

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   CITY NEWS AND NOVELTY, INC.,       :  
4                   Petitioner               :  
5           v.                               :   No. 99-1680  
6   CITY OF WAUKESHA                   :  
7   - - - - -X  
8                               Washington, D.C.  
9                               Tuesday, November 28, 2000  
10           The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:11 a.m.  
13   APPEARANCES:  
14   JEFF S. OLSON, ESQ., Madison, Wisconsin; on behalf of  
15       the Petitioner.  
16   CURT MEITZ, ESQ., City Attorney, Waukesha, Wisconsin; on  
17       behalf of the Respondent.  
18   JAMES A. FELDMAN, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D.C.; on  
20       behalf of the United States, as amicus curiae,  
21       supporting the Respondent.  
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23  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JEFF S. OLSON, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	CURT MEITZ, ESQ.	
7	On behalf of the Respondent	24
8	ORAL ARGUMENT OF	
9	JAMES A. FELDMAN, ESQ.	
10	On behalf of the United States, as amicus curiae,	
11	supporting the Respondent	39
12	REBUTTAL ARGUMENT OF	
13	JEFF S. OLSON, ESQ.	
14	On behalf of the Petitioner	50
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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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

1 or not permit speech based solely on its content.

2 MR. OLSON: You're correct.

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

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

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

17 MR. OLSON: Yes.

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

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

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

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

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

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

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

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

24 MR. OLSON: Those --

25 QUESTION: Is that then subject to some special

1 test because it's a book store?

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

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

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

19 MR. OLSON: That's --

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

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

1 imposed only where it maintains the status quo.

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

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

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

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

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

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

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

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

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

25 QUESTION: But that can be done by the court.



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

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

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

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

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

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

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

8                MR. OLSON:  No.

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

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

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

21              MR. OLSON:  Court of appeals.

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

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

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

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

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

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

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

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

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

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

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

8 MR. OLSON: Or some provision is  
9 unconstitutional.

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

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

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

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

22 QUESTION: No problem, all right.

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

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

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

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

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

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

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

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

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

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

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

8             QUESTION: Why isn't the case moot?

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

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

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

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

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

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

10                  MR. OLSON: Yes. The City News and Novelty is  
11                  footing the bill for this case because they believe  
12                  they're right, they believe in it's important principle,  
13                  and they don't want the 5-year disability from licensure  
14                  that will fall on the corporation and its officers. If  
15                  they're determined to have been operating without a  
16                  license in violation of a valid ordinance up until  
17                  February 14, 2000, which is when they stopped operating as  
18                  an adult book store, they'd be disabled from licensure in  
19                  Waukesha for 5 years after that, until Valentine's Day  
20                  2005.

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

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

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

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

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



1 substantive violation has properly been found.

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

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

9 QUESTION: Well --

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

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

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

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

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

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

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

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

1 make any difference on the question of mootness or  
2 ripeness?

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

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

15 MR. OLSON: Yes.

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

18 MR. OLSON: Correct.

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

22 MR. OLSON: Correct.

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

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

3                   (Laughter.)

4                   QUESTION: I'm not totally sure which one.

5                   MR. OLSON: Well --

6                   QUESTION: You've looked into this more  
7 thoroughly.

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

10                  MR. OLSON: Sure.

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

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

1       it stands today.

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

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

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

18                  MR. OLSON: I --

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

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

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

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

4 MR. OLSON: Because --

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

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

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

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

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

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

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

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

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

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

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

5                   ORAL ARGUMENT OF CURT MEITZ

6                   ON BEHALF OF THE RESPONDENT

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

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

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



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

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

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

1 environments.

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

5 QUESTION: No question.

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

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

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

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

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

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

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

17            QUESTION: But isn't that your position?

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

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

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

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

13 MR. MEITZ: And I --

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

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

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

22 MR. MEITZ: Absolutely.

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

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

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

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

25           If they want to declare something obscene or

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

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

14 MR. MEITZ: We believe that --

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

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

23 QUESTION: You mean final determination?

24 MR. MEITZ: Yes.

25 QUESTION: As opposed to access?

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

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

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

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

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

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

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

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



1       tribunal might be thought not to be neutral.

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

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

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

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

24              QUESTION: I am worried --

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

1       like you said --

2               QUESTION: That's right.

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

6               QUESTION: Yes.

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

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

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

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

25              MR. MEITZ: Renton and Mini Theatres was a

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

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

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

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

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

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

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

3 MR. MEITZ: Yes.

4 QUESTION: Remember what I just went through  
5 with him?

6 MR. MEITZ: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

1 the doctrinal handle.

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

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

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

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

19 MR. MEITZ: That's my understanding.

20 QUESTION: Okay.

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

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

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

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

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

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

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

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

21          MR. MEITZ: No.

22          QUESTION: Thank you, Mr. Meitz.

23          Mr. Feldman, we'll hear from you.

24                 ORAL ARGUMENT OF JAMES A. FELDMAN

25                 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

1                               SUPPORTING THE RESPONDENT

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

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

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

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

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

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

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

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



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

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

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

16 QUESTION: Yes.

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

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

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

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

21           I think --

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

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

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

10          (Laughter.)

11          QUESTION: I don't understand.

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

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

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

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

1 MR. FELDMAN: Right.

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

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

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

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

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

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

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

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

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

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

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

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

1 not?

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

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

19 QUESTION: I thought --

20 MR. FELDMAN: -- is constitutionally protected.

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

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

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

8                   MR. FELDMAN: That's correct.

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

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

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

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

1 is complete?

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

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

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

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

18 MR. FELDMAN: Excuse me.

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

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



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

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

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

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

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

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

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

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

8 QUESTION: Thank you, Mr. Feldman.

9 Mr. Olson, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF JEFF S. OLSON

11 ON BEHALF OF THE PETITIONER

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

25 This Court's decisions are clear that delay in a

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

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

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

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

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

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

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

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

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

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.  
2 MR. OLSON: Thank you.  
3 CHIEF JUSTICE REHNQUIST: The case is submitted.  
4 (Whereupon, at 11:12 a.m., the case in the  
5 above-entitled matter was submitted.)  
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