No. 99-1680

IN THE SUPREME COURT OF THE UNITED STATES

CITY NEWS AND NOVELTY, INC,
Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,
Respondent

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES Et al.,

Filed October 25th, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Whether a municipal licensing scheme for sexually oriented businesses is invalid under the First Amendment if it does not require a prompt judicial decision when a business owner challenges the denial of a license.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

Ordinances

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] They have a compelling interest in the issue presented in this case: whether a municipal ordinance that requires the licensing of sexually oriented businesses is invalid if it does not assure that judicial challenges to the application of the ordinance will be resolved promptly.

This case has tremendous practical importance for States and local governments across the Nation. As the Court has noted on a number of occasions, local governments have found the effective regulation of adult businesses to be essential for the prevention of crime, the preservation of property values, and the maintenance of neighborhood quality. See, *e.g.*, *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). To accomplish these purposes, States and innumerable municipalities have adopted licensing regulations similar to the Waukesha ordinance challenged in this case. If petitioner prevails in its argument that prompt judicial resolution of challenges to the application of such regulations must be assured—a guarantee that it is beyond the power of local gov-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

ernments to provide—these regulations will be rendered invalid, substantially undercutting the ability of States, counties and municipalities to combat the corrosive secondary effects of sexually oriented businesses. Because *amici* have substantial experience with the sort of ordinance at issue here and will be directly affected by the Court's decision, they submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

Petitioner's argument that a scheme for the licensing of adult businesses must guarantee a prompt judicial decision when a business contests the denial of a license is flawed on several levels. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), held that such judicial promptness is required when the State imposes a system of censorship, where the censor also bears the burden of seeking court approval for the suppression of speech, and where any restraint imposed in advance of a judicial decision must be temporary. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), however, the lead opinion took a different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue, appearing to indicate that it is sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license. This departure from *Freedman* is only logical. The Court held in *FW/PBS* that the administrators of licensing schemes for adult businesses (unlike the censors in a case like *Freedman)* do *not* bear the burden of seeking court approval for license denials—and it was the requirement that the censor obtain advance judicial authorization for the suppression of speech that was the essential predicate for *Freedman*'s further insistence on the prompt completion of judicial review.

More fundamental First Amendment principles confirm that prompt resolution of judicial challenges to the denial of licenses for sexually oriented businesses is not necessary. Such a promptness requirement makes sense when the regulation of speech is presumptively unconstitutional because it involves censorship of content or unconstrained administrative discretion. But regulations of adult businesses do not require an assessment of the content of speech, and give local officials very limited discretion. As a consequence, such licensing regimes do not allow for the suppression of particular ideas. At the same time, the proprietors of adult businesses have a substantial economic stake in seeing the judicial review process through to completion, a reality that reduces the need for an immediate judicial resolution. In these circumstances, the availability of a temporary restraining order or preliminary injunction to prevent abusive uses of the licensing process suffices to protect the interest in free expression.

Indeed, we believe that challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*. It is appropriate to treat a regulation of speech as a prior restraint when it may be applied to suppress particular points of view. In contrast, regulations that serve purposes unrelated to the content of expression are deemed content neutral, even if they have an incidental effect on some speakers but not others. That analysis should govern licensing requirements of sexually oriented businesses. Such regulations, which are directed at the secondary, non-expressive effects of adult businesses, are justified without reference to the content of the regulated speech. That sort of restriction is properly analyzed as a time, place, and manner regulation rather than as a prior restraint.

See City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THE PROMPT RESOLUTION OF CHALLENGES TO THE APPLICATION OF A MUNICIPAL ORDINANCE REQUIRING THE LICENSING OF SEXUALLY ORIENTED BUSINESSES

At the outset, two points may help put the issue here in perspective. *First*, as respondent explains, much of petitioner's brief is directed at a point that is not properly in the case. Petitioner argues at considerable length that Waukesha's *administrative* licensing process is defective. See Pet. Br. 19-27. The Court, however, limited its grant of certiorari to the question whether a licensing scheme is unconstitutional if it does not "contain explicit language which prevents injury to a speaker's rights from want of a prompt *judicial* decision." Pet. i (emphasis added). The Court, of course, "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," and this case—in which the Court expressly *limited* its grant of certiorari to the question addressing judicial review—plainly is not one of those "'most exceptional cases'" in which it would be appropriate to disregard that rule. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (quoting *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976)).

Nor is petitioner's current administrative argument one that is subsumed within the question presented in the petition. As the Court put it in very similar circumstances, the issue now argued by petitioner may be "*related* to the one petitioner[] presented, and perhaps [is] *complementary* to the one

petitioner[] presented, but it is not 'fairly included therein.'" *Yee*, 503 U.S. at 537. Thus, both the judicial review question actually presented in the petition and the administrative point that petitioner now argues "might be subsidiary to a question embracing both"—that is, whether the Waukesha system complies with the First Amendment—"but they exist side by side, neither encompassing the other." *Ibid.* See, *e.g.*, *American Nat. Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 608 (1985).

There is, moreover, no compelling need for the Court to address the nuances of Waukesha's administrative process. The constitutional requirements governing the administration of municipal licensing schemes are settled, and "[t]he lower courts have not reached conflicting results" on the application of those requirements. *Yee*, 503 U.S. at 537. But "[t]hey *have* reached conflicting results over" the *judicial* role in reviewing administrative licensing decisions. *Id.* at 538 (emphasis added). That, presumably, is why the Court granted review in this case, and it would be appropriate for the Court to confine its decision to the resolution of that conflict.[2]

Second, the issue presented here is one of enormous practical importance to States and municipalities across the Nation. The Court has repeatedly

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[2] In addition, as respondent also explains, this case appears to be moot because petitioner's injury would not be remedied were it to prevail in this Court. We note that a petition raising an issue identical to the one presented here is pending in *Harkins* v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3176 (U.S. Sept. 8, 2000) (No. 00-375). That case, which presents a pre-enforcement, facial challenge to a municipal licensing ordinance, would provide a suitable vehicle for the resolution of the question presented here if the Court dismisses this case on mootness grounds.

noted the efforts by municipalities to address the problems of crime, declining property values, and other aspects of urban blight that often accompany sexually oriented businesses. See, *e.g.*, *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). As the substantial volume of litigation raising the issue presented here suggests,[3] many cities have responded to these problems by enacting licensing schemes very similar to the one employed in Waukesha. But although these licensing ordinances provide for judicial review of licensing decisions, they generally do not, and could not, require judicial resolution of challenges to license denials by a date certain. "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000) (footnote omitted). This means that petitioner's approach would invalidate "city ordinances on the basis of the swiftness or slowness of that particular state's judicial procedures." *Id.* at 897 (Merritt, J., dissenting).

[3] See *11126 Baltimore Blvd., Inc.* v. *Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir.), *cert. denied*, 516 U.S. 1010 (1995); *Chesapeake B & M, Inc.* v. *Harford County*, 58 F.3d 1005 (4th Cir.), *cert. denied*, 516 U.S. 1010 (1995); *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc.* v. *City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *East Brooks Books, Inc.* v. *City of Memphis*, 48 F.3d 220, 225 (6th Cir.), *cert. denied*, 516 U.S. 909 (1995); *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101-1102 (9th Cir. 1998); *Boss Capital, Inc.* v. *City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000); *Lady J. Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000); *Harkins* v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3176 (U.S. Sept. 8, 2000) (No. 00-375).

As a result, the rule contended for by petitioner would render unconstitutional a very substantial body of municipal legislation, an outcome that would cause substantial disruption across the country. At the same time, local governments would lose the flexibility that the Court has recognized as important in addressing local problems that take widely varying forms. See *Renton*, 475 U.S. at 52; *American Mini Theatres*, 427 U.S. at 71 (plurality opinion). Fortunately, however, that outcome is not required here. Petitioner's argument is not supported by precedent; cannot be justified by the constitutional principle that underlies the Court's decisions in this area; and is inconsistent with the First Amendment rules governing the regulation of adult businesses generally. The decision below upholding the Waukesha ordinance accordingly should be affirmed.

A. *FW/PBS* Does Not Require The Prompt Resolution Of Judicial Challenges To License Denials

1. It is common ground between the parties in this case that a classic prior restraint, in which government officials are given substantial discretion to suppress speech that they dislike, must be subjected to the most rigorous procedural requirements. That is the rule stated in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), where state law empowered officials to prevent the exhibition of films that they did not find to be "moral and proper." *Id.* at 52-53 n.1. The *Freedman* Court held that, for such a restraint to be valid, (1) "the burden of proving that the film is unprotected expression must rest on the censor"; (2) "the requirement cannot be administered in a manner which would lend an effect of finality to the censor's deter-

mination whether a film constitutes affected expression," meaning that the censor either must issue a license "within a specified brief period * * * or go to court to restrain showing the film"; and (3) "the procedure must also assure a prompt and final judicial decision." *Id.* at 58-59. See *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (opinion of O'Connor, J.). Although the Court's decisions leave some ambiguity about the precise nature of this "prompt" judicial review requirement where censorship schemes like the one considered in *Freedman* are at issue, we recognize that there is some support for the proposition that such schemes will satisfy the constitutional mandate only if they provide for "a final judicial determination on the merits within a specified, brief period." *Blount* v. *Rizzi*, 400 U.S. 410, 417 (1971).[4]

In *FW/PBS*, however, the Court appeared to take a different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue. Justice O'Connor's lead opinion for three Justices in *FW/PBS* did not indicate that there must be a prompt judicial "determination" or "immediate"

[4] See *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (State must provide "immediate appellate review"); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141, 142 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963) ("an almost immediate judicial determination of the validity of the restraint"). Other decisions, however, have not appeared to contemplate the same immediacy in the judicial review process. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 771 (1988) (referring to "relatively speedy" judicial review); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975) ("a prompt final judicial determination must be assured"). Indeed, *Freedman* itself emphasized that the Court did "not mean to lay down rigid time limits or procedures." 380 U.S. at 61.

judicial review, as *Freedman* and its progeny required. Instead, Justice O'Connor's opinion indicated that the licensing regime must provide only for "the *possibility* of prompt judicial *review*." 493 U.S. at 228 (emphasis added). Justice O'Connor repeated this formulation throughout her opinion. See *id.* at 229 (referring to "an *avenue* for prompt judicial review") (emphasis added); *id.* at 230 (referring to "the *availability* of prompt judicial review") (emphasis added). This approach seems to contemplate a regime in which it is sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license.[5] Lower courts accordingly have read this language to permit—and municipalities have relied upon it in enacting—licensing ordinances that comply with the judicial review requirement by providing nothing more than "*access [to] the courts* within a brief period." *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) (emphasis added) (Higginbotham, J.).[6]

[5] Justice Brennan, writing for three Justices in *FW/PBS*, would have held that *all* of the procedural safeguards identified in *Freedman* must be provided in the adult business context (493 U.S. at 239 (Brennan, J., concurring in the judgment)); in contrast, Justice White and then-Justice Rehnquist were of the view that *Freedman* was *wholly* inapplicable in this setting (*id.* at 244 (opinion of White, J.)), as was Justice Scalia under a different rationale (*id.* at 250 (opinion of Scalia, J.)). In this context, the departure from *Freedman* undertaken by Justice O'Connor's opinion commanded majority support in the Court.

[6] Accord *Boss Capital*, 187 F.3d at 1256; *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994); *Grand Brittain*, 27 F.3d at 1070; *Jews for Jesus, Inc.* v. *Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). But see *Nightclubs, Inc.*, 202 F.3d at 892; *Baby Tam & Co.*, 154 F.3d at 1101-1102; *11126 Baltimore Blvd.*, 58 F.3d at 998-1001; *East Brooks Books*, 48 F.3d at 225.

That the lead opinion in *FW/PBS* believed the First Amendment to be satisfied in this setting by timely access to judicial review finds support in the authority cited by Justice O'Connor. In describing the judicial review requirement, Justice O'Connor's opinion pointed not only to *Freedman* and *Skokie*, but also to *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). There, the Court referred to the "*availability* of expeditious judicial review" (*id.* at 155 n.4 (emphasis added)), illustrating the meaning of that phrase by reference to Justice Harlan's *Shuttlesworth* concurrence and Justice Frankfurter's concurring opinion in *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). Those opinions, in turn, found it sufficient that the applicant for a permit was able to "invoke relief by way of mandamus or certiorari." *Id.* at 420 (Frankfurter, J., concurring in the result). See *Shuttlesworth*, 394 U.S. at 162 n.4 (Harlan, J., concurring) ("Since the time remaining [before a scheduled event for which a license was sought] was sufficient to obtain relief by way of mandamus, there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure."). These avenues for review do not impose absolute time limits for judicial decision.

2. In addition, the conclusion of a majority of the Justices in *FW/PBS* that the *Freedman* test does not in all respects govern the licensing of adult businesses establishes that the First Amendment does not, in this context, require a fixed date for the resolution of judicial challenges to license suspensions. In particular, Justice O'Connor's lead opinion held that, because regulation of the licensing of sexually oriented businesses is not "presumptively invalid" (493 U.S. at 229), *Freedman*'s requirement that *the censor* initiate judicial proceedings is inapplicable in

the adult business context.[7] The requirement that the censor go to court, however, was an essential premise for *Freedman*'s further insistence on the prompt completion of judicial review—meaning that the abandonment of the former requirement necessarily affects the application of the judicial review mandate to the licensing of sexually oriented businesses.

The Court explained in *Freedman*:

> [W]hile the State may require advance submission of all 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.* * * * [O]nly a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured * * * 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.* * * * *Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent*

[7] As noted above (at note 5, *supra*), three other Justices, who would have gone considerably farther, agreed in *FW/PBS* that this aspect of *Freedman* (among others) is inapplicable in the adult business setting.

effect of an interim and possibly erroneous denial of a license.

Freedman, 380 U.S. at 58-59 (emphasis added). The Court's holding in *Freedman* thus was that, where censorship schemes are at issue, the decision to prohibit expression may not have final effect absent a judicial decision; that any restraint imposed in advance of such a judicial decision may be only temporary; and that, because speech might be inhibited after the expiration of a temporary administrative restraint during the pendency of the required judicial review, a prompt final judicial decision must be assured "to minimize the deterrent effect of an interim" license denial.

This analysis, however, has no application where the licensing of adult businesses is concerned because in that setting a restraint on speech *may* become final in the absence of a judicial decision; denial of a license will be permanent unless the *applicant* decides to challenge the restraint in court. As a consequence, the administrative decision to deny a license to a sexually oriented business need *not* be only temporary. And this means that *Freedman*'s rationale for requiring a prompt judicial resolution—the concern that speech might be inhibited during the period between the expiration of a temporary administrative restraint and the rendering of the judicial determination that is *necessary* for the censor's decision to become final—has no bearing on schemes for the licensing of adult businesses, where a judicial decision is not a prerequisite for a license denial to become effective. It therefore is implicit in the analysis of the lead opinion in *FW/PBS* that licensing schemes for adult businesses need not impose rigid deadlines on the judicial review process.

B. First Amendment Principles Establish That Prompt Resolution Of Judicial Challenges To License Denials Is Not Necessary

As the preceding discussion suggests, more fundamental First Amendment principles, many of which were discussed by Justice O'Connor's opinion in *FW/PBS*, also indicate that a licensing scheme for sexually oriented businesses need not guarantee a prompt judicial decision when license denials are challenged. The decisions in which the Court has applied a requirement of expedited judicial review involved regulations of speech that were "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). These included, most prominently, cases presenting censorship schemes in which state officials passed judgment on the *content* of speech, as in *Freedman* itself. See, *e.g.*, *Freedman*, 380 U.S. at 52, 54-55; *Southeastern Promotions*, 420 U.S. at 552-53; *Bantam Books*, 372 U.S. at 66. Such restrictions present particular dangers because they permit the suppression of speech by officials who may disapprove of the ideas expressed or the means of expression; because even well-intentioned censors may be led into error by the fact that fully protected speech often is separated from expression that is legitimately subject to regulation (such as obscenity) "only by a dim and uncertain line" (*Bantam Books*, 372 U.S. at 66); and "[b]ecause the censor's business is to censor," meaning that state officials with responsibility for censorship may be insensitive "to the constitutionally protected interests in free expression." *Freedman*, 380 U.S. at 57-58.

In addition, the Court has suggested that a prompt judicial determination may be necessary when issuance of a permit or license is " 'contingent upon the

uncontrolled will of an official.'" *Shuttlesworth*, 394 U.S. at 151 (citation omitted). In such cases, as in the ones involving the censorship of content, "the prior restraint [is] embedded in the licensing system itself, *operating without acceptable standards*." *Southeastern Promotions*, 420 U.S. at 553 (emphasis added). Thus, "none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead, they involved censorship." *Boss Capital, Inc.* v. *City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000).

Ordinances like the one at issue here are quite different from the *Freedman* paradigm in a variety of material respects. *First*, as Justice O'Connor noted in *FW/PBS*, licensing schemes for adult businesses do not involve an assessment of the content of regulated speech, and therefore do not allow for the suppression of particular ideas. "Under [such an] ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). See *Boss Capital*, 187 F.3d at 1256 ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license."). Officials in Waukesha thus base their licensing decisions on objective factors such as the presence of minors, the construction of viewing booths, and the like, instead of on the substance of the applicant's expression.

Second, such licensing systems give local officials very limited discretion. Administrators are not permitted "'to roam essentially at will'" (*Shuttlesworth*, 394 U.S. at 153 (citation omitted)), or to exercise a judgment that has a large subjective component. Instead, municipal decisionmakers are directed to judge compliance only with a defined set of neutral and objective factors.

Third, as Justice O'Connor also explained in *FW/PBS*, the practical impact of a licensing regime for adult businesses differs significantly from that of the censorship system at issue in *Freedman*. The expense and delay inherent in challenging the suppression of a *single* movie or book in a given locality means that exhibitors or publishers may find it "too burdensome to seek review of the censor's determination." *Freedman*, 380 U.S. at 59. In contrast,

> [t]he license applicants under the [Waukesha] scheme ha[s] much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.

FW/PBS, 493 U.S. at 229-30 (opinion of O'Connor, J.). Because such an applicant is likely to "stick it out and see litigation through to its end," "[t]he need for a prompt judicial decision is * * * less compelling for licensing ordinances than for censorship schemes." *Boss Capital*, 187 F.3d at 1256.

Fourth, it bears at least passing note that the nature of the expression at issue here is considerably different from the speech that was constrained in

Freedman or *Shuttlesworth*. The Court has found it " 'manifest that society's interest in protecting th[e] type of expression [sold by an adult business] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.' " *Renton*, 475 U.S. at 49 n.2 (quoting *American Mini-Theatres*, 427 U.S. at 70 (plurality opinion)). Cf. *California* v. *LaRue*, 409 U.S. 109, 118 (1972) ("we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries [documented at bars featuring nude dancing] were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater"). At the same time, it may be that the speaker's powerful (and almost purely) commercial interest in providing the materials that are available at a sexually oriented business, like the similar incentives underlying commercial speech, means that such expression is hardy enough to survive even if it is accorded diminished constitutional protection.

Against this background, First Amendment principles do not require the significant intrusion into state judicial processes that would follow from conditioning the constitutionality of licensing schemes for adult businesses on the guarantee of an immediate judicial decision when license denials are challenged. Because these licensing regimes are "not presumptively invalid" (*FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.)), there is no logical reason to insist that the judgment of the officials administering them be validated by an almost immediate judicial decision. The practical concern with the difficulty of challenging the censorship of *particular* films that underlay the promptness requirement in *Freedman* is not present here. And the assurance in this case that licensees may obtain access to the courts *prior* to the effectuation of a license cancellation means that temporary restraining orders or preliminary injunctions are available to prevent clear cases of abuse on the part of local officials. See *Nightclubs, Inc.*, 202 F.3d at 897 (Meritt, J., dissenting); *Grand Brittain, Inc.* v. *City of Amarillo*, 27 F.3d 1068, 1070, 1071 (5th Cir. 1994). This case therefore calls "for 'treating unlike things differently according to their differences' " (*Boss Capital*, 187 F.3d at 1256-1257 (citation omitted))—and thus for a departure from *Freedman*'s requirement of a prompt judicial decision.

C. Ordinances Requiring The Licensing Of Sexually Oriented Businesses Should Not Be Treated As Prior Restraints

The considerations discussed above are enough to dispose of petitioner's claims. But there also is a more fundamental defect in petitioner's argument that the *Freedman* requirement of a prompt judicial decision applies here: in our view, challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*.

The Court has treated the state regulation of speech as a prior restraint in cases where officials controlled expression on the basis of its content or had virtually unconstrained discretion to deny speakers a license or permit—situations where the regulation of speech had "the potential for becoming a means of suppressing a particular point of view." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). In contrast, the Court subjects limits on speech to the lower

level of scrutiny suitable for time, place, and manner restrictions when the State has not

> adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. * * * Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). See, *e.g.*, *Heffron*, 452 U.S. at 649.

It is this latter analysis, suitable for content neutral regulations, that should govern licensing requirements for sexually oriented businesses. Such regulations plainly serve purposes that are "unrelated to the content of expression" and, because they are directed entirely at nonexpressive conduct (by, for example, limiting access to the business by minors or prohibiting sexual activity on the premises), are "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. As Justice White and then-Justice Rehnquist noted in their *FW/PBS* dissent, an ordinance like the one in Waukesha "does not regulate content and thus it is unlike the content-based prior restraints that the Court has typically scrutinized very closely. * * * [T]here is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by [such an] ordinance." *FW/PBS*, 493 U.S. at 246 (White, J., dissenting).

To be sure, the content of speech is relevant to the Waukesha ordinance in one sense: the licensing scheme applies only to "adult oriented establishment[s]" (Waukesha Mun. Code § 8.195(2)), and such an establishment is identified by whether, among other things wholly unrelated to speech, it exhibits and sells films or periodicals that display any of a predictable list of defined sexual acts or portions of the anatomy. *Id.* § 8.195(1). In closely related contexts, however, the Court has made clear that such ordinances must be treated as *content* neutral because they are "aimed not at the content of the films shown at [the adult business], but rather at the *secondary effects* of such [businesses] on the surrounding community" (*Renton*, 475 U.S. at 47)—and that is so even if disapproval of the business was a subsidiary motivating factor in the enactment of the ordinance. *Ibid.* As the Court has explained, such an "ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48.[8] This type of

[8] Indeed, the state interest in a licensing ordinance like the one in Waukesha is particularly compelling because such regulations address dangerous and harmful activities that take place in the licensed establishment itself. As the court below explained, the violations committed by petitioner—involving minors loitering on the premises and sexual activity by patrons—raise concerns including "the transmission of AIDS and other sexually transmitted diseases and increased levels of criminal activity such as prostitution, rape and assaults." Pet. App. 37a. Cf. *LaRue*, 409 U.S. at 110-111 (describing activity at bars and nightclubs featuring nude dancing, which included prostitution, "[i]ndecent exposure to young girls, attempted rape, rape itself, and assaults on police officers").

ordinance is "properly analyzed as a form of time, place, and manner regulation" (*id.* at 46) because it "does not contravene the fundamental principle that underlies [the Court's] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial views.' " *Id.* at 48-49 (citation omitted). See *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1394 (2000) (plurality opinion).

As Justice White noted in *FW/PBS*, this conclusion applies with full force to the licensing of sexually oriented businesses: decisions like *Renton* "make clear * * * that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral." *FW/PBS*, 493 U.S. at 244 (White, J., dissenting). And under the analysis applicable to content neutral regulations, ordinances like the one in Waukesha must be upheld. Licensing decisions under the Waukesha ordinance do not turn on the content of the applicant's speech, and the ordinance does not in any way attempt to limit the permissible forms of expression at adult businesses. On its face, the ordinance is instead directed at combating "increased levels of criminal activities including prostitution" and other transient sexual acts, as well as at the preservation of property values. Waukesha Mun. Code § 8.195 (preamble). There can be no doubt that this interest in "seek[ing] to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood" (*Pap's A.M.*, 120 S. Ct. at 1393 (plurality opinion)) is a legitimate and important one " 'that must be accorded high respect.' " *Renton*, 475 U.S. at 50 (citation omitted). And there has been no suggestion that the ordinance is overbroad,

or that its stated purposes are pretextual. See generally *Heffron*, 452 U.S. at 647-55. Settled doctrine therefore establishes the validity of the ordinance without regard to whether it provides for expedited judicial review—or any of the other accouterments of prior restraint analysis.

We say this with some hesitation, because we recognize that six Justices in *FW/PBS*, writing in two separate opinions, treated the Dallas ordinance there at issue as a species of prior restraint. See 493 U.S. at 225-30 (opinion of O'Connor, J.); *id.* at 238-41 (Brennan, J., concurring in the judgment). In our view, however, the issue is one that the Court could appropriately consider anew. Justice O'Connor's lead opinion in *FW/PBS* did not reach the question whether the ordinance was properly viewed "as a content-neutral time, place, and manner restriction" because the opinion concluded that "the city's licensing scheme lacks adequate procedural safeguards." *Id.* at 223 (opinion of O'Connor, J.). But the opinion never expressly addressed the threshold question whether there was a proper basis for applying the procedural safeguards designed for prior restraints, and did not respond to the dissenting views of Justice White on this point. Because there is no majority opinion in *FW/PBS*, because the lead opinion did not directly analyze whether the licensing of adult businesses is properly treated as a prior restraint, and because the assumption that underlies the outcome in *FW/PBS* is in tension with decisions such as *Renton*, it would be appropriate for the Court to revisit the issue.

It should be added that, far from imposing a prior restraint, the *application* of the Waukesha ordinance to petitioner does not present *any* First Amendment

issue at all. Petitioner's request for renewal of its license was denied because petitioner "permitt[ed] minors to loiter on the premises, fail[ed] to maintain an unobstructed view of the viewing booths and allow[ed] patrons to engage in sexual conduct inside the booths" (Pet. App. 7a)—all violations that "manifest[] absolutely no element of protected expression." *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). See Pet. App. at 37a-42a & nn. 13, 15 (describing petitioner's violations). As the Court observed in *Arcara*, when rejecting a constitutional challenge to the closure of an adult bookstore for virtually identical reasons, First Amendment issues arise only when the conduct triggering the closure had "a significant expressive element that drew the legal remedy in the first place * * * or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." *Arcara*, 478 U.S. at 706-07. See *id.* at 708 (O'Connor, J., concurring) ("Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment."). Because the conduct prompting the denial of petitioner's application had no expressive component, petitioner cannot challenge the ordinance as applied in this case.

CONCLUSION

The judgment of the Court of Appeals of Wisconsin should be affirmed.

Respectfully submitted,

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