TG Markup

No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF WISCONSIN

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, AND PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation ("FTRF"), International Periodical Distributors Association, and Periodical and Book Association of America, Inc. submit this joint amicus brief in support of petitioner, urging that this Court find the ordinance in question to be constitutionally

infirm and to reverse the decision of the court below.[1] This brief is submitted upon written consents of counsel to petitioner and respondent. Petitioner's consent is submitted herewith; respondent's consent has previously been filed with the Court.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") publish, distribute, sell and are consumers of books, magazines, videos, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers.

Zoning and business regulatory ordinances relating to the sexually explicit nature of products sold or displayed by retail establishments are proliferating. In many cases these ordinances purport to apply even to retailers whose predominant product lines have no sexual content, explicit or otherwise. *Amici* are mainstream providers of speech in a variety of fora and media. They are concerned that, unless regulatory ordinances expressly provide for maintenance of the status quo pending judicial review of whether an existing establishment requires and is entitled to a license or complies with a zoning regulation, these ordinances inevitably will have the effect of chilling the dissemination of First Amendment-protected material. In addition, absent a stay or other provision maintaining the status quo, ultimate judicial vindication may come only after the Draconian closure of a retailer, preventing distribution of First Amendment-protected materials during the review period.

Amici submit this brief to highlight the very real danger of zoning and business licensing ordinances being used to target unpopular speech, if a communicative business can be closed prior to the culmination of judicial review. When government restricts politically disfavored but constitutionally protected speech – such as the speech at issue here – it violates the rights not only of the restricted creators and distributors, but also of mainstream

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1 A description of the *amici* is attached as Appendix A.

consumers who avail themselves of a wide variety of materials and who would rather discriminate in their consumption themselves than allow the government to dictate those choices.[2]

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).

SUMMARY OF ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural limitations on the operations of a censorship board decision-maker are required by the First Amendment. Many of these limitations relate to the imposition of discrete time limits so that unreviewable censorship is not achieved by inaction. This Court subsequently held in *FW/PBS, Inc. v. City of Dallas* that at least two of these limitations – that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained and that expeditious judicial review be available – apply equally to licensing of businesses that sell First Amendment-protected materials. 493 U.S. 224, 228 (1990)

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[2] The Court has assiduously protected the "right to receive information and ideas." *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 (1980); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

It is undisputed that neither the Waukesha ordinance at issue here, nor the related Wisconsin statute, imposes any time limit on the available judicial review; there is no requirement of expeditious judicial review. Nor do they require maintenance of the status quo during the judicial review period so that the retailer can avoid premature and possibly wrongful closure.

It is both intolerable and unconstitutional to permit an existing business selling First Amendment-protected material to be closed pending judicial review of a decision to revoke or deny a business license. Even if the courts subsequently reverse such revocation or denial, the business' First Amendment rights will have been infringed, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

Further, as a practical matter, permitting the revocation or denial to become effective during the period of review by the courts requires the business either to close, or to self-censor all of the First Amendment-protected materials that might possibly bring it within the purview of the regulatory statute or ordinance, since even temporary closure will impose grievous, if not fatal, economic harm on such a business.

ARGUMENT

THE STATUS QUO MUST BE MAINTAINED PENDING JUDICIAL REVIEW OF THE DENIAL OR REVOCATION OF A BUSINESS LICENSE TO AN EXISTING BUSINESS DEALING IN FIRST AMENDMENT-PROTECTED MATERIALS

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural limitations on a censorship board decision-maker are required by the First Amendment. Many of those limitations relate to the imposition of discrete time limits so that censorship is not achieved by inaction. This Court

subsequently held in *FW/PBS, Inc. v. City of Dallas* that at least two of these limitations – that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained and that expeditious judicial review be available – apply to the licensing of communicative First Amendment-protected businesses. 493 U.S. 224, 228 (1990)

The Waukesha ordinance at issue in this case (§ 8.195, Municipal Code of Waukesha, Wisconsin) does not provide for judicial review. The relevant review provision is found in the municipal administrative procedure provisions of state law, which gives a party 30 days to seek review by certiorari. Wis. Stat. § 68.13. There is, however, no provision imposing a time limit for a decision, or even requiring expeditious review. Nor is there any requirement for the maintenance of the status quo while judicial review is pending.

Under *Freedman*, a "prompt final judicial decision" is required. 380 U.S. at 59. Similarly, *FW/PBS* requires "prompt judicial review in the event that the license is erroneously denied." 493 U.S. at 228. The procedures applicable in this case are constitutionally deficient under both these tests.

Some courts have read the *FW/PBS* test to require only prompt access, i.e., to prohibit preventing petitioner from requesting such review for some period of time. *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255 (11th Cir. 1999). This is an untenable interpretation which fails to comply with both the language and intent of this Court. *See, e.g., Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998).

Prompt access alone is a meaningless right. When a retailer is faced with closing, the ability promptly to file for judicial review has little value unless accompanied by a prompt decision and an intermediate stay. A prompt filing followed by a judicial reversal two years later does not adequately protect the First Amendment rights of the vindicated business. Counsel for *amici* is unaware of any judicial system which grants judicial

review but prevents petitioner from requesting such review for some period of time. And few, if any, administrative procedures impose a delay between the issuance of a denial and issuance of the final appealable order. Thus a "right" to prompt access is always available, but gives the petitioner nothing of value.

As the Ninth Circuit pointed out in *Baby Tam*,

> The phrase "judicial review" [in *FW/PBS*'s requirement of "prompt 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 legendary major league umpire Bill Klein 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 1101-02.

Rather, to effectuate the intent of both the *Freedman* and *FW/PBS* Courts, and to protect First Amendment rights, there must be a prompt decision, so that the vendor of First Amendment-protected material is not left in limbo. In such a case, even more than usual, the adage that "justice delayed is justice denied" is applicable, particularly since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm."" *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Amici would be directly affected by the absence of such a safeguard. *Amici* include general bookstores and other retailers of constitutionally protected communications. *Amici* do not include

"adult" retailers as that term is commonly used, but rather mainstream establishments, whose predominant products are not sexually explicit or even sexually related, although many stock some products which could be considered relevant under typical zoning or business license ordinances. However, ordinances that potentially apply to such mainstream establishments are proliferating.

Municipalities have attempted to apply such ordinances to retailers whose stock consisted of as little as 3% and 10% sexually explicit material. *City of Columbia v. Pic-A-Flick Video, Inc.*, No. 25113, 2000 WL 460496, at *1 (S.C. 2000) (3%); *World Wide Video v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991) (10%). In yet another case, such an ordinance was applied to a general pharmacy and drug store which devoted less than 5% of its store to videos, only some of which were "adult". *Brown v. Pornography Commission of Loan Southhampton Township*, 620 F.Supp. 1199, 1203-4 (E.D. Pa. 1985). While such applications were held to be unconstitutional, it is notable that in all three cases the retailer was vindicated only after judicial review. And the application of such ordinances to retailers 40% of whose stock could be considered sexually explicit has been upheld. *See, e.g., ILQ Investments v. City of Rochester*, 25 F.3d 1413, 1415 (8th Cir. 1994).

Further, even if a prompt decision is required, and even more so if it is not, an existing seller of First Amendment-protected materials must be permitted to remain open pending judicial review of a decision to revoke or deny a business license, or of a decision to shutter the establishment because of an alleged zoning violation. To do otherwise would be to infringe the retailer's First Amendment rights, even if judicial review subsequently reverses the revocation or denial. The closing of any retail establishment obviously has a major impact on its business, from which it may never recover, even if it is subsequently permitted to reopen. Furthermore, during the closure period, the retailer will not know whether or when it may reopen. The only practical alternative for the retailer would be to self-censor by eliminating from its stock the First Amendment-protected materials which might possibly bring the establishment within the purview of the regulatory statute or ordinance. In either event,

First Amendment rights are chilled, a prior restraint is achieved, and protected materials are not available at the location. That is not a result anticipated or permitted by *Freedman*, *FW/PBS* and the First Amendment.[3]

CONCLUSION

Amici urge this Court to reverse the decision below on the ground that the Waukesha ordinance and Wisconsin statutes neither require a prompt judicial review determination, nor require maintenance of the status quo pending such determination.

Dated: August 25, 2000

Respectfully submitted,

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[3] Nor is it enough that, as here, a stay is granted in a particular case, although not mandated by law. *Freedman* requires that the limits "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). Otherwise the retailer, not knowing whether the status quo will be maintained, will be forced to self-censor to avoid the possibility of closure.

APPENDIX A: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 270 members include most of the major commercial book publishers in the United States. AAP members publish most of the general, educational, and religious books produced in the United States.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.