

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

CAREN CRONK THOMAS AND WINDY :

CITY HEMP DEVELOPMENT BOARD, :

Petitioners :

v. : No. 00-1249

CHICAGO PARK DISTRICT :

- - - - -X

Washington, D.C.

Monday, December 3, 2001

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

APPEARANCES:

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

DAVID A. STRAUSS, ESQ., Chicago, Illinois; on behalf of the Respondent.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF RICHARD L. WILSON, ESQ. On behalf of the Petitioners	3
ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ. On behalf of the Respondent	25
ORAL ARGUMENT OF JAMES A. FELDMAN, ESQ. On behalf of the United States, as amicus curiae, supporting the Respondent	43
REBUTTAL ARGUMENT OF RICHARD L. WILSON, ESQ. On behalf of the Petitioners	50

1 P R O C E E D I N G S

2 (11:05 a.m.)

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

6 Mr. Wilson.

7 ORAL ARGUMENT OF RICHARD L. WILSON

8 ON BEHALF OF THE PETITIONERS

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

17 CHIEF JUSTICE REHNQUIST: Well, Freedman was a  
18 quite different case from the present one. You agree with  
19 that, don't you? I mean, there you're talking about some  
20 form of censorship. Here you're talking about a permit to  
21 use a park that a lot of other people want to use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 QUESTION: But aren't you --

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

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

1 denied his right to core political speech using those  
2 standards.

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

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

8 QUESTION: He did conduct his expression.

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

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

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

20 QUESTION: Yes.

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

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

4 QUESTION: In any --

5 QUESTION: Well, still the point remains that I  
6 just think you overstate the case when you tell us this is  
7 a Freedman case. Justice O'Connor gave you the simplest  
8 time, place, and manner regulation that's content-neutral,  
9 if there are two groups that want to use a space that hold  
10 100 and they're each 100, do you have to sort out the two.  
11 That is not a Freedman case. Sure, I suppose if you push  
12 us to the wall it's a prior restraint. Of course there  
13 are cases that say that prior restraints have a heavy  
14 burden.

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

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

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



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

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

6 MR. WILSON: Yes, Your Honor.

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

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

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

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

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

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

5 MR. WILSON: Well, it says --

6 QUESTION: I don't know what it means.

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

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

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

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

19 MR. WILSON: Correct.

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

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

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

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

3 MR. WILSON: Yes, Justice.

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

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

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

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

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

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

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

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

7 MR. WILSON: Yes, sir.

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

11 MR. WILSON: Well, the interesting --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. WILSON: No.

19 QUESTION: -- core speech?

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

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

1 has to be that rule, too, if --

2 MR. WILSON: It would seem --

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

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

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

15 (Laughter.)

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

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

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

1 about?

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

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

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

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

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

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



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

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

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

9 QUESTION: Yes, the hypo.

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

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

16 MR. WILSON: Well --

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

19 MR. WILSON: I don't.

20 QUESTION: Okay.

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

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

24 MR. WILSON: I do.

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

1 QUESTION: When --

2 QUESTION: Your brief tell us that --

3 QUESTION: Excuse me, please let me finish.

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

13 MR. WILSON: Justice Scalia --

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

17 QUESTION: Hemp concert --

18 QUESTION: -- Hemp concert later, yes.

19 (Laughter.)

20 MR. WILSON: One would assume that the --

21 QUESTION: Can't do that?

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

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

1 (Laughter.)

2 MR. WILSON: I've met them.

3 (Laughter.)

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

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

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

20 QUESTION: All right, but just --

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

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

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

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

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

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

1 issued is slight.

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

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

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

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

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

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

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

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

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

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

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

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

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

5           QUESTION: And where did we say that?

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

8           QUESTION: Well, that was 60 years ago.

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

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

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

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

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

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

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

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



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

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

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

19 MR. WILSON: Content of the speech.

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

25 MR. WILSON: If there are competing applications

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

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

7 MR. WILSON: Yes, sir.

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

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

16 QUESTION: It does.

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

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

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

22 ORAL ARGUMENT OF DAVID A. STRAUSS

23 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

24           QUESTION: That's a reason for denial.

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

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

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

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

10 MR. STRAUSS: In the order of receipt.

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

14 MR. STRAUSS: I guess --

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

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

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

25 QUESTION: Can you ask for the park 3 years in

1 advance?

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

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

9 MR. STRAUSS: There's some provision --

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

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

18 QUESTION: May deny.

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

21 QUESTION: And not otherwise.

22 MR. STRAUSS: And not otherwise. And not  
23 otherwise.

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

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

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

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

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

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

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

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

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

25 QUESTION: And do the regulations require that

1 you give the reasons?

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

8 QUESTION: Thank you.

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

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

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

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

1 application, and --

2 QUESTION: Late?

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

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

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



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

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

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

18 QUESTION: How about denials?

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

1 you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 QUESTION: Which happened here.

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

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

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

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

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

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

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

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

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

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

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

8 QUESTION: Or a zoning ordinance.

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

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

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

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

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

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

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

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



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

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

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

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

18 MR. STRAUSS: Well, Justice --

19 QUESTION: Or are you just ducking the issue?

20 (Laughter.)

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

25 I think it's misleading to characterize it as a

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

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

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

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

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

5 QUESTION: And prompt judicial review  
6 opportunity.

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

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

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

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

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

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

9 If the Court has no further questions --

10 QUESTION: Thank you, Mr. Strauss.

11 Mr. Feldman, we'll hear from you.

12 ORAL ARGUMENT OF JAMES A. FELDMAN

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING THE RESPONDENT

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

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

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

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

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

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

25 MR. FELDMAN: The problem would be exactly the

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

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

12 MR. FELDMAN: But I think --

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

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

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

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

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

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

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

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

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

10 QUESTION: Would it be --

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

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

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



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

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

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

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

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

23 MR. FELDMAN: Well --

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

25 MR. FELDMAN: I think that that would at least

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

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

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

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

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

23           MR. FELDMAN: That's correct.

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

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

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

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

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

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

3           QUESTION: Thank you, Mr. Feldman.

4           Mr. Wilson, you have 2 minutes remaining.

5           REBUTTAL ARGUMENT OF RICHARD L. WILSON

6                   ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25