IN THE SUPREME COURT OF THE UNITED STATES

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CAREN CRONK THOMAS AND WINDY :

CITY HEMP DEVELOPMENT BOARD, :

Petitioners :

v. : No. 00-1249

CHICAGO PARK DISTRICT :

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Washington, D.C.

Monday, December 3, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

RICHARD L. WILSON, ESQ., Orlando, Florida; on behalf of the Petitioners.

DAVID A. STRAUSS, ESQ., Chicago, Illinois; 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

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-1249, Caren Cronk Thomas and Windy City Hemp Development Board v. the Chicago Park District.

Mr. Wilson.

ORAL ARGUMENT OF RICHARD L. WILSON

ON BEHALF OF THE PETITIONERS

MR. WILSON: Mr. Chief Justice, and may it please the Court,in the unanimous opinion in Freedman versus Maryland this court stated that when the government imposes a permit requirement on the exercise of free speech, that permit scheme must include certain procedural safeguards which are there, quite obviously, to prevent the unwarranted and perhaps unlawful delay or suppression of speech that might occur without them.

CHIEF JUSTICE REHNQUIST: Well, Freedman was a quite different case from the present one. You agree with that, don t you? I mean, there you re talking about some form of censorship. Here you re talking about a permit to use a park that a lot of other people want to use.

MR. WILSON: While agree that there s a difference between the two cases,this case begs for more protection than the speech involved in Freedman. Because after all, the Freedman case was specifically -

specifically arose from a censorship scheme which was aimed at sexually explicit speech. This is a case involving core political speech. And although the -

QUESTION: Well is this content neutral in your view, the regulation?

MR. WILSON: I believe that the regulation in this case is content neutral. It is rife with the opportunity to make viewpoint based decision, but not on its face.

CHIEF JUSTICE REHNQUIST: I have to say that thinking about the case, I suppose analytically this is a prior restraint. And we have said that there s a heavy presumption within validity. But on the other hand, it s a content based time, place and manner regulation, and we have sustained these in case after case, and you want to make this a Freedman case.

Freedman was a case where you had to submit your speech to prior examination, prior submission of speech, and it was in that context, and the Court was very clear, as I recall, in Freedman to say when -- there must be prior submission of speech, then you have to have the procedures Freedman set forth, so I think you're really stretching our precedents, particularly Freedman, to put Freedman in your case.

It's true you may have some other arguments, if

there were some content-based suppression going on, but this isn't a Freedman case. Our authorities just don't allow us to make that leap.

MR. WILSON: Justice Kennedy, with respect, I could not disagree with you more, and I think we can look at a few cases to show that this is surely a prior restraint case, and the one that comes to mind most readily is where that exact same question was presented to this Court when, in FW/PBS v. The City of Dallas, the Fifth Circuit had held that the Dallas licensing scheme, which was content-neutral, period, in all regards, which a content-neutral licensing scheme licensing sexually oriented business in Dallas, was a time, place, and manner restriction, and this Court rejected that approach and said, first we find that it is an unlawful prior restraint, and therefore it is --

QUESTION: Well, I think your premise may be one that we're going to have trouble adopting. This is use of a public park. It is limited in terms of size and space, and presumably there may well be competing interests trying to use the park at the very same time, when it can't accommodate every possible use at all times. Now, is there no way that the park can attempt to find rules of the game so that everybody gets accommodated?

MR. WILSON: Justice O'Connor, there's no

indication in this record or in any situation that I'm aware of --

QUESTION: But just answer whether that is possible, under First Amendment time, place, and manner doctrine. Yes, it's public space, and yes, it is political speech, but is it a possible time, place, and manner regulation to say a group of 300 wants to use it Tuesday, and a second group of 600 wants to use it Tuesday, we have to sort out who gets it and when? Is that not possible?

MR. WILSON: Certainly, Justice O'Connor, that's possible. What we complain about is when the Government can say, we will decide who gets to use the park, particularly when the scheme is such, when it lacks the kind of standards required that the Government can make that choice improperly.

QUESTION: But aren't you --

QUESTION: Under the standards there was a list of 13, and they seem to be reasonable, fairly clear standards, and you are coming to us with a facial challenge, and are we to project that those standards will not work properly? You're not coming to us with any concrete case.

MR. WILSON: Justice Ginsburg, the record in this instance is a solid, concrete case. Mr. McDonald was

denied his right to core political speech using those standards.

QUESTION: And then he was granted it, as I understand it.

MR. WILSON: Mr. McDonald never received a permit. From the time he filed this application for permit --

QUESTION: He did conduct his expression.

MR. WILSON: He was allowed to conduct a spontaneous rally on a very limited basis. No sound system was allowed. No vendors were allowed, no stage, no structures.

QUESTION: What about, in the list that we have are functions that were being held at the park. One of the permitted events was -- it may not have been Mr. McDonald. He may not have been with us any more, but it was for the same organization, was it not?

MR. WILSON: One of the events in the lodging material?

QUESTION: Yes.

MR. WILSON: Yes, that is true. Those have not been obtained without great difficulty, however. Indeed, the brief of the Chicago Park District indicates that the permit for the event for this fall was granted. The park district filed that brief before the organization was

notified that somehow the park district had lost that application and the permit therefore was not valid, and they'd have to go some place else.

QUESTION: In any --

QUESTION: Well, still the point remains that I just think you overstate the case when you tell us this is a Freedman case. Justice O'Connor gave you the simplest time, place, and manner regulation that's content-neutral, if there are two groups that want a use a space that hold 100 and they're each 100, do you have to sort out the two. That is not a Freedman case. Sure, I suppose if you push us to the wall it's a prior restraint. Of course there are cases that say that prior restraints have a heavy burden.

But we have sustained in countless cases content-neutral time, place, and manner regulations for the use of parks and those are not Freedman cases, period, as I read the cases. Now --

MR. WILSON: Justice Kennedy, I think clearly it's a prior restraint. I mean, there are two --

QUESTION: Well, I happen to disagree with Justice Kennedy's suggestion. I think you just have to strain all over the case to find that this is a prior restraint. It's public property, and you're just standing in line with a bunch of other people to get the use of it.

MR. WILSON: Mr. Chief Justice, from Neer v. Minnesota forward, the Court has said that when speech is prohibited in advance, that is a prior restraint.

QUESTION: Okay, but Neer was the shutting down of a, padlocking of a newspaper --

MR. WILSON: Yes, Your Honor.

QUESTION: -- of a private -- the shoe is on the other foot here. Nobody is telling your client he can't run a printing press in a private place. What -- your client is coming and saying, we want to use this public park that a lot of other people want to use, and to say that you're going to have to get in line and obey some rules, it doesn't come close to being a prior restraint.

MR. WILSON: My problem with that, Mr. Chief Justice, is not that you have to get in line with other people and share the use of the park, which was Justice O'Connor's concern when she posed the time, place, and manner question.

My complaint is that the way this scheme is set up, it allows the park district to choose which people in that line can come forward and get their pass to speak, and which people in that line --

QUESTION: Do you think the language of, may grant, is something that allows too much discretion? Is that your complaint?

MR. WILSON: It is one of our complaints, and even that --

QUESTION: Or do we read may as shall grant, if these conditions are met?

MR. WILSON: Well, it says --

QUESTION: I don't know what it means.

MR. WILSON: It says may deny, is what it says.

QUESTION: It says may deny, but maybe it mean -- means that the permit must be granted if the categories are met.

MR. WILSON: But that's not what it says, Justice O'Connor. Indeed, the Seventh Circuit recognized that the use of the word, may in this scheme creates the potential --

QUESTION: You agree it must be granted if conditions are met. You just say, it need not be denied if the conditions are not met. That's your complaint, isn't it?

MR. WILSON: Correct.

QUESTION: You agree that if the conditions are met, your client meets all the conditions, he gets in.

MR. WILSON: I agree with that, Justice Scalia. What I --

QUESTION: Okay. You're saying if your client doesn't meet some of the conditions, he may not be allowed

in, whereas somebody that the park district likes more will be allowed in.

MR. WILSON: Yes, Justice.

QUESTION: That same thing was true, wasn't it, in Poulos? I mean, the language in Poulos was even more protean than the language in the may phrase.

MR. WILSON: I think Poulos would have been decided differently by this Court had the --

QUESTION: So we've got to overrule it to hold your way.

MR. WILSON: Yes. Had the -- had your court, the supreme court of New Hampshire, not construed that statute in such a limiting way to say that if you apply for a permit under Poulos and under Cox you get the permit, there was no discretion to deny, and in the opinion that this Court wrote in Poulos, it pointed that out, that that cured the problem in that case, and I think realistically this Court has recognized the --

QUESTION: But wasn't the discretion left the same discretion, in effect, to evaluate facts, and to act based upon that evaluation which the Chicago scheme allowed Chicago?

MR. WILSON: My understanding of that case is that after the construction the New Hampshire court placed on it, that became part and parcel of the statute, and

even though the statute retained the discretion, it had authoritatively been limited by the New Hampshire supreme court, so the discretion was gone by judicial act and not by legislative change.

QUESTION: The discretion was gone to deny somebody who met the conditions?

MR. WILSON: Yes, sir.

QUESTION: But there -- was there no discretion to grant someone who did not meet the conditions? Did the New Hampshire supreme court speak to that?

MR. WILSON: Well, the interesting --

QUESTION: It's the latter that you're complaining about, not the former.

MR. WILSON: It is the latter. By the way, Justice Scalia, there's another aspect of your inquiry, and we both agree, obviously, that if you meet the qualifications, you're entitled to the permit. It goes no further. In this case, however, it is very difficult, if not impossible, to show that you meet the qualifications because of the behind-closed-doors way that this permit scheme is imposed and implemented, and this case presents the perfect example.

As the Court knows from the record in this case, Mr. McDonald vehemently and categorically denied that he had done those things which under the code would deny him

a permit, but that made no difference. Not only did the park district say that as far as we are concerned you did it, and you are not entitled to speak, that prevents you, in our opinion, from ever speaking in a park for the rest of your life, and anyone associated with you.

QUESTION: But that didn't happen, and you say -- you give us this one instance. You don't have a record of uneven applications, and beyond that, I would really like to know what is your idea of a scheme that would be compatible with the First Amendment.

In answer to Justice O'Connor you said yes, they can have rules of the road, so there aren't too many people at any time, that there aren't colliding events. What scheme do you say is necessary to meet the First Amendment?

MR. WILSON: First, in direct answer to Justice O'Connor's inquiry, a scheme that says you may not obtain a permit for an event at a day and time for which another permit has already been issued, no question. There's no complaint that anyone could have.

QUESTION: Well, of course, that assumes that you have a permit scheme, so it doesn't work.

MR. WILSON: I'm sorry, Justice Kennedy.

QUESTION: That assumes that you can have a permit scheme.

MR. WILSON: Surely you can have a permit scheme. I think this Court has made it very clear you can have a --

QUESTION: Well, that's what we're asking, what the requisites are for the permit scheme.

MR. WILSON: The question may well be, when can you lawfully deny a permit for free speech under this -- under a permit scheme in what is the traditional public forum, a public park, and what is the most precious of speech, core political speech.

QUESTION: Well, you're saying the most precious speech. Are you suggesting that if, say, somebody wanted to have a softball game in the park and they applied, and your client wanted to have a speech in the park, and he applied, that your client should be given some sort of a preference over the softball game because it's free speech, or --

MR. WILSON: No.

QUESTION: -- core speech?

MR. WILSON: No, Mr. Chief Justice. I am saying that if that softball game had a permit, the free speech event would have to take place at another day, at another time, or at another location.

QUESTION: But they're both before the board. I mean, you say, first come, first serve, is that it, there

has to be that rule, too, if --

MR. WILSON: It would seem --

QUESTION: You're positing a situation in which somebody has already been granted a permit for the time. What if -- what about the situation where you have several people who want to get in for a time that has not yet been committed to anybody.

MR. WILSON: A first come, first serve rule would certainly help the situation and, of course, these permit applications are dated, time-dated and time-stamped when they are submitted, but there is no requirement that it be first come, first served.

QUESTION: Okay. What if they collide on their way in to file the permit.

(Laughter.)

QUESTION: What's your rule then? Does political speech always win? Is that the tie-breaker?

MR. WILSON: Well, obviously it's a very difficult question on facts which might never, ever occur, and I'm not claiming that when the park district is making a decision on whether to issue a permit, or space A on day A, it has to look at these permits and say, oops, political speech, first in line, and that's --

QUESTION: If it doesn't say that, doesn't it retain exactly the discretion that you're complaining

about?

MR. WILSON: No, sir. If it said first come, first serve according to the time date and time stamp, that would solve the problem. Your hypothetical assumes --

QUESTION: Okay, we've got the collision at the door. If the tie-breaker rule is political speech always wins, your problem doesn't arise. If there isn't that tie-breaker rule, it seems to me, there is enough discretion left to be a violation on your view.

MR. WILSON: Well, I would certainly think that this case need not turn on that somewhat unlikely occurrence.

QUESTION: Well, maybe, but I'd like to know what the principle is that you want us to apply, and I think the principle that you want us to apply means that when they bump each other's foreheads at the door, political speech has got to win, or there's an unconstitutional discretion left, amounting to the possibility of a prior restraint.

If that's wrong, tell me why it's wrong.

MR. WILSON: I believe that's wrong because -- well, first of all, again, we're not going to find that situation, but let's assume we did, and they bump their heads on the way in. First come, first served is a

reasonable approach, if that is a concrete and consistently --

QUESTION: Yes, but you just keep changing the hypothetical. What's the principle in the case that the time rule, first come, first served, doesn't work? What's the principle?

MR. WILSON: When first come, first served does not work?

QUESTION: Yes, the hypo.

MR. WILSON: It would seem that as long as the event is suitable for that particular park, first come, first serve should always work.

QUESTION: But by hypothesis, Justice Souter's question is you can't apply it here because they both came at the same time.

MR. WILSON: Well --

QUESTION: You don't have an answer for that, right? You don't have an answer for that situation.

MR. WILSON: I don't.

QUESTION: Okay.

MR. WILSON: I really don't, and --

QUESTION: But you think first come, first serve is a thoroughly reasonable rule.

MR. WILSON: I do.

QUESTION: But you're going to tell us that --

QUESTION: When --

QUESTION: Your brief tell us that --

QUESTION: Excuse me, please let me finish.

When Pope Paul visited -- John Paul visited Chicago there was a rally, or a gathering in the Chicago parks. If your client had filed for that day 2 years earlier, right, the park would have to say, gee, I'm sorry. The park couldn't have a 30-day before rule, we're not going to grant any applications until 30 days before the event, and we're going to look over all of the feasible applications at that point. That would not be reasonable?

MR. WILSON: Justice Scalia --

QUESTION: So that it finds, gee, you know, the Pope is only going to be here one day, and you know, maybe we can have this --

QUESTION: Hemp concert --

QUESTION: -- Hemp concert later, yes.

(Laughter.)

MR. WILSON: One would assume that the --

QUESTION: Can't do that?

MR. WILSON: -- holder of the permit would be reasonable in accommodating such as an extraordinary event as this, and if --

QUESTION: No, no, this is an unreasonable --

(Laughter.)

MR. WILSON: I've met them.

(Laughter.)

QUESTION: The park district always has the availability of going to court to seek a court order in that unusual situation to demonstrate to a court that this is such an extraordinary event that they should be able to withdraw that permit and make reasonable accommodation to the other events, and it's -- like Justice Souter's hypothetical, it conceivably could happen. It's not going to happen very often. It may never happen.

QUESTION: It's not Pope John Paul, it's the Beatles, and the Beatles are only going to be there for one day. I mean, you're going to have courts decide whether the Beatles are more important than your Hemp concert?

MR. WILSON: No, sir, and that's why I believe that a first come, first serve rule is going to be reasonable in almost all situations.

QUESTION: All right, but just --

QUESTION: It seems to me the problem with that --

QUESTION: Just testing your brief, you say that even under the first come, first serve rule the Government has the obligation to go to court to validate the permit,

under Freedman, and I just don't get that out of our -- sure, that's what Freedman said, but Freedman was a very special case, and a time, place, and manner regulation for a park is not.

MR. WILSON: Well, of course, Freedman has -- I mean, the analysis from Freedman has been used in noncensorship cases, but in that case the Government needs to bear that burden. It's a very slight burden. It's a --

QUESTION: Mr. Wilson, where -- where? You say, the Government goes to court. The park district goes to court and shows that there's no conflict with the First Amendment. The court you're assuming, I gather, if you're following the Freedman mode, is a State court, and yet from this very litigation it seems that you prefer the Federal court, so how would a Freedman scheme do you any good at all, considering that your preferred forum is the Federal court, and I don't think, if the Government brought that case, if the park district brought that case in the State court, wouldn't you be stuck there?

MR. WILSON: No question, of course, the Supremacy Clause makes Freedman applicable to that State court, but the likelihood that an individual is going to insist on going forward with judicial review when his permit was denied because another permit had already been

issued is slight.

QUESTION: No, but I'm asking you -- I asked you before, what is the scheme that you said would be constitutional, and one part of it surprised me. You said Freedman. You go to the State court. But it seems to me you don't want to be in State court. You were brought here a 1983 action. You could have gone to State court with a 1983 action, but you didn't.

MR. WILSON: The problem with that, we have brought a facial challenge in this case because of the difficulty, every single time one is refused a permit, in going to State court or Federal court and litigating whether that particular denial was appropriate, and the medicine here is to get rid of the bad ordinance which allows inappropriate and content-based, or viewpoint-based decisions behind closed doors, even if they are not authorized on the face of the scheme.

It's a burden that the Government ought to bear in core political speech cases, and it is not a great burden. It would be a form complaint, spit out of the word processor, to say the permit was denied, here is a copy of the previously issued permit, we rest.

QUESTION: Do you know any park district that does it that way?

MR. WILSON: Well, some have to now. For

instance, in California, it's not a park district, but in response to the decision of the Ninth Circuit in Baby Tam, the California legislature enacted Chapter 49 of the California statutes, which mandates that when a permit is denied for a First Amendment business, which the Baby Tam case involved, it is the Government who must bear the burden, and the time limits are very stringent. The --

QUESTION: We're talking about a business, a permit to operate a business, not to hold an event in a public park.

MR. WILSON: Well, I would suggest, Justice Ginsburg, that a permit to hold a core political speech rally in a public park deserves at least as much protection as the permit to operate an adult bookstore.

QUESTION: Well, you're arguing for content-neutral --

QUESTION: You're simply wrong under our cases there.

MR. WILSON: I'm sorry, Mr. Chief Justice.

QUESTION: I say, I think you're wrong under our cases there. The Government has a right to make substantial choice in determining who's going to use its premises, whereas the owner of private premises is entitled to use them as he pleases, subject only to the permit process.

MR. WILSON: But this Court has said that in cases of public parks, the power of the Government to restrict free speech activity is at its most circumscribed.

QUESTION: And where did we say that?

MR. WILSON: We said that in Hague v. -- you said that in Hague v. CIO.

QUESTION: Well, that was 60 years ago.

MR. WILSON: But no one has ever suggested, Mr. Chief Justice, that that is not the law today, and indeed, that one quotation from Hague appears in core political speeches through this day, and it is one of the most oft-repeated statements from the cases.

QUESTION: Yes. That doesn't make it valid today.

QUESTION: But isn't your argument for applying it this. Your argument seems to boil down to saying, a content-neutral set of criteria can be abused, and isn't the answer to that an applied challenge as opposed to a facial challenge?

MR. WILSON: No, it is not, Justice Souter. My answer to that is, make the Government come into court and demonstrate to a reviewing court that it was not abused, that it was an appropriate denial of speech, and that's where the burden belongs.

QUESTION: That's why the -- there's no need to retreat from Hague, I wouldn't think. It is important, but the question is what set of rules are appropriate to safeguard the interests of the many people who might want to use the park for different purposes, so why don't you go back to Justice Souter's question and say, well, why isn't it -- answer, why isn't it perfectly appropriate to have a set of neutral criteria, that is a fair set of criteria, and if they are a disguised way of censoring someone, simply leave that up to the as-applied circumstance where the person who is being censored will go into court and say, judge, this is a trick, they're after me, and the judge will decide?

MR. WILSON: Justice Breyer, in order to do that it would seem that this Court would have to retreat from what it said in Forsyth, in which it stated that when a prior restraint in the form of a permit to conduct a political event in a public forum is involved, a facial challenge is appropriate, and the court --

QUESTION: Nobody says -- nobody denies you can make the challenge. I just want to know why you don't lose on the ground that it's a fair set of criteria, and if, in fact, they're not applying that set of criteria fairly, sufficient unto the day.

It's the same question, but I think that that's

initially what I got from Justice Souter, and I just want to know directly your answer.

MR. WILSON: My answer is that this a particular situation where facial challenges are appropriate. This is not a case where the individual need to go to court and demonstrate that in this particular instance his permit was wrongly denied. It is the very existence of this scheme, as the Court said in Lakewood, that creates a danger that it was wrongly denied, and because that danger is there, the permit scheme cannot be allowed to stand --

QUESTION: May I just ask one question about your rule about priorities, and it's the basic rule. I assume they might have a cut-off, say we won't consider applications more than 90 days ahead of time, or something like that, but do you say it is totally impermissible for the park district to use content of what is going to be done in the use of the park as one of the criteria for deciding who gets the -- on competing demands?

MR. WILSON: Content of the speech.

QUESTION: One is a baseball game, another is a concert, another is a lecture on dinosaurs, and another is political speech. Is it totally impermissible to decide that one of those uses is more appropriate on a particular time and place within the park?

MR. WILSON: If there are competing applications

and one of them is a free speech event and one of them is a softball game, and the decision is made based on what the free speech is urging, what the message is, that is entirely inappropriate.

QUESTION: If it's hostility to the message, I agree completely.

MR. WILSON: Yes, sir.

QUESTION: But just supposing all you know about it is, they want to make -- it's a political rally of some kind on the one hand, baseball, music, all those -- can the content, without any hostility to the particular message, be one of the criteria that can break ties?

MR. WILSON: If your question assumes that each of those events would be appropriate for that specific location --

QUESTION: It does.

MR. WILSON: -- then no. The first applied should get the space.

I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Wilson. Mr. Strauss, we'll hear from you.

ORAL ARGUMENT OF DAVID A. STRAUSS

ON BEHALF OF THE RESPONDENT

MR. STRAUSS: Thank you, Mr. Chief Justice, and may it please the Court:

First, if I may, I would like to clarify something about the park district's regulations. The park district does use a first come, first serve rule. It occurs in at least two places in the regulations in joint appendix 143 and joint appendix 146.

Joint appendix 143 prescribes the order in which applications shall be processed. They shall be processed in the order of receipt. 146 criterion number 6 for denial, one ground for denial -- this is -- I'm reading from joint appendix page 146. One ground for denial is that a fully executed prior application for permit for the same time and place has been received, and a permit has been --

QUESTION: But neither of those requires the early application to be accepted, at least not as I read it.

MR. STRAUSS: Well, first come, first serve if the application is valid, yes.

QUESTION: It is required to be accepted? Which one of those says that.

MR. STRAUSS: Well, the -- a valid, a fully executed prior application for a permit has been received, and a permit has been granted --

QUESTION: That's a reason for denial.

MR. STRAUSS: That's a reason for denial, right.

QUESTION: But it doesn't say the converse, that it must be accepted if it's earlier.

MR. STRAUSS: Well, the -- a -- the only ground for denial -- there are other grounds, possible grounds for denial, but one ground for denial is someone was there first.

QUESTION: Well, it works out that way because of the provision that says applications shall be processed in --

MR. STRAUSS: In the order of receipt.

QUESTION: That doesn't require a decision on the processing. I don't see -- I really don't see it, and I'm not sure it's commanded, either, but --

MR. STRAUSS: I guess --

QUESTION: Let me ask you this. Do you think that that's constitutionally required there be a first come, first serve rule?

MR. STRAUSS: Well, it is our system, Justice Stevens. I -- so really this would be a question that wouldn't be implicated in our defense of our system.

I guess I think no, it is not constitutionally required to proceed on a first come, first serve basis. There could be other legitimate criteria that might be used, but I do want to emphasize that is what we do.

QUESTION: Can you ask for the park 3 years in

advance?

MR. STRAUSS: My understanding, Justice Scalia, is that we have a practice, although I don't know if it's written down anywhere, of not accepting applications for more than some period of time in advance, I think 6 months.

QUESTION: I would think there would have to be something --

MR. STRAUSS: There's some provision --

QUESTION: Now, the whole scheme is written on the basis that the permit may be denied, and there are a set of criteria, but it doesn't appear to be any affirmative requirement that anything be granted if it meets all the requirements.

MR. STRAUSS: Oh, Justice O'Connor, we do have to grant it if it meets those requirements. That language that the park district --

QUESTION: May deny.

MR. STRAUSS: -- may deny is an authorization to the park district to deny in these circumstances.

QUESTION: And not otherwise.

MR. STRAUSS: And not otherwise. And not otherwise.

QUESTION: And it doesn't do anything to govern how you grant competing applications, other than the fact

that you say there's some kind of built-in first come, first serve basis.

MR. STRAUSS: The way the competing applications are handled is on a first come, first serve basis.

QUESTION: One of the objections made by the petitioner was that either in this case or, reading the regulations, you don't have to give written reasons. He said that there was no record and so forth. It seemed to me that was -- I'd like you to respond to that.

MR. STRAUSS: Justice Kennedy, we do provide reasons.

QUESTION: That was my -- and you did in this case?

MR. STRAUSS: Yes, we did, in this case. That is in the record. The exchange of letters between petitioner's predecessor, Mr. McDonald, and the park district is in the joint appendix, and --

QUESTION: This is based on previous damage and material misrepresentations in the earlier --

MR. STRAUSS: That's right. It was based on previous violations and, in fact, in this case we gave Mr. McDonald notice that he had engaged in conduct in violation of his permit when he did it, before he submitted the subsequent application.

QUESTION: And do the regulations require that

you give the reasons?

MR. STRAUSS: Yes, they do. I'm reading now on joint appendix page 145. The section is misnumbered. It's correctly numbered in the appendix to our brief, but the substance is the same. Notice of denial and application for a permit shall clearly set forth the grounds upon which the permit was denied.

QUESTION: Thank you.

MR. STRAUSS: It then goes on to say that where feasible, if there is a competing use the park district will propose a way to accommodate the use. That's a requirement on us, to try to provide an alternative site or alternative date to --

QUESTION: Could you explain the degree of discretion to grant, in the event that the conditions are not satisfied?

MR. STRAUSS: Yes, Justice Souter. Our view, which we think is really the only reasonable reading of the ordinance, is that we can exercise discretion, as it were, within the criteria, so that if there is a way to grant the application that -- an application that is in violation that does not defeat the purpose of the conditions, we will try to do that.

Let me be more concrete about it. The place where this comes up most frequently is with a late

application, and --

QUESTION: Late?

MR. STRAUSS: A late -- late application, application that's not submitted. We have a schedule of deadlines which are very specific. Often, they're not met. In fact, they're habitually not met by, in Justice Black's terms from Oregon v. City of Struthers, the poorly financed causes of little people. Those are the people who often get their applications in late, and the park district's view is, if it's -- if we can make the necessary accommodations, and do the necessary setup and necessary coordination and free the space for you, even though your application is late, we will do it, and that's the kind of discretion we exercise.

QUESTION: Would there have been discretion in this case? Let's assume the only prior violation had been the fact that if that earlier gathering people were still hanging around at 11:00, after -- or after 11:00 when the park closed. Would there have been discretion to forgive that?

MR. STRAUSS: Yes, there would have been, if we had concluded that -- if the applicant said to us something that gave us reason to believe it wouldn't happen again, or if the nature of the event were such that it was scheduled earlier in the day, or something like

that, that it wouldn't happen again, or if it happened again it wouldn't be so much of a problem, but we don't assert, and I don't think you can assert, consistent with the ordinance, a kind of free-floating discretion to overlook violations for people we like and not for people we don't like. I think that would be a violation of the ordinance.

QUESTION: Does the record tell us how many permits are granted and how many denied each year by the park?

MR. STRAUSS: Justice O'Connor, on the grants, the record, the most precise number we have in the record is there are thousands of applications and thousands of grants a year. We submitted to the Court the permits in our lodging, the permits granted from January through August of this year, and there were over 1,000 of those in one region of the park.

QUESTION: How about denials?

MR. STRAUSS: Denials, Justice O'Connor, is a hard number to come up with, and this bears on the Freedman v. Maryland point, because what often happens is that the denial takes the form of saying, we can't accommodate you at this space at this time, but if you're willing to move your event a week later, or willing to move it to this alternative site, then we can accommodate

you.

Now, I suppose that's a denial, because we're not granting the permit applied for, and I suppose if petitioner prevails we would have to go to court and defend that denial, which seems a really unworkable scheme, but because of that the park district really can't -- couldn't tell me how many denials there are, because so many of them are worked out and the event goes forward in a different time or place than that which was applied for.

I think there are really three ways in which this case differs from Freedman v. Maryland. One which was suggested by some questions from the Court, perhaps the most important one, of course, is in Freedman the Board of Censors, self-described Board of Censors was explicitly concerned with the content of speech.

We are not only not concerned with the content of speech, we are not concerned with whether the event involves speech or expressive activity at all, and if you look at the application form, unless the applicant somehow discloses it, there is really no way for us to know from the application form what kind, whether this is a speech-related event or not. The box that Mr. McDonald checked was named corporate/festival, which could include a variety of events not involving speech.

QUESTION: I guess a permit was denied to Mr. McDonald based on some prior event where people stayed after 11:00.

MR. STRAUSS: Justice O'Connor, it was denied for multiple reasons. It was denied partly because it wasn't filled out properly. The form omitted information, partly because one of the applicants was not an organization that had the capacity to sue or be sued, and also because of a series of violations of which that was only one. There was also --

QUESTION: Are there administrative mechanisms in place for someone who wants to challenge the basis for the denial to raise it administratively?

MR. STRAUSS: Yes, there is, Justice O'Connor. There's a provision for an appeal to the general superintendent of the park district from the decision made by the permitting officers in the park district, and you can submit any material you like to the general superintendent, who must rule on it promptly. If he doesn't rule on it promptly, then the appeal is deemed allowed.

QUESTION: I take it that's the second distinction from Freedman.

MR. STRAUSS: Well, the second distinction from Freedman -- that is a distinction, Justice Souter, but the

second distinction really is that a key premise of Freedman is that the decision in question was one that the courts had superior competence to make, and that the agency was to be distrusted in making. The Court said the decision was whether the speech was constitutionally protected or is obscene, and a theme of Freedman is, as the Court said in Freedman, a censor's business is to censor, and this is really something that requires, in the Court's words, judicial participation.

What we're dealing with here is the management of parks, where I think the story is reversed, and when you're dealing with whether a particular use is appropriate for this area of the park with this infrastructure, this is the kind of park district has superior competence with, and there's really no reason to insist, as the Court did on judicial --

QUESTION: Does the same problem get injected by the exception clause in the ordinance, that in fact they can waive conditions if there would be a First Amendment violation?

MR. STRAUSS: Justice Souter, that clause, two things about that clause are salient, I think. First, that clause only comes into play, the clause that provides that we shall waive certain fees when someone is engaged in First Amendment activity and otherwise couldn't hold

the event if we didn't waive the fees, that only comes into play if someone applies for a waiver, so we're in a situation where someone has come to us in order to seek this dispensation, has told us we're engaging in expressive activity, and the second thing --

QUESTION: Which happened here.

MR. STRAUSS: Which happened here. In one instance he got his dispensation.

The other thing is, we feel we have to have that in there because of suggestions in this Court's opinions in Murdock and Forsyth County that there might be a constitutional issue if we charge more than a nominal fee.

QUESTION: And the third distinction that you want to rely on?

MR. STRAUSS: The third distinction, Justice Souter, is that in the Freedman context the Court had indicated a strong preference for after-the-fact regulation, that if the -- if a community is concerned about obscenity, the way to regulate that is by after-the-fact criminal prohibitions.

Prior restraints are strongly disfavored and be allowed only in narrowly hedged circumstances, but the Court has never suggested that when it comes to managing parks, the preferred way to do it is somehow by allowing people to do what they will and then punish people after

the fact who have done the wrong thing, who have conducted an event in a way that conflicted with another event.

QUESTION: Mr. Strauss, you've ably distinguished Freedman, but do you think that none of the procedural safeguards that were involved in Freedman are applicable here, starting with the basics, the administrator has to have some time limits to act on these petitions to hold events?

MR. STRAUSS: Justice Ginsburg, I would put that part of Freedman in a different category. I think that the requirement that the administrator act within a specified period is a corollary of the rule that the administrator cannot have unlimited discretion over whether to grant or deny. Just as unlimited discretion over whether to grant is a problem, unlimited discretion over when to grant is a problem.

QUESTION: I think there's considerable merit, what you have just said, although at the end of the brief you make the final argument that this is really not a speech statute anyway. Am I to infer from that that you think we could write an opinion to say that neutral standards are not necessary?

MR. STRAUSS: Yes. That was going to be the second part of my answer to Justice Ginsburg, Justice Kennedy. That is our position. Our claim does not hinge

on that. The Court could disagree with us on that and still rule in our favor in this case, but it is our position that because this statute applies, this ordinance applies so broadly to such a wide range of conduct, much of which, most of which is not expressive, that it really should be viewed as more like a business license, or a building permit, which, of course --

QUESTION: Or a zoning ordinance.

MR. STRAUSS: Or a zoning permit, variance of some kind, which, of course, apply to expressive activities, but to a lot of other activities, too.

QUESTION: The easy way to answer that argument is to say we've never done this with reference to parks.

MR. STRAUSS: Well, that's right, Justice Kennedy, but as some of the questions from the Court suggested during my colleague's argument, because these are parks, perhaps the Government has more leeway than it would have in telling people what they can do on their own property.

I understand that on the other hand they are public forums, and I am not sure how that -- whether those arguments cancel out, but it seems to me the crucial fact here is that the park district is not only not engaged in the business of censoring speech, it is at the far extreme from that, and it is regulating conduct because it affects

the infrastructure of the parks, and uses of the parks, and much of this conduct is in no obvious way expressive, and in our view that seems to make it more like a business license.

QUESTION: But you did say that you feel some compulsion from the First Amendment to have to make a decision within a set time to guard against abuse of discretion. You said that. How about, need there be any avenue for judicial review after we get through with your park administrator?

MR. STRAUSS: Justice Ginsburg, I think -- well, for anyone claiming a violation of a constitutional right, there should be an avenue for prompt judicial review, and further, I think that part of Freedman is intended to deal with that situation like that present in some of this Court's cases, in FW/PBS and in Shuttlesworth in particular, a situation where the applicant can't be quite sure when the permit's been denied, so the applicant doesn't quite know when it's okay to go to court.

That was what happened in Shuttlesworth, and I think that troubled the Court, and I think that's the idea that when the Court said in FW/PBS there must be an avenue for prompt judicial review, that's what the Court had in mind, that the permitting scheme cannot be set up in such a way that whenever -- when the applicant goes to Court

the permitting authority can then step back and say, oh, we haven't denied the permit yet.

Here, it's clear when we deny it. We have to act within a certain number of days. We have to issue a statement. The statement has to give reasons, and there is -- and at that point the decision can be challenged in State court in a variety of ways. It can also be challenged --

QUESTION: I suppose the very fact that you have those provisions in means it's a little different from the ordinary zoning ordinance or business license, because those are all motivated by First Amendment concerns, I assume.

May I ask you, how would you -- I understand your basic position, but are you saying that this is not a prior restraint, or that it's a permissible prior restraint?

MR. STRAUSS: Well, Justice --

QUESTION: Or are you just ducking the issue?

(Laughter.)

MR. STRAUSS: No, Justice Stevens, I don't -- I wouldn't want to duck the issue. I'd want to say it was a terminological issue, which I guess is different from ducking it.

I think it's misleading to characterize it as a

prior restraint. As Justice Kennedy said, there were some technical definitional way in which yes, it is a prior restraint, but it really has none of the characteristics that have caused the Court to subject prior restraints to the presumption of unconstitutionality.

In particular, as I said to Justice Souter, this isn't an area in which the Court has said the preferred way of regulating is by after-the-fact criminal punishments. The Court has always recognized that what common sense tells us, that this an area where you really do need before-the-fact guidance, or at least before-the-fact guidance is acceptable.

That, combined with the fact that it's not a content-based -- not only not a content-based scheme, not a content-based scheme that even refers to expression at all, I think gives it none of the characteristics that have troubled the Court about prior restraints, so in light of that, whether it is technically called not a prior restraint, or a valid prior restraint, I think really is a terminological point.

QUESTION: So if something like this is to be considered valid, what are the limits to make it reasonable as a regulation? We've already mentioned prompt action should be required, perhaps, by the park. Do you agree with that?

MR. STRAUSS: If the Court does not accept our argument that this is more like a business license, then yes, prompt action or a specified time for action by the administrator.

QUESTION: And prompt judicial review opportunity.

MR. STRAUSS: And an opportunity for prompt judicial review, that's right. Otherwise, just --

QUESTION: How about the adequacy of judicial review? I take it one objection was that you don't get any actual hearing in court. Everything is on the paper record.

MR. STRAUSS: Justice Ginsburg, my reading of the Illinois cases is that that's not true even in State court and, of course, the applicant has the option of going to the Federal court.

My reading of the Illinois cases is that you can join a claim for equitable relief with the common law certiorari, which is the Illinois way of reviewing administrative proceedings, and you can certainly -- it's clear you could join a 198 -- a State court in a 1983 action, and that would allow you to conduct full discovery.

But I guess my more fundamental answer to your question, Justice Ginsburg, is, it seems odd in this case

to speculate about the adequacy of Illinois procedures when petitioner has not invoked them, and has not complained about the adequacy of the Federal proceedings that he has invoked, that the place to decide whether Illinois provides adequate proceedings would be in a case where someone invokes them, and the Court then sees what the Illinois courts are prepared to do in cases of this kind.

If the Court has no further questions --

QUESTION: Thank you, Mr. Strauss.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

It's our position that the park district's ordinance satisfies the First Amendment standards and the judgment of the court of appeals should be affirmed.

QUESTION: Do you think we should view it as Mr. Strauss urges, as a zoning ordinance, or a business license, or as some kind of content-neutral time, place, and manner restriction?

MR. FELDMAN: I think more the latter. This is a public forum. There was a finding -- there may be other

Government property that wouldn't fall within that category, but it is a public forum, and restrictions on speech in a public forum are subject to the First Amendment, but the restriction in this ordinance, the relevant restrictions are that the discretion that has to be -- that may be exercised by the administrative body can't be unfettered, but on the other hand, total precision is not required, and I think, as Mr. Strauss explained, there are 13 specified grounds under which a permit may be denied here, and those are the only grounds under which it may be denied, and I think that's adequate guidance for whatever discretion or flexibility would be in the system. And indeed, some flexibility is necessary in a system where you re trying to accommodate competing users and where the alternative, as the Court of Appeals said, if you allowed no flexibility at all, would be even a minor or technical violation of one of those criteria, would have to lead to a denial of a permit, which would mean a lot fewer people using the park, both for speech and for nonspeech purposes.

QUESTION: It would make it a lot fairer, wouldn't it? I mean, you either meet the criteria, or you don't. If you don't meet them, you don't get a permit. What's the matter with that?

MR. FELDMAN: The problem would be exactly the

kind of thing that Mr. Strauss described, is that if there is a minor -- if you put in your permit application slightly too late, or there was a stray mark on your application, requiring total strictness on any of these criteria would just mean that people who really should be entitled to have the opportunity to speak --

QUESTION: Well, they didn't follow the rules. I mean, you're giving enormous discretion to the city. They don't have discretion to deny, but among those that are deniable, they can allow some in and not allow others in.

MR. FELDMAN: But I think --

QUESTION: Why don't you just say, these are the rules, if you come in late, you haven't complied with the rules, period. That's very fair.

MR. FELDMAN: I think as Mr. Strauss -- I think it was Mr. Strauss said, the -- whatever the flexibility or discretion that remains in a system like this would be -- has to be exercised in accordance with those grounds for denial. Those are the only grounds that are listed, and I think those are the only things the park district is supposed to be taking into account in deciding whether to grant or deny a permit, and -- but you can --

QUESTION: How do you say it doesn't frustrate the purpose of the provision which says, you know, the

thing has to be in, you know, 2 weeks beforehand, if you get it in 1 week beforehand? How can you possibly say that doesn't frustrate the purpose of the provision? The purpose is to give you 2 weeks to consider it.

MR. FELDMAN: Right, but I think -- well, it could well be that the purpose is to make sure that the park district can guarantee it can consider it, but if they -- if it comes in on a day, 1 day late but there's nothing else on top of it that they're waiting to consider, if it's in the wintertime when they have very few permit applications, they can get to it anyhow, and there's no reason for them not to permit that use of the park. In any event, that's --

QUESTION: Even apart from that, I assume there's no way to write a regulation that is not going to require some judgment, some discretion. I mean, what's material in the falsehood, what is the conflict in the uses? I don't suppose you can eliminate that degree, the degree of flexibility that is implied in applying concepts like that.

MR. FELDMAN: I think that's right, and I think a crucial feature of this requirement is that, of the ordinance here is that the parks are used for multiple uses by multiple people. There's a concern with preserving the park's own facilities so that people who

will use the same place in the future will have that available to them, and there has to be some availability to accommodate all of that in the normal, in an ordinary administrative scheme, and I think this scheme is well-drawn, and if there are further difficulties with it, they can be challenged on an as-applied basis.

One thing the park district can't do is make its decisions based on favoring or disfavoring particular kinds of speech.

QUESTION: Would it be --

MR. FELDMAN: That should be addressed on an as-applied basis, and I think it could be in the State court proceedings, or in a 1983 proceeding.

QUESTION: Along the lines of Justice Scalia's question, would it be proper for a city council or municipality to draft an ordinance just like this one and then at the end saying, the commissioner of parks, in his sole discretion, may waive any or all of the foregoing requirements?

MR. FELDMAN: I think the -- the only difficulty -- it would depend on what that meant. If it said, in his sole discretion meant he may consider anything he -- anything, I think that would be -- that would probably be a problem, but if it meant, considering the factors that are the legitimate factors on whether

someone should use the park, which are the ones that are set out in the criteria, in the ordinance, I think it would be actually similar to what the ordinance is.

QUESTION: Well, we've said in a case like Forsyth that discretion has to have some definition and some control to it, and if you have at the end an absolute waiver provision, it seems to me that would contradict that.

MR. FELDMAN: Oh, I think -- well, I think that's right. If the meaning of that provision is that notwithstanding what we've just said, the commissioner has absolute discretion, I think that that would be correct, and that would pose a problem under Forsyth and the other cases that have said that you can't have that kind of unfettered discretion.

This is a guided -- this is a statute that has quite limited and guided --

QUESTION: Well, how do we know that? Where does it say that the may, the may grant anyway is limited to those applications that generally meet the purposes of the -- where does it say that? Do we just take your word for it?

MR. FELDMAN: Well --

QUESTION: Or the park district's word for it?

MR. FELDMAN: I think that that would at least

be the most reasonable construction of an ordinance like this, where there's attempt to detail these 13 specific criteria quite specifically, and there's no suggestion that there's any other basis on which the park district can act, and I think that that's just the most reasonable interpretation of this kind of ordinance.

And again on a facial as-applied -- one difficulty with a facial challenge to an ordinance like this is, you don't want to construe it in such a way as to intentionally render it unconstitutional and therefore limit the ability of the park district to make its facilities open, to have a permit scheme that really makes its facilities open to all.

QUESTION: Mr. Feldman, do the Federal regulations for the use of Federal parks, the use of the Mall, do they differ with respect to the may deny?

MR. FELDMAN: No. They're -- well, they're very similar. The specific criteria are different, and are differently --

QUESTION: But there is the may deny, implying there are cases where, although you could, you don't have to deny?

MR. FELDMAN: That's correct.

QUESTION: And no criteria for the waiver in the Federal scheme either?

MR. FELDMAN: No, and the way those have consistently been applied is, those are the grounds that are to be considered in determining whether you can grant a permit, and there aren't other grounds on which a permit would be denied.

Now, there -- the only other -- but actually, in the Federal scheme at least, and probably here, too, some types of other -- some types of considerations can be considered. For example, if someone has a particular facility that would be particularly good for one use, if someone wants to hold a rally on a baseball field, someone else wants to have a baseball game there, I think they can say, well, you have the baseball game on the baseball field, and you have your rally at another location, and there is some of that that goes on in proposing different particular locales so as to accommodate all of the different users who want to use the park.

QUESTION: And is there a first come, first serve rule?

MR. FELDMAN: Basically, yes. If you satisfy the other requirements of the rule, it's basically similar to this. It's subject to -- the actual first come, first served rule under the National Park Service parks here in Washington like this has to do with the date of the application, not the date on which it's processed.

If there are no other, further questions, that concludes --

QUESTION: Thank you, Mr. Feldman.

Mr. Wilson, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD L. WILSON

ON BEHALF OF THE PETITIONERS

MR. WILSON: Justice O'Connor, I'd like to address quickly two points that you raised. First, there's no meaningful administrative procedure. There is no mechanism. They send you a letter telling you that your permit was denied, and they read off the violations. You send a letter back and say, I did not do any of that, and they say, oh, yes, you did, denied. That's the end of it. There is no hearing. You don't even get to know who made the allegations.

Secondly, in your inquiry as to judicial review, this Court unanimously provided us with a crystal clear definition of prompt judicial review. There should be no mystery in the Federal circuits. Another unanimous opinion, Blunt v. Rizzi, written by the same Justice who wrote Freedman, and on a Court that contains six of the justices who participated in Freedman, Blunt defined prompt judicial review as follows:

A final judicial determination on the merits within a specified brief period. That was in 1971, so

there should have been no mystery from the plurality of opinion in FW/PBS, because that plurality opinion did not say, there must be the availability of judicial review. That opinion said, there must be availability of prompt judicial review --

QUESTION: Mr. Wilson, what does that mean if you pick the Federal court, that Illinois is going to write a statute that says, and if you choose to come to the Federal court rather than the State court, the Federal court is going to have X number of days to decide it?

MR. WILSON: Justice Ginsburg, that would be the choice of the park district of the City of Chicago, because the park district is the party that has to go to court to seek --

QUESTION: Oh, if you're -- but that's not what Justice O'Connor said in her case. She didn't take that last part of Freedman.

MR. WILSON: But there's certainly a distinction between those businesses that Justice O'Connor was writing about in FW/PBS and a core political speech.

QUESTION: Well, suppose we reject your notion that the scheme is invalid unless the park goes to court, and the court has a tight time line? Suppose we reject that?

MR. WILSON: I would then say, Justice Ginsburg,

that this Court has elevated the kind of sexually explicit speech in that case above the core political speech in this case, based on the context of the speech, which would fly in the face of --

QUESTION: Well, I don't follow that at all.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wilson. The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)