No. _____

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHICH PARTY BEARS THE BURDEN OF PERSUASION WHEN A LITIGANT CHALLENGES, AS AN UNCONSTITUTIONAL PRIOR RESTRAINT, A MUNICIPAL ORDINANCE WHICH REQUIRES A SPEAKER TO OBTAIN A CITY LICENSE BEFORE ENGAGING IN EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT?

II. IS A LICENSING SCHEME WHICH ACTS AS A PRIOR RESTRAINT REQUIRED TO CONTAIN EXPLICIT LANGUAGE WHICH PREVENTS THE EXERCISE OF UNBRIDLED DISCRETION IN FIXING THE PENALTIES FOR ITS VIOLATION?

III. IS A LICENSING SCHEME WHICH ACTS AS A PRIOR RESTRAINT REQUIRED TO CONTAIN EXPLICIT LANGUAGE WHICH PREVENTS INJURY TO A SPEAKER'S RIGHTS FROM WANT OF A PROMPT JUDICIAL DECISION?

PARTIES

The Petitioner is City News and Novelty, Inc., a Wisconsin corporation, the plaintiff in the circuit court, the appellant in the Wisconsin Court of Appeals, and the petitioner in the Wisconsin Supreme Court. City News and Novelty, Inc., has no parent corporation or subsidiaries.

The Respondent is the City of Waukesha, Wisconsin, a Wisconsin municipality, the licensing entity, the defendant in the circuit court, the appellee in the Wisconsin Court of Appeals, and the respondent in the Wisconsin Supreme Court.

The State of Wisconsin has not been a party to the proceedings below, the Attorney General of the State of Wisconsin has been served with documents throughout the proceedings in order to give the State an opportunity to appear and defend the challenged provisions, as is required by Wisconsin state law. (See *State ex. Rel. Smith v. City of Oak Creek*, 131 Wis. 2d 451, 457, 389 N.W.2d 366, 368 (Ct. App. 1986), affirmed 139 Wis. 2d 788, 407 N.W.2d 901 (1987)).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals, in *City News and Novelty, Inc. v. City of Waukesha,* 231 Wis. 2d 93, 604 N.W.2d 870 (Ct. App. 1999), which was given binding effect in the State of Wisconsin by the decision of the Wisconsin Supreme Court to deny review on January 18, 2000.

OPINIONS BELOW

The order of the Wisconsin Supreme Court is unpublished and is reproduced in the Appendix to this petition. The decision of the Wisconsin Court of Appeals is published as *City News and Novelty, Inc. v. City of Waukesha,* 231 Wis. 2d 93, 604 N.W.2d 807 (Ct. App. 1999), and is reproduced in the Appendix to this petition.

The Wisconsin Court of Appeals entered its decision on October 20, 1999. The petitioner sought review by the Wisconsin Supreme Court, and its petition for review was denied January 18, 2000.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech. . . . "

STATUTES INVOLVED

Chapter 68 of the Wisconsin Statutes governs municipal administrative procedure and review of municipal administrative decisions. The provisions of Chapter 68 are reproduced in the Appendix to this Petition.

ORDINANCES INVOLVED

The City of Waukesha, Wisconsin, regulates adult oriented establishments by means of a municipal licensing ordinance, § 8.195. The provisions of Waukesha Ordinance § 8.195 are reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

City News and Novelty, Inc., operates an adult bookstore in the City of Waukesha, Wisconsin. In years past, City News and Novelty, Inc., has annually renewed its license to operate as an adult business under the

provisions of § 8.195, A-3-4,[1] of the Municipal Code of the City of Waukesha. Its most recent license was due to expire January 25, 1996. On November 15, 1995, City News and Novelty, Inc., applied for renewal of its license. On December 19, 1995, the Common Council of the City of Waukesha denied renewal of its license. A-7.

City News and Novelty, Inc., pursued administrative review of the Council's decision.[2] On January 22, 1996, the Common Council reviewed and affirmed its previous decision. A-72. The Waukesha Administrative Review Appeals Board ("Board") affirmed the City's denial of the license. A-81. City News and Novelty, Inc., sought judicial review via a statutory certiorari action in state court. There, City News and Novelty, Inc., argued that the action of the City in failing to renew its license was unlawful because the licensing ordinance was an unconstitutional prior restraint. In a decision filed April 2, 1997, the circuit court confirmed that City News and Novelty, Inc., had properly preserved its arguments concerning the facial invalidity of the ordinance for review, but rejected those arguments on the merits, and affirmed the decision of the Board. A-55. City News and Novelty, Inc., appealed.

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[1] References to the Appendix to this Petition will be shown as A-___.

[2] Because an administrative body does not have the power to declare an ordinance or a statute unconstitutional, at this stage of the proceedings City News and Novelty, Inc., merely noted its constitutional objections, listing the specific constitutional infirmities alleged in order to preserve the constitutional issues for judicial review.

After receiving the briefs of both parties, the Court of Appeals certified the appeal to the Wisconsin Supreme Court. A-44. By order of April 21, 1998, the Wisconsin Supreme Court refused certification. A-53. The Court of Appeals issued its decision October 20, 1999, A-1. It found that one section of Waukesha's licensing ordinance, § 8.195(3)(b), which governs an applicant's right to a public hearing following denial of a license, was unconstitutional, but also found that provision severable. It upheld the remainder of the ordinance, and therefore, in significant part, affirmed the decisions of the trial court and of the Board.

The Wisconsin Court of Appeals held that although ordinarily when an ordinance regulates First Amendment activities, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt, this Court, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-230 (1990), "rejected this approach where First Amendment prior restraints are concerned and the government action at issue is the review of an applicant's qualifications for a business operating license." A-10. Using this standard, the Court of Appeals found that City News and Novelty, Inc., had not met its burden to demonstrate that the ordinance either permitted unbridled discretion as to the granting and denying of licenses, or that it lacked the required procedural safeguards of prompt administrative and judicial review. City News and Novelty, Inc., filed a timely Petition for Review to the Wisconsin Supreme Court. By order dated January 18, 2000, the Wisconsin Supreme Court denied review. A-54.

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN COURT COMPROMISED AN IMPORTANT FIRST AMENDMENT SAFEGUARD WHEN IT INTERPRETED *FW/PBS, INC. V. CITY OF DALLAS* TO REQUIRE ONE WHO CHALLENGES A LICENSING SCHEME, WHICH ACTS AS A PRIOR RESTRAINT, TO BEAR THE BURDEN OF PROOF IN DEMONSTRATING THAT THE ORDINANCE VIOLATES THE FIRST AMENDMENT.

When the Wisconsin Court of Appeals broke with all First Amendment precedent and transferred the burden of persuasion to City News and Novelty, Inc., requiring it to prove beyond a reasonable doubt that Waukesha's licensing ordinance was an unconstitutional prior restraint, it did so because it believed its holding was required by *FW/PBS, Inc. v. City of Dallas*, 333 U.S. 215 (1990). This Court should issue its writ of certiorari to correct the misconception upon which this error is based. This Court should clarify that *FW/PBS* did not, in fact, alter the long-standing rule that where a party challenges a regulation that restricts the exercise of freedoms protected by the First Amendment, the government bears the burden of justifying the restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Freedman v. Maryland*, 380 U.S. 51 (1965).

A. It Is Unlikely that this Court Intended to Alter The Allocation of the Burden of Proof.

The language in *FW/PBS, Inc. v. City of Dallas*, 333 U.S. 215 (1990) cited by the Wisconsin Court of Appeals as the basis for its imposing upon the petitioner the burden of proving the ordinance to be unconstitutional is found in the portion of Justice O'Connor's plurality opinion where the Dallas licensing scheme is distinguished from the censorship system at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965). The Wisconsin Court gave no indication that it knew it was relying on a non-majority opinion. A-10. That three-justice plurality opinion says:

> The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. . . . The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicants obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a licensing application or that it bear the burden of proof once in court.

FW/PBS, 493 U.S. at 229.

The distinction which the plurality was discussing in this portion of its opinion was twofold: First, in general, the licensing authority does not pass judgment on the content of the protected expression, and second, the licensee has a much greater incentive to seek judicial

review in the face of an adverse ruling than did the individual film producer in *Freedman*. As to the latter point, it makes some sense to require the applicant seeking the license to initiate any court action. However, as to the former, it is one thing to require the applicant to bear the burden of proof on the issues of fact going to its own qualifications, but it is quite another to require that it bear the burden of proof or persuasion in regard to a facial challenge to the validity of the regulation itself.

The language used by Justice O'Connor in other sections of the same opinion belies any intent to shift from the government the burden of justifying the restriction on First Amendment freedoms. For example, an earlier portion of the same section of the opinion begins "while '[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.' " *Id.* at 225 (multiple citations omitted). To say that a system of prior restraint, including a scheme of licensing adult bookstores, bears a heavy presumption against its constitutional validity is another way of saying that it is the government that bears the burden of justifying the regulation. *See*, for example, *Clark v. Community for Creative Nonviolence*, 468 U.S. at 294, n.5, where this Court explained that the general rule that one who seeks relief bears the burden of demonstrating entitlement to it means that one who claims that a regulation impinges on activity protected by the First Amendment bears the burden of establishing that the activity is in fact protected by the First Amendment; once that is established, the government bears the burden of justifying its restrictions.

Lower courts have consistently interpreted the "presumption of unconstitutionality" as requiring the government to bear the burden of demonstrating the validity of a regulation that functions as a prior restraint. See, for example, *Jersey's All-American Sports Bar, Inc. v. Washington State Liquor Control Board*, 55 F. Supp. 2d 1131, 1138 (1999): "The government can only overcome this presumption by demonstrating that the prior restraint includes procedural safeguards designed to protect against abuse of the power to censor. . . . To avoid a finding that a statute grants unbridled discretion, the government must show that it includes narrow, objective, and definite standards for the granting or denial of the license," citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

Given the *FW/PBS* plurality's reiteration that the prior restraint there bore a heavy presumption of unconstitutionality, it is highly unlikely that the plurality intended to do away with such a presumption. More likely, it was the intention of the plurality to say that while the municipality retained the burden of justifying its restriction in the face of a facial challenge to the validity of the ordinance, the license applicant should assume the burden on any challenge to its qualifications to hold a license.

B. The Requirements of *Freedman* Are Still Binding Precedent.

The position that a licensing ordinance does not require all three *Freedman* safeguards was advanced by Justice O'Connor in § II of her plurality opinion in *FW/*

PBS. Only Justices Stevens and Kennedy joined that section of the opinion. Three justices, Brennan, Marshall, and Blackmun, concurred in the judgment that the Dallas ordinance was unconstitutional but believed that none of the *Freedman* requirements may be eliminated in the context of a licensing regulation which restricts First Amendment freedoms. Those justices argued that the "transcendent value of speech" always requires that the burden of persuasion be placed on the government when expression is regulated. *FW/PBS*, 493 U.S. at 238, citing *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Chief Justice Rehnquist and Justice White, concurring and dissenting, would not have applied any *Freedman* safeguards to a licensing situation, and Justice Scalia, dissenting, would have applied a different analysis entirely.

When a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764, n.9 (1988), citing *Marks v. United States*, 430 U.S. 188, 193 (1977). Therefore, *FW/PBS* may not properly be read as requiring that the safeguards set forth in *Freedman* have been modified, since that rationale neither enjoyed the assent of the majority nor was the narrowest ground for the decision.

There was a single rationale, though, enjoying the assent of six Justices, that completely explains the result in *FW/PBS*. Six Justices agreed that the Dallas ordinance was unconstitutional because it was a prior restraint requiring at least two of the three *Freedman* procedural

safeguards, and those two safeguards were lacking. *11126 Baltimore Boulevard v. Prince George's County, Maryland,* 58 F.3d 988, 999, n.15 (4th Cir. 1995) (*en banc*), *cert. denied,* 516 U.S. 1010. In short, the requirements established by this Court in *Freedman* have not been modified and are therefore still binding on the states.

The fact that this court has been unable to muster a majority opinion in some First Amendment cases concededly makes life more challenging for lower court judges. Each Justice of this court no doubt tries hard to move toward consensus, at least to the point of enabling the court to issue a majority opinion, before reluctantly accepting the fact that conscience requires a separate statement. This court has also instructed the lower courts, in *Marks, City of Lakewood,* and elsewhere, on how to determine the authoritative holdings of such cases.

For a court whose decisions become the law of a state to disregard these instructions and simply treat a plurality opinion as if it were a majority holding, just because it appears first in the reporters, is a serious matter. It not only begets error in the case at hand, but it sends a message to trial-level courts and lawyers that they may simply dispense with the arduous vote counting required by a *Marks* analysis, and treat a lead plurality opinion as if it were a majority opinion. This court should grant certiorari in this case to nip this practice in the bud, in recognition of the value of the sincere exercise of conscience that sometimes compels a Justice of this court to write separately, even where this choice means the court will not produce a majority opinion, and lawyers and judges will have to read carefully and count votes.

II. WAUKESHA'S LICENSING ORDINANCE DOES NOT CONTAIN EXPLICIT, OBJECTIVE STANDARDS TO PREVENT THE EXERCISE OF UNLAWFUL DISCRETION.

A licensing scheme which acts as a prior restraint must exhibit not only the three *Freedman* procedural safeguards, but it must also contain "narrow, objective and definite standards to guide the licensing authority" in deciding who gets licenses and who does not get them. *Shuttlesworth v. Birmingham,* 394 U. S. 147, 150-151 (1969). "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.,* at 151 (quoting *Staub v. City of Baxley,* 355 U.S. 313, 322 (1958)).

In *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 759-760 (1988), this court recognized that discretion in the granting or denying of required periodic license renewals can be every bit as effective a cloak for the censorship of unpopular speech as discretion in the granting or denying of new licenses.

Some licensing schemes empower licensing authorities to respond to violations of their lawful regulations by imposing temporary prohibitions on licensees' rights to engage in the licensed expressive activity. It is self-evident that standardless discretion as to the duration of such a temporary prohibition can be every bit as much a

cloak for censorship as standardless discretion in the granting or denying of new licenses or annual renewals. A licensing authority might respond to unpopular speech by imposing a long suspension or even a permanent revocation for a trivial violation. An ordinance which permits a licensing authority to censor by back-door suspensions without standards to govern the severity of the penalties it imposes is necessarily every bit as facially objectionable as one which permits front-door censorship in the granting or denying of a license in the first place.

A. Provisions which Allow the City to Choose Between Mild and Severe Punishments Without Standards to Guide that Choice Confer Unbridled Discretion Upon City Officials.

Under Waukesha's ordinance, if an operator commits a violation, the ordinance gives the city unbridled discretion to determine whether such a violation will be punished by a revocation, which lasts for a maximum of one year, or by nonrenewal of a subsequent license, which lasts for five years. A-36. The ordinance lists no criteria by which the city is governed in making this choice. A-104-106. Before the Wisconsin courts, the city defended the absolute discretion its scheme vests in city officials as to severity of punishment for violations. A-35.

Without standards to prevent subjective criteria from being used as the basis for deciding which penalty to invoke, the ordinance does not protect a bookstore from being subject to the danger of censorship. Nothing in the

language of the ordinance prevents the city from choosing the most severe penalty because of its distaste for the materials disseminated. Because such a decision would not only be unconstitutional, but also virtually undetectable, *see, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988), it is necessary that the ordinance contain explicit provisions which would make such an occurrence impossible. The *Lakewood* Court cautioned that demonstrating the link between the expressive content and the subsequent denial of license renewal might well prove impossible. *Id.* at 759-760. Thus, the dangers inherent in the Waukesha ordinance, which contains no explicit standards and permits subjective discretion to be exercised in determining what penalty to apply after a violation has occurred are exacerbated in circumstances where, as here, a store selling unpopular expressive material must seek renewal on an annual basis.

This court should grant certiorari to make it clear to government entities that standardless discretion at any phase of a licensing scheme where the right to speak is in play violates the First Amendment.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE GUARANTEE OF PROMPT JUDICIAL REVIEW THAT MUST ACCOMPANY A LICENSING SCHEME MEANS A PROMPT JUDICIAL DETERMINATION OR SIMPLY THE RIGHT TO PROMPTLY FILE FOR JUDICIAL REVIEW.

The Waukesha licensing ordinance comes up short of constitutionally mandated procedural safeguards in

another way. Another element which this Court has found essential in an ordinance which restricts freedom of expression by licensing it is "prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228 (O'Connor, J., plurality opinion). As the Wisconsin Court of Appeals noted in its decision, there is currently a split among the federal appellate circuit courts as to whether "prompt judicial review" means merely speedy access to, or initiation of, judicial review, or alternatively, whether it means a prompt judicial decision. A-21-22. The Court of Appeals went on to resolve this issue by holding that "prompt judicial review" means prompt access to court. A-22. This court should grant the requested writ in order to resolve this serious conflict among the circuits.

A. The Court Should Grant Certiorari to Consider the Role that Preserving the Status Quo May Play When A Municipality Lacks the Power to Require a State Court to Determine a License Case Promptly.

One reason the Wisconsin court was reluctant to hold that prompt judicial review means a prompt judicial decision was that it was dealing with a local ordinance, and the Waukesha City council lacks the authority to impose time requirements on Wisconsin's state courts. A-22. What Waukesha can do, though, is to guarantee that the status quo will be maintained throughout the pendency of judicial review proceedings. In the case of an existing business, like the Petitioner here, such a provision would in most cases keep the business from suffering any injury from an adverse licensing decision until such time as the

courts finally determine the matter. The purpose behind the requirement of prompt judicial review would be served, even though the ordinance could only afford prompt access to court. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.").

In the instant case, the City of Waukesha *ad hoc* permitted City News to continue operating without interruption throughout much of the judicial review process. However, every bookstore is entitled to *explicit* protection in this regard, and need not simply rely on the charity or kindness of city officials. In reiterating the "essential" safeguards, this Court has required "the licensor to make the decision whether to issue the license within a specified and reasonable period of time during which the status quo is maintained." *FW/PBS*, 493 U.S. at 228 (O'Connor, J., plurality opinion). Even the Fifth Circuit Court of Appeals, one of the circuits which has taken a narrow approach to the issue of prompt judicial review, agrees on the need to preserve the status quo by explicit language:

> The contention is that the County cannot constitutionally shut down an existing business while its application for a license is pending, and that TK's was operating when Denton County adopted its regulations. The County points out that it has not attempted to close TK's. . . .
>
> Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process. It is no answer that the County has not elected to do so.

> The absence of constraint internal to the regulation is no more than open-ended licensing. Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the state. . . .
>
> Because TK's was in business when the Order was adopted, its free speech activity cannot be suppressed pending review of its license application by the County.

TK's Video v. Denton County, 24 F.3d 705, 708 (5th Cir. 1994).

The court in *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1574 (D. Minn. 1992) also held that even if the city has not attempted to force an applicant out of business during the pendency of proceedings, the retention of the status quo must be *explicit* in the ordinance itself. *Wolff*, 803 F. Supp. at 1574-75. The Fourth Circuit, too, has held that not only must the status quo be explicitly preserved throughout the administrative stage, but that it is preferable to extend it through the judicial review stage. *Chesapeake B&M, Inc. v. Harford County, Maryland*, 58 F.3d 1005, 1009 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010 (1995); *Baltimore Blvd.*, 58 F.3d at 1001. And the Eleventh Circuit reminds us that the requirement that the status quo be maintained through at least the administrative process is one of the basic requirements which stems from *Freedman*. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363 (11th Cir. 1999).

The Waukesha ordinance not only fails to explicitly provide for the retention of the status quo; in fact, on its face, it says the opposite, at § 8.195(2)(b), A-101, which

states, "[N]o adult establishment shall be operated . . . without first obtaining a license to operate." When the lack of preservation of the status quo is coupled with the lack of definitive time limits and the attendant possible delay in judicial review, the Waukesha ordinance has the potential for long-term suppression of expression prior to any type of judicial review. As a result, it is constitutionally defective on its face. This court should grant certiorari to assist those government entities that wish to regulate adult businesses within the constitutional boundaries of their power to do so, by more clearly defining those boundaries in this notoriously murky area, and in particular, by more clearly stating the meaning of "prompt judicial review" and illuminating the interplay between the concept of prompt judicial review and retention of the status quo during administrative and judicial proceedings in license cases.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be, in all respects, granted.

Dated this 17th day of April, 2000.

Respectfully submitted,

CITY NEWS AND NOVELTY, INC.

Petitioner

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