2001 WL 967487 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Caren Cronk THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD, Petitioners,
v.
CHICAGO PARK DISTRICT, Respondent.

No. 00-1249.
August 22, 2001.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE SUPPORTING RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF THE INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING RESPONDENT

Pursuant to Rule 37.3(b) of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of respondent. Respondent has consented to the filing of this brief. This motion is made necessary by the refusal of petitioners to consent to the filing.

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issues presented in this case, which concern the constitutional rules governing access to parks and other public fora. This Court has recognized that regulation of the use of parks and other public spaces is

essential to ensure the continued availability of these areas for both recreational uses and political demonstrations. *See, e.g., Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984); *Cox v. New Hampshire,* 312 U.S. 569 (1941). To protect parks from overuse and damage, and to ensure the convenience and safety of the citizens who frequent them for a wide variety of purposes, virtually all municipalities and other local governments have enacted permit systems regulating the use of public parks for large demonstrations.

If petitioners prevail on their claims that such permit systems must be treated as prior restraints of speech, that they must provide rigid timetables for judicial resolution of claims challenging permit denials, and that the government must initiate court proceedings in defense of all permit denials, the effectiveness of local regulation of public parks will be seriously impaired. Because *amici* have a deep interest in the type of ordinance at issue here, they seek leave to file this brief to assist the Court in the resolution of this case.

*i QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether content-neutral permit systems for demonstrations in public parks should be treated as time, place, and manner regulations rather than as prior restraints.

2. Whether content-neutral permit systems for demonstrations in public parks are permissible if they allow prompt legal challenges to permit denials but do not require the government to initiate court proceedings and compel it to bear the burden of proof when it denies a permit application.

3. Whether content-neutral permit systems for demonstrations in public parks are constitutionally permissible if they allow prompt access to judicial review of permit denials without setting a rigid time limit for final judicial resolution of such challenges.

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*1 INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief. [1]

SUMMARY OF ARGUMENT

A. Petitioners' argument-that they are entitled to all of the protections set out in *Freedman v. Maryland,* 380 U.S. 51 (1965)-is premised on their fundamental contention that systems regulating the issuance of permits to demonstrate or rally in public parks must be treated as prior restraints. But in the circumstances of this case, petitioners' contention is wholly without merit. The Court has treated state regulation of speech as a prior restraint only when governmental officials restricted expression on the basis of its content, or had unbridled discretion to restrain speech that they disliked- settings where the regulation had "the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Soc. for Krishna Consciousness,* 452 U.S. 640, 649 (1981).

In contrast, regulations that serve purposes *unrelated* to the content of expression are deemed content-neutral, even if they have an incidental effect on some speakers and not on others. That sort of restriction is properly analyzed as a time, place, and manner regulation rather than as a prior restraint on speech. And here, it is manifest that the Chicago Park District ordinance, which regulates *all* park uses by any group of more than 50 persons, *is* content-neutral and *does not* grant Park District officials excessive discretion. It therefore cannot be deemed a prior restraint.

***2** B. Petitioners also are wrong in contending that Park District officials must carry the burden of initiating judicial proceedings, and must bear the burden of proof in such proceedings, whenever they seek to deny a permit application. *Freedman* imposed such requirements on governmental decisionmakers when they sought to *censor* speech on the basis of its content. But as the Court subsequently made clear in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990), these requirements have no application to licensing officials who do "not exercise discretion by passing judgment on the content of any protected speech." *Id.* at 229 (plurality opinion); *see also id.* at 244 (opinion of White, J.). That distinction makes perfect sense: because content-neutral regulations are not presumptively unconstitutional (in contrast to censorship regimes like the one at issue in *Freedman*, which are), there is no need for officials who are applying such regulations to seek prior judicial approval for their decisions. As a consequence, this aspect of *Freedman* is inapplicable to the content-neutral Chicago ordinance.

C. For similar reasons, petitioners are incorrect in their contention that the Chicago ordinance is unconstitutional because it does not impose a strict time limit on the completion of judicial review when permit applications are denied. *Freedman* imposed such a requirement of judicial expedition where content-based censorship was at issue because, in such a system, the censor bears the burden of seeking court approval for the suppression of speech; any restraint on speech imposed in advance of that approval must be temporary. When a content-neutral system like Chicago's is at issue, however, the government does *not* bear the burden of seeking court approval for permit denials. Because the requirement of advance judicial authorization was the essential predicate for *Freedman*'s further insistence on the prompt completion of judicial review, both of these elements of *Freedman* are inapposite here.

*3 ARGUMENT

At the outset, a review of the legal landscape may help put the issue here in perspective. Virtually all municipalities of any size have permit systems, like the one used by the Chicago Park District, that govern the use of parks and similar public spaces for demonstrations and rallies. Although these permit ordinances provide for judicial review of decisions denying permits, we are not aware of any ordinance that requires the municipal government to initiate judicial proceedings when turning down a permit application. They also generally do not, and could not, require judicial resolution of challenges to license denials by a date certain; "[q]uite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 893 (6th Cir. 2000) (footnote omitted).

As a result, the rule contended for by petitioners-which would obligate municipal officials to seek advance judicial approval whenever they deny a protester's application to use the public parks, and which would require that courts issue decisions in such suits within a set time period-would render unconstitutional a very substantial body of municipal legislation, an outcome that would cause substantial disruption across the country. At the same time, local governments would lose the flexibility that the Court has recognized as essential in managing public resources. *See, e.g., City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 52 (1986); *Cox v. New Hampshire,* 312 U.S. 569, 576-577 (1941). Fortunately, however, that outcome is not required here. Petitioners' argument is not supported by precedent; cannot be justified by the constitutional principles that underlie the Court's decisions in this area; and is inconsistent with the First Amendment rules governing the regulation of public fora generally. The decision below upholding the Chicago ordinance accordingly should be affirmed.

*4 I. CONTENT-NEUTRAL SYSTEMS GOVERNING ACCESS TO PUBLIC SPACES THAT DO NOT GIVE GOVERNMENT OFFICIALS UNLIMITED DISCRETION TO DENY PERMIT APPLICATIONS SHOULD BE REVIEWED AS TIME, PLACE, AND MANNER REGULATIONS RATHER THAN PRIOR RESTRAINTS

The foundation for petitioners' argument is their claim that a system requiring issuance of a permit before an organization is allowed to demonstrate in the public parks amounts to a "prior restraint." Pet. Br. 15-25. But this contention is insupportable. The Court has treated state regulation of speech as a prior restraint in cases where officials controlled expression on the basis of its *content* or had virtually *unconstrained discretion* to deny speakers a license or permit-situations where the regulation of speech had "the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Soc. for Krishna Consciousness,* 452 U.S. 640, 649 (1981).

In contrast, the Court subjects limits on speech to the lower level of scrutiny suitable for time, place, and manner restrictions when the State has not

> adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *** Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)) (other citations omitted).

*5 It is this latter analysis, suitable for content-neutral regulations, that generally should govern permit requirements for use of public parks. Such regulations plainly serve purposes that are "unrelated to the content of expression" and, because they typically

require application of neutral criteria unrelated to the content of expression, are "*justified* without reference to the content of the regulated speech." *Id.* As a consequence, a content-neutral restriction on access to public parks need not be subjected to strict scrutiny because "concerns about 'prior restraints' relate to restrictions imposed by *official censorship*" aimed at the message of the regulated speech. *Hill v. Colorado,* 530 U.S. 703, 734 (2000) (emphasis added). *See Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 763-64 n.2 (1994); *Schenck v. Pro-Choice Network,* 519 U.S. 357, 374 n.6 (1997). With these principles in mind, the Court should affirm the Seventh Circuit's holding that the Chicago permit system may not be analyzed as a prior restraint.

A. Chicago's permit system is content-neutral

Under this Court's precedents, the principal inquiry in determining content neutrality in speech cases "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791;*see also Renton*, 475 U.S. at 47-48 (government regulation of expressive activity is "content neutral [so long as it is] *justified* without reference to the content of the regulated speech"). Under this test, the Park District ordinance must be deemed content-neutral-and petitioners do not seriously contend otherwise. There is absolutely no reason to believe either that the Park District's permit ordinance was enacted for the purpose of censoring disfavored views or that it has been implemented in a discriminatory manner. On the contrary, the ordinance's purpose is to regulate any use- athletic, social, cultural, or political-by any group of more than 50 persons. *See* J.A. ***6** 63-64 (provisions of Park District ordinance listing uses for which permit is required).

As the court of appeals found, "[t]he regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity." Pet. App. 3a. Quite clearly, its purpose is simply to regulate all access to public parks by large groups, thereby protecting the "substantial Government interest in conserving park property," *Clark*, 468 U.S. at 299, and ensuring that property's accessibility "to other members of the public." *Id.* at 298.

Indeed, far from censoring petitioners' efforts to promote the cause of marijuana legalization, the Park District allowed their demonstration to go forward despite their failure to meet the standards for a permit, and actually "assisted MacDonald [the now-deceased original plaintiff] by opening bathrooms, providing garbage cans, and allowing MacDonald to use portable speakers to amplify sound." Pet. App. 78a (opinion of district court). To hold that a risk of censorship exists in a case where the government not only did not try to suppress an unpopular demonstration but actually assisted it would be a surprising application of First Amendment principles.

B. Chicago's permit system is not a prior restraint because it does not give unfettered discretion to public officials

Because the Park District's regime is content-neutral on its face, it could present a danger of censorship only if it granted "unbridled discretion" to public officials. *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 757 (1988). Petitioners' claim that the ordinance does vest officials with such an unconstitutionally excessive degree of discretion rests solely on a provision of the Chicago Park District ordinance that allows, but does not require, the Park District to deny permit applications that fail to meet objective content-neutral criteria. J.A. 71-73 (provision of ordinance setting forth ***7** grounds for permit denials). Despite the absence of proof of any such discrimination, petitioners assert that this provision enables the Park District to discriminate against disfavored political speech.

This contention fails for three reasons. First, and most fundamentally, the degree of discretion allowed to the Park District is far less than the "unbridled discretion" necessary to trigger classification of the ordinance as a prior restraint. Second, there is no evidence that even this limited discretion has been used for purposes of discrimination, and this Court's First Amendment precedents require judicial consideration of agency practices as well as statutory text. Finally, the canon against statutory constructions that raise constitutional problems militates against any interpretation of the Park District waiver provision that labels it a vehicle for unbounded official discretion.

1. *Content-neutral permit systems are constitutionally problematic only if they give unbridled discretion to government officials*

As we have noted, the only situations in which the Court has treated a content-neutral regulation of speech as a prior restraint are those in which the regulatory regime "plac[es] unbridled discretion in the hands of a government official or agency." *Lakewood*, 486 U.S. at 757;*see also, e.g., Forsyth County v. Nationalist Movement,* 505 U.S. 123, 133 (1992) (invalidating a permit system because it allowed "arbitrary application"); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975) (a prior restraint exists in cases "where officials have unbridled discretion over a forum's use"); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 153 (1969) (invalidating a permit system because it "empower[ed] its licensing officials to roam essentially at will"); *Cox v. Louisiana,* 379 U.S. 536, 556-57 (1965) (invalidating permit statute that "provides no standards for the determination of local officials as to which assemblies to permit or which to ***8** prohibit" and thereby gave them "completely uncontrolled discretion"); *Staub v. City of Baxley,* 355 U.S. 313, 322 (1958) (invalidating city solicitation permit "criteria" because they "are without semblance of definitive standards *** governing the action of the Mayor and Council in granting or withholding a permit"); *Saia v. New York,* 334 U.S. 558, 560 (1948) (analyzing as prior restraint a city ordinance that prescribed "no standards *** for the exercise of *** discretion"); *Lovell v. City of Griffin,* 303 U.S. 444, 450-51 (1938) (striking down as a prior restraint ordinance that required written official permission for distribution of pamphlets without specifying the grounds upon which permission could be granted or denied); *cf. MacDonald v. City of Chicago,* 243 F.3d 1021, 1030 (7th Cir. 2001) (noting that this Court has declared facially content-neutral licensing systems to be prior restraints only in cases where they "placed unfettered discretion in the hands of *** officials"), *petition for cert. filed*, No. 00-1839 (June 11, 2001). [2]

The Court has explained that such permit systems are problematic because of the danger that unconstrained ***9** discretion will be used to "discriminat[e] against disfavored speech" and encourage "self-censorship" by permit applicants. *Lakewood*, 486 U.S. at 757-58. *See also Hill*, 530 U.S. at 734 (holding that prior restraints are distinguished by the threat of "censorship"); *Southeastern Promotions*, 420 U.S. at 553 (noting that the doctrine of prior restraint reflects "[o]ur distaste for censorship"). In *Lakewood*, for example-one of the decisions principally relied upon by petitioners-"nothing in the law *** require[d] the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application." 486 U.S. at 769. Discrimination against disfavored speakers is almost inevitable in such a system.

These dangers, however, are simply not present in the instant case where there are precise standards that severely constrain official discretion. The Park District's permit system establishes clear criteria to govern the evaluation of applications. These rules ensure that proposed demonstrations do not interfere with the parks' primary recreational uses, that they do not conflict with other approved rallies, and that they do not pose an excessive danger to public safety. *See generally* J.A. 71-73. Indeed, in the Chicago park system, official discretion enters the picture only in cases where permit seekers have *already* failed to meet objectively determined, content-neutral standards for a permit. In all other cases, the Park District is required to grant the permit application irrespective of the speakers' ideology. It is unlikely that a true system of censorship would limit its impact to selective discrimination against a subclass of permit-seekers defined by their failure to meet objective and content-neutral permit standards.

In fact, in analogous circumstances the Court has held that regulatory schemes creating limited administrative discretion over a subset of issues relating to permit applications are "of an entirely different, and lesser, order of magnitude" from those in which "officials enjoy unguided discretion to deny the right to speak altogether." *Ward*, 491 U.S. at 794. Thus, ***10** in *Ward*, the Court held that a city ordinance giving officials discretion to determine the level of sound amplification available to permit holders did not constitute unlimited discretion amounting to a prior restraint despite the fact that "the city's sound technician theoretically possesses the power to shut off the volume for any particular performer," *id.* at 795 n.5, and thereby "provide inadequate sound for per- formers based on the content of their speech." *Id.* at 794.

This distinction between limited and wholly unfettered discretion is essential if local governments are to perform their vital function of regulating the use of public spaces. Some degree of official discretion is inevitable in any permit system. Subjecting all instances of official discretion to the stringent scrutiny imposed on prior restraints that pose a threat of censorship would undermine the legitimate operations of local governments, make the operation of parks and other public fora a practical impossibility, and lead to an enormous diversion of scarce judicial resources away from real dangers to constitutional rights.

2. *A history of unbiased implementation shows that the Chicago ordinance does not provide officials with unbridled discretion that poses a threat of censorship.*

In addition, the Court has held that "[a]dministrative interpretation and implementation of a regulation are *** highly relevant" to any judicial determination of the scope of discretion that a permit system provides officials. *Ward*, 491 U.S. at 795. The Court thus recognizes that meaningful limits on official discretion may be imposed not only by "textual incorporation" in a statute but also by "binding judicial or administrative construction, or *well-established practice.*" *Lakewood*, 486 U.S. at 770 (emphasis added) (other citations omitted).

***11** In this case there is a "well-established practice" of basing decisions to withhold permits solely on content-neutral criteria relating to the legitimate management of public parks. There is no indication in the record that the Park District has ever denied a permit based on the content of the applicant's speech, or even that it has *inquired* into that content. Indeed, Mr. MacDonald's repeated success in obtaining permits would seem to prove the point. Thus, even if the text of the Park District ordinance-read literally and in isolation from other evidence-could be thought to grant overbroad discretion to Park District officials, longstanding patterns of "administrative *** implementation," *Ward*, 491 U.S. at 795, show that this discretion cannot remotely be thought to amount to a system of censorship.

3. *The canon against statutory constructions that raise constitutional problems precludes reading the Chicago ordinance to confer unconstitutionally excessive official discretion*

By the same token, judicial interpretations of local ordinances challenged on First Amendment grounds must not "r[u]n afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz,* 487 U.S. 474, 483 (1988). "[T]he Court has held that a state statute should not be deemed facially invalid [under the First Amendment] unless it is not readily subject to a narrowing construction by the state courts." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975); *see also Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973) (holding that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute").

In the event that a broad reading of the Park District ordinance is thought constitutionally problematic, such a "narrowing construction" is readily available. The ordinance ***12** states that the Park District "may deny an application for permit" if the application fails to meet various specified conditions relating to safety, user fees, proper application procedures, and consistency with other uses of the park. J.A. 71. The word "may" need not be interpreted to give the District completely unconstrained discretion to accept or deny applications that violate one or more of the objective criteria set out in section C.5.e of the Park District ordinance. *See* J.A. 71-73. Instead, the provision could reasonably be interpreted to allow waivers in cases where the District has reason to believe that permit applicants are likely to uphold the substance of the particular condition in question, even though they are in technical violation of it. In the case of the requirement affecting petitioners here-that applicants not have "violated the terms of prior permits issued" to them-it is reasonable to suggest that the condition may be waived in cases where the Park District has reason to believe that such violations will not recur. *See* J.A. 73 (§ C.5.e (13)).

At the very least, it is reasonable to interpret the waiver provision in a way that forbids the Park District to base its judgments on the content of applicants' speech. There accordingly is a reasonable alternative interpretation that enables the Court to "avoid [the] constitutional difficulties" inherent in any construction of the ordinance that leaves the door open to content-based discretion. *Frisby*, 487 U.S. at 483. [3]

13 4. *The political content of petitioners' speech is irrelevant to the prior restraint question

Finally, the content of petitioners' speech is irrelevant to the prior restraint issue in this case. In fact, petitioners' contention (Pet. Br. 15) that they are entitled to especially favorable treatment because they seek to engage in political speech would itself raise serious constitutional problems by *requiring* the Park District to engage in content-based discrimination.

To satisfy petitioners' demands, the Park District would have to give proposed political demonstrations more favorable consideration than that allowed applicants who wish to speak on cultural, artistic, or other matters. Yet such a demand for content-based discrimination violates the fundamental First Amendment principle that "government regulation" must not "discriminate[] among speech-related activities in a public forum" on the basis of their "subject matter" unless the regulation at issue can survive the most exacting judicial scrutiny. *Carey v. Brown,* 447 U.S. 455, 461-62 & n.6 (1980); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983) (holding that in "quintessential public forums" such as "streets and parks *** [f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

Not surprisingly, the various decisions cited by petitioners are inapposite, *see* Pet. Br. 15-16; each addressed a situation where the government imposed content-based restrictions on speech or specifically *targeted* political speech for restriction. *See, e.g., McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995) (striking down state restrictions on distribution of campaign literature); *Garrison v. Louisiana,* 379 U.S. 64 (1964) (invalidating libel statute as applied to criticism of public officials); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (same).

***14 C. The Court should defer to the City's interest in content-neutral regulation of limited public spaces**

In view of the wide range of uses made of Chicago's parks, compelling practical considerations, noted by the Park District in its brief, support the conclusion that courts should hesitate before applying prior restraint analysis to content-neutral permit processes regulating the use of limited public spaces. In such situations, local governments have an especially strong "interest in protecting the 'safety and convenience' of persons using a public forum."*Heffron*, 452 U.S. at 650 (internal citation omitted). And "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Id.* at 650-51.

For this reason, restrictions on the use of public parks may satisfy constitutional requirements even if they would not be upheld in other settings. Regulations governing the use of public spaces that are "designed to promote the public convenience in the interest of all *** cannot be disregarded [even] by *the attempted exercise of some civil right which in other circumstances would be entitled to protection.*" *Cox*, 312 U.S. at 574 (emphasis added). Indeed, in the case of public parks the Court has specifically recognized "the Government's substantial interest in maintaining" facilities "in an attractive and intact condition, readily available to the *** people who wish to see and enjoy them." *Clark*, 468 U.S. at 296. Even petitioners' *amicus* Public Citizen concedes that government has a special interest in regulating access to parks because they are "limited public resources." Public Citizen Br. *Am. Cur.* 20.

As the court of appeals rightly pointed out, excessive judicial scrutiny of government regulation of parks may undermine the usefulness of these vital public fora for all ***15** citizens, including organizers of political demonstrations; "to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech." Pet. App. 3a. If local governments were not allowed to use any discretion but instead had to subject all permit applications to rigid criteria, they would have to impose either extremely strict requirements that would exclude a large number of legitimate applicants or very loose ones that would lead to overcrowding and cause damage to park facilities. In either case, parks would have less utility as settings for political speech than if authorities were allowed a reasonable degree of content-neutral discretion. To prevent this unhappy state of affairs, public officials who have the responsibility to regulate public spaces must be permitted to exercise reasonable, content-neutral discretion.

II. CONTENT-NEUTRAL PERMIT SYSTEMS REGULATING THE USE OF PUBLIC SPACES NEED NOT OFFER THE FULL RANGE OF PROCEDURAL SAFEGUARDS REQUIRED OF CONTENT-BASED CENSORSHIP SYSTEMS

It is common ground between the parties in this case that a classic prior restraint, in which government officials are given substantial discretion to suppress speech that they dislike, must be subjected to the most rigorous procedural requirements. That is the rule stated in *Freedman v. Maryland,* 380 U.S. 51 (1965), where state law empowered officials to prevent the exhibition of films that they did not find to be "moral and proper." *Id.* at 52 n.2 (citation omitted). Insofar as is relevant here, the *Freedman* Court held that, for such a restraint to be valid, (1) "the burden of proving that the film is unprotected expression must rest on the censor"; (2) "the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression," meaning that the censor either must issue a license "within a specified ***16** brief period *** or go to court to restrain showing the film"; and (3) "the procedure must also assure a prompt final judicial decision."*Id.* at 58-59. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. at 227 (plurality opinion). Petitioners assert that each of these requirements must apply to permit systems like those used by the Park District. Pet. Br. 30-40. This contention, however, is wrong in every particular.

A. An agency administering a content-neutral permit system is not required to initiate judicial proceedings in defense of permit denials and need not bear the burden of proof in court

To begin with, the Court's decision in *FW/PBS* unequivocally refutes petitioners' claims that the Chicago ordinance is unconstitutional because it does not require the Park District to initiate judicial proceedings in defense of all permit denials, and does not require the government to bear the burden of proof in such proceedings. The plurality opinion in *FW/PBS* specifically distinguished "licensing scheme[s]" from regulations of expressive content, reasoning that the former "do[] not present the grave 'dangers of a censorship system' " and therefore do not require "the full procedural protections set forth in *Freedman.*" *FW/PBS*, 493 U.S. at 228 (plurality opinion) (internal citation omitted). As the plurality explained, a licensing system that "does not exercise discretion by passing judgment on the content of any protected speech" but merely "reviews the general qualifications of each license applicant" is "a ministerial action that is not presumptively invalid." *Id.* at 229.

The plurality therefore concluded that a licensing system for adult businesses that "does not exercise discretion by passing judgment on the content of any protected speech" need "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 229-30 (plurality opinion). Justice White and then-Justice ***17** Rehnquist went even further, expressing the view that *Freedman* was *wholly* inapplicable to such content-neutral ordinances. *Id.* at 244-46 (opinion of White, J.). This conclusion by a majority of the Court that the first two elements of *Freedman* apply only to regulations that discriminate on the basis of content is dispositive of petitioners' claims here.

Not surprisingly, the view of the *FW/PBS* plurality is supported by more general First Amendment principles, which compel the conclusion a permit system governing use of public parks need not require initiation of judicial proceedings by governmental authorities whenever a permit is denied. The decisions in which the Court has applied such a "government- initiation" requirement involved regulations of speech that were "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (plurality opinion). As we suggest above, these included, most prominently, cases presenting censorship schemes in which state officials passed prior judgment on the content of speech, as in *Freedman* itself. *See, e.g., Freedman*, 380 U.S. at 52, 54-55;*Southeastern Promotions*, 420 U.S. at 552-53;*Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963).

Such restrictions present particular dangers because they permit the suppression of speech by officials who may disapprove of the ideas expressed or the means of expression; because even well-intentioned censors may be led into error by the fact that fully protected speech "is often separated" from expression that is legitimately subject to regulation (such as obscenity) "only by a dim and uncertain line," *Bantam Books*, 372 U.S. at 66; and "[b]ecause the censor's business is to censor," meaning that state officials with responsibility for censorship may be insensitive "to the constitutionally protected interest in free expression." *Freedman*, 380 U.S. at 57-58.

***18** The Court likewise has suggested that the *Freedman* procedural safeguards may be necessary when issuance of a permit or license is " 'contingent upon the uncontrolled will of an official.' " *Shuttlesworth*, 394 U.S. at 151 (citation omitted). By giving free rein to the exercise of discretion, such systems inevitably invite biased application against unpopular speakers. In such cases, as in the ones involving the express censorship of content, "the prior restraint [i]s embedded in the licensing system itself, operating without acceptable standards." *Southeastern Promotions*, 420 U.S. at 553. Thus, all of these cases "involved censorship" and resulted in the presumptively unconstitutional suppression of speech. *Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251, 1256 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

Ordinances like the one at issue here, however, are fundamentally different from the *Freedman* paradigm in a variety of material respects. *First*, as Justice O'Connor noted in *FW/PBS*, licensing schemes that do not involve an assessment of the content of regulated speech do not allow for the suppression of particular ideas. "Under [such an] ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229 (plurality opinion). *See Boss Capital*, 187 F.3d at 1256 ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license."). Officials of the Chicago Park District thus base their licensing decisions on objective factors such as a history of prior violations, not on the content of the applicant's expression.

Second, such permit systems give local officials very limited discretion. Administrators are not permitted " 'to ***19** roam essentially at will,' " *Shuttlesworth*, 394 U.S. at 153 (citation omitted), or to exercise a judgment that has a large subjective component. Instead, municipal decisionmakers are directed to judge compliance only with a defined set of neutral and objective factors.

Third, the practical impact of a permit regime for use of municipal parks differs significantly from that of the censorship system at issue in *Freedman.* The expense and delay inherent in challenging the suppression of a single movie or book in a given locality means that exhibitors or publishers, who have other markets open to them and other products to sell even in the censor's jurisdiction, may find it "too burdensome to seek review of the censor's determination." *Freedman*, 380 U.S. at 59. In contrast, a group that is determined to carry out a single demonstration at one location has "every incentive *** to pursue a license denial through court." *FW/PBS*, 493 U.S. at 230 (plurality opinion). Indeed, petitioners have persisted in their challenge to the Chicago Park District's permit system despite the fact that they were *allowed* to hold the demonstration initially in question. *See* Pet. App. 77a-78a. And there is no reason to believe that activist groups seeking to hold repeated demonstrations at prime locations

in major cities will be any less persistent in defending their interests than the adult businesses whose interests were at stake in *FW/PBS. Cf. Cannabis Action Network*, 231 F.3d at 763-64;*Beal*, 184 F.3d at 121-22.

Against this background, First Amendment principles do not require the significant intrusion into state administrative and judicial processes that would follow from conditioning the constitutionality of permit regimes for public parks on governmental initiation of judicial action when a permit is denied. Because these licensing regimes are "not presumptively invalid," there is no logical reason to insist that officials validate their decisions by seeking judicial approval or by bearing the burden of proof in such proceedings. This ***20** conclusion does not, of course, leave permit applicants defenseless against oppressive government conduct; applicants always may seek temporary restraining orders or preliminary injunctions to prevent clear cases of abuse on the part of local officials. *See Nightclubs, Inc.*, 202 F.3d at 897 (Merritt, J., dissenting) (discussing licensing of adult businesses); *Grand Brittain, Inc. v. City of Amarillo,* 27 F.3d 1068, 1070, 1071 (5th Cir. 1994) (same). This case therefore calls "for 'treating unlike things differently according to their differences,' " *Boss Capital*, 187 F.3d at 1256 (citation omitted)-and thus for a departure from *Freedman*'s requirement of governmentally initiated judicial proceedings.

B. Content-neutral permit systems need not place a rigid time limit on judicial review

In addition, if we are correct in our view that municipal officials need not initiate judicial proceedings whenever they deny permit applications, it necessarily follows that the First Amendment does not require a fixed date for the resolution of judicial challenges to license suspensions. Because permit denials are not "presumptively invalid," *Freedman*'s requirement that the censor initiate judicial proceedings is inapplicable here. The requirement that the censor go to court, however, was an essential premise for *Freedman*'s further insistence on the prompt completion of judicial review- meaning that the inapplicability of the former requirement in this context necessarily also affects the mandate for expedited judicial review.

The Court explained in *Freedman*:

> [W]hile the State may require advance submission of all films, *** the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. *** [A] procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured ***21** *** that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the distributor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59 (citations omitted). The Court's holding in *Freedman* thus was that, where censorship schemes are at issue, the decision to prohibit expression may not have final effect absent a judicial decision; that any restraint imposed in advance of such a judicial decision may be only temporary; and that, because speech might be inhibited after the expiration of a temporary administrative restraint during the pendency of the required judicial review, a prompt final judicial decision must be assured "to minimize the deterrent effect of an interim" license denial.

This analysis, however, has no application where the issuance of permits to use park facilities is concerned because in that setting a restraint on speech *may* become final in the absence of a judicial decision; denial of a license will be permanent unless the *applicant* decides to challenge the restraint in court. As a consequence, the administrative decision to deny a park permit need *not* be only temporary. And this means that *Freedman*'s rationale for requiring a prompt judicial resolution-the concern that speech might be inhibited during the period between the expiration of a temporary administrative restraint and the rendering of the judicial determination that is necessary for the censor's decision to become final-has no bearing on schemes for ***22** issuing permits for the use of park facilities, where a judicial decision is not a prerequisite for a denial to become effective. It therefore is implicit in the analysis of *FW/PBS* that ordinances of the sort at issue here need not impose rigid deadlines on the judicial review process. *See* 428 U.S. at 228-30 (plurality opinion); *id.* at 244 (opinion of White, J.). [4]

Here, the challenged ordinance requires that the Park District act on a permit application within twenty-eight days and that the Superintendent of the District decide an appeal from a permit denial within seven days. *See* Pet. App. 10a. Illinois law allows petitioners immediately to challenge a permit denial by the superintendent in state court. *See id.* at 8a-9a (collecting cases). There is no reason to believe that this system poses a "grave danger *** of *** censorship" severe enough for the Constitution to require rigid time limits on judicial review. *FW/PBS*, 493 U.S. at 228 (plurality opinion).

***23 CONCLUSION**

The judgment of the court of appeals should be affirmed.

Footnotes

FN
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Amici Curiae

1 Pursuant to Rule 37.6 of the Rules of the Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

2 Two recent appellate decisions relied upon by petitioners do not depart from the rule that content-neutral permit systems may be considered prior restraints only if they provide for unbridled official discretion. *See* Pet. Br. 24. In *Cannabis Action Network, Inc. v. City of Gainesville,* 231 F.3d 761, 771 (11th Cir. 2000), *petition for cert. filed*, No. 00-1503 (Mar. 29, 2001), the Eleventh Circuit held that a city sound ordinance was a prior restraint because it allowed sound devices to be suppressed at the "uncontrolled discretion" of the police. Similarly, in *Beal v. Stern,* 184 F.3d 117 (2d Cir. 1999), the Second Circuit held that a city assembly and rally permit system was a prior restraint but noted that "content-neutral" permit systems that "do 'not delegate overly broad licensing discretion' to government officials" should be analyzed as "time, place, and manner restrictions." *Id.* at 124 (quoting *Forsyth County*, 505 U.S. at 130). There accordingly is no support for petitioners' contention "that any scheme which allows a governmental entity to deny the use of a public forum in advance of actual expression is a prior restraint." Pet. Br. 20-21.

3 The only alternative to such an approach would be for the Park District to eliminate the waiver provision entirely by refusing permits to *all* applicants who violate the standard permit criteria. Such an unforgiving policy would reduce the

total amount of speech in Chicago's parks, making the permit system "more restrictive" than it is currently. Pet. App. 6a. A decision effectively eliminating all discretionary waivers therefore would undermine the First Amendment goal of furthering the use of public spaces for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO,* 307 U.S. 496, 515 (1939).

4 At least four federal courts of appeals have adopted this approach in the context of various licensing and permit schemes. *See MacDonald*, 243 F.3d at 1035;*Boss Capital*, 187 F.3d at 1256;*TK's Video, Inc. v. Denton County,* 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc), *cert. denied,*511 U.S. 1085 (1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.,* 984 F.2d 1319, 1327 (1st Cir. 1993). *See also City News & Novelty, Inc. v. City of Waukesha,* 604 N.W.2d 870, 882 (Wis. Ct. App. 1999), *dismissed as moot*, 121 S.Ct. 743 (2001). Three circuits have taken the opposite view. *See Nightclubs, Inc.*, 202 F.3d at 892;*Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County,* 58 F.3d 988, 998-1001 (4th Cir.) (en banc), *cert. denied*, 516 U.S. 1010 (1995).

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