the status quo pending administrative and/or judicial review of a renewal application. In so holding, the court acknowledged that "the licensing scheme in this case starts with a license renewal application deadline 60 days before the license's expiration date." (A-19.) The court, however, concluded that "a decision must be rendered at the very least thirty-nine days before the license is due to lapse." (*Id.*) However, as noted above, the combined ordinance and statutory scheme allows the City *at least* 71 days to render a final administrative decision, and this is assuming that the City does not take advantage of its discretion to continue the hearing on the administrative appeal, and that all briefing in the administrative appeal will be completed by the time of the hearing. In any event, the Court of Appeals perceived no constitutional requirement that the status quo be preserved pending *judicial* review.

After rejecting City News' challenges based upon a failure to preserve the status quo, the Court of Appeals then also rejected an alternative assertion that the ordinance was invalid because it failed to provide prompt judicial review of a non-renewal decision. (A-20-24.) The court concluded that even open-ended judicial review

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[13] The Court's upholding of the Chapter 68 procedures was implicit. City News duly raised this issue with the Court of Appeals (*see*, n. 12, *supra*), but its opinion did not separately discuss this aspect of petitioner's challenge.

satisfies the applicable constitutional requirements so long as the applicant has immediate access to the courts when a renewal is denied. (*Id.*)

City News filed a Petition for Review with the Wisconsin Supreme Court. The Petition was denied on January 18, 2000. (A-54.) On April 18, 2000, City News filed its Petition for Writ of Certiorari with this Court. The Petition was granted on June 19, 2000, limited to the third question presented in the Petition. That question presents, in the context of the foregoing facts, a very narrow issue for resolution by this Court: When a licensing ordinance contains a renewal requirement, must the ordinance include explicit language to prevent injury to a speaker's rights from want of a prompt administrative or judicial decision?

SUMMARY OF THE ARGUMENT

For a variety of reasons, Waukesha's ordinance governing adult business license renewals lacks adequate safeguards to protect a speaker's rights during the extensive time that will elapse while a denied applicant exhausts all required administrative appeals, and, thereafter, diligently pursues judicial review.

First, the ordinance employs an administrative appeals scheme which confers on City officials an indefinite and potentially endless period of time for rendering a final and judicially reviewable administrative determination granting or denying an adult business license renewal. This is because the ordinance adopts certain Wisconsin statutory procedures for exhaustion of administrative remedies, never fashioned for application in time-sensitive First Amendment cases. While the state statute gives municipalities the option of "opting out" of

these open-ended state procedures and substituting their own custom-made administrative review procedures, Waukesha has not availed itself of this opportunity, choosing instead to disregard the requirement this Court identified in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), that there must be a guarantee of a final administrative determination on a permit application for expressive businesses within a specified and brief time period. For this reason alone, the City's license renewal scheme is facially unconstitutional and unenforceable. Moreover, because of the indefiniteness of the time periods for completion of administrative review, the time between the filing of a renewal application and the completion of any *judicial* review is also indefinite, thereby precluding any assertion that the ordinance provides prompt judicial review.

Second, while the ordinance does not specify the *maximum* potential time that City officials could take in rendering a final and judicially reviewable administrative ruling on a renewal application, it does establish a series of time limits which cumulatively allow the City to use up to 71 days to process the application without even relying on *any* of the open-ended features of this scheme. However, the City requires an applicant to file for renewal 60 days before the expiration of the license. Consequently, one can timely file a license renewal application and find that the license has expired before the City has even rendered a final administrative ruling on the renewal application, even if the City has not taken advantage of *any* of the open-ended time periods of its licensing scheme. Because the 71-day administrative review period exceeds the 60-day advance-filing period for renewals, by definition this scheme fails to guarantee a judically-reviewable final administrative decision on a license renewal application within a reasonably "brief" time period.

Third, this Court's decisions, including *FW/PBS, Freedman v. Maryland*, 380 U.S. 51 (1965), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), all make clear that while prompt judicial review is required to ensure the constitutionality of administrative prior restraints which merely *preserve* the status quo, administrative prior restraints may not *alter* the status quo by forcing the cessation of ongoing expressive businesses prior to judicial review. Because the Waukesha renewal scheme fails to provide a stay pending completion of *either* administrative *or* judicial review, it violates the First Amendment for this reason as well.

In short, the failure of Waukesha's adult business licensing scheme either to guarantee a prompt and final administrative ruling on a renewal application, or to preserve the status quo for a preexisting licensed business pending administrative and judicial review, mandates its invalidation under the tests established by this Court's decisions. These decisions preclude the City from arguing that the judicial review provided to an applicant can be considered in any sense "prompt."

ARGUMENT

The primary question before this Court is whether Waukesha's adult business licensing ordinance is facially invalid because it does not provide for a stay of an order denying renewal of a license during the administrative and judicial review process. Because licensing requirements are – by definition – prior restraints[14] (and are in

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[14] *Any* license requirement for expressive activities is, by definition, a "prior restraint" on expression. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 and 131 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969); *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951). *Cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-226 (1990). This is

fact the archetypal prior restraints which motivated enactment of the First Amendment[15]), this Court has repeatedly held that any licensing scheme for protected First Amendment activity must contain strict procedural safeguards.[16] Although "prior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint comes to this Court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 225 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)). *Accord Vance v. Universal Amusement Co.*, 445 U.S. 308, 316, n.13 (1980), and numerous cases therein.

The renewal procedures under Waukesha's adult business license ordinance are remarkably bereft of required constitutional safeguards. The ordinance's constitutional defects include: (1) the failure to ensure a final judicially reviewable administrative ruling on a permit application within a specified and brief time period; (2) the failure to preserve the status quo pending judicial review; and (3) the failure to preserve the status quo

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because until one has obtained the license, one is banned in advance from engaging in the desired expressive activities.

[15] In *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938), this Court recognized that "[t]he struggle for the freedom of the press was *primarily directed* against the power of the licensor." (Emphasis added.)

> [T]he liberty of the press became initially a right to publish '*without* a license what formerly could be published *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guarantee of liberty, the prevention of that restraint was a *leading purpose* in the adoption of the constitutional provision.

303 U.S. at 451-452 (final emphasis added).

[16] *See, e.g., Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS, Inc. v. City of Dallas, supra.*

pending completion of even compulsory *administrative* review.

Under the permit renewal scheme here challenged, the time periods for completion of mandatory administrative review are open-ended, with no guarantee of a final ruling before the prior license expires. Nor is there any provision automatically staying a non-renewal order pending the completion of *either* the mandatory administrative review *or* any review by a court. As a result, an existing business may well be forced to close before its owner has the opportunity to seek any judicial review, and, indeed, even before the completion of all compulsory administrative review. Such a licensing scheme is patently invalid.

Additionally, this Court's decisions establish beyond doubt that one faced with an unconstitutional licensing scheme may challenge its lack of procedural safeguards on its face, even if the record does not show that the locality abused its discretion in applying its ordinance to the challenger. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 223-225.[17] The familiar theory, of course, is that standing is recognized in such cases in order to protect others not before the court (and ultimately the public) from the unconstitutional impact of such sweeping prior restraints. Consistent with this rule of standing, this Court has held that facially invalid licensing laws affecting First Amendment rights are void and may be ignored with impunity by those wishing to engage in the exercise

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[17] As this Court noted in *FW/PBS*, 493 U.S. at 223-224:

> [W]here a scheme creates a "[r]isk of delay" . . . , such that "every application of the statute create[s] an impermissible risk of suppression of ideas," *Taxpayers for Vincent*, 466 U.S. [789], at 798, n.15 [(1984)], we have permitted parties to bring facial challenges.

of First Amendment rights, as if they had never been enacted. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

I

THE WAUKESHA LICENSE RENEWAL PROVISIONS VIOLATE THE FIRST AMENDMENT BY FAILING TO GUARANTEE THAT THE CITY WILL RENDER A FINAL AND JUDICIALLY REVIEWABLE ADMINISTRATIVE RULING ON A RENEWAL APPLICATION WITHIN A BRIEF AND SPECIFIED TIME PERIOD.

The most obvious of the ordinance's deficiencies with respect to adult business license renewals is its failure to comply with the basic First Amendment requirement which led this Court to invalidate the Dallas adult business licensing scheme in *FW/PBS*. Specifically, the Waukesha ordinance fails to guarantee that there will be a final and judicially reviewable administrative ruling denying renewal within any brief and specified time period. Because the open-ended nature of the administrative time frame necessarily delays the point in time at which judicial review may be initiated, such a flaw is within the scope of the question presented because it causes the time frame for judicial review to be open-ended and indefinite. *See, e.g., Redner v. Dean*, 29 F.3d 1495, 1501-1503 (11th Cir. 1994).

In *FW/PBS*, this Court addressed a Dallas licensing scheme for adult businesses which instructed the chief of police to grant or deny a license within 30 days from the date the application was filed, but further provided that the license could not issue unless various other city inspectors had first inspected and approved the premises. Because the ordinance did not impose time limits for the completion of those inspections, the 30-day ostensible

time limit was deemed illusory and indefinite. Because the time period was indefinite, this Court held the licensing requirement facially invalid.

The same vice infects the Waukesha renewal scheme. As the facts detailed above illustrate, the ordinance compels a denied renewal applicant to exhaust the administrative appeals procedures established by Chapter 68 of the Wisconsin Statutes, and those statutes create an open-ended scheme for obtaining a final administrative determination. Specifically, the indefiniteness of this time period is traceable to the "administrative appeal" mandated by § 68.10 of the Wisconsin Statutes. While Section 68.11(1) mandates that the hearing on this appeal must begin within 15 days of the notice of appeal, no provision limits the duration of the hearing or prevents its being repeatedly or indefinitely continued.

The only relevant time limit, found in § 68.12(1), requires a final determination on the appeal within 20 days after the completion of *both* the hearing *and* all briefing. However, just as the statute does not prohibit repeated or indefinite continuances of the hearing, it likewise imposes no deadline for the completion of briefing. Accordingly, even if the hearing were promptly commenced within the prescribed 15 days from the notice of appeal, and even if the hearing were concluded in a single day and was never continued, the statute imposes no definite requirement for a final ruling because the post-hearing briefs contemplated by the statute need not be submitted within a specified fixed period, and the requirement of a final determination of the appeal is measured, *inter alia*, from the date when all briefing is completed. Consequently, the time periods for completion of administrative review are open-ended and violate the First Amendment principles identified in *FW/PBS*.

Apart from its lack of any *definite* time limits for completion of administrative review, this scheme independently violates the First Amendment principles of *FW/PBS* because it fails to guarantee that a final judicially-reviewable administrative decision will be rendered within a "brief" time period. Wholly apart from the open-ended features of the ordinance's renewal procedures, the fixed time periods alone allow the City a total of 71 days within which to render a final judicially-reviewable administrative determination on a renewal application.

While the meaning of the constitutionally required "brief" period must necessarily vary with the context in which it arises, it is clear that in the present context, 71 days cannot be found constitutionally "brief" where the ordinance provides that a license renewal application will be timely if filed 60 days before the expiration of the license. Whatever else the constitutionally required concept of a "brief" time period means in these cases, it surely must mean that, at an absolute minimum, the time period by which administrative review must be completed must be shorter than the time between the date a license renewal application is due and the date the license expires if renewal is denied.

No doubt, the lack of definite and brief time periods here is the result of a broad state-wide scheme establishing generally applicable administrative review procedures which apply to all municipal administrative rulings, and which were not fashioned with any special time-sensitivity for review of speech-related rulings. However, the City has an easy remedy. Section 68.16 of the Wisconsin Statutes expressly allows municipalities to enact ordinances which opt out of the mandatory state administrative procedures set forth in Chapter 68.

Accordingly, Waukesha has no excuse, in an ordinance specifically aimed at speech activities, for failing to provide the speech-sensitive procedural safeguards which this Court mandated in *FW/PBS*.

Because Waukesha's licensing scheme is facially unconstitutional for failure to guarantee a final, judicially reviewable administrative ruling on a license renewal within a specified and brief time period, the ordinance should be invalidated and the Court need not even reach the separate constitutional problem addressed in Point II of this brief. However, should the Court elect to reach it, the constitutional problem identified therein is no less compelling.

II

THE WAUKESHA ORDINANCE'S PROVISIONS FOR NONRENEWAL OF AN ADULT ENTERTAINMENT BUSINESS LICENSE ARE ALSO FACIALLY UNCONSTITUTIONAL BECAUSE THEY FAIL TO PROVIDE A GUARANTEED STAY IF EITHER THE ADMINISTRATIVE OR JUDICIAL REVIEW PROCEDURES EXTEND BEYOND THE LICENSE EXPIRATION DATE.

In numerous prior decisions, this Court has held that administrative prior restraints on expression which occur prior to judicial review are *only* permissible if they *preserve*, not *alter*, the status quo, and only if they guarantee a prompt judicial determination in review of any administrative restraint which *preserves* the status quo. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 227-228, 239. On grounds of both precedent and policy, that clear rule should prevail in the present case.

A. This Court's Decisions Make Clear That, In The Absence Of Some Great Or Immediate Threat To The Public Health Or Safety, Government May Not Interfere With Ongoing Expression Absent Prior Judicial Approval.

Two consistent threads run through this Court's prior restraint cases with respect to the requirement of effective judicial intervention in a prior restraint scheme. Where the administrative restraint is one which *preserves* the status quo (such as the film-licensing scheme in *Freedman*), this Court's decisions have made clear that one of the prerequisites of such a scheme is that it ensure prompt judicial review.[18] This case, however, involves the

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[18] *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965), where this Court said:

> Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser v. Randall*, 357 U.S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination

other thread of this Court's prior restraint cases, where the administrative restraint *alters* the status quo by causing the cessation of *ongoing* speech activities.

Although this Court has been careful not to make too much of this distinction, lest it minimize the risks of suppressing *prospective* speech activity, in *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 771-772 (1988), the majority recognized that in cases of *ongoing* expression, "there is exceptional force to the argument that a permit delayed is a permit denied." In keeping with this reasoning, the Court's decisions in this area clearly establish that administrative prior restraints may not ordinarily alter the status quo before there has been judicial approval of the restraint.

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suffices to impose a valid final restraint. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519 (1962). To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), for example, this Court struck down an informal scheme of prior restraint by which booksellers were persuaded to pull off their shelves any books mentioned in a prosecutorial "blacklist." The Court characterized this as an informal system of prior restraint and stated that only a *judicial* determination would suffice for interfering with ongoing speech activity:

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. We have tolerated such a system *only where it operated under judicial superintendence* and assured an almost immediate judicial determination of the validity of the restraint.

372 U.S. at 70-71 (emphasis added, citations and footnotes omitted).

Again, in *Southeastern Promotions, Ltd. v. Conrad*, the Court stated:

> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint ***prior to judicial review can be imposed*** only for a specified brief period and ***only for the purpose of preserving the status quo***. Third, a prompt final judicial determination must be assured.

420 U.S. at 560 (emphasis added).

As this Court has clearly stated in *Southern Promotions* that "any restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo," this rule should be dispositive of the present case. Here, Waukesha has an ordinance scheme which authorizes the City to impose a restraint prior to judicial review which *alters* the status quo by forcing an ongoing business to close.

Further support for this position comes from this Court's decisions in both *Freedman v. Maryland* and *FW/PBS*. While both of these cases analyzed prior restraints which *preserved* the status quo, they both clearly discussed the constitutional issues which apply here. As Justice O'Connor stated for the three-Justice plurality in *FW/PBS*:

> In *Freedman*, we determined that the following . . . procedural safeguard . . . . [*inter alia*, was] necessary to ensure expeditious decision making by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed *only* for a specified period *during which the status quo must be maintained.*

493 U.S. at 227 (emphasis added). Justice O'Connor then adopted this portion of the *Freedman* test for the analysis of the adult business license ordinance in *FW/PBS* (as did Justice Brennan in his concurring opinion for himself and two other Justices[19]) by stating that it was "essential" that "the licensor must make the decision whether to issue the license within a specified and reasonable time period *during which the status quo is maintained.*" *Id.* (emphasis added).

Here, the ordinance does not provide for maintaining the status quo while the licensor makes a renewal decision. Rather, this ordinance, on its face, empowers the City to extend the mandatory administrative appeal process well beyond the expiration date of the license for which a renewal application is timely filed. Consequently, this ordinance allows city administrative officials to change the status quo by closing a pre-existing business prior to judicial review. That is forbidden by *FW/PBS*, *Freedman* and *Southeastern Promotions*.

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[19] *See* 493 U.S. at 239.

B. As A Matter Of Policy, It Is Critical That The Requirement Of Prior Judicial Review Be Maintained As A Protection Against Unconstitutional Administrative Prior Restraints Of Ongoing Speech Activities.

Under the Waukesha ordinance, all phases of the mandatory administrative appellate review may be conducted exclusively by City Council members who have no necessary legal training and,,certainly, no training in constitutional law. Consequently, *judicial* intervention is critical to ensure that all requisite constitutional safeguards are employed before the City unilaterally terminates ongoing expressive activities. Such review serves a variety of important constitutional functions under the First Amendment, including (1) ensuring that any closure sanction is not broader than is constitutionally tolerable based upon the nature of the alleged violation; (2) ensuring that only offenses committed by constitutionally responsible individuals can force the closure of an expressive business; (3) protecting against the dangers of bias where those who sit as judge and jury in nonrenewal rulings may be the very politicians who have the most political interest in closing such businesses; and (4) insuring at least one level of judicial scrutiny, given that the ordinance allows the relevant violations to be proven without any showing of prior judicial convictions.

1. Judicial review prior to governmental interference with ongoing expression is necessary to ensure that a nonrenewal sanction is not overbroad.

Prior judicial review is constitutionally indispensable for a licensing renewal/revocation scheme such as Waukesha's, in order to ensure that an administrative sanction for an ordinance violation does not sweep unconstitutionally broadly. Under the Waukesha scheme,

every violation of which an operator has actual or constructive knowledge is deemed of equal severity and absolutely precludes the owner from reapplying for a license for a full year. § 8.195(8)(a)-(d).

Many adult business licensing ordinances around the country authorize non-renewal, revocation or suspension for *any* violation of the municipal code or any applicable law. This could be for something as minor as shrubbery which slightly exceeds the allowable height for such shrubbery. It could also be for some minor and easily fixable violation of a building or electrical code. These ordinances generally, and Waukesha's in particular, do not require any prior notice or warning to the applicant so they may cure any potential problem. The only notice required under the Waukesha ordinance is that provided in § 8.195(8)(b), which simply indicates that the licensee shall be given 10 days notice before the holding of any public hearing to revoke his license. The ordinance provides for no notice allowing the cited business an opportunity to cure any easily remediable violations.

While the ordinance authorizes, in the midst of a license term, a short-term suspension for a first-time violation by a worker without the owner's actual or constructive knowledge, this flexibility disappears at renewal time, when nonrenewal for any violation is mandatory.[20] Moreover, the great potential for mischief in this type of scheme is illustrated by § 8.195(8)(a)-2, which compels revocation if the operator "violates any provision of this section *or any rules or regulation adopted by the Council*

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[20] Under § 8.195(4)(a)-2, the sanction of non-renewal appears mandatory and non-discretionary upon proof of but a single violation. Even in the revocation context, proof of one violation of *any* type by the owner compels a one-year non-discretionary revocation of the owner's license. (*See* § 8.195(8)(a), stating that "[t]he Council *shall* revoke a license or permit for any of the following reasons." Emphasis added.)

pursuant to this section." There is no limit to the potential rules or regulations which the Council may adopt pursuant to this code section; consequently, the potential for abuse on the face of the ordinance is significant. As a result, judicial intervention in such a scheme is mandatory to assure that any sanction for a violation is constitutionally tolerable, particularly given that the ordinance *requires* revocation for a *first* offense by an operator (or a second offense by any employee of the operator under circumstance where the owner had no knowledge of the employee's violations and could not have known of them even with the exercise of due diligence).[21]

In short, this ordinance confers unlimited power upon the City Council to enact rules establishing the most picayune and technical violations which would then justify (and indeed compel) a one-year license revocation. *See* § 8.195(8)(d). Such a scheme mandates judicial intervention in order to ensure that the remedy imposed is constitutionally sustainable. This is particularly important in an area where a licensing requirement is imposed exclusively upon a class of businesses defined by the content of their expression, and the potential for extremely biased and politically-motivated application is patent.

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[21] Surprising as it may seem, the number of offenses required for revocation is arguably greater than that required for non-renewal. Assuming the initial licensing requirements apply in a *renewal* context, the ordinance compels non-renewal upon proof of only *one* violation. *See* § 8.195(4)(a)-2. Moreover, in the context of renewal decisions, *any* violation by an employee automatically is attributable to the owner (and therefore warrants revocation) regardless of the scienter of the owner. *See* § 8.195(10)(b). Also, the finding of a violation in the *non-renewal* context disables an applicant from re-licensure for *five* years (*see* § 8.195(4)(a)-2), while the same violation found in a *revocation* proceeding only prohibits re-licensure for *one* year. *See* § 8.195(8)(d).

2. Judicial review is also necessary to ascertain that a constitutionally responsible individual has committed an offense justifying nonrenewal of a license to engage in expression.

Judicial intervention is also indispensable to an administrative scheme designed to silence ongoing expression because of the danger that the City will base a revocation or non-renewal upon offenses assertedly committed by persons who lack the owner's motivation to fight the charges against them.

Specifically, as this Court is surely aware, not every officer tells the truth in every case. Occasionally, and particularly where strong political pressure is brought to bear, false charges can be brought against customers or employees of adult entertainment businesses where the prosecuting official has reason to believe that the charged individual will simply enter a guilty plea rather than suffer the embarrassment or expense of a trial, and the threat of a much greater sanction if they were to contest the charges.

For example, suppose a married man, who knows his wife would disapprove his watching of such films at home, goes to an adult bookstore and watches a sexually explicit film in a video viewing booth. If this customer is under surveillance by an unscrupulous vice officer assigned the task of finding lewd conduct violations in an adult bookstore, it would not be at all surprising to find fabricated charges brought against the individual based upon a factual dispute over the precise conduct in which the customer was engaged. However, it would be the extremely rare case where such a customer would fight the charges, due to the extreme embarrassment and expense of a public trial. This is particularly the case where, as would be likely in such a setting, the prosecutors would promise a suspended sentence or some other

relatively painless resolution if the individual simply entered a guilty plea. Thus armed with a conviction, motivated prosecutors can then bring such information to the local mayor or police chief in a license revocation or non-renewal context and, without any judicial intervention whatsoever, the owner can find his business closed with no due process opportunity to contest the validity of the charges against him.

Likewise, it is common in many areas for prosecutors to bring factually questionable prostitution or lewd conduct charges against the dancers at an adult entertainment business under circumstances where the dancers may have good faith statutory or constitutional defenses to the charges. However, because these prosecutors are motivated to obtain convictions to use against the owner, they routinely offer plea bargains to the dancers which let them off with suspended sentences and/or summary probation, while threatening the fullest sanctions available under the law if they contest the charges. Invariably, the dancers enter guilty pleas and waive their rights to assert good faith statutory or constitutional defenses to the charges against them. The dedicated or zealous prosecutor then simply gathers up such convictions and presents them to the local mayor in a revocation or renewal proceeding. The City then swiftly obtains the immediate revocation or nonrenewal of the owner's license, all without any opportunity for the owner to contest the charges. This is particularly the case given that conflict of interest laws absolutely prohibit the owner's attorneys from controlling litigational decisions involving the defense of charges against the dancers.

Accordingly, as a matter of policy, it is critical for this reason as well that judicial intervention precede any termination of an ongoing expressive business.

3. **Because of the dangers of bias where municipal executives sit as judge and jury in determining the rights of those engaged in expression to which they are frequently hostile, judicial review is constitutionally critical before ongoing speech may be stifled.**

As noted above, innumerable decisions of this Court have stressed the necessity of impartial judicial review where fundamental rights are at stake. Underlying all these decisions is an overarching policy consideration, recognizing the unfortunate but undeniable reality that local officials and enforcement officers are institutionally more concerned with enforcement than with protecting constitutional rights. Nowhere is this truer than in cases involving expression protected by the First Amendment, but to which for political or other ideological reasons, local officials are often demonstrably hostile.

In its many decisions upholding the right of access to the federal courts, this Court has stressed the need for an impartial magistrate in the not-uncommon instances in which "by reason of prejudice, passion, neglect, intolerance or otherwise, . . . the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

Where First Amendment interests are at stake – and particularly where as here a licensing law threatens the removal of presumptively protected materials from circulation – this Court has always held that procedural protections such as close judicial supervision "must be applied with 'scrupulous exactitude.' " *Zurcher v. Stanford Daily*, 436 U.S. 537, 564 (1978) (*quoting Stanford v. Texas*, 379 U.S. 476, 485 (1965)). For the past four decades, this Court has upheld as one of the most central of those protections that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity

to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *see also Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

This Court is no stranger to instances of local officials who have used permitting or licensing laws to censor speech they disfavored. *See, e.g., Walker v. City of Birmingham*, 388 U.S. 307, 317-339 (1967), as discussed in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157-158 (1969). More recently in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (concurring opinion), Justice O'Connor recognized the potential for a city to "use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books." The ever-present threat of the censorial abuse of a law allowing officials to close an expressive business requires that judicial review precede any such closure.

Many of this Court's decisions in cases involving alleged obscenity have turned on this point, the Court emphasizing time after time that materials may not be suppressed at the discretion of the often zealous enforcement officer. Rather, a judicial officer must first have an opportunity to "focus searchingly on the question of obscenity." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968); *Roaden v. Kentucky*, 413 U.S. 496, 502 (1973). This rule is far from idiosyncratic to the doctrine of obscenity, but rather represents the broader principle that speech may not be stifled prior to a neutral judicial determination.

One of the most instructive of these decisions insisting upon supervision by an impartial magistrate is *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-327 (1979), in which this Court borrowed heavily from its general Fourth Amendment jurisprudence in holding that a town justice who joined a zealous search party in an obscenity raid "did not manifest that neutrality and detachment

demanded of a judicial officer when presented with a warrant application. . . . [H]e was not acting as a judicial officer but as an adjunct law enforcement officer."

"We have repeatedly said that a warrant authorized by a neutral and detached judicial officer is 'a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." ' " *Id.* at 326 (*quoting United States v. Chadwick*, 433 U.S. 1, 9 (1977), and *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). Again, this Court's concern focused on the relatively neutral institutional role of magistrates, compared to that of a law enforcement official charged exclusively with "ferreting out crime."

The same contrast exists between the neutral role of a magistrate and that of City Council members, who (institutionally) are well known for unabashedly political opposition to adult businesses, disregarding all constitutional protections. To empower such individuals to close expressive businesses prior to *de novo* judicial review is anathema to the First Amendment, and underscores the cornerstone of this Court's existing prior restraint doctrine, i.e., that prior restraints which alter the status quo must be preceded by *judicial* intervention.

This Court again articulated this fundamental policy concern in *Forsyth County v. National Movement*, 505 U.S. 123 (1992), facially invalidating an ordinance granting county officials discretion in assessing, or waiving, a parade permit fee based on the official's estimation of the potential expenses, including those for "maintenance of public order." Of the policy behind constitutional safeguards such as requiring that a speech-licensing authority be bound by "narrow, objective and definite standards," this Court said:

> The reasoning is simple: 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.

505 U.S. at 131 (citation omitted).

As will be discussed in more detail below, this reasoning applies with particular force in the present context of licensing authorities who must appraise facts, exercise judgment, and form opinions which decide the fate of an expressive business. In contrast to the obscenity context, under a licensing scheme not just one or a few expressive works are at stake, but rather an entire ongoing expressive business offering the public innumerable works. For this reason, this Court has always treated speech-licensing laws as posing enormous dangers of censorship.

Thus, even where local licensing officials may pin their decision to close an expressive business on "objective" criteria, judicial supervision remains crucial in order to safeguard against censorship by hostile or biased local officials (and particularly, as here, *political* officials). As the licensing officials who pass on a license renewal application, the Waukesha City Council will always be involved in the "appraisal of facts, the exercise of judgment, and the formation of an opinion." At the very least, they will have to assess the credibility of testimony when one of their own subordinates, e.g., a city police officer or inspector, alleges violations justifying nonrenewal, for example.

Experience teaches that, given their institutional roles as enforcers of municipal policy and as elected officials subject to the winds of political pressures, local administrators are often more prone to censor than to protect First Amendment rights. For all these reasons, this Court's longstanding requirement that an impartial magistrate intervene before expression is stifled, has its strongest justification where frequently hostile local officials

exercise life-and-death discretion over the fate of expressive businesses.

4. Judicial review is also required because, on its face, this ordinance does not require that any of the relevant violations be proven by prior judicial convictions.

Another aspect of the Waukesha ordinance which compels judicial intervention before an administrative order is allowed to terminate ongoing expression, is the fact that the administrative agency is not engaged in the mere ministerial task of determining whether there has been a court conviction of a constitutionally responsible person for an offense that warrants revocation under the ordinance. Instead, city executives, who are often politically motivated to be quite hostile to adult businesses, sit in administrative judgment and make *their own* factual determinations whether various violations may have occurred.[22] (A-42.)

The absence of a requirement for proof of prior judicial convictions exacerbates the danger of disguised censorship which was noted in *Forsyth County*.[23]

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[22] Because City News challenges this nonrenewal scheme on its face, it is immaterial that in the present application of this scheme, the City happened to have relied largely on judicial convictions. Because the ordinance does not *require* that all violations be proven by prior judicial convictions, no argument can be made in defense of the ordinance that it limits the grounds for revocation to those proven by prior convictions.

[23] Due to its particular relevance, the *entirety* of the relevant language from *Forsyth County* is set forth below:

> Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation

The Ordinance's revocation and renewal criteria provide more than ample opportunities for the appraisal of facts, exercise of judgment, and formation of an opinion by the City executives who make renewal decisions. For example, § 8.195(10)(c) prohibits employees from allowing any minor "to loiter *around* . . . an adult oriented establishment," regardless of whether they actually enter the premises. Whether a minor will be deemed to have loitered "around" an adult oriented establishment will involve appraisal of facts, the exercise of judgment, and the formation of an opinion.[24] The same is also obviously true with respect to the requirement of § 8.195(10)(d), which allows revocation or non-renewal if the City concludes that the premises are not maintained "in a clean and sanitary manner."[25]

> that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view. . . . To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." [Citations omitted.] The reasoning is simple: *if the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion,"* . . . by the licensing authority, "the dangers of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted.

505 U.S. at 130-131 (emphasis added, citations omitted).

[24] Little imagination is required to envision enforcement officials spying a group of teenagers loitering on a nearby corner, and charging the bookstore with a violation on this basis. Reviewing city officials who may be inveterately hostile to the bookstore's existence will not view such charges with the objective eye of a detached magistrate.

[25] Even assuming that this provision does not confer "standardless discretion" on the licensing authority, *cf. Forsyth*

Less obvious, but no less relevant, are each of the more objective revocation criteria. While the criteria themselves may be objective, whether they have been met requires the trier of fact to evaluate the credibility of witnesses. This in itself involves the exercise of judgment, the appraisal of facts, and the formation of an opinion. Moreover, in the administrative context, the ordinance does not provide any tools of discovery by which the licensee can challenge the credibility of the witnesses against him or her.

5. Judicial review is essential in the nonrenewal context because of the need to determine constitutional questions.

Even where there are not significant disputes about objective or subjective facts, challenges to licensing decisions will often raise issues that courts are uniquely qualified to resolve. For example, in this case City News objected, on statutory and due process grounds, to Mayor Carol Opel sitting as chair of the Administrative Review Board after she had presided at two Council meetings where nonrenewal votes had been successful, and had necessarily exercised her authority to decide not to veto the Council's resolutions. (A-29-31.) Apart from the inherent difficulty in asking city politicians to declare city procedures constitutionally inadequate, due process concerns like this which arise in the administrative process are simply going to be beyond the ken of the lay officials handling the case at that point.

County, it is certainly susceptible to subjective interpretations. The inspector may subject an adult bookstore to a "white glove" standard to which no other retail business would be held. *Cf. City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451-452 (1983) (facially invalidating for vagueness, a provision of an ordinance regulating abortions, requiring that fetal remains be disposed of in a "humane and sanitary" manner.)

Finally, the likelihood of constitutional challenges to an ordinance's standards for nonrenewal requires preservation of the status quo pending a judicial disposition of a nonrenewal decision. Such challenges simply cannot be asserted in a meaningful way prior to judicial review, yet they may provide a complete defense to a revocation or nonrenewal accusation. For example, this Court should not read the record of this case as a history of concessions of violations on the part of City News, but as a history of strategic choices. City News does not concede that *any* of the Ordinance provisions that were employed to nonrenew its license are constitutionally valid. It chose to rely on other arguments, but in future cases applicants for renewal will challenge the validity of issuance and renewal standards like the disability provisions the petitioners lacked standing to challenge in *FW/PBS*. They will argue that some other punishment for violations may be permissible, but that cutting off the right of future speech based on past abuses is not, *Vance v. Universal Amusement Co.* 445 U.S. 308 (1980); *Near v. Minnesota,* 283 U.S. 697, 713 (1931). They will argue that renewal standards are unconstitutionally vague. *See, e.g., East Brook Books, Inc., v. City of Memphis,* 48 F.3d 200, 227 (6th Cir. 1995), *cert. denied,* 516 U.S. 909. These are future cases, but their obvious imminence underscores the essential necessity of judicial review prior to any curtailment of ongoing speech.

In Wisconsin, as the circuit court below noted, an applicant does not encounter a body that has the jurisdiction, much less the legal acumen, to declare legislation unconstitutional until his or her case reaches circuit court. *See* A-56-57, *citing Kmiec v. Town of Spider Lake,* 60 Wis.2d 640, 645 (1973). If the only reason a nonrenewal decision violates the law is that the ordinance provision on which it is based is unconstitutional, the administrative process is worse than useless, because it forces the denied applicant to sink valuable time and energy into a

pointless effort, and works a postponement of the only review that can provide relief, judicial review. Yet, the consequences of the administrative determination are the outright closure of an ongoing expressive business prior to any possible judicial review.

Such consequences are far more devastating in the renewal/revocation/suspension context than in the context of an initial permit denial, because once an ongoing business is forced to close, economic factors will usually preclude its reopening down the road after the eventual completion of judicial review, should the administrative decision be reversed. Once such a business closes, it is likely to lose most, if not all, of its employees. Also, a closed business typically cannot make mortgage or lease payments. The potential long-term consequences of an administrative nonrenewal are simply too great, absent the most compelling circumstances, to permit such an interference with the status quo without a requirement of prior judicial involvement.

C. Numerous Protections Are Available To The City If It Is Required To Provide A Stay Pending Administrative And Judicial Review Of Any Non-Renewal/Suspension/Revocation Decision.

As demonstrated below, City News is not advocating an absolutist position, nor is it advocating a position which leaves municipalities without ample options for dealing with those businesses which are routinely or flagrantly violating applicable laws.

1. The City may provide for temporary administrative closure where there is a great and immediate threat to the public health or safety.

One exception to the otherwise mandatory constitutional rule that judicial review should precede administrative closure of an ongoing business, is that prompt

judicial review could constitutionally occur *after* implementation of a temporary administrative closure order if such a closure order were pursuant to generally applicable laws and if there were a subsequent judicial determination that unilateral administrative closure was necessary in order to prevent immediate and great injury to the public health or safety.

For example, during the Northridge earthquake, the Los Angeles Department of Building and Safety "red-tagged" a large number of businesses which were deemed unsafe to continue operating, at least without critical repairs. This procedure mandated their immediate closure until necessary repairs were completed. There was obviously no time for prior judicial review in that circumstance. The applicable constitutional rule here would not preclude such non-judicial restraints merely because, e.g., one of the many red-tagged businesses may be one engaged in expression. However, even in that circumstance, subsequent judicial review must be available to ensure that municipal officials do not improperly use a generally applicable threat to health and safety as a pretext for suppressing unwanted expression.

2. **For other types of violations, e.g., lewd conduct violations, if the City perceives a serious ongoing situation that requires immediate action, the City may ask a court to issue a TRO in a nuisance abatement action.**

Neither do the applicable First Amendment rules impair the City's ability to effectively deal with those adult businesses which fail to respond to an initial notice of violation. If there is an adult business which, after notice, repeatedly and significantly violates applicable criminal laws or local ordinances, then a municipality may fully protect its interests by filing a public nuisance action similar to the one approved by this Court in *Arcara*

v. Cloud Books, Inc., 478 U.S. 697 (1986), and seek immediate issuance of a temporary restraining order if the circumstances warrant such relief.

Such an option would not interfere in any way with the constitutional principle that *administrative* prior restraints which terminate *ongoing* expression are impermissible, absent prior review and *de novo*[26] judicial approval.

D. If This Court Elects To Determine The Duration Of The Stay Which Is Constitutionally Required, Both Precedent And Policy Dictate That The Stay Should Remain In Effect Until There Has Been A Prompt Decision On The Merits By The Initial Court Reviewing The Matter.

Because the Waukesha ordinance fails to provide an automatic stay to preserve the status quo pending judicial review, and even pending completion of *administrative* review, it is a facially unconstitutional prior restraint. Since the ordinance gives the City the power to close an existing business before, and conceivably long before, there is even the *possibility* of access to the courts, such a scheme simply does not provide prompt judicial review, regardless of whether prompt judicial review is considered merely prompt access to the courts or a prompt judicial determination on the merits. Because this ordinance fails to provide a stay preserving the status quo pending *any* type of judicial review, it should be invalidated on that basis and the Court need not address the separate question of whether some other ordinance, not

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[26] This Court has recognized that where First Amendment rights are potentially affected, all relevant fact finding by a reviewing court must be *de novo*. *See Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 508, n.27 (1984); *Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston*, 515 U.S. 557, 567-568 (1995); *cf. Speiser v. Randall*, 357 U.S. 513, 521 (1958).

presently before the Court, would be constitutional if it provided a stay only until the completion of administrative review but not pending a judicial determination. However, should this Court nonetheless elect to reach that issue, it is clear, both as a matter of precedent and policy, that the appropriate stay should preserve the status quo until there has been an on-the-merits judicial determination by the initial court reviewing the administrative order.

1. This Court's prior decisions compel the conclusion that the duration of any stay must preserve the status quo pending resolution of the merits by the initial reviewing court.

As noted in Point I-A herein, this Court's prior decisions have distinguished between administrative prior restraints which *preserve* the status quo and those which alter it by forcing the termination of pre-existing speech activities. As this Court stated in *Southeastern Promotions,* "any restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo." 420 U.S. at 560. The Court's articulations of this constitutional principle in *FW/PBS* and *Freedman* were to the same effect.

If, as this Court has repeatedly stated, administrative prior restraints which take place prior to judicial review can *only* be imposed for the purpose of *preserving* the status quo, it necessarily follows that any scheme which imposes a restraint prior to judicial review which *changes* the status quo (e.g., by forcing the closure of a pre-existing business) is impermissible.

Accordingly, regardless of the appropriate meaning given the term "prompt judicial review" in the context of a scheme for the licensing of a *new* business, in the context of a renewal, suspension or revocation scheme, the status quo must unquestionably be preserved until

there has in fact been an on-the-merits determination by at least the first court to consider the matter.[27] Consequently, it should be immaterial in this context whether any judicial review is "prompt," because a stay should be in effect protecting the applicant throughout the entire period until a judicial decision has been rendered on the merits.

While some may suggest that the stay should expire at the end of the *administrative* appellate process (rather than at the time the court issues its own determination), that argument is entirely inconsistent with this Court's decisions: "[A]ny restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo." *Southeastern Promotions*, 420 U.S. at 550. There can *be* no judicial review until a court has in fact reviewed the administrative order. Accordingly, a valid ordinance must mandate a stay until the administrative order is reviewed by a court, thus preserving the status quo.

2. Policy considerations also compel preservation of the status quo pending an initial judicial determination on the merits, particularly where, as here, the administrative rulings under review are those rendered by elected municipal politicians who are typically anything but neutral administrative fact finders, and who lack both the experience and authority to consider the constitutional ramifications of their actions.

Given the facts that the Waukesha scheme allows members of the City Council to participate in both levels

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[27] City News does not suggest that prompt judicial review requires preservation of the status quo pending *appellate* judicial review, nor do any of this Court's cases suggest such a requirement.

of administrative review, and that city councils, for political reasons, are often quite hostile towards adult entertainment businesses, the rule suggested here is critical. Otherwise, the requisite constitutional protections for speech would be obliterated if city councils could simply issue orders forcing the termination of existing expression before any neutral judicial officer has had an opportunity to review their determinations.

For each of the five separate policy reasons given in Point II-B above, any stay must preserve the status quo until there has been an independent *judicial determination*. Also, as noted above, the potential harm from politically-motivated licensing decisions prior to judicial review is even greater in the context of a *renewal* scheme than that of a *new* business seeking its first license. Moreover, the longer any delay, the greater chance that the effect of any erroneous interim closure order will render final relief moot because the business will not be able to survive. As stated in *Freedman v. Maryland*: "[I]f it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U.S. at 58. While this caveat from *Freedman* is unquestionably true in the context of one seeking an initial license to engage in expression,[28] it is *particularly*

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[28] The promptness of judicial review for one seeking to establish a *new* adult business can be critical to the ability of such a business ultimately to open. Often, an applicant for a new adult business license will have only an option of limited duration on the property in question. If judicial relief takes too long, the option will expire and the applicant cannot benefit even if the court ultimately reverses the licensing decision.

Likewise, whenever substantial funding is required in connection with the establishment of a new adult entertainment business, e.g., a large scale nightclub business, the longer it takes for judicial review, the more likely that a variety of

true in the context of an existing business whose speech has been silenced by the revocation or non-renewal of a license. The likelihood that the censor's determination may in practice be final is greatly heightened by the economic costs of orders closing already-existing and ongoing businesses.[29]

Consequently, numerous compelling reasons dictate that a constitutional ordinance must provide for a stay to remain in effect until a court has actually reviewed the challenged administrative ruling.

This Court granted certiorari on the question of whether "a licensing scheme which acts as a prior

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economic factors will lead to the abandonment of the project before any ruling is rendered.

[29] The likelihood of injury to be suffered by the non-renewal of an ongoing business' license is even *greater* under an ordinance scheme such as this one, because, on its face, it guarantees the City's ability to administratively close a business *well in advance of the applicant's ability to exhaust all compulsory administrative remedies.* The *minimum* time which the City may take in rendering a final judicially reviewable administrative ruling is 71 days. However, because of the open-ended nature of the time periods for submitting briefing and concluding a hearing in the third level of administrative determinations, the ordinance in fact gives the City the power to impose far longer delays before completion of administrative review. Beyond this, some reasonable period must also be factored in for the preparation of appeals by the denied applicant, as well as the time which it takes for the applicant to receive notice of prior adverse administrative rulings.

In short, the City has the power under this ordinance scheme to ensure that any ongoing business will be closed *long* before there is even the possibility of seeking relief from a court. In the case of ongoing businesses, the exercise of such power will likely be fatal to the speech enterprise, regardless of whether a reversal might ultimately occur at the conclusion of an equally indefinite period for judicial review.

restraint [is] required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision." The wrong way to answer this question is to hold that an ordinance can always ensure against such injury *either* by staying the injurious effect of an administrative decision pending a judicial decision *or* by guaranteeing speedy judicial proceedings. As demonstrated above, the right to meaningful judicial review must mean more than judicial proceedings that simply terminate quickly after they begin if the rights of renewal applicants are to be protected from potential administrative censorship. *Without* a stay, even the swiftest judicial decisionmaking fails to prevent injury to the rights of a business that may well have to close before it can even get to court. *With* a guaranteed stay throughout the first level of judicial review, a renewal applicant suffers no injury even if court review is not very prompt, and the City's inability to control the pace of litigation in the circuit court, which the court below found determinative, ceases to be a concern.

In contrast, the presence of a stay *only* through the *initiation* of judicial review proceedings, is totally ineffective to prevent the dangers of an administrative prior restraint which remains in effect during the pendency of potentially lengthy judicial proceedings of indefinite duration.

Although arising in the unrelated context of a prior restraint on *new* business license applicants, the following discussion from *Baby Tam & Co., Inc. v. City of Las Vegas* (*Baby Tam I*), 154 F.3d 1097 (9th Cir. 1998), illustrates the force of the argument, in *all* contexts, that there is no constitutional utility to a rule which merely insures prompt judicial *access*, but not a prompt judicial *determination*:

> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is

> sufficient. As the Seventh Circuit acknowledged in *Graff*, "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324. Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.
>
> The phrase "judicial review" compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As [a] legendary major league umpire . . . once said to an inquisitive catcher: "It ain't nothin' till I call it." This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.

154 F.3d at 1101-1102.

While the meaning of the term "prompt judicial review" in the context of a licensing scheme which *preserves* the status quo (such as was involved in *Baby Tam*) is not presently before this Court,[30] the logic of this

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[30] This case does not present the Court with the question of the meaning of the term "prompt judicial review" as employed in the context of licensing schemes which *preserve* the status quo, such as licensing schemes applicable to new adult businesses where, if the license application is denied, the status quo is not changed. There is great potential variation in the degree of injury that delay may inflict on different sorts of speakers, *e.g.*, political speakers versus commercial speakers, and in the amount of "promptness" that might be afforded in administrative/judicial review schemes that preserve the status

language certainly applies here where the potential consequences of an erroneous administrative decision altering the status quo are so severe.

CONCLUSION

Under the Waukesha ordinance, absent the grace of the City, an unsuccessful applicant for license renewal almost certainly faces permanent closure of its business. Without any doubt, it faces the loss of its First Amendment rights for a significant period of time. *See Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). The City of Waukesha has chosen not to concern itself with the First Amendment rights of speakers once the City declines to renew permission to speak. It neither provides specific and mandatory maximum time periods for completion of administrative review, nor does it even allow the owner of an existing business who timely files his renewal application the necessary time to complete administrative review before his license will expire. Neither does it provide a stay of the licensing requirement pending completion of either administrative *or* judicial review. For each and all of these reasons, City News asks this Court to hold this permit renewal scheme facially unconstitutional and to reverse the decision of the Wisconsin Court of Appeals

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quo, especially before the subject expressive activity has begun. Examining which ones afford "prompt" judicial review is not before the Court in this case. Since the only ordinance provisions employed in the current case are those involving license *renewal* decisions (which, if negative, administratively *alter* the status quo and therefore require a stay), there is no occasion on these facts to speculate as to any minimal time period that might satisfy, in some other context, a requirement of prompt judicial review.

with instructions remanding the matter for further proceedings consistent with its opinion.

Respectfully submitted,

JEFF SCOTT OLSON
131 West Wilson Street
Suite 1200
Madison, Wisconsin 53703
(608) 283-6001
(Fax) (608) 283-0945

Counsel of Record

RICHARD L. WILSON
3610 Dubsdread Circle
Orlando, Florida 32804-3052
(407) 649-9225
(Fax) (407) 423-8727

Attorneys for Petitioner

JOHN H. WESTON
G. RANDALL GARROU
WESTON, GARROU & DEWITT
12121 Wilshire Boulevard
Suite 900
Los Angeles California 90025
(310) 442-0072
(Fax) (310) 442-0899

CATHY E. CROSSON
406 S. Eastside Drive
Bloomington, Indiana 47401
(812) 855-2596
(Fax) (812) 855-0555

Of Counsel