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 Court Of Appeals Of Wisconsin

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE PETITIONER'S PRAYER, THAT THIS COURT SHOULD HOLD § 8.195 (1995) INVALID ON ITS FACE, IS NEITHER MOOT, NOR WAIVED, NOR OUTSIDE THE SCOPE OF THE PETITION AS GRANTED.

A. This Case Is Not Moot.

1. Unless the Ordinance, as it stood in 1995, is declared void, the corporate Petitioner and all of its officers are guilty of having violated the Ordinance by operating without a license, and are disabled from licensure in Waukesha and elsewhere.

While it is true that the corporate Petitioner has promised to close the store at its current downtown location in Waukesha (Respondent's Lodging, Vol. I, Tab 14),[1] it has never promised not to apply for a license to open at a new location, in Waukesha or elsewhere, nor does it disavow an intent to do so.[2] As will be shown below, the decision here under review will continue to have a negative impact on the Petitioner by disqualifying it in

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[1] The Respondent filed a voluminous Lodging with its brief in this Court. Respondents' Lodging, Vol. 1, Tabs 14-16, includes pleadings from other litigation involving the Petitioner and correspondence between the parties from earlier this year. The Petitioner now submits its own, much slighter, lodging, with similar, judicially noticeable documents. The Petitioner has no objection to the Court taking judicial notice of the extra-record documents in the Respondent's Lodging, if it also considers those in the Petitioner's Lodging that complete the story.

[2] In *City of Erie v. Pap's A. M.*, 120 S. Ct. 1382 (2000), this Court held that the possibility that a party might wish to do business in a municipality, even though it disavows any intention to do so, is sufficient to save a once-ripe challenge to a municipal ordinance from Article III mootness.

connection with future license applications, and, accordingly, this case has not become moot.[3]

No individual may hold, or participate in holding, a license under the Waukesha ordinance for a period of five years after having violated it. WMC § 8.195(4), Pet. App. 103. The nonrenewal decision in this case was based on violations of the Ordinance in 1994, and 1995. Pet. App. 82-83. The § 8.195(4) disabilities from the violations upon which the nonrenewal was based will expire later this year. However, operating an adult oriented establishment without a license, as City News did for years after its nonrenewal, is also a violation of the Ordinance.[4] Unless the Ordinance is declared unconstitutional, the disabilities from licensure in Waukesha borne by City News and its officers as a result of this continuing violation will persist until February, 2005.[5] Other municipalities' licensing ordinances deny licenses to those whose licenses to

[3] Before the agreement to close Petitioner's store, Petitioner filed an application for a new license on February 10, 2000. The February 10, 2000, application was rejected, in part, because of the disability flowing from the 1995 nonrenewal. *Id.* Petitioner's counsel's letter of June 12, 2000 (Respondent's Lodging, Vol. I, Tab 14), withdraws Petitioner's appeals from the rejection of that application, not the application at issue in this case, Petitioner's Lodging, Tab 8, and thus has no relevance to the standing issue here.

[4] The City's Resolution of May 7, 1996, permitted the Petitioner to operate only through review in the Circuit Court. Petitioner's Lodging, Tab 3. This concluded on April 7, 1997. Pet. App. 55. The City specifically rejected a suggestion by Petitioner that its operation thereafter be deemed lawful. Letter from Meitz to Olson, Feb. 4, 2000 (Petitioner's Lodging, Tab 7).

[5] From April 2, 1997, when the Circuit Court decision was handed down (Pet. App. 55) and the Petitioner's right to continue to operate conferred by the Council Resolution of May 7, 1996 expired (Petitioner's Lodging, Tab 3), until February 8, 2000, when the City amended its ordinance (*id.*, Tab 9) (six days before Petitioner ceased operating as an adult store, *id.*, Tab 7), the Petitioner was operating without a license in violation of the

operate adult businesses have been revoked or nonrenewed by any city, imposing civil disabilities of varying durations, and disabilities from licensure may persist after that. *See, e.g., Sibron v. New York*, 392 U.S. 40 (1968), in which the Court held that an appeal of a criminal conviction was not moot as to a defendant who had completed his sentence, because of the possibility of collateral consequences flowing from the conviction.[6]

2. In this review of an administrative decision, there is no basis for the Court to pass judgment on amendments to the Ordinance after the administrative decision under review.

Though it made no such suggestion in its Brief in Opposition to the Petition for Writ of Certiorari, the City of Waukesha now contends that this case is moot, because it has amended its ordinance. If this Court were to attempt to rule on the constitutionality of the present version of Waukesha Municipal Code (WMC) § 8.195, it would truly be aiming at a moving target. The ordinance was amended four times this year, on February 8, 2000 (after the Court of Appeals decision), on August 16, 2000 (after this Court granted certiorari), on September 20, 2000 (after Petitioner's brief was filed), and on November 10, 2000 (after Respondent's brief was filed). Petitioner's Lodging, Tab 9. Notwithstanding the City's determined efforts to shield the original ordinance from review by this Court, it is the version of the ordinance in effect at the time of the administrative decision under review that must control the result of this case, as shown below.

original ordinance scheme reviewed by the courts below. On January 21, 2000, the City affirmatively warned Petitioner that it was operating without a license (*id.*, Tab 7).

[6] "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequence will be imposed on the basis of the challenged conviction." *Sibron*, 392 U.S. at 57.

If the original version of the Ordinance is constitutional, City News and all of its officers are disabled from any new licensure in Waukesha for five years. However, if it is facially invalid, they were entitled to violate it "with impunity." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). The unamended Ordinance controls on this point.

The City argues that, since the ordinance has, this year, been amended to remedy the lack of any time limit for a public hearing decision under § 8.195(3)(d), an applicant can now steer clear of the open-ended periods allotted for completing a public hearing and completing post-hearing briefing under the alternative Chapter 68 review scheme. Respondent's Brief at 24. This amendment is simply not relevant to this case, as the Petitioner is not now operating an adult business in Waukesha, and the validity of Petitioner's nonrenewal depends solely upon the renewal scheme in effect at the time of the nonrenewal ruling.

This court confronted a very similar question in *Massachusetts v. Oaks*, 491 U.S. 576 (1989). There, in a separate opinion by Justice Scalia, five Justices agreed that a subsequent narrowing amendment of a law could not render moot a claim that it was facially void when violated.

The City cites *Diffenderfer v. Central Baptist Church of Miami, Fla.*, 404 U.S. 412 (1972) (per curiam) for the proposition that the Court should look to the amended Ordinance, but in that case and all of the cases on which it relied, the plaintiffs sought prospective relief involving the future application of a statute. Here the Petitioner seeks no such relief, and prospective injunctive relief would not be available in a Chapter 68 review action such as this in any event. *Hanlon v. Town of Milton*, 2000 WI 61, 235 Wis.2d 597, 612 N.W.2d 44, 48 ¶ 16 (2000). The relief the Petitioner seeks is the vacation of the order denying renewal and the retrospective invalidation of the Ordinance as it stood when the Petitioner was violating it by operating without a license, in order to remove the disabilities flowing from the nonrenewal and from those

violations. If, however, the Court believes that the current version of the Ordinance is controlling, it should, as in *Diffenderfer*, remand so the Petitioner may, if it chooses, amend its complaint to challenge the amended ordinance, and the Wisconsin courts may then have the first opportunity to consider the effects of the amendments.

B. The Petitioner's Arguments Were Neither Waived Nor Outside The Petition.

City News' brief in the Wisconsin Court of Appeals explained the holding in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), and argued that the Ordinance failed to guarantee the right to prompt judicial review "under any interpretation of prompt judicial review." City News' Court of Appeals Brief at 22, quoting *Redner*, 29 F.3d at 1502. City News contended that "by the absence of a requirement of a decision following a public hearing within any certain period of time," Brief at 22, "judicial review is potentially unavailable for an extended period of time while the administrative review is still pending." Brief at 22, quoting *Redner*, 29 F.3d at 1502.

This argument went to § 8.195(3)(d) of the Ordinance, and the Court of Appeals agreed with it. Pet. App. 24-26. Then, in its Court of Appeals brief, City News went on to argue that WMC § 2.11, the City's generic administrative procedure ordinance, and Chapter 68, Wis. Stats. (Pet. App. at 61), which it adopts, "are insufficient for the purpose of providing 'prompt judicial review' *for the same reason.*" Brief at 23 (emphasis supplied)[7]. *See also* City

[7] The Wisconsin Court of Appeals' observation that the petitioner did not "directly challenge" Chapter 68 (Pet. App. 28), is quite misleading. The court merely noted that City News was not claiming ch. 68 was facially invalid in all its potential applications most of which do not involve permits to engage in First Amendment activity. *See* City News' Court of Appeals Brief at 12, 14, and 21-22, where City News objected to the adoption by reference of Chapter 68's open-ended review

News' Reply Brief in the Wisconsin Court of Appeals at 5-6, n. 1. The Court of Appeals understood this argument, clearly did not consider it waived, and rejected it on its merits. The Court said, "the primary method of review lies under ch. 68, Stats.," and ruled squarely, if incorrectly that ch. 68 "provides a fixed timetable" such that "judicial review may not be delayed for an indefinite period of time." Pet. App. 23.

Neither is the Petitioner's argument that a licensing ordinance must maintain the status quo through the first level of judicial review newly minted before this Court. Indeed, the Circuit Court analysed City News' challenge "for failure to preserve the status quo throughout the review process" (Pet. App. 60), and observed, "Time limits and status quo go hand in hand." Pet. App. 62. The Court of Appeals considered the question of maintenance of the status quo throughout administrative review so central to this case that it was one of the grounds upon which the court unsuccessfully attempted to certify the case to the Wisconsin Supreme Court. Pet. App. 44.

The time limits and status quo issues raised here were fairly included in the Petition for Certiorari. The Petition explained that, included within the question presented regarding "prompt judicial review" were both the

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procedures into municipal code provisions governing the renewal of licenses for protected expression.

Additionally, as noted in the Brief for the United States as Amicus Curiae, at 29, n. 15, Petitioner's counsel's letter after oral argument in the Court of Appeals (which was submitted *at the court's invitation*), again emphasized the open-ended structure of the ch. 68 procedures, focusing on a case, *Franken Equities v. City of Evanston*, 967 F. Supp. 1233 (D. Wy. 1997), that invalidated a licensing procedure because the hearing which it provided was of potentially indefinite duration. The oral arguments and this submission supplemented the briefing on lack of time limits in the Court of Appeals.

subsidiary question of effective time limits for the administrative review scheme as well as the issue of preservation of the status quo. *See*, Petition at 17.[8]

II. PETITIONER'S *FACIAL* CHALLENGE CANNOT BE DEFEATED SIMPLY BECAUSE THE CITY DID NOT APPLY ITS ORDINANCE UNCONSTITUTIONALLY.

As the courts below consistently recognized, the City's willingness to allow the Petitioner to operate pending judicial review in this one case cannot save its ordinance from facial review. Pet. App. 25, 60, 62.

In any event, a facial challenge to a licensing scheme that confers unbridled discretion is appropriate, and the option for unlimited delay is a form of unbridled discretion. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-224 (1990) (plurality opinion), this Court said that "where a scheme creates a risk of delay such that every application of the statute creates an impermissible risk of suppression of ideas, we have permitted parties to bring facial challenges" (internal quotation marks and citations omitted).

Finally, if both alternative judicial review provisions are invalidated, it is impossible to construe the balance of

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[8] The City is wrong in suggesting that built-in open-ended delays in its licensing scheme have nothing "to do with the actual question presented." Respondent's Brief at 24. If a business can be closed for an indefinite or lengthy period before city officials complete their administrative decisionmaking, judicial review cannot be deemed "prompt" in any constitutionally meaningful sense of that word. *See, e.g., Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994). This Court actually presaged the holding in *Redner* by observing in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990) (plurality opinion) that the ordinance there failed to provide an avenue for prompt judicial review because its administrative procedure lacked effective time limits.

the licensing requirement so that it survives,[9] and the Wisconsin courts on remand should then vacate the non-renewal order, and relieve the petitioner and its agents of the disability from licensure they currently bear for having had a license denied and for having operated without a license.[10]

III. IT IS PRECISELY BECAUSE A FACIALLY CONTENT-NEUTRAL LICENSING SCHEME CAN BE EMPLOYED TO EFFECT CONTENT-BASED CENSORSHIP BY DELAY THAT THIS COURT HAS REQUIRED PROCEDURAL SAFEGUARDS INCLUDING PRESERVATION OF THE STATUS QUO.

The City's primary argument on the merits is that the requirements of *Freedman*[11] and *Southeastern Promotions*,[12] including that the status quo be maintained through judicial review, apply only to governmental speech-licensing schemes that are expressly content-based, that is, schemes that license only a particular book, film or performance, and unabashedly allow for licensing decisions based on content. This argument was considered by this Court and flatly rejected in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). In that case, this Court discussed the subject of which, if any, of the *Freedman* guarantees apply when the context of a licensing scheme switches from unapologetic

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[9] The Wisconsin Court of Appeals invalidated one of the 1996 Ordinance's paths to judicial review, § 8.195(3)(d), for want of a time limit. If this Court invalidates the other path (*i.e.*, the adoption in § 8.195(11) of Chapter 68 review), the 1996 Ordinance will lack any of the procedural safeguards required by *FW/PBS* and the renewal requirement would be facially invalid.

[10] Though the Ordinance's licensing provisions should fall, Wisconsin's courts might well sever and preserve the Ordinance's substantive provisions governing the operation of adult businesses, at §§ 8.195(9)-(10).

[11] *Freedman v. Maryland*, 380 U.S. 51 (1965).

[12] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

censorship to an annual licensing scheme for adult stores. It did not announce any relaxation of *Freedman*'s status quo preservation requirement. *Id.* at 228.

In *FW/PBS*, six justices of this Court agreed as to the application of certain of the *Freedman* procedural safeguards to adult business licensing laws.[13] One of these safeguards requires the preservation of the status quo. As noted in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975), "[w]e held in *Freedman*, and we reaffirm here, that . . . any restraint *prior to judicial review* can be imposed only for a specified period and *only for the purpose of preserving the status quo*." (Emphases added.)

The plurality opinion by Justice O'Connor confirmed that this safeguard applies to the annual licensing of

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[13] The Brief of the National League of Cities and others, 17-22, misstates prior restraint analysis in the context of a challenge to a licensing scheme lacking *procedural* guarantees. Any enactment that requires permission from the government prior to engaging in speech is in fact a prior restraint. *FW/PBS* at 225; *and see, Alexander v. United States*, 509 U.S. 544, 553, n. 2 (1993). In *FW/PBS* this Court did not reach the question of whether the *substantive* provisions of the licensing scheme there, *i.e.*, the license requirement and its civil disability provisions, should be assessed under standards applicable to time, place and manner schemes, 493 U.S. at 223 (plurality opinion), because it invalidated the licensing scheme for its lack of *procedural* safeguards. The Court should do the same in this case, as it presents no challenge to the city's substantive authority to require that adult stores be licensed, nor to the substantive standards governing who gets a license (though these significant issues, which the Circuits are just now beginning to develop, will no doubt be raised in future cases). This Court has never suggested that the *Freedman procedural* safeguards are unnecessary in the context of a prior restraint merely because its substantive provisions may be content-neutral provisions aimed at secondary effects. *See, e.g., FW/PBS* (safeguards required in content-neutral adult-business licensing scheme).

adult businesses. The plurality enumerated the three *Freedman* safeguards in the following language:

> (1) any restraint *prior to judicial review* can be imposed only for a specified brief period *during which the status quo must be maintained;*
>
> (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS at 227 (emphasis added).

Then, in moving to the context of adult business licensing schemes, it said:

> Thus, the first two safeguards 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.

FW/PBS at 228 (emphasis added).

While the status-quo-preservation language in *FW/PBS* is not precisely identical to the language in *Southeastern Promotions,* it is sufficiently similar that it would be unreasonable to interpret it as having intended any change in the nature of the requirement as articulated in *Southeastern Promotions,*[14] particularly given its

[14] In *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), the Court said, that a prior restraint of speech may be imposed before the would-be speaker has the opportunity to obtain a judicial determination of its lawfulness *only* where the restraint has the effect of maintaining the status quo, *e.g.,* by restraining speech that has not yet commenced. Since a restraint in advance of judicial determination may be imposed when and only when it preserves the status quo, it necessarily follows that a restraint in advance of a judicial determination may not be imposed where it would alter the status quo, *e.g.,* by terminating expressive activity already lawfully underway. In *Southeastern Promotions,* the Court summed up its holding by saying, "Procedural safeguards were lacking here in several respects," and then listed among them: "During the time prior to judicial determination, the restraint altered the status quo." 420 U.S. at 562.

characterization as "essential" and the absence of any other discussion of the status quo point in the plurality opinion.

However, regardless of whether this Court looks to the promulgation of the status quo requirement as stated by the majority in *Southeastern Promotions,* or undertakes a creative reading of the language used by the plurality in *FW/PBS,* the ordinance challenged here cannot survive. Obviously, measured against the language used in *Southeastern Promotions,* the ordinance falls because it fails to preserve the status quo pending a judicial determination. Alternatively, even if the *FW/PBS* plurality deliberately intended to cut back on *Southeastern Promotions'* status quo requirement to only require preservation of the status quo pending completion of *administrative* review, the scheme under which Petitioner's license was denied readily fails that test as well. Due, at least in part, to its open-ended time limits for a final administrative decision, a business's right to operate could easily terminate long before completion of all diligently-pursued administrative review. In short, this scheme fails under any formulation of the status quo requirement, and the Court may not be compelled to address the broader question of whether a stay should remain in effect pending an initial judicial determination on the merits.

However, should the Court reach that question, it should hold that an annual licensing scheme for adult businesses must guarantee an unsuccessful applicant for renewal the preservation of the status quo through the first level of judicial review, as in *Freedman* and *Southeastern Promotions.*

This Court has consistently refused to dispense with time-honored procedural protections for First Amendment rights on the ground that the potential for unlawful suppression appeared in novel dress. "As far back as the decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720-721 (1931), this Court has recognized that the way in which a restraint on speech is "characterized" under state law is of little consequence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989).

The *FW/PBS* plurality recognized some differences between a censorship scheme and a licensing scheme, but appreciated their functional similarity, noting that "Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *FW/PBS* at 226.[15]

The City implicitly suggests that this Court should rewrite its licensing jurisprudence on the assumption that municipal officials will always act fairly, and that to suggest that their anti-pornography feelings might sway their judgment is a "gratuitous insult. . . . " Respondent's Brief at 39. This Court has previously rejected this suggestion, holding that a presumption that municipal licensing personnel will act in good faith and obey unwritten standards is "the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770

[15] In a display of plain speaking rare among the Circuits in the context of licensing jurisprudence, the Seventh Circuit recently called the Dallas licensing scheme invalidated in *FW/PBS* a system of "quasi-censorship," and explained the result in that case by frankly admitting that government often has a content-based ax to grind against a sexually oriented business, even in the licensing context. *Thomas v. Chicago Park District*, ___ F.3d ___, ___ (Case No. 99-1811, 7th Cir. 2000).

(1988).[16] Though *Lakewood* involved only substantive discretion in licensing decisions, the analysis must be the same where, as here, a licensing scheme allows for procedural discretion. "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion).[17]

The reason for the status quo preservation requirement is to insure that licensing personnel (who need not be neutral quasi-judicial decision makers but can be, as here, local politicians sitting on the City Council) cannot unilaterally shut down existing businesses without some prior judicial approval of their decision. A single adult business can easily become one of the most highly charged political issues on a municipal landscape. The

[16] The *potential* for biased or arbitrary administration of a licensing scheme, which arises from an enactment's lack of procedural safeguards, is all that is necessary to require its facial invalidation. " . . . [T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992). *See also, Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

[17] This Court's requirement that licensing ordinances contain procedural safeguards to curtail discriminatory enforcement recognizes that, where procedural safeguards are lacking, and a municipality need not explain a subjective licensing decision or a delay in the review process that results in the closure of a business before it can get to court, it is easy for it to conceal any improper conduct or motives in any given case. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758, 759 (1988), where the Court acknowledged "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action," and *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992).

status quo guarantee is a crucial safeguard necessary for protecting First Amendment rights against those powers that are most politically motivated to engage in content-based censorship pretextually based on content-neutral reasons.

Beyond this, however, preservation of the status quo pending court review is critical, because city officials may deny a license based on criteria in an ordinance, which are, themselves, unconstitutional. Since city decision-makers typically have no power to rule on the constitutionality of the ordinances they administer, it is crucial that the status quo be preserved until at least one court has examined the merits of the revocation order and all of the licensee's related constitutional defenses.[18]

IV. ONE WHOSE LICENSE EXPIRES DURING ADMINISTRATIVE REVIEW DOES NOT HAVE EFFECTIVE AVENUES BY WHICH TO AVOID INJURY FROM WANT OF PROMPT AND EFFECTIVE JUDICIAL REVIEW.

The City asserts a renewal applicant can assure itself of at least a judicially reviewable administrative decision

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[18] For example, if the basis for a non-renewal order were a change in the city's adult zoning restrictions, rendering the business's previously lawful location a violation of the licensing ordinance, and requiring the immediate termination of all non-conforming uses, surely, before City officials could shut down such a business, the business should have the opportunity to assert constitutional defenses, such as that the new scheme effectively allowed no locations for adult businesses at all, in violation of the "reasonable opportunity" requirement of *Renton v. Playtime Theatres, Inc.*, 471 U.S. 41, 53 (1986). Likewise, if a licensing ordinance singled out adult businesses by providing that a renewal must be denied upon proof of even minor and easily curable violations of municipal code provisions unrelated to protecting the public interest from the effects of adult speech, like snow-shoveling ordinances, surely an adult business should have the opportunity to contest the constitutionality of such a provision, as applied to it, before its expressive activity could be terminated.

before expiration of its license by filing more than seventy-one days in advance of its expiration date. Respondent's Brief at 20. The seventy-one day figure, however, merely represents a sum of the allotted time periods for those phases of the Chapter 68 review process that are required to be completed within stated times. There are two crucial phases in the process, the public hearing itself, and post-hearing briefing, that are not required to be finished within any fixed period. Because a renewal applicant cannot know how much time these phases of the review process might consume, it cannot calibrate its filing date with any certainty at all. There is "no means by which an applicant may ensure" completion of the review process prior to the expiration of its license. *FW/PBS*, 493 U.S. at 227 (plurality opinion).

The City suggests that any necessary protection of a speaker's rights during the judicial review process can be achieved, at a point after closure of a business will likely already have occurred, by seeking a discretionary temporary injunction in the reviewing court. This argument was recently considered and rejected by the Sixth Circuit in *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, ___ (6th Cir. 2000), which said that it, "both misinterprets a long line of legal precedent in the area of prior restraints and minimizes the importance of the First Amendment freedoms at stake."

This suggested remedy is totally inadequate because, no matter how promptly a reviewing court may be presented with a claim for interim relief: 1) in a scheme like Waukesha's, where it is quite possible for an existing license to expire long before exhaustion of administrative review, a business may already have been closed for a substantial period of time before even getting to court; and 2) there is no guarantee as to how swiftly the court will either hear or rule on even an *interim* request for relief. It goes without saying that any realistic assessment of the length of time a business stands to be closed prior to any opportunity for interim relief must also include the time it will take the business to find a lawyer, and the

time it will take the lawyer to prepare the requisite court papers.

Moreover, in order to obtain temporary relief in court, an applicant would necessarily be required to demonstrate a likelihood of success on the merits. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 519-20, 259 N.W.2d 310, 313-14 (1977). Since the final decision on the merits will simply consist of a review of the administrative record, the court would necessarily have to base any interlocutory determination regarding whether the applicant has a likelihood of ultimate success on the same record. It obviously could not do so until the record would be prepared and transmitted to it by the municipality. Before the September 19, 2000, amendment of the ordinance (Petitioner's Lodging, Tab 9) this process, too, entailed the prospect of indefinite delay.

The City also suggests that a licensee could possibly obtain relief against the interruption of its business through filing a collateral action, and can lawfully be relegated to this remedy. Such a holding by this Court would be even less faithful to its consistent requirement that protection for the procedural rights of licensees in any speech-licensing scheme be guaranteed.

V. THE DIRE CONSEQUENCES PROJECTED BY THE CITY WILL NOT FLOW FROM A RULING THAT PROTECTS A NON-RENEWED LICENSEE'S RIGHT TO OPERATE THROUGH THE FIRST LEVEL OF JUDICIAL REVIEW.

A. The Issue Before This Court Involves Only Preserving The Status Quo For Ongoing Speech Pending Judicial Review.

The City argues that the status quo rule of *Freedman* and *Southeastern Promotions* unlawfully discriminates in favor of ongoing speech, since new applicants "have . . . as great a First Amendment interest as existing adult businesses." Respondent's Brief at 42. The City implies that any rule that an unsuccessful applicant for *renewal* must be allowed to operate until it receives a judicial decision would confer upon applicants for *new*

licenses an equal-protection right to open and operate pending judicial review, though they might be totally unqualified for licensure. This argument ignores the fact that this Court has already said that licensors may impose a prior restraint for a short period prior to judicial review if such restraint merely preserves the status quo. *Freedman* at 58-59. No question concerning the rights of new applicants is presented in this case. There is, moreover, good reason for being especially careful that procedural protections are afforded to speech in progress.

First, interruption of an existing business is much more likely to work a permanent termination of its expressive activity, as it is much more likely to lead to insolvency, which would cause an ultimate judicial decision to be "too little, too late." A brief, temporary delay is less likely to have equally devastating consequences for a business that has not yet opened, and may not have ongoing expenses. Second, as the Court recognized in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), there is a real possibility that the content of ongoing, unpopular speech will arouse a retaliatory animus. In contrast, regulators dealing with a new applicant will have only a general idea of the content of its future speech, which is less likely than speech in progress to engender a motive to retaliate like that of which the Court warned in *Lakewood*.

B. Application Of *Southeastern's* Status Quo Requirement For Prior Restraints Will Not Interfere With The Enforcement Of Laws Of General Application, Such As Tax And Sanitation Laws, Even Against Those Engaged In Protected Expression.

The City suggests that *Southeastern's* status quo requirements would adversely affect "every kind of regulation of every kind of expressive business," including zoning, tax, and sanitation laws. Respondents Brief at 18, 41, 42. The City predicts that municipal regulators of all kinds would be hamstrung and the courts would be flooded. This Court considered and disposed of a similar argument in connection with a scheme that allowed for

substantive discretion in licensing decisions, in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760-61 (1988). As the Court recognized there, laws of general application, which are not tied to licensing schemes for expressive activity,[19] and which do not otherwise function as prior restraints, do not present the dangers of hidden censorship discussed above. Therefore, such laws need not manifest the *Freedman* procedural guarantees.[20] Nothing the Court does in this case will interfere at all with their administration.

C. A Municipality Has A Large Arsenal Of Weapons At Its Disposal In Cases Where A Business Presents An Ongoing Danger To The Public.

The City and its *amici* contend vigorously that a rule allowing a business to stay open pending judicial review opens the public to grave danger. When one bears in mind that a license nonrenewal is mandatory after *any* violation of the Ordinance, no matter how trivial, one

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[19] "A law is 'general' for present purposes if it regulates conduct without regard to whether that conduct is expressive." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575-576, n. 3 (1991) (Scalia, J., concurring). The distinction between a law of general application and a law tied to speech is illustrated by the requirement at WMC § 8.185(10)(d) that the premises be kept "clean." A law that simply required all businesses to be kept clean, theatres and restaurants alike, with like sanctions for all, would be a law of general application. A law that required all businesses to be kept clean, tied to a licensing scheme only for expressive activity (such that a theatre could forfeit its very right to exist if popcorn on the floor went unswept for too long, but a restaurant could not), would not be a law of general application.

[20] The Court, though, has been watchful to make sure that enactments that masquerade as laws of general application are not structured so as to be "more onerous" with respect to those engaged in expressive activity "than with respect to the vast majority of other businesses." *FW/PBS* at 225. Such laws trigger the safeguard requirement.

must question how often such danger is real, but if a case arises in which it *is* real, the municipality has many tools at hand to address it. Individual violations of the Ordinance can be separately prosecuted. Also, the municipality itself can seek temporary and permanent injunctive relief in court, even in the context of prosecutions for those very violations. *Town of Wayne v. Bishop*, 210 Wis.2d 219, 565 N.W.2d 201 (Ct. App. 1997). In Wisconsin, anybody can bring a nuisance action pursuant to §§ 832.09-11 Wis. Stats. and seek an injunction closing the business for a year. *State v. Panno*, 151 Wis.2d 819, 447 N.W.2d 74 (Ct. App. 1989).[21] In this case, the Waukesha County District Attorney's office did bring such an action against City News. The court granted a prompt temporary injunction requiring removal of the Petitioner's movie booths, and the court's final order mandated modifications in the store's operation. (Petitioner's Lodging at Tabs 4-6).

CONCLUSION

The risks of long-term improper suppression of protected speech inherent in Waukesha's license renewal procedures are real, while the risks associated with maintenance of the status quo through a single level of judicial review are slight because true emergencies can be addressed in so many other ways. The burdens faced by a renewal applicant facing closure, prior to judicial review, based on erroneous factual findings or constitutionally impermissible reasons, are substantial and in some cases

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[21] As noted by this Court in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), such a sanction does not offend the First Amendment because it is location-specific and does not preclude its target from engaging in expressive activities at other locations in the municipality, unlike a license nonrenewal which imposes a five-year city-wide disability. It is also of great significance that in such a nuisance action, any sanction is imposed by a judge, not a municipal official, so no restraint of expression occurs prior to judicial review of the facts, the law, and the defendant's constitutional rights.

insurmountable, while the burdens on a municipality facing a problem business holding over during judicial review are ordinary, and are, after all, part of the business of government. Surely, the First Amendment cannot tolerate a licensing scheme under which hostile local officials may close an expressive business before it has had any opportunity to assert its constitutional defenses. This Court should hold Waukesha's permit renewal scheme facially unconstitutional, and reverse the decision of the Wisconsin Court of Appeals with instructions remanding the matter for further proceedings consistent with its opinion.

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