No. [illegible]

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF [illegible] AS AMICUS CURIAE IN SUPPORT OF PETITIONER

[illegible]

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STATEMENT OF POSITION

Florida Cannabis Action Network, Inc. (CAN) is a Florida not-for-profit corporation which engages in political rallies, festivals, signature campaigns and other activities for the purpose of advocating the decriminalization of marijuana and educating the public concerning the medicinal benefits of cannabis. Because CAN frequently faces permitting ordinances similar to the prior restraint at issue here, this amicus brief supports the petitioner in urging the Court to declare that the Waukesha ordinance violates the First Amendment rights of petitioner and others.[1]

Respondent previously filed its blanket consent to amici curiae on July 10, 2000. Petitioner's consent to this amicus brief is submitted herewith.

INTEREST OF AMICUS

CAN is a political organization which sponsors rallies and distributes literature advocating the decriminalization of marijuana and the medicinal benefits of cannabis. Its rallies and festivals typically take place in parks and plazas which are quintessential public fora. Needless to say, the political views of this group are

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[1] This amicus curiae brief was authored entirely by undersigned counsel for CAN. No person or entity other than CAN and its counsel has made any monetary contribution to the preparation or submission of this brief.

controversial and unwelcome in many communities across the country.[2]

In many jurisdictions, CAN must secure a permit in advance of its rally. These permits are often characterized as "parade permits," "festival permits," street-closing permits" or "noise permits". The effect of all of them, however, is to restrain the speaker in the absence of government permission in the form of a license or permit. Not surprisingly, local governments are often reluctant to grant a permit for the dissemination of CAN's controversial message. The result has been a series of lawsuits, where Court intervention was necessary to force local officials to allow political speech. *See, e.g., Michel-Trapaga v. City of Gainesville*, 907 F.Supp. 1508 (N.D.Fla.1995); *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317 (M.D. Fla. 1998). Similar political groups in other states have also been forced to litigate permitting issues in order to hold their parades and rallies. *See, e.g., MacDonald v. Safir*, 206 F.3d 183 (2d Cir. 2000); *MacDonald v. City Of Chicago*, 1998 WL 673652 (N.D. Ill. 1998).

CAN has also been active in securing signatures for a citizen initiative to place a medical marijuana constitutional amendment on the ballot for the next state election. These activities have resulted in a hostile reaction from government, including forced expulsions from public

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[2] Florida, in particular, has many government-sponsored "zero tolerance" programs in schools and communities which advocate "official" positions in opposition to CAN's views.

areas around polling stations. Again, CAN's only recourse has been the federal courts.[3]

CAN's interest in these proceedings is to secure the rights of political dissidents to prompt judicial access - including prompt judicial *disposition* - of permitting decisions affecting political speech. While the petitioner in this case is a business engaged in commercial presentations of adult erotic speech, the Waukesha ordinance is very similar to permitting ordinances routinely encountered by CAN. CAN also seeks to ensure that any weakening of the *Freedman* requirements relative to judicial review is limited to adult erotic speech and that political speech continues to be afforded the highest protection by this Court.

SUMMARY OF ARGUMENT

The seminal case of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965) has been the primary bulwark of free thinkers of all types against the abuses of local permitting officials. Those abuses can hide behind content-neutral permitting ordinances as effectively as the most obvious content-based restrictions. In either case, speech can be stifled in the absence of government permission to speak.

Among the most important of the *Freedman* requirements is that prompt judicial review be available *before* a prior restraint is imposed and that the status quo be

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[3] CAN has been involved in two lawsuits against the City of Jacksonville involving forced expulsion of canvassers from polling stations. Both of these cases settled after litigation was filed.

preserved pending a final disposition on the merits. 380 U.S. at 58-60, 85 S.Ct. at 738-40. As *Freedman* correctly points out "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression..." 380 U.S. at 58, 85 S.Ct. at 739.

This protection is of particular importance when pure political speech is at risk. It is distressingly common for local officials to deny permits for political events on the basis of their own political views, or even a simple desire to avoid the expense and disruption that may accompany a controversial event. *See, e.g., Michel-Trapaga, supra; Bledsoe, supra.* Because political issues are often time-sensitive and resources to disseminate minority views are scarce, the denial of a permit often spells the denial of speech. The only significant defense to this indirect censorship is the requirement that the prior restraint be withheld pending a prompt judicial resolution.

In this context, judicial review must include not only access to the Courts, but a disposition of the case on the merits. Absent a final determination, mere access to the Courts does no good to the political speaker who must often espouse his views while events are current or be effectively silenced for all time.

Furthermore, a stay pending review does the political speaker little good as the status quo is equivalent to a denial of speech. That prong of the *Freedman* requirements is important for existing businesses, but cannot help the first time speaker who must obtain government approval before engaging in First Amendment activities.

This Court should vigorously apply all of the *Freedman* requirements, including the right of prompt

judicial disposition on the merits and maintenance of the status quo (where that favors speech). To the extent that this Court may consider weakening any of the *Freedman* standards, it should nonetheless take the utmost care to preserve the rights of political speakers as compared to commercial speakers.

ARGUMENT

THE *FREEDMAN* REQUIREMENTS RELATIVE TO JUDICIAL REVIEW AND MAINTENANCE OF THE STATUS QUO MUST BE PRESERVED, PARTICULARLY WHERE POLITICAL SPEECH MAY BE ADVERSELY AFFECTED

Political expression in this country is strong and diverse only because the First Amendment has been defended vigorously through the years. From the Sedition Act of 1798 to the civil rights marches of the '60s, to the Nazi march in Skokie, it is obvious that an unrestrained majority can wreak havoc on the political liberties of the minority. It is equally obvious that judicial review, in courts charged with enforcing constitutional rights, is the last and most essential defense against the tyranny of the majority.

CAN's interest in these proceedings is to secure the rights of political dissidents to prompt judicial access - including prompt judicial *disposition* - of permitting decisions affecting political speech. Furthermore, CAN intends to demonstrate that a stay of proceedings to preserve the *status quo* is not a reasonable alternative to judicial review where political rights are at stake. Indeed, a stay is exactly the opposite of the prompt decision-making needed to preserve these fragile liberties.

As recounted above, the experiences of this amicus curiae show in graphic detail why prompt judicial review is absolutely essential to avoid suppression of controversial speech. CAN has repeatedly resorted to litigation in the federal courts to vindicate its First Amendment right to conduct rallies, distribute literature and secure signatures for ballot initiatives.

It is imperative, however, that the Court not reach the false conclusion that access to the federal judiciary is a quick and easy remedy for local violations of First Amendment rights. CAN is an exceptional group in that it has a committed core of activists who are not dissuaded by official intimidation. CAN also has committed attorneys who are willing to litigate these issues on behalf of an indigent client. The lesson to be learned from CAN's experiences is that local suppression of pure political speech is common and often takes the form of permit denials or indefinite delays of permitting decisions.

This Court has long recognized that local government officials cannot be trusted with the final decision to restrain speech:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid prior restraint.

Freedman v. Maryland, 380 U.S. 51, 58, 85 S.Ct. 734, 739 (1965). That principle has been consistently upheld by this Court and has been applied to all manner of permitting and licensing decisions. *See, e.g., FW/PBS, Inc. v. City of*

Dallas, 493 U.S. 215, 110 S.Ct. 596 (1990), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969)).

Despite the clear language of *Freedman* and the public policy mandating judicial intervention, the lower courts have split over the precise form of "judicial review" required. The root of this split among the Circuits appears to be language in the plurality opinion of *FW/PBS* to the effect that mere access to the courts *may* be sufficient for adult business licensing disputes:[4]

> [T]here must be the possibility of prompt judicial review in the event that [a] license is erroneously denied.

FW/PBS, 493 U.S. at 228, 110 S.Ct. 596.

Some courts have found that the possibility of eventual review through common law certiorari or similar judicial actions is sufficient to comply with the *Freedman* requirements.. *See, e.g., Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (*en banc*); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). Other Circuits have insisted that judicial relief is meaningless without an actual determination on the merits within a reasonably brief time. *See, e.g., Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (*en banc*).

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[4] Because this language appears in a plurality decision which did not draw the votes of five members of the Court, it has been argued that *FW/PBS* did not modify the judicial review requirements of *Freedman*. *See, Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir.1998).

At least one Circuit has taken the novel position that "licensing decisions" require less constitutional protection than do "censorship decisions". *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir 1999).[5]

The purpose of this amicus brief is to urge this Court not to weaken the *Freedman* protections - particularly as applied to noncommercial political speech. As a matter of policy, political speech should be given more protection than commercial speech. Certainly political speech is of greater societal import than adult erotic speech presented for commercial gain. *Compare, Barnes v. Glen Theatre*, Inc., 501 U.S. 560, 565-66, 111 S.Ct. 2456, 2460 (1991) (Nude dancing is at "the outer perimeters of the First Amendment, though we view it as only marginally so.") with *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection."). Common sense also tells us that political speech is more sensitive to suppression than is commercial speech.[6]

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[5] CAN respectfully suggests that neither *Freedman*, nor any other decision of this Court, would support a distinction of this nature. Political expression can be curtailed by a supposedly content-neutral permitting scheme just as effectively as by the most blatant censorship scheme. *See, e.g., FW/PBS, supra.*

[6] It would be a sad event in First Amendment jurisprudence if the Constitution were construed to say that core political speech – the very speech for which the First Amendment was added to the Constitution – enjoyed no more protection than sexually explicit, commercially exploited speech.

The policy issues which Appellants address here are precisely the same ones which led to the adoption of the *Freedman* requirements in the first place. There are obvious parallels between the movie publishers at issue in *Freedman* and the political activists who appear here as amicus curiae:

> Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country....

Freedman, 380 U.S. at 59, 85 S.Ct. at 739.

This Court has itself noted the fact that purveyors of commercial pornography have a tremendous incentive to obtain a license for a particular location in a particular community. *FW/PBS*, 493 U.S. at 229-30, 110 S.Ct. at 607. While political activists may be equally motivated to air their views, they do not necessarily have an incentive to conduct their activities in a particular locale. Indeed, an activist facing government opposition in Gainesville, Florida and hampered by limited time and resources, may well conclude that his message will be better received at the next town along the highway.

Furthermore, an adult business can presumably wait a month or two before it secures a license – widespread interest in pornography appears to be a permanent fixture of American culture. In contrast, political issues are often fleeting and may lose their currency in a matter of days. If the organizer of a rally is denied a permit, his speech is effectively censored and suppressed for all time.

These policy considerations are specifically addressed by the plurality in *FW/PBS* when it was faced with an adult business with far greater "staying power" than a movie distributor:

> The Court in *Freedman* also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. 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 applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.

493 U.S. at 229-30, 110 S.Ct. at 607.

Other than the obvious policy considerations favoring the greatest protection for political speech, it should be clear that permitting ordinances restraining rallies and festivals are not simple licensing measures so much as an opportunity to censor speech. For instance, a parade

permit is not a "license" to close streets. Rather, it is a one-time permission to engage in speech which has the prospect of drawing large crowds. There are no continuing licensing standards which the applicant must meet; rather the government considers whether its single use permit will unduly impact on traffic on a particular day. In short, ordinances of the kind routinely applied against these activists bear every mark of a law requiring government permission to speak and no resemblance to regulatory measures of the kind applicable to businesses.

Prompt judicial disposition is imperative to preserve the rights of political activists faced with a prior restraint on speech. Judicial review is no good to the permit applicant if the date for his parade has passed, the election is over, or the particular "hot button" political issue is now cold and stale. Where an adult business may be in a position to "wait out" judicial review or suffer a closure while the case winds its way through the Courts, a political activist must strike while the iron is hot and the slightest delay imposed by administrative authorities is equivalent to the most lasting censorship. The First Amendment demands prompt judicial disposition of permitting decisions affecting pure political speech.

Similarly, a stay of administrative proceedings pending judicial review (the narrow question certified by this Court) does no good for an activist dependent on a permit for his speech. After all, the status quo in that instance is no permit. No permit is equivalent to no speech and no speech spells the end of political discourse. The only remedy which preserves both the rights of the political speaker and the government interest in maintaining order is a prompt administrative decision followed by a prompt judicial determination on the merits.

CONCLUSION

Amicus curiae prays that this Court explicitly preserve the right of prompt judicial review, including a final disposition on the merits, for permitting decisions affecting speech of all kinds. This Court should also recognize that a stay pending judicial review is of no benefit to a speaker who is applying for a permit in the first instance since the status quo effectively censors time-sensitive speech. To the extent this Court may consider a weakening of the *Freedman* standards, this ruling should be expressly limited to commercial licensing decisions affecting adult businesses.

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Respectfully Submitted,

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