IN THE SUPREME COURT OF THE UNITED STATES

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CITY NEWS AND NOVELTY, INC., :

Petitioner :

v. : No. 99-1680

CITY OF WAUKESHA :

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Washington, D.C.

Tuesday, November 28, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

JEFF S. OLSON, ESQ., Madison, Wisconsin; on behalf of the Petitioner.

CURT MEITZ, ESQ., City Attorney, Waukesha, Wisconsin; on behalf of the Respondent.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-1680, City News and Novelty, Inc. v. the City of Waukesha.

Mr. Olson.

ORAL ARGUMENT OF JEFF S. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: Mr. Chief Justice and may it please the Court:

This case is controlled by the interaction of four principles, all designed to eliminate the danger of censorship by delay, from this Court's decisions on speech licensing schemes. First, in order to comply with the First Amendment, a speech licensing scheme that acts as a prior restraint must guarantee an applicant a prompt final administrative decision in a short, fixed period of time.

QUESTION: Mr. Olson --

MR. OLSON: Yes.

QUESTION: -- is this a speech licensing scheme?

MR. OLSON: It is a speech licensing scheme because it requires a license to operate an adult book store.

QUESTION: But it's different than Freedman, in the sense that Freedman was expressly designed to permit

or not permit speech based solely on its content.

MR. OLSON: You're correct.

QUESTION: And it seems to me this is not that at all. I recognize the analogy, but Freedman is not directly controlling, it seems to me.

MR. OLSON: You're right that the Waukesha ordinance doesn't permit licensing decisions on its face to be made on the basis of content, but the Court I believe has recognized in City of Lakewood and in FW/PBS that licensing decisions that are not expressly content-based can still be used for covert content-based censorship.

QUESTION: Are you claiming that any of the reasons that were given -- this is a case of a license that was in existence, and it was -- it's a nonrenewal case, right?

MR. OLSON: Yes.

QUESTION: And the nonrenewal was based on violation, alleged violation of the terms of the license. Are you contesting that any of those terms, like no minors on the premises, open booths, that any of those terms violate the First Amendment?

MR. OLSON: Not in this case. We will do that in some future case, but we have not made that argument in this case and we don't think the Court should reach that

argument in this case. This is a case about procedures, not about the substantive disqualification criteria.

QUESTION: I suppose a book store, or a newspaper has to -- they're in a building, and I guess they can't have holes in the floors and unsafe electricity and maybe they wouldn't be able to run a business if they did. They don't have to meet -- for that safe electricity or working conditions and so forth there isn't some special test, is there?

MR. OLSON: Oh, all of those laws of general application that don't act as prior restraints targeted at speech can be enforced.

QUESTION: How are the violations here targeted at speech? I believe that the accusation was they were -- involve conduct, nothing to do with speech in the books in the store.

MR. OLSON: They're targeted at speech in the sense that they're tied to the license, and they're tied to the permission to continue your ongoing speech.

QUESTION: Well, so you have a book store, and it says you can have a license to sell a book store, open your book store provided there isn't electricity running all over the floor and electrocuting people.

MR. OLSON: Those --

QUESTION: Is that then subject to some special

test because it's a book store?

MR. OLSON: If the requirement to have the electricity only applies to book stores, yes, it would be subject to the Freedman guarantees. If it applies to everybody, as all those building code requirements do as far as I know, then they're not subject to the Freedman guarantees, and that's what the Court said in Lakewood.

The second principle that I think controls the Court's disposition of this case is that a speech licensing scheme violates the First Amendment if it permits the status quo to be altered to the applicant's detriment during the administrative proceedings.

QUESTION: How do you get that from Freedman, because Freedman, the status quo was no speech. That is, the Court said you must have a graphic procedure, because you're not allowing someone to speak. Here, a speaker has been permitted to speak, has a license, and the question is whether it will be renewed. So --

MR. OLSON: That's --

QUESTION: So you're asking for, the continued speech is the status quo, as distinguished from Freedman, where no speech was the status quo.

MR. OLSON: That's absolutely correct. In Freedman and in Southeastern Promotions the Court said that a prior restraint before judicial review can be

imposed only where it maintains the status quo.

Where the status quo is speech, obviously you can't impose a prior restraint prior to judicial review, and in the tail-end of Southeastern Promotions the Court listed the constitutional deficiencies with the law at issue there, and one of the deficiencies listed was that it permitted the status quo to be altered to the applicant's detriment before judicial review.

QUESTION: That was another Freedman-type case, wasn't it, where the performance could not go on under the existence.

MR. OLSON: It was a new speech case, that's correct, but I believe the Court found that the status quo was altered to the applicant's detriment because the show in the presentation of Hair in Southeastern Promotions had to be postponed and they lost their date for the presentation.

We believe that the third principle governing this case is that a licensing scheme that acts as a prior restraint must confer upon an unsuccessful applicant the right to prompt judicial review, and the fourth principle is that --

QUESTION: Do you really -- is that really your principle? As I understand your case, it's not prompt judicial review as such, as was the case in Freedman, but

here you would be delighted to have delayed judicial review as long as you keep your license until judicial review is over, so what you're really saying, it's not a question of prompt, it's a question of until the end of the judicial road, however long that road is, your license can't be revoked.

MR. OLSON: We believe that's what Southeastern Promotions requires, and we believe that's the only way to prevent injury from lack of prompt judicial review.

QUESTION: But then if that's the case it's nothing to do with the promptness of judicial review. It's simply that you retain your license until judicial review is over, however long it takes.

MR. OLSON: It's right that that's the rule we're urging the Court to find in Southeastern Promotions and FW/PBS and apply in this case, but it's wrong to say that it has nothing to do with the promptness of judicial review, I think, because the question on which the Court granted certiorari is does the licensing ordinance have to contain language to prevent injury from want of prompt judicial review, and the only way to prevent injury from want of prompt judicial review when you're enacting city licensing ordinance is to maintain the status quo, guarantee the status quo --

QUESTION: But that can be done by the court.

If that's constitutionally required, as you say, when you have the ordinance providing for prompt commencement of judicial review, what would go along with the prompt commencement of judicial review is the ability of the court, indeed the obligation of the court, if the Constitution is as you say it is, to immediately issue a stay order preventing the cancellation of the license.

Why isn't that sufficient? Why does it have to be in the statute if you provide for judicial review and if, as you tell us, the court having judicial review must maintain the status quo?

MR. OLSON: Justice Scalia, it's not sufficient for five reasons. First, the timing of that sort of temporary relief is in the discretion of the circuit court and can depend on lots of factors, including docket pressure --

QUESTION: Not if it's constitutionally required, as you tell us. You tell us that the status quo has to be maintained. If that's so, you have a -- you know, a lock on a stay order from the court as soon as the case gets there.

MR. OLSON: Well, that really depends on what this Court says in this case. If the Court says in this case, as we urge it to say, that the status quo through judicial review must be guaranteed, then I suppose we

could go into circuit court and get on the schedule for a motion and have the judge receive briefs and decide our motion and, after a period of time, issue an order implementing this Court's decision.

QUESTION: It would also mean that you've brought this case before you have any reason to believe you've been harmed.

MR. OLSON: No.

QUESTION: I mean, why should we pronounce that advisory opinion? If it is indeed the case, as you say it is, that the court must issue a stay order, why can't we await that event? If and when a court doesn't issue a stay order, then you've been harmed.

MR. OLSON: I don't think that a stay order, the possibility of a stay order in the circuit court is an adequate substitute for Freedman safeguards, including maintenance of the status quo as written into the ordinance.

QUESTION: Well, the supreme court of Wisconsin held -- was it the supreme court, or the court of appeals?

MR. OLSON: Court of appeals.

QUESTION: The court of appeals held that what you're asking for was not required here, didn't it?

MR. OLSON: The court of appeals believed that the status quo would be maintained through the

administrative proceedings automatically, and the court of appeals held that it wasn't necessary to maintain the status quo through the termination of judicial proceedings.

QUESTION: So under that holding, if you went into the Circuit Court of Waukesha County you might get a stay and you might not.

MR. OLSON: Well, we wouldn't have much of a claim on a stay today except by making the arguments from Freedman and Southeastern Promotions that we're making here today.

QUESTION: Well, couldn't you argue that the administrative determination by the city was arbitrary or capricious? Isn't that a ground for judicial review of an administrative order?

MR. OLSON: We could. That would be an argument going to the merits of the claim and, of course, it would be relevant to the issuance of a stay, because we have to show probability of success.

QUESTION: Your position basically is, even though your claim substantively has no merit, you're still entitled to an automatic stay.

MR. OLSON: I don't even get to whether we're entitled to an automatic stay in my thinking, because I don't think that the possibility of a stay being imposed

in a discretionary manner in the circuit court is sufficient to satisfy Southeastern Promotions, Freedman, FW/PBS.

QUESTION: It is sufficient if they decide your case -- if the circuit -- you have some claim on the merits. You say they're arbitrary in taking away my license.

MR. OLSON: Or some provision is unconstitutional.

QUESTION: Yes, all right, you say this, we have a claim on the merits, and you say, judge, decide it. Decide it before we have to close down. Now, if they do, it's fine, right? You have no complaint as long as the judge decides your claim on the merits before you have to shut the door.

MR. OLSON: In an as-applied challenge that would be correct, but this is a facial challenge.

QUESTION: No, but I'm not saying about this case. Suppose it was always true that the judges would decide on the merits before anyone had to shut the door.

MR. OLSON: If that were always true, then --

QUESTION: No problem, all right.

MR. OLSON: -- the court wouldn't have to worry about a specific guarantee --

QUESTION: Fine, then why aren't you better off,

not worse off, if the court decides a stay before you have to shut down, for after all, a court will give you the stay as long as there's a reasonable probability of success, but the court will allow you to stay open on the merits only if you're right.

MR. OLSON: Getting that stay does require us to show a reasonable probability of success on the merits.

QUESTION: But to win, you have to win, so you're easier -- it's easier for you to get the stay than it is to win.

MR. OLSON: Not -- not really, in terms of timing especially. We can't show a reasonable probability of success on the merits in an administrative review until that administrative record gets to the court, and there's no time limit on that under the unamended ordinance.

QUESTION: This case has an air of unreality to it, because in fact your client did get a stay until the end of the judicial road without making a showing of probability of success on the merits and, in fact, the entire case has been now adjudicated on the merits, is that not so?

MR. OLSON: That's correct, and we have no as-applied challenge here. This is strictly a facial challenge case.

QUESTION: But isn't it also have an air of

unreality because your client is not in business any more and doesn't intend to go back into business, as I understand the proceedings.

MR. OLSON: Our client is still just barely in business operating as a nonadult store, and intending to close even that operation within a matter of days, but as we pointed out in our brief --

QUESTION: Why isn't the case moot?

MR. OLSON: The case isn't moot because there's a disability from licensure that flows from having violated the ordinance by operating without a license, which I told them they were entitled to do under Shuttlesworth, because --

QUESTION: But there's a disability for licensure for a business he has no intention of engaging in, as I understand it.

MR. OLSON: Well, there's no showing that they intend to engage in this business, or that they have not applied for a new license and they don't have an application pending now, but they haven't foresworn any intention to apply for a license at some other location in the future.

QUESTION: I have the impression -- I may be unfair to you -- that you may be representing interests other than the named party to the case here.

MR. OLSON: Not -- my client has a real, concrete interest in having a facially valid, constitutional ordinance on the book in Waukesha. City News and Novelty and its officers have real interests in that --

QUESTION: Sufficient interest to finance extensive litigation in the United States Supreme Court. I guess that's the answer, right, and of course he's paying the bills, I suppose.

MR. OLSON: Yes. The City News and Novelty is footing the bill for this case because they believe they're right, they believe in it's important principle, and they don't want the 5-year disability from licensure that will fall on the corporation and its officers. If they're determined to have been operating without a license in violation of a valid ordinance up until February 14, 2000, which is when they stopped operating as an adult book store, they'd be disabled from licensure in Waukesha for 5 years after that, until Valentine's Day 2005.

QUESTION: That disability has nothing -- I mean, that disability has something to do with a defect in the system that might have produced a merits decision that was contrary to the facts, or contrary to the law, but I don't see how that disability has anything to do with the

question of timing that you're now bringing before us. I mean, if, indeed, your client was properly found to be in violation of the substantive provisions of the ordinance, then it seems to me he deserves to be disabled from future licensing.

What does that have anything to do with the timing question of, you know, he has to be allowed to continue operation before the adjudication is made? I mean, I see that you have some continuing interest, but it's not an interest that depends at all upon the issue that you're bringing before us here.

MR. OLSON: Justice Scalia, they do in the following sense. If there is no valid judicial review path in this licensing ordinance, then there's no valid renewal mechanism, and the whole licensing requirement becomes facially invalid. Then they're entitled to operate without a license.

QUESTION: But you're not saying that the whole judicial review mechanism is invalid in the sense that it has produced an unjust or incorrect substantive decision. You're saying that there's one feature of it, namely whether your client was allowed to operate in the meantime that rendered it unfair, but I don't see how that has anything to do with your -- the propriety of preventing your client from operating in the future, once a

substantive violation has properly been found.

Or, you say it can't properly be found, that the entire judicial proceeding is invalidated by reason of the fact that your client could not be allowed to continue operation pending the proceeding?

MR. OLSON: My client was allowed to continue, but my client was entitled to have that guaranteed on the face of the ordinance, and we contend that the --

QUESTION: Well --

QUESTION: There is a -- there was a -- I forgot what the title of the case was, but a decision of this Court explaining that if you were entitled to something as a matter of constitutional right, due process, like notice, it doesn't matter that the notice provision isn't in the law itself, as long as the court insists on it. Then you have no constitutional right that has been violated.

MR. OLSON: That's right. There are some of the cases going to the requirement of, for example, explicit and specific and objective licensing standards that recognize that these could be -- these could come from usage or authoritative construction, as well as on the face of the legislation, but here there is no usage or authoritative construction that builds a status quo --

QUESTION: Well, do you have -- all we know is

in your case you were allowed to remain in operation until the end of the line. Do you -- is there anything in this record to show that that doesn't routinely happen?

MR. OLSON: Well, as far as I know, this is the only establishment ever to be licensed in Waukesha as an adult book store. There's nothing --

QUESTION: So you're saying in another case someone else might suffer the violation of a constitutional right, but certainly that has not been your experience, and I don't know why we shouldn't assume that other cases would proceed in this same pattern and not in some other pattern.

MR. OLSON: The Court has held in more than one case that license applicants are entitled more to the hope of the grace -- to more than the hope of the grace of the Government. They're entitled to a guarantee. In other words, maybe they will. Maybe they will let the next guy stay open, too, or maybe they'll say that we let Olson's clients stay open because that was test case, raising constitutional issues about our ordinance and we weren't sure how it was going to come out, now we know, so you've got to close with our nonrenewal decision. We're entitled --

QUESTION: Mr. Olson, does the fact that you're making a facial constitutional challenge here in your view

make any difference on the question of mootness or ripeness?

MR. OLSON: Yes, I think it does. I think if we were making an as-applied challenge the -- Justice Scalia would be right in the sense that we haven't suffered any injury, because we were allowed to remain open. The fact that we're making a facial challenge, I think first of all it focuses the Court's attention on the ordinance as it stood in 1995, and that's -- in '96, and that it prevents it from being mooted out by the subsequent amendments to the ordinance that have taken place four times this year.

QUESTION: Maybe, is it standing? I mean, as I understand it you're saying -- you're complaining about a procedural flaw, call it X.

MR. OLSON: Yes.

QUESTION: And as far as your client is concerned, X never happened to him.

MR. OLSON: Correct.

QUESTION: As far as your client was concerned, it's now been determined that he violated the statute on the merits.

MR. OLSON: Correct.

QUESTION: And your client says, I'm out of business anyway, I've made an agreement not to try to get back into it.

Now, it sounds as if that should violate some prudential principle. I just --

(Laughter.)

QUESTION: I'm not totally sure which one.

MR. OLSON: Well --

QUESTION: You've looked into this more thoroughly.

QUESTION: Can I add one fact before you answer Justice Breyer?

MR. OLSON: Sure.

QUESTION: Generally the purpose of the facial challenge is to protect third parties who may not be before the court, but here, is it not a fact that the third parties are largely, maybe not entirely protected by the amendment to the ordinance, from the very danger that you're seeking -- the very principle you're seeking to vindicate?

MR. OLSON: The third parties are protected from a couple of the original problems. They're protected from indefinite time -- indefinite times in the administrative procedure. But they're not protected from lack of prompt judicial review and lack of preservation of the status quo during judicial review. The third parties out there who will apply for renewal in the future under this ordinance will still face those facial problems with the scheme as

it stands today.

QUESTION: But those third parties will be in exactly the position that your client has been in during the course of this litigation, isn't that correct?

What I'm getting at is, the kind of the classic third-party right that we recognize is the right in the case in which the individual defendant in effect says, yeah, as applied to me the ordinance is perfectly constitutional, but there are these other people and as to them it would not be.

But here your client is in exactly the same position as the other people, and should that make a difference? One reason why it might make a difference is, if it turns out that this supposedly facially invalid ordinance in practice is applied in a perfectly valid way to you, should we therefore assume that it will be different when the ordinance is applied to third parties?

MR. OLSON: I --

QUESTION: So I'm wondering whether you're really in a situation in which our cases recognize your right to raise a third-party right where you're in the same boat with them.

MR. OLSON: I think your cases prevent you from assuming that we are in the same boat with them. I think they prevent you from assuming that they won't be required

to close pending judicial review, for example, or that --

QUESTION: Well, why aren't you in the same boat with them?

MR. OLSON: Because --

QUESTION: You say our cases prevent me from making that assumption. Why aren't you?

MR. OLSON: We got the grace of the Government and a special dispensation to be allowed to remain open. Future applicants, there's no reason to believe that they will get that, and they are entitled --

QUESTION: There's also, usually a champion comes forward and says, other people are going to be chilled, but in this case not only aren't others chilled from getting into this business, but you're being edged out not because of any ordinance, but because a bigger player has taken over and there's not -- and has squeezed you out of the market.

MR. OLSON: Maybe not totally out of the market. They might want to apply for a license at some other location.

QUESTION: But they are perfectly adequate champion of themselves. It's not like the person who is going to be afraid to demonstrate for fear of being arrested. It's -- I don't see any chill of people like, what is it, the B -- whatever the organization that has

come into this town with a bigger and better adult book shop.

MR. OLSON: Setting that particular organization aside and looking at future operations that might be deciding whether or not to locate in Waukesha, I don't think it's beyond the stretch of the imagination to suggest that they might decide to go elsewhere if this Court decides that Waukesha's ordinance is just fine and you can be nonrenewed administratively for popcorn on the floor, and you have to close until you get a judicial decision on the merits that that's an unconstitutional criterion.

QUESTION: Maybe we have been misconstruing your argument. Is your argument not that there is a third-party right that you were raising, but an argument that even as to you in this case, in which you were allowed to operate as the proceedings progressed, even as to you in this case, the statute was simply flatly unconstitutional and therefore the entire proceeding was unconstitutional, even though you weren't shut down pending the determination.

MR. OLSON: We do contend that, and we do contend that at least on remand the nonrenewal order will have to be vacated because it was issued pursuant to an unconstitutional licensing scheme.

And with the Court's permission, I'd like to reserve my time.

QUESTION: Very well, Mr. Olson. Mr. Meitz, we'll hear from you.

ORAL ARGUMENT OF CURT MEITZ

ON BEHALF OF THE RESPONDENT

MR. MEITZ: Mr. Chief Justice, and may it please the Court:

The petitioner in this case was denied a renewal of its adult license for committing nine separate violations of our municipal code, including permitting minors to loiter and allowing sexual activity to both occur on the premises. The City of Waukesha maintains that a guarantee of a prompt judicial determination, as required in Freedman in the context of a censorship scheme, is neither applicable or required for a licensing ordinance that focuses on the secondary effects of such establishments and targets prior misconduct not protected by the Constitution.

The specific issue before this Court, which is before the Court today, is that -- whether such an ordinance, which has neither the effect or purpose of limiting or restricting the content of any commutative materials must provide either a guarantee of a prompt judicial determination, versus the availability or access

to prompt judicial review for administrative decisions that are made concerning conduct which is unprotected by the First Amendment.

QUESTION: Well, if we accept your statement of the question, I think it's perhaps an easier case than I believe they mean to bring, because I think part of their point is that even under a scheme which is justified on the secondary effects analysis, so it's not content-based in the classic sense, even under that scheme, there is still going to be a content restriction on speech if this establishment is shut down, and that is true simply because the nature of the establishment is rather content-specific, so you're going to have a content -- you're going to have an effect which is correlated to content, so that's why I wonder if it's fair for you to say that the ordinance does not have the effect, in addition to not having the purpose of a content restriction, because I think they're saying it does have the effect of a content restriction, and that's why you ought to have some safeguards.

MR. MEITZ: In answering your question, Justice Souter, this Court said in the seminal cases, in the first and the plurality of American Mini Theatres, and in Renton, that these types of establishments, adult establishments do have a effect on the surrounding

environments.

The Court said in Renton, the majority said that you are capable of regulating, you have a substantial important interest, and as long --

QUESTION: No question.

MR. MEITZ: As long as your regulations are justified without regard to the content of what they sell, in this case what they sell or rent, that is content-neutral. Certainly --

QUESTION: It is content-neutral for certain purposes, but he is saying that there ought to be some procedural safeguard that recognizes the fact that even these so-called content-neutral limitations based on secondary effects do have an effect on speech, and that effect is at least very closely correlated with content, and he's saying that for that reason, even though you can regulate it -- that's not being contested, is it, as a broad proposition -- even though you can regulate it, there ought to be some limits on your regulation because of the damage that you can and do on a content-basis, in effect.

MR. MEITZ: And I think that is clear. As the Court -- a plurality stated in FW/PBS, technically this is a -- requires prior restraint analysis, and we do initially, we provide the objective standards for review,

because if you don't have, as the case was cited in Lakewood, where there are no standards, you have unbridled discretion, and without any standards there's that hidden idea of censorship, and we provide, as the court of appeals determined, objective, definitive standards.

The other key here, as FW said, is you must provide, the licensor must provide a determination in a reasonable, specific period of time.

QUESTION: But I think, and I don't want to cut you off, but I think what you're saying -- and this may be fine, but I want to make sure I understand it. You're saying, yes, so long as we meet certain conditions, not all the conditions he wants, we can have an effect on content.

MR. MEITZ: I think what we're going to find here is certainly --

QUESTION: But isn't that your position?

MR. MEITZ: There will be what we consider an incidental burden on content. There clearly will be, but this Court on numerous occasions involving time, place, and manner restrictions where you have in place some restrictions, as long as they're incidental, and incidental as this Court has defined on many occasions, is that the regulation is essential to the furtherance of the interest, and clearly here, our interest, our interest in

protecting the health, safety, and welfare of our citizens, is geared on not what they're selling, not what they're renting.

We're concerned about keeping minors out of these establishments. We're concerned about keeping sexual activity from occurring. We're concerned about peep booths not being obstructed, which would discourage sexual activity.

QUESTION: We accept that and he accepts that. All he's saying is, if you're going to regulate on that perfectly legitimate basis, you've got to do it promptly. That's the argument. Why can't you do it promptly --

MR. MEITZ: And I --

QUESTION: -- and therefore why is it a burden? I mean, that seems to me what the issue is in this case. Why is it a burden that you should not carry?

MR. MEITZ: We would agree with that. We believe that the argument of administrative determine -- of prompt judicial administrative determination is not the issue before the Court.

QUESTION: But do you agree that it's required?

MR. MEITZ: Absolutely.

QUESTION: Well then, what's the difference between an administrative delay, which you concede the Constitution prohibits, and a judicial delay?

MR. MEITZ: The big difference is this, and I think there were six justices in FW/PBS v. Dallas that recognized the distinction between content-based censorship schemes and the Freedman analysis, which was -- required these safeguards to obviate the dangers of a censorship system, and those licensing ordinance that do not pass judgment on the content of any commutative material.

QUESTION: But what sense would it make for the Court to have strict rules about administrative expedition but not judicial, other than what Justice -- the line of questions Justice Scalia was indicating, that there is authority to issue a stay? Other than that, what would be the reason?

MR. MEITZ: The reason is, is the requirement for a guarantee of a prompt judicial determination in Freedman is because the licensing scheme in Maryland was passing a determination on the content of what is obscenity. This Court has stated, to obviate the risks associated with that the judiciary has the expertise to make determinations concerning the constitutionality or whether a matter is protected or unprotected. That is clear, that an administrative review body is not the final arbiter.

If they want to declare something obscene or

not, the burden is upon them -- the burden upon them of going to court and proving that is there, and the requirement of prompt judicial determination is because the judiciary has the necessary sensitivity towards what is protected or not protected versus an administrative body.

QUESTION: Mr. Meitz, if some kind of provision for prompt administrative review is required in these license revocation cases, do you think this Court has ever decided whether the ensuing judicial review, whether it has to provide for a prompt decision or just prompt access to the courts, to courts having a power to maintain the status quo if the appropriate showing is made.

MR. MEITZ: We believe that --

QUESTION: Is there a difference between access and final decision and what do you think our cases hold in that --

MR. MEITZ: For matters involving censorship or content-based situations, it's clear from Freedman and its progeny, Southeastern, that a prompt judicial, guarantee of a prompt judicial determination is necessary to minimize the risk, and the --

QUESTION: You mean final determination?

MR. MEITZ: Yes.

QUESTION: As opposed to access?

QUESTION: Yes. However, as the plurality stated in FW, the words availability, avenue, and possibility, that that is appropriate considering the fact that what we are doing here, the municipality is not passing judgment on the content. What they sell is irrelevant. We are making determinations that are within our expertise. We do it every other Tuesday in the City of Waukesha.

QUESTION: Well, I'm not clear on what you think is necessary. Is it necessary here that there be a provision on the face of the statute for prompt final judicial decision, or just prompt access to the court for judicial review?

MR. MEITZ: Prompt access, Justice O'Connor, because we believe that the purpose, the reason for a prompt judicial determination to eliminate that discouraging effect on the individual film exhibitor to go into court and the expertise, which only the judiciary has, that is not applicable.

QUESTION: But it seems to me it would go the other way around. If the administrative agency has expertise, and it's required to expedite, in your case, but the judiciary doesn't, then you're allowing the entity without expertise to delay. That seems to me, you have it backwards.

MR. MEITZ: Not with regard to matters that are not content-based. If you're making a determination on whether minors are loitering or not, that is within the particular realm of municipal body. They make decisions like that all the time, and that decision is, in effect, final, unless there is an appeal taken, and that's clearly unlike the censorship scheme, where you have to go to court Maryland, if you want this to be declared obscene you better get authorization --

QUESTION: I go back to my earlier question. If the premise is that the Constitution requires expedition at the administrative level, why doesn't it have the same requirement at the judicial level? Expertise can't be the answer, because that works against you, it seems to me.

MR. MEITZ: The reason it would not be required, you have to look at the underlying rationale of Freedman and why Freedman required a prompt judicial determination, because of specifically what the Court said -- filed like, the 37 photographs. You are not in the position, censor -- you are -- you're in the business of censoring, and you are not sensitive to the protected versus unprotected speech.

QUESTION: Well, isn't there something, too, to the idea that when you get into court, you're dealing with a neutral tribunal, whereas perhaps the administrative

tribunal might be thought not to be neutral.

MR. MEITZ: This is true, and I think as you pointed out earlier the deferential standard of review exists virtually in every State that I'm aware of. It's pointed out by the Solicitor General, is whether there -- whether the administrative body was arbitrary and capricious, exercises will versus its judgment.

QUESTION: Mr. Meitz, would you be making this same argument if what was at issue here was not a statute directed at adult book stores but a statute directed at, let's say, radio stations? It's not addressed at all business, just radio stations.

It picks them out, and it addresses the external effects of radio stations. If they're found to be in violation of the sanitary code because they're infested with rats, or because the plumbing is unsafe, or because the electricity is unsafe, their license can be revoked. It seems to me a very parallel situation. Now, would you say that you could have a hearing under that statute directed only at radio stations, and shut down the radio station before the opportunity for complete judicial review has been accorded?

MR. MEITZ: If you're obviously not trying to --

QUESTION: I am worried --

MR. MEITZ: -- control the content, but if it's

like you said --

QUESTION: That's right.

MR. MEITZ: -- rats, or whatever, I would say, absolutely, because if you -- you have an interest in maintaining the sanitation and health of the community --

QUESTION: Yes.

MR. MEITZ: -- and if there happened to be a licensing scheme that allowed them to be shut down, I think the municipality would have a real substantial interest in controlling, and as part of its public --

QUESTION: A court would want to inquire into why only radio stations were prohibited from having rats in them, as opposed to every other kind of business, I suppose.

MR. MEITZ: I would agree with that, but I think, again I bring the Court back to the seminal cases of American Mini Theatres and Renton. The Court recognized that these secondary effects associated with such establishments are important and substantial, and they allow the municipality some flexibility with dealing with these very serious problems, so yes, in a sense --

QUESTION: Those cases just dealt with the location of the business. They didn't go into procedures at all, Renton and Mini Theatres.

MR. MEITZ: Renton and Mini Theatres was a

licensing, albeit you're correct, Justice Stevens, it did involve the zoning, but I think there have been other cases since then, and I'll use -- although not in the adult book scheme, but I will mention Ward v. Rock Against Racism, where there was a clear burden, or incidental burden placed upon speech from the standpoint of how loud the music could be in Central Park, and the interests of the municipality being, you know, the neighbors around Central Park had the right to quiet enjoyment --

QUESTION: But again, that didn't have anything to do with the timing of the decision, as I remember it, did it?

MR. MEITZ: Well, the Court there analyzed that as intermediate scrutiny, time, place, and manner restriction.

QUESTION: I'd just like to get quickly your -- what's the procedural doctrine that -- is -- look, they're complaining about X. They weren't hurt by X. They've decided definitely they're not entitled to a license anyway and they're going out of business, all right. They've agreed to that, and yet they want to complain about X. What's the procedural doctrine that bars them?

MR. MEITZ: I'm not sure if I understand the question.

QUESTION: Well, you don't think they ought to

be here making this argument. You called it moot, or -- we just went --

MR. MEITZ: Yes.

QUESTION: Remember what I just went through with him?

MR. MEITZ: Yes.

QUESTION: I want to know, what's the procedural doctrine that says we can't get to the merits of this?

MR. MEITZ: I -- the reason we brought this issue to the Court's attention, and for the very limited, unique situation, was the issue upon which you granted review, and that is whether you require a prompt judicial determination. The fact whether it was expedited or not, they were not injured. They were allowed to stay open, and that -- again, we would prefer that this matter be litigated on the merits. We have many municipalities --

QUESTION: I just want the name of the doctrine. What is the law that stops them from doing --

MR. MEITZ: I would cite Asarco from the standpoint at least that you have to have some kind of likelihood of redress that's available from this Court, and it's very speculative at this point in time.

QUESTION: But you called it moot. You did label it mootness, as opposed to standing, because I suppose, on the theory that going in, when this whole

thing started, they appeared to be -- to have a live interest in this, but now at the end of the line they haven't maintained that interest. I thought that's what you were saying, but maybe not.

MR. MEITZ: Only since the Court granted this petition for review, we felt it was our obligation to bring it to your attention because of the limited issue upon which you granted the review, not because we amended the ordinance.

QUESTION: Well, is the -- is this any more moot than Pap's and Erie was moot?

MR. MEITZ: I think it's distinguished from Pap's, because one, as the Court stated in Pap's, they were -- this is clearly not an attempt by us -- they arrived at a favorable decision from the lower court, number 1. Number 2, we don't know what -- as Justice O'Connor said in Pap's, there's some ongoing injury that occurred in that case to the City of Erie --

QUESTION: The difference seemed to me to be, in Pap's it's solely a question of mootness. Here there's a different thing. The additional thing is that they were never hurt by the provision of which they're complaining.

MR. MEITZ: And that's exactly why we brought that to the attention --

QUESTION: I know, and I'm trying to look for

the doctrinal handle.

MR. MEITZ: Yes, and we look at it, if the Court would have granted cert on all issues that would have been a different case, because that might, if you were -- the standards issued, or there was some impartiality question of City of Waukesha panel, then that would maybe undermine the entire licensing process, but this was a very limited issue, and we fail to see how this -- how they are harmed by this, or there's any redress likely by this Court.

The Court here is -- there's 21,000 municipalities in this country, approximately, all of which have a substantial interest and -- in seeing -- preserving the quality of urban life in America.

QUESTION: May -- I'm sorry, may I just go back to this other issue, and I want to ask you a question about your ordinance.

They're out of business now, I take it. They're not -- they don't wish to operate at the moment.

MR. MEITZ: That's my understanding.

QUESTION: Okay.

MR. MEITZ: They're closing down this week.

QUESTION: Now, if they were to win their case, would they be entitled to a license renewal under your ordinance, even though they do not at the present time wish to operate the business?

MR. MEITZ: We don't believe so, because of the narrow issue before the Court.

QUESTION: Well, I'm not -- no, but I'm not asking about the issue before the Court. I'm asking a question about your ordinance. If they were to win this case and they come to you and say, we don't intend to operate this business, but we'd like a license, does your ordinance provide for granting them a license?

MR. MEITZ: They could be granted a license if they were -- if they're found not to have committed a violation over the past 5 years. The offices --

QUESTION: You license businesses that don't intend to operate?

MR. MEITZ: If they don't operate, no, we would not give them a license.

QUESTION: Well, that was my question. As I understand it, they don't intend to operate. They say, okay, we've won our case. We don't intend to operate, give us a license. Can they get a license under your ordinance?

MR. MEITZ: No.

QUESTION: Thank you, Mr. Meitz.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

It's our position that the city's ordinance in this case satisfies First Amendment procedural standards in that prompt judicial review is available and therefore the judgment below should be affirmed.

QUESTION: You mean access to review, as opposed to decision-making?

MR. FELDMAN: Yes. I think that actually is the question on which the courts of appeals were divided, and that's the question that the Court ought to reach and decide, whether what's necessary is access to prompt judicial review, or a final judicial determination on the merits within a particular period of time.

QUESTION: Mr. Feldman, are those cases involving renewals, or initial issuance of licenses?

MR. FELDMAN: I think all of the -- at least all of the court of appeals decisions I think were initial licenses.

QUESTION: Do you think the considerations are the same in the two situations?

MR. FELDMAN: Yes, I do. I think there are differences in a due process analysis between someone who has applied for renewal of a license and hasn't gotten the

renewal and has a property interest, perhaps, in that license, and that may have due process implications, but I think from the standpoint of the First Amendment the question is, is there going to be a period of time during which the expression doesn't occur, or does occur, and it's just an interest in expression, and it doesn't matter whether before that time the person was licensed and had -- expression occurred or not.

QUESTION: Of course, the status quo is entirely different, because in one case the status quo is that the First Amendment materials are being sold, and in the other they're not in -- they're not being sold.

MR. FELDMAN: I think that's true. I think that status quo issue has to -- may have to do with a due process analysis.

QUESTION: Yes.

MR. FELDMAN: From the standpoint of the First Amendment, the Court's references in Freedman and the other cases to maintaining the status quo was -- in the context of those cases what that meant is, there can be a period of time during which the expression doesn't occur, and I think that's the same principle that applies here. There can be a period of time in this case pending judicial review, as long as the judicial review is available, during which the expression doesn't occur.

I think what's necessary in this context is, the license applicant has to have the availability of -- has to be able to go immediately into court once the administrative decision is made, the licensee has to have the ability to get temporary or preliminary relief if the facts of the case warrant it, and there has to be no particular obstacles that are placed in the licensee's way, and if all of that is satisfied, then the court is in the position to safeguard the licensee's interest and no further requirements are necessary.

QUESTION: So you think the availability of temporary relief on a substantial showing is a necessary component of the review?

MR. FELDMAN: It's not directly presented here, because that is available under this statute, but yes, I think it's probably -- if you had a scheme -- and they are unusual, but I think they may exist here and there. Where a court doesn't have the power to grant the temporary relief, I think that would raise other -- that would raise First Amendment concerns.

I think --

QUESTION: Mr. Feldman, does the Government have a position on mootness, or whatever you want to call it, or the justiciability of this case at this time in its current posture?

MR. FELDMAN: I think it's our position that essentially for the reasons given by the petitioner, that, although it might be a close question, the case is probably not moot. There still is some continuing interest that the petitioner has in the case.

QUESTION: Why do these adult book store owners keep going out of business and not intending to get back in? I mean, we had the same question in Pap's. It's an occupational hazard, I gather.

(Laughter.)

QUESTION: I don't understand.

MR. FELDMAN: I'm really not aware of the economics that lead to that.

QUESTION: But how does he have the right to raise the claims of people who are not here whom would be affected by this procedural provision, when he himself is not affected by it?

MR. FELDMAN: I think that his -- I think his basic claim is this, is this procedure that the city's put into effect, this licensing procedure, is unconstitutional, and therefore I don't really even need a license, or if I need a license, I ought to be able to get one immediately. That's the basic claim that --

QUESTION: He's saying the whole thing is unconstitutional because --

MR. FELDMAN: Right.

QUESTION: -- it doesn't have sufficiently quick judicial review, which he himself wouldn't have been affected by.

MR. FELDMAN: That's right, but I -- the fact that in this particular case he wouldn't have been affected by it --

QUESTION: Can you think of another case where it was that distant and somebody was allowed to raise somebody's First Amendment rights when the other people were perfectly able to raise it themselves?

MR. FELDMAN: Well, I think the FW/PBS case, for example, or in the Lakewood case, I think in a couple of those cases you've had people who say, that there are these -- that there are First Amendment procedural safeguards that are required, and the party is able to go into court and say, his claim is that the scheme is unconstitutional. Now, I'm not -- we don't agree that it is --

QUESTION: Even though it doesn't affect them at all. Even though they're not affected and the other people --

MR. FELDMAN: They're not affected in this case. I suppose the theory would be that when he goes for renewal again he might be affected, or that he --

QUESTION: Well, if the theory is if he goes for renewal again and he's not going back into the business, it's a little far-fetched, isn't it?

MR. FELDMAN: Right. I think -- yes.

QUESTION: Well, I take it that the classic Thornhill doctrine, where I'm allowed to raise somebody else's rights, is because it's a content-based statute, and this is not content-based.

MR. FELDMAN: That's right, and I think that's the crucial -- this is not contents-based, it's true, but although in the FW/PBS case, which was identical to this in terms of whether it was content-based, the Court said the party could also raise these procedural interests, First Amendment interests, could make a challenge to the constitutionality of that scheme.

I do think that on the merits the important -- the crucial point here is that the decisions the city makes are not content-based. Unlike in a situation like Freedman, where the Court said, this Court said that a reviewing court has to be able -- has to -- is necessary, because what the State was doing was looking at the particular movie and making a judgment based on that content about whether that movie should be allowed.

QUESTION: Can you explain to me why the administrator must act promptly, but the judiciary does

not?

MR. FELDMAN: Yes, I hope so. I think in -- in FW/PBS what the Court held was that some of the Freedman requirements are not necessary in this context and, in particular, it said the city doesn't have to go to court. You can let the other party go to court and the city doesn't have to bear the burden of proof when it goes to court, and I think the point of that decision was that the municipal decision here, since it's not content-based, can be allowed to go into effect and have final effect even with no judge ever looking at it.

In the Freedman context, it's quite different. In the Freedman context, what the Court was saying, we don't want this censor's decision to go into effect for any significant period of time without a judge looking at it. It's not really a final determination of law until you go into court, until a judge has a chance to look at it and decide whether the material --

QUESTION: I thought --

MR. FELDMAN: -- is constitutionally protected.

QUESTION: Am I wrong, I was thinking, look, normally where your courts are at stake a preliminary injunction is good enough, but that isn't good enough where it's the administrator, because the administrator might not be as fair.

MR. FELDMAN: I'm not sure I understand the question.

QUESTION: Well, the reason that you have to protect them more about -- against the administrator than a judge is, you think, well, the judge will be fair. He sees irreparable injury, and if there's some probability of success he'll give you the injunction.

MR. FELDMAN: That's correct.

QUESTION: But you have to be tougher than that on administrators, because they're already taken a side and they're not judicial and so forth.

MR. FELDMAN: That's correct. I was only making the point that there was a unique feature present in a Freedman-type case, which is, you don't want any effect to be given, or any substantial effect to be given to the administrative decision because it's a content-based decision on the content of that speech. You don't want any effect to be given to that, basically, until it gets into court.

Here, the point of FW/PBS was, that can have some effect as long as the proper procedures are required, and --

QUESTION: Excuse me, until it gets to the court? Are you saying that if it's a content-based restriction you cannot impose it until the judicial review

is complete?

MR. FELDMAN: No. No, but I do think that the Freedman safeguards were designed so that it has a very limited effect, and that was the reason why in Freedman you needed the judicial determination, not just the access to the judge, to be within a very prompt period of time, because there was a concern that that administrative decision just shouldn't have a final effect until -- not for a very long time, only for the minimum possible time, until the judge decides the --

QUESTION: Why wouldn't a stay by the judge, if the judge thought there was any question about it, why wouldn't that have sufficed in that context as well?

MR. FELDMAN: That would, but I think you could look at the Freedman decision --

QUESTION: Yes, but that would be changing the status quo.

MR. FELDMAN: Excuse me.

QUESTION: That would be changing the status quo. The State problem is different in the two situations.

MR. FELDMAN: The stay, in my view, in our view those are really procedural due process issues and not First Amendment issues, but I think that would be sufficient. I think you can look at the Court's decision

in Freedman as essentially saying that the -- saying that either a judge has to grant a stay in each one of these cases regardless of the merits, or there has to be a prompt judicial determination within a very short period of time.

QUESTION: Yes, but the stay in the case involving an initial issue, a stay would be a mandate to grant the license, rather than a stay to maintain the status quo.

MR. FELDMAN: That's correct. That's correct.

QUESTION: So it's really not a stay, it's more of a mandamus.

MR. FELDMAN: That's correct, but I -- that's correct. That's correct, but I do think the difference is that in the initial -- whether, in -- under a procedural due process analysis there is a difference. For the First Amendment the question is, is that speech occurring during that period of time, and how long a period of time can that be allowed to happen.

The decisions that the city makes in a scheme like this are decisions about things like whether there were minors in the store, what was the age of the people, were they there, were they not there, were the booths covered or were they not covered so that you could be able to tell what was going on inside them, was there sexual

activity that some of the patrons were engaging in or not.

Those are very, very different from the kinds of decisions that were made in the Freedman context, and since those decisions are the kinds of things that municipalities make in generally in enforcing police power-type ordinances, there's no reason for them not to be given, in fact, when they make them.

QUESTION: Thank you, Mr. Feldman.

Mr. Olson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JEFF S. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: Thank you. If I'm operating a radio station and the city takes my license away because I've let the fence around my tower get into slight disrepair, and my defense is that the provision of the ordinance that says you can lose your license for having your fence in disrepair slightly is unconstitutional, I can't even raise that defense until I get to court, and if I don't get prompt judicial review or a stay of the status quo and be allowed to operate until my judicial decision, I will in all likelihood be out of business and I won't have any effective judicial review on that constitutional defense, and the administrative process can't touch that constitutional argument.

This Court's decisions are clear that delay in a

licensing process can lead to content-based censorship just as easy as lack of standards, even in a situation where licensing decisions are not expressly based on the content of the material.

Lakewood I think also warns us that an ongoing business is a more likely target of content-based discrimination in the licensing process at the administrative level. The --

QUESTION: Then I don't understand why the proper answer isn't, because there is this danger, the court will look at it case-by-case and if, indeed, this is a situation where the administrator is abusing authority to disguise what is really content-based regulation, the court can say in that situation, we put a freeze on it. We allow you to keep your license pending the decision.

But if there's no basis for that, so that it is just a time, place, and manner-type restraint, why should you be able to maintain the status quo, which is, allowed to go on with the business, in face of very serious charges of violations that have nothing to do with the content of the books and tapes that are sold?

MR. OLSON: On the face of the ordinance, those violations may or may not be very serious. Nonrenewal is required for one single, trivial violation of a provision of the ordinance that may well be unconstitutional. We

can't test the constitutionality of that provision on the face of the ordinance until we get to court.

There are really large numbers of people out there, highly motivated, with influence in municipal affairs, who are waiting for this Court to give them an opening for the covert censorship of sexually explicit speech through delay of licensure, or through any other method that allows room for indirect action.

Not only my client, as an adult book store, but other people who are engaging in unpopular speech and mainstream media ask this Court not to create that opening for covert censorship by delay of the judicial review until that delay becomes fatal to many businesses who won't have meaningful judicial review because they'll just die on the vine while they're waiting for a judicial decision.

A temporary injunction that they have to take the burden of getting in circuit court is not going to be an answer. First of all, it's the kind of cumbersome and time-consuming and expensive measure that, as Justice Harlan, concurring in Shuttlesworth, said, you shouldn't have to engage in to pursue your free speech rights, and second, it's a flawed process because you have to wait for the administrative record to prove you've got a chance of prevailing.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

MR. OLSON: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:12 a.m., the case in the above-entitled matter was submitted.)