No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,
Petitioner,
v.

CITY OF WAUKESHA,
Respondent.

**On Writ of Certiorari
to the Supreme Court of Wisconsin**

BRIEF *AMICUS CURIAE* OF THE LIBERTY PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The organization espouses vigilance over regulation of all kinds, as well as restriction of

[1]Petitioners and respondents both have consented to the filing of this *amicus* brief. Counsel for respondent has informed *amicus* that a letter of consent has previously been filed with the Court. Petitioner's letter of consent is being lodged with the Clerk.

individual civil liberties such as the rights to free speech and to association, which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates one of the most profound individual liberties, the right to free speech, a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual. Laws imposing licensing requirements on expression are of particular concern to The Liberty Project because they undermine or destroy this fundamental right. If not subject to prompt and effective judicial review, such laws present a particular danger of abuse, with extremely severe consequences for targeted individuals and types of expression. The Liberty Project's strong interest in the protection of the freedom of all citizens to engage in expression without government interference will allow it to provide this Court with additional insight into the constitutional values at stake in this case.

SUMMARY OF ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court set forth three procedural safeguards required of administrative prior restraints to ensure that undue delay does not result in the unconstitutional suppression of speech. One of those safeguards, that any administrative refusal to permit speech must be accompanied by "a prompt final judicial decision," 380 U.S. at 59, recognized both that a public official's refusal to deny a license will sometimes be erroneous and that, absent prompt and certain judicial review, that refusal could be tantamount to a final decision. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court considered the applicability of *Freedman* to an

administrative licensing scheme regulating sexually oriented businesses. In upholding the "core principle" of *Freedman*, six Justices of this Court concluded that *Freedman*'s requirement of prompt judicial review remained an "essential" safeguard in combating the unconstitutional suppression of speech. 493 U.S. at 228. Nevertheless, several circuits, and the Wisconsin Court of Appeals in the instant case, concluded that *FW/PBS* relaxed the prompt judicial review safeguard and that, in the context of an ordinance regulating sexually oriented businesses, mere access to a judicial forum was all that this Court's precedents require.

These courts are incorrect. Both *Freedman* and *FW/PBS* made clear that a statute conditioning the right to speak on the receipt of a license must ensure a prompt judicial decision, not merely access to a judicial forum. These cases correctly recognize that the scope of First Amendment rights, and thus the propriety of any government regulation of them, is fundamentally an issue for the courts. Any scheme that fails to require prompt judicial review of a license denial not only delays the right to speak in the event that the denial was erroneous, but, more important, increases the risk that, due to delay, the licensor's "determination may in practice be final." *Freedman*, 380 U.S. at 58. The arguments for relaxing this prompt judicial review requirement fail to take into account these risks of delay, and provide no basis for this Court to revisit and weaken well-established principles designed to protect constitutional rights against administrative overreaching.

ARGUMENT

THE WAUKESHA ORDINANCE IS AN INVALID PRIOR RESTRAINT BECAUSE IT FAILS TO ASSURE A PROMPT JUDICIAL DETERMINATION OF THE PROPRIETY OF THE CITY'S REFUSAL TO GRANT A LICENSE TO AN ADULT-ORIENTED BUSINESS.

This case presents a narrow but fundamental question: whether a licensing scheme that acts as a prior restraint on constitutionally protected speech is invalid unless it ensures that a license denial will be reviewed by a court in a timely manner. That question must be answered in the affirmative. As this Court has repeatedly recognized, "[a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. City of Dallas*, 493 U.S. 215, 225 (1990) (plurality opinion) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)) (alteration in *FW/PBS*). A licensing scheme that acts as a prior restraint by prohibiting a business engaged in expressive activity from operating altogether can be as effective a tool of censorship as direct censorship itself. And because businesses cannot survive if they cannot operate, without prompt judicial review to reverse erroneous license denials or revocations, the prior restraint these licensing decisions impose may easily and quickly become a permanent restraint on protected speech.

Accordingly, this Court should affirm the requirement announced in *Freedman v. Maryland*, 380 U.S. 51 (1965), and declared "essential" in *FW/PBS*, 493 U.S. at 228, that a licensing regime that acts as a prior restraint must be promptly reviewed by a court if it is to pass constitutional

muster. Because the Waukesha licensing ordinance "exists as a prior restraint on businesses purveying sexually explicit but protected speech," *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 876 (Wis. Ct. App. 1999), but does not provide for prompt judicial review of licensing decisions, it should be invalidated.

A. This Court's Decisions in *Freedman* and *FW/PBS* Mandate That a Licensing Ordinance Provide for a Prompt Final Judicial Decision on the Merits of Any License Denial.

The framework for analyzing this case is well-established. In *Freedman*, this Court recognized the very real risks to protected speech that a system of administrative prior restraints imposes. A censor "may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression," and thus judicial review of decisions imposing a prior restraint on speech is critical. 380 U.S. at 57-58; *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (noting that "the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable"). Moreover, "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Freedman*, 380 U.S. at 58.[2] Accordingly, the *Freedman* Court adopted procedural

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[2]*See also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963) ("We have tolerated such a system [of prior administrative restraints] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."), citing *Kinglsey Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Action for Children's*

safeguards that must be employed when the government acts to censor speech directly:

> 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.

Southeastern Promotions, 420 U.S. at 560 (summarizing *Freedman* requirements); *see also Freedman*, 380 U.S. at 59 (reiterating that a licensing "procedure must . . . assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license").

In the wake of *Freedman* this Court has repeatedly reaffirmed both the need for judicial review of governmental decisions suppressing speech, and the need for such review to be quickly completed. *See, e.g., Southeastern Promotions,* 420 U.S. at 560 ("a prompt final judicial determination must be assured"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 367, 371-74 (1971) (requiring safeguards that ensure that "administrative delay does not in itself become a form of censorship," including time limits for completion of judicial proceedings in obscenity forfeiture

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Television v. FCC, 59 F.3d 1249, 1260 (D.C. Cir. 1995) ("The lesson of *Bantam Books* is that the state may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected, lest the state be able effectively to suppress protected speech.").

cases); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (requiring "a final judicial determination on the merits within a specified, brief period"); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968) (*Freedman* satisfied by statute requiring judicial determination within nine days of administrative decision). These cases made clear that the scope of the First Amendment's protections is a question for the courts and that any scheme censoring speech due to its content must therefore ensure a prompt judicial determination of the propriety of that regulation.

Twenty-five years after *Freedman* was decided, this Court reviewed an ordinance strikingly similar to that presented in this case. In *FW/PBS*, 493 U.S. 215, the Court, in a series of separate opinions, struck down portions of an ordinance which imposed licensing requirements on adult entertainment establishments. Three justices, in an opinion authored by Justice Brennan, reasoned that the full panoply of protections required by *Freedman* apply in this context, and that the ordinance failed to conform to those safeguards. 493 U.S. at 239-41 (Brennan, J., concurring). In an opinion written by Justice O'Connor, three other members of the Court, reasoning that the ordinance involved only the "ministerial action" of "review[ing] the general qualifications of each license applicant" rather than "passing judgment on the content of any protected speech," *id.* at 229, concluded that the first *Freedman* safeguard – that the government institute a judicial proceeding and bear the burden of proving that certain material is unprotected – was unnecessary. *Id.* at 229-30.

Justice O'Connor's opinion also recognized, however, that, as with a censorship system, "a licensing scheme creates the possibility that constitutionally protected speech will be

suppressed" absent adequate procedural safeguards. *Id.* at 226. Accordingly, the "core policy" underlying *Freedman*, "that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech," *id.* at 228, applies with equal force to censorship systems and to licensing schemes. Therefore, these three Justices concluded, the remaining *Freedman* safeguards not only apply, but "are *essential*: 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, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228 (emphasis added) (*citing Freedman*, 380 U.S. at 51).

In the wake of *FW/PBS*, four Circuit Courts of Appeals and the Wisconsin Court of Appeals have concluded that, although this Court deemed at least two *Freedman* requirements "essential," it nonetheless "relaxed," without discussion, the requirement that administrative prior restraints be subject to prompt judicial review. *See City News & Novelty*, 604 N.W.2d at 881 (mere availability of judicial review of an administrative restraint satisfies "prompt judicial review" requirement); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999); *TK's Video, Inc. v. Denton Cty.*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (plurality opinion) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). Three other Circuits have flatly disagreed, concluding that "Part II of Justice O'Connor's opinion did not relax the *Freedman* prompt judicial review requirement." *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58

F.3d 998, 999 (4th Cir. 1995) (en banc); *accord Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000) ("[A] system of prior restraint that fails to ensure a reasonably prompt decision by a judicial officer cannot be squared with the First Amendment."); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998) ("prompt judicial review" requires both a hearing and a prompt decision by judicial officer); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995) (same). As set out below, the Fourth, Sixth and Ninth circuits are correct.

Although the cases concluding that mere access to a judicial forum is sufficient after *FW/PBS* are not models of clarity, they appear to rely on Justice O'Connor's use of the phrase "possibility of prompt judicial review," 493 U.S. at 228, rather than the phrase "assure a prompt final judicial decision" that was used in *Freedman*, 380 U.S. at 59. *See Boss Capital*, 187 F.3d at 1255; *TK's Video*, 24 F.3d at 709. But these two phrases do not reflect substantive differences. Indeed, *Freedman* itself used the phrases "prompt judicial review" and "prompt judicial determination" interchangeably, 380 U.S. at 56-60, as have numerous cases since. *See Southeastern Promotions*, 420 U.S. at 561-62 (holding that "board's system did not provide a procedure for prompt judicial review" where judicial determination on merits was not obtained for more than five months); *Thirty-Seven Photographs*, 402 U.S. at 367-70 (using term "prompt judicial review" as synonymous with "prompt judicial decision"); *Blount*, 400 U.S. at 417 (summarizing *Freedman* as holding that, "to avoid constitutional infirmity a scheme of administrative censorship must . . . require 'prompt judicial review' – a final judicial determination on the merits within a specified, brief period").

Moreover, given the thoroughness with which Justice O'Connor explained her view that the first *Freedman* safeguard was unnecessary in the context presented there, *see* 493 U.S. at 228-30, and the degree to which that analysis was the subject of division on the Court, *see, e.g.,* 493 U.S. at 240-41 (Brennan, J., concurring in the judgment), it is utterly implausible that Justice O'Connor intended to relax the third *Freedman* safeguard, without analysis, solely by means of a minor change in phrasing. Indeed, Justice O'Connor's opinion deemed the requirement of prompt judicial review "essential" – citing *Freedman* itself for support, *FW/PBS*, at 228.[3]

Finally, and critically, the holding of *FW/PBS* confirms that the third *Freedman* safeguard remained unchanged. Having held that the "prompt judicial review" safeguard was mandatory, Justices O'Connor, Stevens, and Kennedy joined a majority of the Court in striking down the ordinance under review for failing to provide such a safeguard, even though, as Justice White noted in dissent, "no one suggests that licensing decisions are not subject to immediate appeal to the courts." *Id.* at 248 (White, J., concurring and dissenting). If the "prompt judicial review" requirement meant the mere access to a judicial forum, the Court in *FW/PBS* would have upheld the ordinance because a party denied a license had access to such a forum. In short, *FW/PBS* cannot plausibly

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[3]In any event, Justice O'Connor's opinion spoke for only three Justices of the Court. *See FW/PBS*, 493 U.S. at 238-42 (Brennan, J., concurring in the judgment) (all three *Freedman* safeguards apply). Thus, the Court's holding is the narrowest ground on which the case was decided – which was that the challenged ordinance did not provide adequate procedural safeguards. *See, e.g. Marks v. United States*, 430 U.S. 188, 193 (1977); *1126 Baltimore Blvd.*, 58 F.3d at 999.

be read to relax the requirement in *Freedman* that a licensing scheme provide for a prompt judicial determination.

B. The Requirement of a Prompt Judicial Determination is Essential to Ensure That a Licensing Scheme Will Not Suppress Constitutionally Protected Speech.

This Court was correct in holding that a scheme that conditions the right to engage in expressive activity on the receipt of a license must be subject to prompt judicial review, and it should not now alter or abandon that requirement. Ours is a society that places paramount value on the ability to think and speak, free from unwarranted government interference. Because a free society "prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," *Southeastern Promotions*, 420 U.S. at 559, any law conditioning the right to speak on the permission of government officials must contain safeguards to ensure that protected speech is not wrongfully suppressed. *See FW/PBS*, 493 U.S. at 226-27; *Freedman*, 380 U.S. at 56-57.

One "evil" that such safeguards must protect against is the ability of the government to make a prior restraint permanent by delaying its decision on whether to issue the necessary license. *See FW/PBS*, 493 U.S. at 227 ("A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech."). Thus, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* at 226. But requiring the decisionmaker merely to act quickly does not adequately protect speech. Mindful of the risk that the decisionmaker –

even if acting quickly – may wrongly deny the license, courts have unwaveringly concluded that the denial must not be the last word on the subject. Instead, it is the judiciary that must make the determination whether a licensing decision that serves as a prior restraint on speech is appropriate. *See Freedman*, 380 U.S. at 58 ("only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression"); *see generally* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 55 (1984) ("The requirement of a full and fair hearing before an independent judicial forum for the adjudication of constitutional rights is a widely accepted premise of modern constitutional thinking."). Thus, the decision on a license application must be coupled with prompt judicial review of that decision.

These two requirements work in conjunction to ensure that speech is not wrongfully, and, even worse, permanently, suppressed. Without a requirement that a licensing decision be made within a reasonable time period, speech could be restrained indefinitely by the licensor's mere inaction. *See, e.g.*, *11126 Baltimore Blvd.*, 58 F.3d at 996; *FW/PBS*, 493 U.S. at 227. In such a case, the availability of prompt judicial review of a licensing decision would be meaningless. Similarly, the requirement that a licensing decision be made quickly would be small comfort to a license applicant if review of that decision could be delayed for months, or years. Even if the license applicant could prove with certainty that the denial was erroneous, if such judicial review does not occur quickly, there is a very real risk that the licensor's erroneous decision will, in effect, be final. *See*

Freedman, 380 U.S. at 58-59.[4] Thus, the "two *Freedman* safeguards work together to ensure that the entire review process will be expeditious" and meaningful. *Nightclubs, Inc.*, 202 F.3d at 893; *see generally* Lawrence H. Tribe, *American Constitutional Law* § 12-37, at 1055 (2d ed. 1988) (because of "judicial primacy in first amendment jurisprudence," Court has invalidated "any system which allows administrative determinations either directly or indirectly to determine *finally* the scope or application of first amendment privileges").

Access to a judicial forum alone is plainly insufficient to forestall the "effect of finality" that a licensor's decision would otherwise have. *Freedman*, 380 U.S. at 58.[5] Even "prompt" access to a judicial forum does not ensure that resolution will be prompt, and therefore does nothing to

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[4]While City News itself has pursued its case through the levels of court, this Court's jurisprudence in this area has never focused on whether the party before it actually was able to stay in business during the period of the prior restraint, because the fact that the case is even before it means that the license seeker was able to challenge the denial or suspension to the Supreme Court. Rather, the Court's concern is with the number of cases that neither it nor any other court will ever see. *See, e.g., Freedman*, 380 U.S. at 59 (noting that, absent procedural safeguards, aggrieved parties may lack incentives to challenge license denials).

[5]As an initial matter, such a "requirement" would not add anything and it would be meaningless for this Court to have mandated it and deemed it "essential." All litigants possess the right to challenge a statute – even if it does not impose a prior restraint – on constitutional grounds. *See Nightclubs, Inc.*, 202 F.3d at 893; *Baby Tam & Co.*, 154 F.3d at 1101 ("prompt judicial review" requirement meaningless if mere access to judicial review were sufficient, because "'[a] person always has a judicial forum when his speech is allegedly infringed'") (quoting *Graff*, 9 F.3d at 1324 (plurality op.)).

prevent a wrongful restraint on speech that lasts for months or years. In the instant case, for example, a full 17 months elapsed between City News's application for a license and the first judicial decision on the merits. *See City News & Novelty*, 604 N.W.2d at 875-76. Nothing in the Wisconsin Court of Appeals' decision indicates that proceedings in this case were unusually protracted, and statistics from state courts across the country indicate that such delays are not uncommon. *See Examining the Work of State Courts, 1998: A National Perspective for the Court Statistics Project* 38-39 (Brian J. Ostrom & Neal B. Kauder ed., 1999) (civil trials in state courts average 22 months from filing to disposition).[6] In the context of a restraint on protected speech, such delays are devastating. Quite apart from the fact that *any* delay in the exercise of First Amendment rights constitutes irreparable harm,[7] a muzzle on speech that lasts for months

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[6]Although City News itself was allowed to continue operating during the pendency of this case, nothing in the statute mandates such a stay. Accordingly, the statute itself still "gives rise to the possibility of the suppression of protected expression before judicial review of the case on the merits, and is therefore contrary to the principles which underlie the procedural safeguards set forth in *FW/PBS*." *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1116 (9th Cir. 1999).

[7]*See Freedman*, 380 U.S. at 61 (if statute does not require prompt judicial determination, "the victorious exhibitor might find the most propitious opportunity for exhibition pas[sed]"); *see also, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162-63 (1969) (Harlan, J., concurring) (delay in exercise of First Amendment rights in itself burdens them and may risk their destruction); *cf. City of Houston v. Hill*, 482 U.S. 451, 467-68 (1987) (explaining Court's reluctance to abstain in cases that raise facial challenges to statutes under First Amendment, noting that allowing claimant to "suffer the delay of

as a case challenging denial of a license winds its way through the "protracted and onerous course of litigation," *Freedman*, 380 U.S. at 59, will frequently result in a total denial of speech. A prospective bookstore may well abandon its plan to open if it is prohibited from doing so for months or years. An existing business that has to close because its license is revoked or not renewed may well not have the means to continue fighting the licensing decision through the judicial system – especially given that the closure denies it of revenue. The only practical alternative for many of these businesses is to steer far clear of the underlying statutory provisions, thus bringing about the "chilling" of speech that the prior restraint doctrine seeks to avoid. *See Southeastern Promotions*, 420 U.S. at 559.

The Courts of Appeal that have effectively eliminated the judicial review requirement have not attempted to grapple with the harm such delay imposes. Instead, they have focused on factors that are uniformly irrelevant to the need for procedural safeguards. Some courts, for example, appear to rely on the fact that the licensing scheme at issue is content-neutral. *See Boss Capital*, 187 F.3d at 1256; *Graff*, 9 F.3d at 1331-33 (Flaum, J., concurring); *see also TK's Video*, 24 F.3d at 708.[8] Even if true, this does not alter the need for

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state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect") (quotation and citation omitted); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980) (noting chilling effect on protected expression that delay might produce).

[8]Although the Fifth Circuit noted the "content-based" restrictions of other cases, it rejected *Freedman*'s requirement of a prompt judicial determination primarily on the basis that "[a] 'brief period' within which all judicial avenues are exhausted would be an oxymoron." *TK's Video, Inc.*, 24 F.3d at 709. But this Court has never required that all judicial

prompt judicial review. Indeed, *FW/PBS* itself involved a regulation that was no less content-neutral than the ordinance at issue here, and was nonetheless deemed constitutionally infirm because it "fail[ed] to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *FW/PBS*, 493 U.S. at 229; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 n.4 (1969) (content-neutral regulation must provide for "expeditious judicial review"). That is not to dispute, of course, that content-neutral regulation is subject to a lower constitutional standard, and *a fortiori* is more likely to be valid in the abstract, than content-based regulation. But even a statute limited to "mundane" content-neutral factors runs the risk that the factors will be applied improperly or that the factors themselves, however "mundane," do not justify the regulation of particular expressive activity. The danger of prior restraints arises not from the basis on which a government official denies a license, but from the possibility that, absent an assurance of prompt review, there will be no judicial determination of whether that denial was proper – resulting in the wrongful suppression of protected speech. Thus, the relevant question is not whether the underlying regulation is within the proper scope of government regulation, but whether the determination of whether the regulation was properly applied will be decided quickly enough to prevent the erroneous denial from becoming

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proceedings, including relevant appeals, must conclude within that brief period. Rather, the Court has required only a decision by a trial court in an adversary hearing. *Interstate Circuit*, 390 U.S. at 690 n.22; *Baby Tam & Co.*, 154 F.3d at 1102 (the term "final" means "that a judicial officer should make the final decision denying a license rather than a state censor . . . . It does not refer to a court's decision itself becoming final through various rehearing and appellate procedures.").

permanent. It is for this reason that a licensing ordinance, even if providing narrow standards, violates the Constitution if it does not *also* provide the procedural safeguards that *Freedman* mandates. *See FW/PBS*, 493 U.S. at 226-30 (invalidating licensing ordinance under *Freedman* despite claim that ordinance is content-neutral); *Shuttlesworth*, 394 U.S. at 155 & n.4 (content-neutral ordinance restraining speech must make available "expeditious judicial review"); *see also Southeastern Promotions*, 420 U.S. at 552 (refusing to reach question whether prohibited speech was obscene because system was "lacking in constitutionally required minimal procedural safeguards"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988) (even if "government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion"; otherwise, official may make decision of "who may speak and who may not based on the content of the speech or viewpoint of the speaker"); *see generally* Tribe, *supra*, § 12-37 & -38, at 1054-57 (noting concerns that "an administrative censor is unlikely to be sensitive to the values of freedom of expression" and that an administrative official will use licensing power to discriminate based on content through selective enforcement of regulatory power).

Nor does the fact that "applicants for adult entertainment licenses . . . have every incentive to stick it out and see litigation through to its end," *Boss Capital*, 187 F.3d at 1256, justify abandoning the requirement of prompt judicial review. In *FW/PBS*, Justice O'Connor reasoned that, because the viability of an entire business is impacted by a licensing scheme, an applicant denied a license will invariably initiate court proceedings to challenge the denial –

thus rendering unnecessary *Freedman*'s command that the licensor bear the burden of going to court. 493 U.S. at 229-30; *cf. Freedman*, 380 U.S. at 61 (refusing to set forth rigid procedures for accomplishing safeguards). But the judicial remedy sought by the potential licensee must be effective to be meaningful and, as discussed above, review may well be meaningless unless the court proceedings produce a quick decision. *See Baby Tam & Co.*, 154 F.3d at 1101-02 ("judicial review" entails both consideration and a decision; "[w]ithout consideration, there is no review; without a decision, the most exhaustive review is worthless").

Finally, the fact that a "municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time," *City News & Novelty*, 604 N.W.2d at 882, is irrelevant to the question of whether the Constitution compels a prompt decision. If a municipality cannot ensure prompt judicial review, the remedy is to invalidate the licensing ordinance, not to relax the constitutional requirement. *See Graff*, 9 F.3d at 1341 (Cummings, J., dissenting) ("[S]ince when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give."). In any event, this reasoning does not support the Wisconsin Court's interpretation of the "prompt judicial review" requirement: just as a municipality cannot direct a state court to issue a decision within a specified period of time, it also cannot grant that court jurisdiction to review the municipality's licensing decision. Only the state legislature has these powers. *See Nightclubs,* 202 F.3d at 893 & n.10 (both the availability of judicial review and the speed within which certain cases must be resolved are dependent upon state law). There is no reason that a city – due to its claimed

powerlessness to comply with *Freedman* – should be excused from its constitutionally imposed requirements, especially where a state government enacting precisely the same law would not be so exempt.

Moreover, even though a city cannot alone ensure a prompt judicial determination, it is not powerless to bring its licensing scheme in compliance with *Freedman*'s commands. For example, an ordinance may provide that a license denial or revocation goes into effect only upon a judicial determination affirming the denial or revocation of a license, *see Nightclubs*, 202 F.3d at 894; *11126 Baltimore Blvd.*, 58 F.3d at 1001 n.18, and could provide provisional licenses to new applicants pending judicial review of license denials, *see Nightclubs*, 202 F.3d at 894. Indeed, such an approach avoids altogether the risk of delay that administrative restraint poses. *See, e.g.*, *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (*Freedman* requirement could be met where a licensing scheme provides "for an automatic stay [of a license suspension or revocation] pending a judicial decision"); *Nightclub Management, Ltd. v. City of Cannon Falls*, 95 F. Supp. 2d 1027, 1036 (D. Minn. 2000).

A city could also take measures short of abandoning the prior restraint aspect of its licensing statute altogether. A city could, for example, "provide that a license shall issue if a reviewing court fails to reach a decision within a reasonably brief period of time," *Nightclubs*, 202 F.3d at 894, and could petition the reviewing court for expedited briefing or hearing in cases where a frustrated license applicant seeks judicial review. In addition, a city could petition its state legislature to pass laws obligating state courts to resolve municipal administrative appeals, or

appeals raising First Amendment issues, within a brief period. *Id.*; *see generally* Sandra C. DiGiulio, *Expedited Judicial Review Ensures that Restraints On the Adult Entertainment Industry Pass Constitutional Muster*, 31 McGeorge L. Rev. 623, 629-32 (2000) (discussing new California statute creating "an expedited judicial review process to appeal a local administrative revocation, suspension or denial of a permit or other entitlement for expressive conduct protected by the First Amendment"). In short, even if a city's purported lack of power were relevant to the constitutional validity of a city's ordinance, cities are not powerless to meet the procedural safeguards set forth in *Freedman*.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Court of Appeals upholding Waukesha's licensing ordinance should be reversed.

Respectfully submitted,

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