No. 99-1680

In the Supreme Court of the United States

CITY NEWS AND NOVELTY, INC., PETITIONER

v.

CITY OF WAUKESHA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT II

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the First Amendment requires a municipal ordinance that governs the licensing of adult-oriented businesses to ensure that a license remains in effect until there has been a judicial decision on the validity of the city's decision not to renew the license.

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INTEREST OF THE UNITED STATES

This case presents the question whether a licensing scheme that regulates businesses that seek to display or sell adult-oriented material protected by the First Amendment must guarantee an automatic stay of a decision denying a licensing renewal pending judicial review, where the decision is based on considerations other than the content of the material that is displayed or sold. The National Park Service (NPS) within the United States Department of the Interior is charged with promoting and regulating the use of the National Parks, some of which are often used for special events and demonstrations, such as marching, picketing, religious services, and other activities protected under the First Amendment. 16 U.S.C. 1 (1994 & Supp. IV 1998); *Clark*

v. *Community for Creative Non-Violence*, 468 U.S. 288, 289-290 (1984). NPS has promulgated regulations that provide that demonstrations and special events in the National Capital Region generally may not be held without a permit. 36 C.F.R. 7.96(g)(2). The NPS has promulgated time, place, and manner restrictions governing demonstrations and special events. 36 C.F.R. 7.96(g)(5). NPS's regulations also set forth procedures for the application, extension, or revocation of a permit, 36 C.F.R. 7.96(g)(3), (4)(iii), (5)(iv) and (6), but those regulations do not require a judicial decision on the merits before the denial takes effect.

The Forest Service within the United States Department of Agriculture has similar regulations for the issuance, renewal, and termination of special-use permits that govern non-commercial activity conducted by groups of 75 or more persons on lands in the National Forest System. 36 C.F.R. 251.50, 251.51, 251.54, 251.56, 251.60, 251.64. Those regulations are designed to "provid[e] a reasonable administrative system for allocating space among scheduled and existing uses and activities, address[] concerns of public health and safety, and control[] or prevent[] adverse impacts on forest resources." 60 Fed. Reg. 45,258 (1995). The United States therefore has a significant interest in the Court's resolution of the question presented.

STATEMENT

1. Respondent, the City of Waukesha, Wisconsin, determined that adult-oriented establishments contribute to declining property values and an increased level of criminal activity in surrounding communities. Waukesha, Wis., Mun. Code (Mun. Code) § 8.195 (1995) (preamble).[1] In order to

[1] The ordinance defines adult-oriented establishments to include "'adult bookstores,' 'adult motion picture theaters', 'adult mini-motion picture establishments' or 'adult cabarets,'" as those terms are defined under the ordinance. Mun. Code § 8.195(1). An "adult bookstore" includes "an establishment having as a substantial or significant portion of its stock in

combat those secondary effects, respondent enacted an ordinance that provides that no "adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City." *Id.* § 8.195(2). The ordinance specifies minimum age qualifications for license applicants, *id.* § 8.195(4)(a)(1) and (b)(1), and prohibits the issuance of a license to any applicant who violated respondent's ordinance within the preceding five years, *id.* § 8.195(4)(a)(2) and (b)(2). The ordinance further regulates the physical layout of adult-oriented establishments that have a "booth, room or cubicle for the private viewing of any adult entertainment." *Id.* § 8.195(9). The ordinance bars adult-oriented establishments from allowing minors to enter such establishments, *id.* § 8.195(10)(c); requires such establishments to maintain the premises in "a clean and sanitary manner," *id.* § 8.195(10)(d); and requires adequate lighting for "the public portions of the establishment," *id.* § 8.195(10)(e).

The ordinance provides that every license terminates after one year from the date of issuance. Mun. Code § 8.195(7)(a). An application for renewal of a license must be filed "not later than 60 days before the license expires." *Ibid.* The ordinance sets forth the procedures for obtaining an initial license, which respondent and the courts below construed to apply as well to obtaining a renewal of a license. Pet. App. 13-14. Under those procedures, the city clerk, upon receipt of an application for license renewal, must notify the applicant within 21 days whether the renewal has been granted or denied, and the clerk must state in writing the reasons for any denial. Mun. Code § 8.195(3)(c) and (d).

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trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities." *Ibid*; see also *ibid.* (defining "specified anatomical areas" and "specified sexual activities").

An unsuccessful renewal applicant then has two options. First, under the ordinance, the applicant has ten days after being notified of the denial to request a public hearing, which must be held within ten days of the request. Mun. Code § 8.195(3)(d).[2] Second, the applicant may follow the administrative procedures under state law that generally govern the "granting, denial, renewal, nonrenewal, revocation or suspension of a license." *Id.* § 8.195(11); see Wis. Stat. Ann. (Wis. Stat.) § 68.02(2) (West 1999). Under those alternative procedures, an unsuccessful applicant for a license renewal has 30 days to request the City to review its initial determination. *Id.* § 68.08. The City then has 15 days to conduct its review and issue a decision. *Id.* § 68.09(3). The applicant may appeal an adverse decision within 30 days, *id.* § 68.10(1) and (2), and the City must provide a hearing within 15 days of receipt of the notice of appeal. *Id.* § 68.11(1). The City must issue its final determination within 20 days after the hearing is completed. *Id.* § 68.12(1). Finally, whether the City renders a final decision under its ordinance or alternatively under state law, an unsuccessful renewal applicant has a right to obtain judicial review of the City's final decision by filing a certiorari action in state court within 30 days of receipt of the City's decision. *Id.* §§ 68.13(1) and 781.01 (Supp. 1999); see also Mun. Code §§ 2.11(1), 8.195(11).

2. Petitioner is the operator of an adult-oriented establishment located in the City of Waukesha which makes available to its customers sexually explicit materials, including books, magazines, and videotapes. Petitioner's establishment also provides viewing booths in which customers may view sexually explicit videotapes. Pet. App. 3. On November 15, 1995, petitioner applied for renewal of its

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[2] As discussed pp. 29-30, *infra*, after the Court of Appeals held Section 8.195(3)(d) unconstitutional because it failed to require the city to reach a final determination within a definite time limit (Pet. App. 25-26), respondent amended Section 8.195(3)(d).

license, which was due to expire on January 15, 1996. *Id.* at 7. On December 19, 1995, the City's Common Council passed a resolution denying petitioner's renewal application because petitioner had violated the licensing ordinance by permitting minors to loiter on the premises, by failing to maintain an unobstructed view of the viewing booths, and by allowing patrons to engage in sexual conduct inside the booths. *Ibid.*; see also *id.* at 76-83.

Petitioner requested review by the Common Council, which affirmed the decision on January 22, 1996. Petitioner then invoked the administrative review procedures under Wisconsin Statutes Annotated Section 68.10 and, on June 28, 1996, the City of Waukesha Administrative Review Appeals Board affirmed the Common Council's decision. Pet. App. 8, 72-73.[3]

Petitioner filed in the Circuit Court for Waukesha County a certiorari action under Wisconsin Statutes Annotated Sections 68.13 and 781.01 (West Supp. 1999) challenging respondent's decision not to renew its license. Compl. No. 96 CV 1427 (Cir. Ct.). The Circuit Court affirmed respondent's decision. Pet. App. 55-71. The court rejected petitioner's contention that the licensing scheme conferred unbridled discretion upon city officials to grant or deny an application for license renewal. *Id.* at 57-60. The court also held that respondent's licensing scheme required an administrative decision to be issued within definite time limits, *id.* at 60-62, and that, under the scheme, "most of the [administrative] review process can be completed prior to the expiration of the one year term of the license," *id.* at 64. The court also concluded that the ordinance adequately provided "access to prompt judicial review under Wisconsin Statute Chapter 68." *Ibid.*

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[3] Petitioner had waived the time periods under Sections 68.11 and 68.12. Pet. App. 73.

3. The Court of Appeals of Wisconsin affirmed in part and reversed in part. Pet. App. 1-43. The court observed (*id.* at 9-10) that a plurality of this Court in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225 (1990), concluded that the First Amendment bars a licensing scheme regulating sexually-oriented business from placing "unbridled discretion in the hands of a government official or agency" who decides whether to grant or withhold a license. The court also observed that the plurality concluded that the "licensing decision must be made 'within a specified and reasonable time period during which the status quo is maintained,' and that "a regulatory scheme must provide for 'prompt judicial review' in the event that a license is erroneously denied." Pet. App. 10 (quoting *FW/PBS*, 493 U.S. at 228).[4]

Applying those principles, the Court of Appeals held that respondent's ordinance "contains specific guidelines for renewal" and therefore does not confer "unbridled discretion" on city officials in making a licensing decision. Pet. App. 12. The court further held that the ordinance preserves the status quo during the period in which a licensor makes a decision. *Id.* at 19. The court reasoned that the ordinance requires an applicant to apply for a license renewal at least 60 days before the expiration of the license, and the ordinance requires city officials to approve or deny the application within 21 days. *Ibid.*

The court held, however, that Section 8.195(3)(d), which required respondent to hold a public hearing within ten days of the applicant's request but imposed no further limitations, "create[d] a risk of an indefinite delay by putting an appli-

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[4] The Wisconsin Supreme Court earlier had declined (Pet. App. 53) the Court of Appeals' certification of the questions whether "an 'adult-oriented establishments' municipal ordinance that fails to preserve the status quo during the administrative license renewal process [is] facially unconstitutional" and whether "the ordinance [is] unconstitutional if it fails to provide express time limits for judicial review." *Id.* at 44-45.

cant at the mercy of the licensing body," because it failed to direct respondent "as to what it must do following the hearing or when it must presumably take action in response to the hearing." Pet. App. 25-26. The court nonetheless held that severance of the invalid hearing provision "le[ft] intact an otherwise complete licensing scheme," because the ordinance incorporated the alternative administrative review procedures under Chapter 68 of the Wisconsin Statutes. *Id.* at 28. The court determined that Chapter 68 "sets forth narrow, definite and objective standards for bringing an appeal." *Ibid.*

The Court of Appeals also rejected petitioner's contention that the ordinance is constitutionally defective for failing to guarantee a judicial decision upholding the denial of a license before the denial takes effect. The court acknowledged (Pet. App. 20) that *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), held that a licensing scheme that involved the direct censorship of expressive material must "assure a prompt final judicial decision." The court noted, however, that "more recently in *FW/PBS* the Court appears to have relaxed this requirement." Pet. App. 20. The court explained that the plurality in *FW/PBS* stated that "expeditious judicial review of [the licensing] decision must be *available*," and that "there must be the *possibility* of prompt judicial review in the event that the license is erroneously denied." *Ibid.* (quoting 493 U.S. at 227, 228 (emphasis added by Court of Appeals)). The court held that "prompt access or availability of judicial review satisfies First Amendment protections," reasoning that "a municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time." *Id.* at 22. The court accordingly found that the city's ordinance is constitutional because it permits an

aggrieved applicant to file a certiorari action to obtain judicial review of the city's final determination. *Id.* at 23-24.[5]

The Wisconsin Supreme Court denied further review. Pet. App. 54.

SUMMARY OF ARGUMENT

I. A. Businesses that are subject to respondent's licensing scheme have a right to judicial review of a final municipal decision not to grant or renew a license. Mun. Code §§ 2.11(1), 8.195(11); Wis. Stat. § 68.13(1). A court reviewing such a decision also may stay the city's licensing decision if the city declines to stay the effect of its own decision and the applicant can demonstrate that it is entitled to temporary relief pending judicial review. Wis. Stat. § 781.02 (Supp. 1999); *id.* § 813.02(1)(a) (1994 & Supp. 1999). Under those procedures, a court may fully protect the First Amendment interests of a license applicant that otherwise could not operate its business pending judicial review of the city's licensing decision. In light of the procedure for issuance of a stay in particular cases where the requisite showing has been made, respondent has not demonstrated an adequate justification for a rule that would require an *automatic* stay of *all* decisions denying an applicant a license renewal.

B. Any benefit to be served by an automatic stay rule would be outweighed by the harm to a city's interest in enforcing a licensing scheme to control the secondary effects of adult-oriented establishments. A city has a substantial interest in imposing time, place, and manner restrictions on sexually-oriented businesses to eradicate adverse secondary

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[5] The Court of Appeals also rejected petitioner's contentions (1) that the Mayor improperly participated in the city's decision to deny petitioner's renewal application, Pet. App. 29-31; (2) that petitioner had insufficient notice of the city's charges, *id.* at 31-35; and (3) that respondent should have suspended petitioner's license as a less severe sanction, *id.* at 35-37. The court then sustained the grounds upon which respondent based its non-renewal determination. *Id.* at 38-42.

effects. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). That interest would be significantly impaired by a rule that automatically barred a city's licensing decision from going into effect until a court has resolved any challenge to the decision. Such a rule also would be particularly pernicious in cases in which the city has determined that a renewal applicant has repeatedly violated the licensing scheme and is therefore not qualified to operate an adult-oriented establishment.

C. This Court's First Amendment precedents do not require that a city's licensing scheme provide for an automatic stay of all adverse licensing-renewal decisions. The Court has required a prior judicial determination on the merits of a censorship decision to guard against the risk that censoring officials will ban protected speech and the risk that a censored speaker will refrain from bringing a judicial challenge to a particular censorship decision. *Freedman* v. *Maryland*, 380 U.S. 51, 57-59 (1965); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 229 (1990) (plurality opinion) (discussing *Freedman*). Neither of those dangers is inherent under a licensing scheme that is not aimed at the suppression of speech, but is designed to combat the secondary effects of sexually-oriented businesses. City officials under such an ordinance do not condition a license upon the review or approval of the content of an applicant's materials. Rather, they determine whether an applicant is qualified to hold a license. In those circumstances, a decision that an applicant is not entitled to renewal of its license is akin to a variety of administrative decisions to which a court applies a deferential standard of review, and which may be stayed pending judicial review only when temporary relief is found to be warranted in the circumstances of the particular case. See Administrative Procedure Act, 5 U.S.C. 705-706; Fed. R. Civ. P. 65(a) and (b).

D. An automatic stay rule cannot be justified on the ground that a court should resolve any facial challenge to a municipal licensing scheme before a licensing decision takes effect. Applicants may bring a facial challenge to a city's ordinance without first exhausting the city's administrative review procedures. Nor is an automatic stay rule justified on the premise that city officials might be hostile to the First Amendment rights of license applicants. Respondent's licensing determinations are made without regard to the content of any material sought to be displayed or sold by an applicant, and the ordinance contains objective criteria that govern whether city officials will renew an applicant's license. In any event, there has been no showing that city officials act in bad faith in administering municipal licensing schemes generally or that respondent's officials have done so in this case.

II. Petitioner's challenges to the alternative *administrative* review procedures under state law are not properly before this Court. Petitioner's contentions were neither timely raised nor passed upon by the Wisconsin Court of Appeals, and similarly were not raised in the petition for a writ of certiorari. There is in any event no occasion for this Court to review petitioner's contentions because respondent has recently amended the administrative review procedures under its ordinance.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE A MUNICIPAL LICENSING ORDINANCE THAT REGULATES SEXUALLY-ORIENTED BUSINESSES TO GUARANTEE AN AUTOMATIC STAY OF THE DENIAL OF A LICENSE RENEWAL PENDING JUDICIAL REVIEW

In *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), this Court held that a "noncriminal process which requires the

prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." "First, the burden of proving that the film is unprotected expression must rest on the censor." *Ibid.* Second, "the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film," *id.* at 58-59, and that "[a]ny restraint imposed in advance of a final determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution," *id.* at 59. Third, the censorship scheme "must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Ibid.*

In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), this Court considered whether the procedural requirements imposed by *Freedman* applied to a municipal licensing ordinance that regulated sexually-oriented businesses in order to eradicate the adverse secondary effects of such businesses. *Id.* at 220. A plurality of the Court described the three *Freedman* safeguards as follows:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Id. at 227. In a series of opinions, the Court in *FW/PBS* held that only the first two of those safeguards applied to the city's licensing scheme.

With respect to the first two safeguards, a plurality of the Court concluded that, under the city's ordinance, "the licensor must make the decision whether to issue the license

within a specified and reasonable time during which the status quo is maintained." *Id.* at 228. The plurality also concluded that "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Ibid.* The plurality found that the licensing scheme in that case failed those two requirements, because it provided neither "an effective limitation on the time within which the licensor's decision must be made" nor "an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *Id.* at 229. Justice Brennan, joined by Justices Marshall and Blackmun, concurred in the judgment, concluding that because in their view "all three of the procedural safeguards specified in" *Freedman* should be applicable, *id.* at 239, the city should also "bear the burden of going to court and proving its case before it may permissibly deny licenses to First Amendment-protected businesses," *id.* at 240.

With respect to the third *Freedman* requirement, the plurality concluded that "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 230. The plurality explained that the city's ordinance was "significantly different from the censorship scheme examined in *Freedman*," because unlike in *Freedman*, where the government "engaged in direct censorship of particular expressive material," the city officials in *FW/PBS* administered the licensing ordinance without regard to the content of any protected speech. *Id.* at 229. The plurality further reasoned that the city's ordinance did not pose the risk that those seeking a license would be deterred from challenging an adverse licensing decision in court. *Id.* at 229-230. The plurality thus concluded that the First Amendment is satisfied when there is a "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review." *Id.* at 230. Justice White, joined

by the Chief Justice, disagreed with the plurality's application of *Freedman*, concluding that none of *Freedman*'s requirements applied to the city's ordinance. *Id.* at 244-249. Justice Scalia, in his dissent, reasoned that the licensing scheme was not subject to the First Amendment. *Id.* at 250-264. Those three Justices therefore necessarily agreed with the plurality's conclusion that the city did not bear the burden of going to court to enforce its licensing scheme and did not bear the burden of proof once in court.

Neither *Freedman* nor *FW/PBS* addressed the precise issue presented in this case—whether, as petitioner urges (Br. 43-49), the First Amendment requires a municipal licensing scheme that regulates sexually-oriented businesses to provide for an automatic stay of the city's licensing decision pending a judicial determination on the merits.[6] In our view, the answer to that question is no. Under respondent's ordinance, a licensing decision is amenable to prompt judicial review, and a court has the authority in a particular case to preserve the status quo pending judicial review of the city's decision if the city declines to stay its own decision pending judicial review and the applicant makes the showing required for interim relief. Those procedures properly balance the First Amendment interests of applicants and the city's competing interest in enforcing a licensing scheme to combat the secondary effects of sexually-oriented business. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (Procedures necessary to satisfy due process depend on consideration of "[f]irst, the private interest that will be affected by the official action; second, the risk of an

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[6] Petitioner specifically does not argue that the city's decision must be stayed until it is final in the sense that all judicial appeals have been exhausted. Pet. Br. 44 & n.27; see also *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 690 n.22 (1968) ("The assurance of a 'prompt final judicial decision' is made here * * * by the guaranty of a speedy determination in the trial court.") (quoting *Freedman*, 380 U.S. at 59).

erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the * * * burdens that the additional or substitute procedural requirement would entail.").

A. Respondent's Licensing Scheme Adequately Protects The First Amendment Interests Of Applicants By Authorizing A Court To Stay The City's Licensing Decision

1. Respondent's ordinance provides that a business subject to its licensing scheme may obtain judicial review of a final municipal decision not to grant or renew a license by filing a certiorari action in state court within 30 days of receipt of the city's decision. Mun. Code §§ 2.11(1), 8.195(11); Wis. Stat. § 68.13(1). "[T]he statutory review by certiorari is a matter of right," and such an action "inquires into not only the jurisdiction of the board or body making the determination but also the merits of the determination." *Browndale Int'l Ltd.* v. *Board of Adjustment*, 208 N.W.2d 121, 129 (Wis. 1973) (quoting *State ex rel. Casper* v. *Board of Trustees*, 140 N.W.2d 301, 304 (Wis. 1966)), cert. denied, 416 U.S. 936 (1974). Thus, in a certiorari action, the reviewing court "may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision." Wis. Stat. § 68.13(1).

Moreover, a business that has been denied a license renewal has two ways in which it may obtain interim relief pending judicial review. First, it may request the city to stay its own licensing decision pending judicial review. Indeed, respondent granted that relief in this very case. Pet. Br. 10 n.11 ("[T]he City exercised its discretion to *not* enforce its licensing requirement * * * while all relevant * * * judicial review was proceeding."); cf. 5 U.S.C. 705 ("When an agency finds that justice so requires, it may

postpone the effective date of action taken by it, pending judicial review.").

Second, a business denied a stay by the city may request the court to issue an immediate stay of the decision if the business can demonstrate that it is entitled to temporary relief pending judicial review. Wisconsin law expressly provides that a court in a certiorari action may award "temporary relief pending disposition of the action or proceeding." Wis. Stat. § 781.02 (Supp. 1999); cf. 5 U.S.C. 705 (reviewing court may postpone effective date of agency action or preserve status or rights during judicial proceedings). State law similarly allows a court to enter a temporary injunction to restrain an act "[w]hen it appears from a party's pleading that the party is entitled to judgment" and the commission of the act sought to be restrained "during the litigation would injure the party." Wis. Stat. § 813.02(1)(a) (1994 & Supp. 1999); see *Werner* v. *A.L. Grootemaat & Sons, Inc.*, 259 N.W.2d 310, 314 (Wis. 1977) (party must show a "reasonable probability of ultimate success on the merits" and "irreparable harm").

Under those procedures, a court not only may review and reverse a decision by respondent not to renew a license, but also may preserve the status quo pending a judicial decision on the merits. Far from being "meaningless" (Pet. Br. 48 (quoting *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998)), the governing procedures permit a court in a particular case to stay the effect of a decision denying a license renewal if an applicant can demonstrate that it is likely to succeed on the merits and that the city's decision would cause the applicant irreparable harm. See Wis. Stat. § 813.02(1)(a) (1994 & Supp. 1999). Petitioner does not challenge the proposition that, by preserving the status quo, such a stay will fully protect the First Amendment rights of an applicant who has been denied a license renewal.

2. Petitioner argues (Br. 45-49) that an *automatic* stay is required because applicants that have been denied a license

renewal *always* suffer irreparable harm to their First Amendment or economic interests if they cannot operate their businesses while a court is resolving a judicial challenge to the city's decision. It is significant for purposes of First Amendment analysis, however, that any harm to an adult-oriented business's interests in selling or displaying expressive materials pending judicial review is not the product of direct censorship of the materials based on their content, but rather the incidental consequence of a decision based on the qualifications of the applicant (including, here, its past conduct), without regard to the content of the materials. See pp. 21-24, *infra*. Furthermore, petitioner ignores the usual requirement that a party seeking a stay must demonstrate both irreparable harm *and* a likelihood of success on the merits. Under respondent's ordinance, the business will already have had an opportunity for a hearing prior to the city's decision denying its application. This Court held in *FW/PBS* that the First Amendment allows such a decision by the city to be conclusive unless the applicant bears the burden of going to court to challenge the decision. See pp. 12-13, *supra*. There accordingly is no reason why the First Amendment should bar state law from requiring an applicant who chooses to challenge the city's decision from also bearing the lesser burden of demonstrating at least a likelihood that the decision was erroneous before obtaining an interim stay.

Petitioner of course does not suggest that applicants are entitled under the First Amendment to operate an adult-oriented business *after* the first reviewing court affirms the city's decision denying to grant or renew a license. See p. 13, note 6, *supra*. Thus, an automatic stay rule would confer an unjustified windfall on applicants who would not have been entitled to a stay on the basis of their individual circumstances and who ultimately lose on the merits. Indeed, an automatic stay rule would advance an applicant's legitimate First Amendment interests only in the limited situation in

which both the city and the court would have denied an applicant's request for a stay but the court ultimately reverses the city's decision. Petitioner offers no basis for concluding that such a situation arises with sufficient frequency to impose an automatic stay rule, especially since the applicant would have had a fair *opportunity* for immediate judicial relief on an interim basis, but simply failed to make the requisite showing at that point.

B. An Automatic Stay Rule Would Unduly Infringe Upon Respondent's Interest In Regulating The Secondary Effects Of Sexually-Oriented Businesses

1. This Court has recognized that the government has a legitimate and substantial interest in imposing time, place, and manner restrictions on certain businesses to "prevent[] harmful 'secondary' effects that are unrelated to the suppression of expression." *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1394 (2000) (plurality opinion) (upholding city ordinance banning public nudity); see also *id.* at 1402 (Souter, J., concurring in part and dissenting in part); see, *e.g. City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding a city ordinance that governed the zoning of adult motion picture theatres because the ordinance "is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community"); accord *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976); see also *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (regulations that were "unrelated to suppression of expression" served "substantial Government interest in conserving park property"). Here, respondent reasonably concluded that sexually-oriented businesses "affect property values, contribute to physical deterioration and blight, have a deleterious effect on both existing businesses around them and surrounding residential areas, including increased transiency [and] increased levels of criminal activities including

prostitution, rape, assaults and other sex related crimes." Mun. Code § 8.195 (preamble) (Pet. App. 95). Respondent therefore passed its ordinance not for "the purpose or effect of imposing a limitation or restriction on the content of any communicative materials," but to "combat and curb the adverse secondary effects brought on by adult oriented establishments." *Ibid.* (Pet. App. 97).

Respondent's interest in regulating those effects would be significantly impaired by a rule that barred respondent from enforcing a decision denying a license renewal in advance of a judicial determination upholding the decision, because such a rule would permit a business to operate even though the city has determined that the business is not fit to operate. An automatic stay rule similarly would be inconsistent with the Court's conclusion in *FW/PBS* that "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application." 493 U.S. at 230 (plurality opinion); see also *id.* at 244 (White, J., concurring in part and dissenting in part). Aggrieved applicants under such a regime would have an enormous incentive to file a notice of appeal simply to effectuate an automatic stay of an adverse licensing decision. Although the applicant presumably would have the burden in the ensuing proceedings of challenging the decision on the merits, see *id.* at 229-230 (plurality opinion), an automatic stay of the licensing decision that the applicant challenges on judicial review would be, in the interim, the practical equivalent of requiring that the city "bear the burden of going to court to effect the denial of a license application." *Id.* at 230.[7]

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[7] Indeed, petitioner argues (Br. 40-42) that a city should seek a court order that temporarily closes such a business either "to prevent immediate and great injury to the public health or safety" (Br. 41) or because the business is a public nuisance. Neither of those alternatives would adequately protect a city's interests when an applicant's conduct or lack of qualifications does not rise to the level of "immediate and great injury to the public health or safety" or constitutes a public nuisance. See Wis.

2. Petitioner recognizes (Br. 49 n.30) that an automatic stay rule might be inappropriate when the city denies an *initial* application, "before the subject expressive activity has begun." In that instance, an applicant has not shown that it is qualified to operate an adult-oriented business, because, *e.g.*, the applicant does not meet the minimum age qualifications, Mun. Code § 8.195(4)(a)(1) and (b)(1), or the applicant previously had violated respondent's ordinance within the preceding five years, *id.* § 8.195(4)(a)(2) and (b)(2). There is no principled distinction, however, between that situation and the denial of a renewal application on similar grounds. Indeed, respondent's interest in regulating the secondary effects of sexually-oriented businesses may be even stronger when it has denied a license renewal to an applicant that has repeatedly violated the city's ordinance and demonstrated in fact that it is not qualified to operate a sexually-oriented business. A requirement that the city must stay its decision denying a license renewal pending judicial review in that instance would significantly burden the city's legitimate and substantial interest in enforcing its licensing scheme.[8]

Stat. § 823.09 (1994) (defining public nuisance to include the maintaining or using of a building "for the purpose of lewdness, assignation or prostitution").

[8] An automatic stay rule could impose significant costs in other contexts as well. For instance, the National Park Service and the Forest Service have promulgated content-neutral time, place, and manner regulations that govern the granting and renewal of permits to engage in expressive activity on national lands. See pp. 1-2, *supra*. A constitutional rule that required those permit decisions to be automatically stayed pending judicial review would prevent the government from issuing permits to other applicants who also wish to engage in expressive activity on the particular land at issue. See 36 C.F.R. 7.96(g)(5)(iv) (providing that permits for demonstrations will be extended "unless another application requests use of the particular area and said application precludes double occupancy"); 60 Fed. Reg. at 45,258 (promulgating Forest Service's

That principle is well-illustrated in this case. Here, city officials found that petitioner repeatedly had allowed minors to visit its premises and had permitted patrons to engage in sexual activity in viewing booths. Pet. App. 76-83. The courts below affirmed those findings as supported by substantial evidence, *id.* at 38-42, 69-70, and the courts similarly concluded that respondent properly declined to renew rather than suspend petitioner's license, "[c]onsidering both the health and safety issues as well as [petitioner's] record of ordinance violations." *Id.* at 37; see also *id.* at 69 (trial court). A rule that would require a city to permit such a business to operate simply because the business challenged the city's decision denying a renewal of the license would seriously undermine the government's interest in enforcing licensing regulations to "prevent[] harmful 'secondary' effects that are unrelated to the suppression of expression." *City of Erie*, 120 S. Ct. at 1394 (plurality opinion).

C. An Automatic Stay Rule Is Not Required By The First Amendment To Avoid The Dangers Of A Censorship Regime

Relying on this Court's decision in *Freedman* v. *Maryland*, *supra*, petitioner argues (Br. 16) that respondent's licensing scheme "may not *alter* the status quo by forcing the cessation of ongoing expressive businesses prior to judicial review." See also Pet. Br. 23-26, 32-33, 43-45. Petitioner's reliance on *Freedman* is misplaced. In that case, the Court relied on two rationales to support the requirement of special judicial review procedures. First, the Court found that government review and censorship of expressive activity present the inherent risk that officials will suppress protected speech. 380 U.S. at 57-59. Second, the Court concluded that a censorship scheme poses the significant danger

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regulations in part to "provid[e] a reasonable administrative system for allocating space among scheduled and existing uses and activities").

that potential distributors or exhibitors will be deterred from bringing a judicial challenge to the decision to censor a particular work, because they would not have a sufficient stake in that one work to assume the burden of instituting judicial proceedings. *Id.* at 58-59. Those concerns, however, are not similarly present in the context of respondent's licensing scheme.[9]

1. Respondent's ordinance "provide[s] for licensing and regulation of adult oriented establishments * * * to combat and curb the secondary effects of such establishments." Mun. Code § 8.195 (preamble) (Pet. App. 97); see also *FW/PBS*, 493 U.S. at 220 (city ordinance "was aimed at eradicating the secondary effects of crime and urban blight"). In determining when a renewal applicant is eligible for a license under respondent's ordinance, city officials do not review or censor the content of any expressive material sold or displayed by a regulated business. Rather, the licensing scheme imposes time, place, and manner restrictions by regulating (1) the qualifications of a license applicant, (2) the physical layout of the business, and (3) the conduct that may occur on the premises. See Mun. Code § 8.195(4), (9) and (10).

Unlike a law that directly censors speech, respondent's ordinance does not present the risk identified in *Freedman* that city officials will impermissibly engage in the suppression of protected speech. In *Freedman*, the Court explained that where a "censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." 380

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[9] Cf. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 308 n.20 (1986) (concluding that the "special judicial procedures" mandated by *Freedman* were not necessary to protect the First Amendment interests of non-union employees when the union determines whether service fees are related to collective bargaining activities).

U.S. at 57-58. The Court therefore concluded that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." *Id.* at 58.

This Court in other decisions has explained that "the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975); see also *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980) (per curiam) ("[T]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.") (quoting *Southeastern Promotions, Ltd.*, 420 U.S. at 559); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963) ("constitutionally protected expression * * * is often separated from obscenity only by a dim and uncertain line."). Because censorship schemes necessarily pose the risk that the government will suppress constitutionally protected speech, *Freedman* and other decisions reviewing such schemes have required the government to obtain a prompt judicial decision that affirms the censor's view that the speech sought to be restrained is actually unprotected.[10]

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[10] See, *e.g.*, *Vance*, 445 U.S. at 316 & n.14 (state law authorized judges to enjoin indefinitely exhibition of obscene films); *Southeastern Promotions, Ltd.*, 420 U.S. at 547-548 (administrative board barred stage production of "Hair"); *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 365-377 (1971) (law permitted customs agents to seize imported obscene materials); *Blount* v. *Rizzi*, 400 U.S. 410, 411-414 (1971) (postal laws permitted censorship of obscene mail); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141 (1968) (per curiam) (city motion picture censorship ordinance); *Bantam Books, Inc.*, 372 U.S. at 70-72 (state commission attempted to censor obscene books); cf. *National Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (trial court enjoined paraders from displaying swastika or materials promoting hatred of Jews); see also *Alexander* v. *United States*, 509 U.S. 544, 551 (1993) ("The constitutional infirmity in nearly all of our prior restraint cases involving obscene material * * * was that the government had seized or otherwise

There is no comparable danger that city officials will improperly suppress protected speech under a licensing scheme in which officials do not condition a license upon the approval of the speech sought to be exhibited. In those circumstances, "the city does not exercise discretion by passing judgment on the content of any protected speech." *FW/PBS*, 493 U.S. at 229 (plurality opnion). Rather, city officials determine whether a particular applicant is qualified to operate a sexually-oriented business, "a ministerial action that is not presumptively invalid." *Ibid.*[11]

Those principles are fully applicable here. When respondent denied petitioner's application for a license renewal, city officials did not base that denial on the content of any expressive material exhibited or sold by petitioner. Rather, city officials determined that petitioner had violated the licensing ordinance because petitioner had permitted minors to visit its premises, had failed to maintain an unobstructed view to the viewing booths, and had permitted patrons to engage in sexual activity in viewing booths. Pet. App. 76-80. Those kinds of determinations are routinely made by administrators, and they are not inherently fraught with First Amendment concerns. See *Graff* v. *City of Chicago*, 9 F.3d 1309, 1333 (7th Cir. 1993) (Flaum, J., concurring) ("Clearly included among such nonthreatening schemes are

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restrained materials suspected of being obscene without a prior judicial determination that they were in fact so.").

[11] Contrary to the suggestion of petitioner's amicus Liberty Project (Br. 16), the Court in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), did not hold that a content-neutral licensing scheme must provide for a prior judicial determination on the merits before a licensing decision may become effective. Rather, the Court in dicta simply stated that the validity of a municipal ordinance that authorized "no more than the objective and even-handed regulation of traffic on [city] streets and public ways" "would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit." *Id.* at 154-155 & n.4.

those that only ask *and* allow administrators to make the kind of determinations for which they are especially suited; *e.g.* questions about city aesthetics, traffic flow or City Code violations."), cert. denied, 511 U.S. 1085 (1994).

Similarly, a court reviewing a decision by respondent under its licensing scheme does not assume that the decision is presumptively invalid. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (noting "the presumption of regularity afforded an agency in fulfilling its statutory mandate"). To the contrary, the courts below were required to affirm respondent's decision denying petitioner a license renewal if the city "kept within its jurisdiction" and "acted according to the law," the decision was not "arbitrary, oppressive or unreasonable," and "the evidence presented was such that [respondent] might reasonably make the order or determination in question." Pet. App. 8. That deferential standard of review, which petitioner has not challenged, is indistinguishable from the standard of review accorded a wide variety of administrative decisions that are not subject to an automatic stay pending judicial review. See, *e.g.*, Administrative Procedure Act, 5 U.S.C. 705, 706; see also Fed. R. Civ. P. 65(b) (standards for obtaining a temporary retraining order).

2. This Court in *Freedman* also reasoned that a prior judicial determination affirming the censor's ban on speech was necessary because otherwise "it may prove too burdensome to seek review of the censor's determination." 380 U.S. at 59. The Court explained that an "administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor." *Ibid.* The plurality in *FW/PBS* similarly observed that when a censored speaker is "likely to be deterred from challenging the decision to suppress the speech, * * * the censor's decision to suppress [is] tantamount to complete suppression of the speech." 493 U.S. at 229.

Under respondent's ordinance, by contrast, "[b]ecause 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." *FW/PBS*, 493 U.S. at 229-230 (plurality opinion); accord *id.* at 248 ((White, J., concurring in part and dissenting in part) (businesses subject to city's licensing scheme "will have every incentive to pursue the licensing applications vigorously"). Similarly, applicants denied a license *renewal* by respondent "have much more at stake" economically than a one-time speaker subject to a censorship scheme, and are therefore likely to challenge an adverse decision by respondent if there is a reasonable basis for such a challenge. *Id.* at 229 (plurality opinion). In those circumstances, a prior judicial decision is unnecessary to prevent a denial of a license renewal from becoming "tantamount to complete suppression of the speech." *Ibid.* (plurality opinion).

D. Policy Considerations Do Not Support An Automatic Stay Rule

Petitioner also argues that policy reasons support an automatic stay rule. Those contentions lack merit.

1. Petitioner contends (Br. 27-29, 36) that a prior judicial determination is necessary so that a court may resolve an applicant's facial constitutional challenges to the ordinance's standards for license renewal or revocation. Petitioner further argues (Br. 38-40) that a court should resolve facial challenges before a licensing decision takes effect, because city officials cannot resolve them during the administrative review process. But applicants may bring a facial challenge to a city's licensing scheme without proceeding under the city's licensing scheme, either by filing a declaratory judgment action in state court, see Wis. Stat. § 806.04 (1994), or by filing an action under 42 U.S.C. 1983 in federal court. See, *e.g.*, *Baby Tam & Co.*, 154 F.3d at 1098-1099 (Section 1983

action).[12] This Court in *FW/PBS* allowed such a facial challenge to both the administrative and judicial review procedures, without requiring exhaustion of administrative remedies. See 493 U.S. at 223-225 (plurality opinion). The existence of possible facial challenges to a city ordinance therefore provides no basis for a rule requiring an automatic stay of all license-renewal denials pending judicial review.

2. Petitioner also asserts (Br. 32-35, 37, 44-45) that an automatic stay rule is necessary because local licensing officials are hostile to the First Amendment rights of sexually-oriented businesses. In determining whether to renew a license under respondent's ordinance, however, city officials do not review the content of any speech; rather, they decide whether a particular applicant is qualified to operate a sexually-oriented business. Official action under such a scheme is not based on the review of speech and therefore is not "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (plurality opinion). See pp. 21-24, *supra*.

Similarly, municipal licensing ordinances that regulate sexually-oriented businesses must be accompanied by objective standards that cabin the discretion of officials who decide whether to grant or deny a license. *FW/PBS*, 493 U.S. at 225-226 (plurality opinion); *id.* at 246 (White, J., concurring in part and dissenting in part); see also *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) ("Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."). Here, the Court of Appeals determined that re-

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[12] Indeed, in addition to instituting the proceeding below to challenge respondent's particular non-renewal decision, petitioner filed suit in both state and federal court seeking to invalidate respondent's ordinance as facially unconstitutional. See *City News & Novelty, Inc.* v. *City of Waukesha*, 487 N.W.2d 316 (Ct. App. 1992) (state declaratory judgment action), review denied, 491 N.W.2d 768 (Wis. 1992); Compl. No. 96-C-383 (E.D. Wis.) (Section 1983 action).

spondent's ordinance contains objective criteria that govern the standards for license renewal, and that holding is not at issue here. Pet. App. 12-16. Thus, because objective standards minimize the risk that officials who administer the ordinance will deny a license based on the speech of a particular applicant, there is no need for respondent to guarantee that its licensing decisions will not go into effect until a court determines that those objective standards were properly applied in a given case.[13]

For similar reasons, petitioner errs in asserting that special judicial procedures are required to guard against the possibility that local officials will deny a license renewal application based on "false charges" or "factually questionable prostitution or lewd conduct charges against the dancers at an adult entertainment business." Br. 30, 31. It is presumed that city officials who administer licensing schemes that contain objective standards will properly discharge their duties under local law. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."); accord *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995). Moreover, petitioner has not asserted that any official misconduct occurred in this case. Cf. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 707 n.4 (1986) ("[T]here is no suggestion on the record before us that the closure of re-

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[13] Petitioner argues (Br. 33) that *Walker* v. *City of Birmingham*, 388 U.S. 307, 317, 339 (1967) and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 157-158 (1969), represent instances of "local officials who have used permitting or licensing laws to censor speech they disfavored." Unlike respondent's ordinance, however, the terms of the city's ordinance at issue in those decisions "clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks." *Id.* at 153.

spondents' bookstore was sought under the public health nuisance statute as a pretext for the suppression of First Amendment protected material."). In any event, as explained above, respondent's licensing scheme permits a court to preserve the status quo if an applicant can demonstrate a likelihood in a given case that city officials acted in bad faith in denying a license renewal.

II. PETITIONER'S CHALLENGES TO THE ADMINISTRATIVE REVIEW PROVISIONS UNDER STATE LAW ARE NOT PROPERLY BEFORE THIS COURT

Petitioner argues (Br. 4-5, 14-18, 19-22) that the provisions for administrative review of the city's licensing decisions under Chapter 68 of the Wisconsin Statutes Annotated are constitutionally deficient because they do not ensure an "administrative ruling on a permit application within a specified and brief time period," and because they "fail to preserve the status quo pending completion of * * * *administrative* review." Br. 17-18.[14] We do not address the merits of those contentions, however, because they are not properly before this Court.

First, petitioner's challenges to Chapter 68 were not timely raised or passed upon by the courts below. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997). As the Court of Appeals observed, petitioner did not

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[14] Petitioner contends (Br. 5, 15, 21) that Chapter 68 allows the city a minimum time of 71 days in which to issue a final licensing decision, and that because the applicant is permitted to file his renewal application up to 60 days before a license expires, Mun. Code § 8.195(7)(a), the city may issue its final decision 11 days after the license expires. Petitioner also contends (Br. 5, 20) that the city may indefinitely delay making a final decision under Chapter 68 because, although Wis. Stat. § 68.12(1) mandates a final decision "[w]ithin 20 days of completion of the hearing * * * and the filing of briefs," Chapter 68 neither limits the duration of the hearing nor imposes any time constraints on the filing of briefs.

"directly challenge" the administrative review procedures of Chapter 68. Pet. App. 28.[15] Rather, petitioner challenged the administrative review procedures under Section 8.195 of the city's ordinance. The court agreed with petitioner's contention that Section 8.195(3)(d) did not contain definite time limits. *Id.* at 24-26. The court further accepted the proposition that there must be "effective preservation of the status quo during the period in which the licensor makes its decision." *Id.* at 19. The court held, however, that because the alternative state law procedures under Chapter 68 "set[] forth narrow, definite and objective standards" for administrative review, the ordinance as a whole is constitutional. *Id.* at 28.

Second, in its petition for a writ of certiorari, petitioner did not challenge the validity of the Chapter 68 administrative review procedures. Rather, petitioner asked this Court to resolve a conflict among the circuits concerning the guarantee of prompt judicial review. Pet. 13.[16] Petitioner therefore did not properly preserve its contentions in this Court. See Sup. Ct. R. 14.1(a); see, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 394 (1999); *Blessing*, 520 U.S. at 340 n.3.

Third, respondent has recently amended the administrative review procedures under its licensing scheme. As previously discussed, the Court of Appeals invalidated Section 8.195(3)(d) because it failed to direct city officials to take

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[15] In its briefs to the Court of Appeals, petitioner did not raise the arguments that it now advances. It was not until six days after oral argument that petitioner stated its view that a hearing under Section 68.12 could be indefinitely extended. See Letter from Jeff Scott Olson to Court of Appeals 1-2 (Apr. 19, 1999).

[16] This Court limited its grant of certiorari to the third question presented, see 120 S. Ct. 2687 (2000), which was whether "a licensing scheme which acts as a prior restraint is required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision." See Pet. i.

action after holding a hearing. Pet. App. 25-26. On September 19, 2000, respondent amended Section 8.195(3)(d), effective immediately, to require city officials to issue a final licensing determination within 20 days of the commencement of the hearing. Waukesha, Wis., Ordinance 42-00. License applicants now may invoke the administrative procedures under amended Section 8.195(3)(d) instead of the alternative administrative procedures under Chapter 68 that petitioner now challenges. No court has passed on the validity of the amended ordinance, and thus any issue concerning the constitutionality of the alternative Chapter 68 procedures may be of no continuing significance. Especially in these circumstances, there is no occasion for this Court to address petitioner's challenges to Chapter 68.

CONCLUSION

For the foregoing reasons, the decision of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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