

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

FW/PBS, INC., dba PARIS ADULT BOOKSTORE II, ET AL.,  
Petitioners V. CITY OF DALLAS, ET AL.;  
M.J.R., INC., ET AL. Petitioners V. CITY OF DALLAS, ET AL.;  
and  
CALVIN BERRY, III, ET AL., Petitioners V.  
CITY OF DALLAS, ET AL.

**CAPTION:**

**CASE NO:** 87-2012; 87-2051; 88-49

**PLACE:** WASHINGTON, D.C.

**DATE:** October 4, 1989

**PAGES:** 1 - 52

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 FW/PBS, INC., dba PARIS ADULT :  
4 BOOKSTORE II, ET AL., :  
5 Petitioners :  
6 v. : No. 87-2012  
7 CITY OF DALLAS, ET AL.; :  
8 M. J. R., INC., ET AL., :  
9 Petitioners :  
10 v. : No. 87-2051  
11 CITY OF DALLAS, ET AL.; :  
12 and :  
13 CALVIN BERRY, III, ET AL., :  
14 Petitioners :  
15 v. : No. 88-49  
16 CITY OF DALLAS, ET AL. :

17 -----x

18 Washington, D.C.

19 Wednesday, October 4, 1989

20 The above-entitled matters came on for oral argument  
21 before the Supreme Court of the United States at 10:02 a.m.

22 APPEARANCES:

23 JOHN H. WESTON, ESQ., Beverly Hills, California; on behalf of  
24 the Petitioners.

25 ANALESIE MUNCY, ESQ., Dallas, Texas; on behalf of the

1 Respondent.  
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ANALESIE MUNCY, ESQ.	
On behalf of the Respondent	28

P R O C E E D I N G S

(10:02 a.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear arguments first  
4 this morning in Number 87-2012, FW/PBS v. City of Dallas; 87-  
5 2051, M. J. R. v. City of Dallas; and 88-49, Calvin Berry v.  
6 the City of Dallas.

7 Mr. Weston.

8 ORAL ARGUMENT OF JOHN H. WESTON

9 ON BEHALF OF THE PETITIONERS

10 MR. WESTON: Thank you, Mr. Chief Justice, and may it  
11 please the Court:

12 These three consolidated cases present various  
13 challenges to this Dallas licensing ordinance. The FW/PBS  
14 Petitioners and the M.J.R. Petitioners, bookstores, motion  
15 picture theaters, arcades, cabarets, attack the ordinance on  
16 various First Amendment grounds arising from their  
17 communicative activities.

18 The Calvin Berry, III Petitioners, motels, are included  
19 within the scope of the ordinance solely because they provide  
20 room rentals for periods of less than 10 hours. They assert a  
21 different challenge, the absence of any justification for  
22 including them within the ordinance. If the Court please, I  
23 will turn to the Berry matter first.

24 Under the ordinance, hotels or others providing rooms  
25 for rent for less than 10 hours are qualified, or are included

1 as sexually oriented businesses. And also under the ordinance  
2 no one may rent rooms for less than 10 hours unless they have  
3 license under the ordinance. On its face, this legislation  
4 applies not only to Petitioners' hotels, but also to the  
5 Hilton, to Holiday Inn, the Sheraton, as well as other hotels  
6 and motels which provide accommodations for those in the  
7 airline industry and truckers and others on travel-sensitive  
8 and short schedules.

9           Given the lack of any reference whatsoever in this  
10 record or in the entire legislative process to short-term  
11 rental establishments, Petitioners respectfully assert that  
12 the scheme as to them is over inclusive and irrational, and is  
13 violative of equal protection and due process of the laws.

14           And if the Court please, I will now turn to the  
15 arguments of the other two Petitioners.

16           Respondents invite this Court to make radical and  
17 wholesale reductions in the most basic protections of the  
18 First Amendment which have traditionally safeguarded  
19 expression in this country. They attempt to justify their  
20 ordinance by several quite remarkable propositions, including  
21 their statement that under the ordinance no religious or  
22 political discourse would be restrained. I suppose, fairly,  
23 their argument extends to that if speech does not contain a  
24 component of religious or political discourse, it is then  
25 subject to lesser and perhaps ultimately no First Amendment

1 protection.

2 If the First Amendment is to have any continuing long-  
3 or short-term validity, Respondents arguments must be  
4 resoundingly rejected.

5 This Court has consistently held over a long, long  
6 period of time --

7 QUESTION: Would you accept a grudging rejection?

8 MR. WESTON: If I can't get a resounding rejection I  
9 would accept a grudging one, Justice Scalia, as long as it is  
10 unequivocal.

11 This Court has held over a long, long period of time  
12 that any laws requiring, as a precondition to the engaging in  
13 speech, licenses --

14 QUESTION: Well, these -- these people are not,  
15 strictly speaking, engaged in speech. They are selling stuff,  
16 aren't they?

17 MR. WESTON: Well, I think that's -- that's true, Your  
18 Honor. There is -- certainly consideration charged for the  
19 expression, but this Court has continually held that the fact  
20 that there was a charge attendant to expression itself,  
21 whether it be in the context of the sale of a newspaper or the  
22 sale of a book or the selling of an admission ticket for a  
23 ballet dance or for theater, certainly was no indication --

24 QUESTION: No, I am not suggesting the -- the exchange  
25 of something for the performance makes it anything less than

1 speech, but these -- these people are engaged in a commercial  
2 business. Can't -- can't a state require a license of these  
3 people the same way it requires the licensing of other people,  
4 for purposes of collecting a sales tax --

5 MR. WESTON: Well, of course, Mr. Chief Justice. Our  
6 point is not that a license per se is impermissible. Of  
7 course not. But rather that any license of this nature must  
8 be construed, must be evaluated, as this Court always has, as  
9 a prior restraint in the beginning.

10 QUESTION: Well, why -- why is it a prior restraint?

11 MR. WESTON: Because without the license one may not  
12 engage in the speech. And as this Court recently noted, its -  
13 -in summarizing its decisions on prior restraint, that a prior  
14 restraint is classically that circumstance where government  
15 can deny or does deny a form in advance of expression. One  
16 may not engage in the speech until one has a license. One may  
17 not obtain -- one does not get the license simply on paying  
18 the filing fee and paying -- and paying one's money and filing  
19 the application.

20 QUESTION: So requiring a permit for a parade, then, is  
21 a prior restraint?

22 MR. WESTON: Is a classical prior restraint, although  
23 it may be an adequate and a valid prior restraint. As the  
24 Chief Justice well knows, not all prior restraints are  
25 invalid. They simply start off requiring the extremely heavy



1 scrutiny of this or any constitutional court, and they come to  
2 this Court or any other court with a heavy presumption against  
3 their invalidity. That is the only point that we make.

4 And because the governmental power inherent in these  
5 prior restraints is so extraordinary, a set of rules involving  
6 strict scrutiny has of course been set up to ensure that  
7 government does not, intentionally or unintentionally, abuse  
8 the extraordinary power which these devices give them.

9 QUESTION: And you take the position that commercial  
10 sales of sexually explicit speech are entitled to exactly the  
11 same protection as, for example, a political rally.

12 MR. WESTON: We take the position that there is no  
13 justification, Justice O'Connor, for creating any sort of  
14 hierarchy for speech under our constitutional framework. We  
15 certainly think that there is nothing that indicates that the  
16 founders or the framers had any such concept. We see no  
17 justification for doing so, and quite frankly, the response I  
18 guess to the implied question might well be why, and followed  
19 by what next. The establishment of any hierarchy of speech  
20 diminishes ultimately the value of all speech. And we would  
21 respectfully submit --

22 QUESTION: Well, how about commercial speech. Do you  
23 think that gets the same protection as political speech?

24 MR. WESTON: Well, the Court obviously has wrestled  
25 with the question of --

1 QUESTION: Do you think our cases would support the  
2 position that they are entitled to the same protection?

3 MR. WESTON: No, I think that --

4 QUESTION: Well, then there is some hierarchy.

5 MR. WESTON: No. I think that generically the Court  
6 certainly has indicated that at least commercial speech, in  
7 some circumstances, is not entitled to the same speech, but I  
8 think --

9 QUESTION: Is this at least commercial speech?

10 MR. WESTON: No, Your Honor, this would not qualify as  
11 commercial speech any more than the sale of a book, the sale  
12 of a newspaper, the sale of a ticket to a rock concert or  
13 whatever. This speech is, in essence, speech or pure speech,  
14 which is to be construed and viewed exactly in that context,  
15 separate from the commercial, commerciality of the message,  
16 which lends the potentially second-class status to commercial  
17 speech.

18 The point I was going to make, Justice Stevens, is  
19 simply that the aspects of commercial speech seem really to be  
20 more akin almost to a time, place and manner circumstance with  
21 respect to it, rather than the content of the message of the  
22 commercial speech.

23 QUESTION: What about obscene speech? Is that a -- is  
24 that a separate category?

25 MR. WESTON: Well, we know, Justice Scalia, that at

1 least up until the present a continuing majority of this Court  
2 has held that obscene speech is simply expression, but not  
3 speech in the First Amendment sense.

4 QUESTION: Well, you can call it not speech, but it's  
5 speech, isn't it?

6 MR. WESTON: Well, with all respect --

7 QUESTION: I mean, let's not play games. We have  
8 established a separate category of speech, obscene speech, to  
9 which we accord no protection, zero. Right?

10 MR. WESTON: Again, not wishing to play games at all,  
11 but this Court's decisions have made clear that, for purposes  
12 of the First Amendment, obscenity is not speech. It is  
13 expression, but it is not speech. And therefore, it is not  
14 entitled, after determinations of obscenity, that it is  
15 nonspeech, to any of the protections. It may be seized, it  
16 may be destroyed. It simply offers none of the incidence of  
17 protected quality which the expression in this case manifestly  
18 retains, because this material is not alleged to be obscene,  
19 and the standard for judging it or identifying it --

20 QUESTION: Well, but if we can say that there is a  
21 separate category of speech which is not speech, as we have  
22 done in obscenity, I suppose we could say there is a separate  
23 category of speech which is only partly protected speech, as  
24 we have already done in commercial speech.

25 MR. WESTON: Well, again --

1 QUESTION: And indeed haven't we done that with respect  
2 to pornography, something just short of obscenity. Haven't we  
3 permitted certain restrictions upon that that are not  
4 permissible with respect to --

5 MR. WESTON: But not on the basis -- well, obviously.  
6 Perhaps we should define terms. Obscenity is that erotic  
7 expression which has been determined to be beyond the pale of  
8 the First Amendment; it is nonspeech.

9 Commercial speech, as I have suggested, is not so  
10 determined by reference to its content. It is more its  
11 purpose or its offered role or why it is being done in -- in  
12 connection with any analysis that may be provided. It really  
13 is, I believe, analytically, much more of a time, place or  
14 manner type of restriction.

15 With respect to pornography, sexually oriented speech,  
16 I am not aware of any majority holding of this Court which, on  
17 the basis of its being sexually oriented speech, has concluded  
18 that it is entitled to less protection. Certainly, I am aware  
19 of what I respectfully call some tentative forays in that  
20 direction, but I do not believe, and I -- I feel quite certain  
21 in saying, that there has been no such ruling on the part of  
22 this Court.

23 QUESTION: What about defamatory speech?

24 MR. WESTON: Defamatory speech typically has also been  
25 considered to be speech which is simply beyond the pale --

1 QUESTION: Well, that is not correct; just a different  
2 burden when it is against a public figure and that sort of  
3 thing. There are different rules applied to defamatory speech  
4 is a form of speech.

5 MR. WESTON: Well, I think that is fair. But again,  
6 defamatory speech is subject to whatever restraints or  
7 whatever inhibitions only after a determination that it falls  
8 into this quasi or this specifically unprotected category.

9 QUESTION: Yes, but we're talking about speech that you  
10 would only say has been entitled to less protection if one can  
11 so conclude after determining it was sexually oriented speech.  
12 You make that determination before you say it gets less  
13 protection.

14 MR. WESTON: I -- I think there would not be a problem  
15 determining that speech were sexually oriented. I think the  
16 problem would then be in terms of, at least with respect to  
17 that aspect of it, exactly how broad the category would be.  
18 Because if one, for example takes a look at the definitional  
19 language in this ordinance, it makes very, very clear that  
20 even verbal descriptions of sexual activity bring material  
21 within the category under the ordinance.

22 I suspect that this would include Ulysses, and the  
23 extraordinary James Joyce depictions of a very explicit sex in  
24 the Molly Bloom soliloquy, as well as it would contain  
25 Harlequin dime store novels which deal extensively, and if not

1 explicitly, describe certainly implied ultimate sexual  
2 activity.

3 QUESTION: But strictly speaking, material doesn't come  
4 within the ordinance. The ordinance does not ban any material  
5 whatever. It just says that if a person is engaged in a  
6 business, a primary purpose of which, a primary purpose of  
7 which is the sale of such material, he needs to comply with  
8 the licensing.

9 MR. WESTON: Well, interestingly, Justice Scalia, the  
10 ordinance says that only with respect to bookstores, and that  
11 may well be why the city in its brief discussed bookstores  
12 only. The other media, interestingly, are described in much  
13 more elastic terms. For example, with respect to arcades,  
14 it's clear that the dissemination of even one film with a  
15 sexually oriented --

16 QUESTION: Well, wait. What kind of Plaintiffs do we  
17 have here? Do we have arcade Plaintiffs --

18 MR. WESTON: Yes, we have arcades, we have bookstores,  
19 we have theaters, we have adult cabarets, we have a -- a  
20 rather broad array.

21 QUESTION: Do these Plaintiffs include all of the kinds  
22 of businesses covered by the ordinance? I didn't understand  
23 that.

24 MR. WESTON: No, no, Your Honor. They do not include  
25 sexual encounter establishments and nude modeling

1 establishments. But they include all of the potential speech  
2 oriented businesses, which are --

3 QUESTION: Well, is -- is it your position that if the  
4 ordinance is bad with respect to arcades, it's -- it has to be  
5 bad with respect to bookstores too?

6 MR. WESTON: No, I think that it would have to be  
7 evaluated in, with respect --

8 QUESTION: Right. So then respond to the point I made  
9 regarding bookstores.

10 MR. WESTON: The --

11 QUESTION: It is the case that no material is -- is --  
12 prevented from being sold.

13 MR. WESTON: Well, on the face it may appear that way,  
14 but it is very unclear as to what, in the literal language of  
15 the ordinance, is a -- a principal business purpose, in terms  
16 of what exact -- as opposed to primary -- and that may make --  
17 I'm not trying to split hairs, that may make some semantical  
18 difference, because the term is -- and a practical difference.  
19 The term is simply not defined anywhere in the ordinance.

20 But -- I -- what -- the notion clearly is, is that  
21 under the Dallas ordinance one may not disseminate the speech  
22 one has chosen to disseminate, absent obtaining a permit. The  
23 only way, under the implication in -- in Your Honor's  
24 question, that one may do so, is by agreeing to or choosing to  
25 disseminate other speech which would -- which one would not

1 otherwise do, some governmentally implied alternative speech,  
2 in order to qualify under the ordinance.

3 So, given that one could not justify the ordinance by  
4 requiring one to carry speech which otherwise one would not,  
5 Riley, Terminiello, one would think that in a real sense,  
6 Justice Scalia, this piece of legislation does in fact impose  
7 a total prior restraint in the City of Dallas on the ability  
8 of one to disseminate the speech one chooses in the absence of  
9 obtaining the permit.

10 QUESTION: Actually you don't have to do other speech  
11 in order to fall out of the a primary purpose of which. You  
12 could sell shoe shines and chewing gum, right?

13 MR. WESTON: No, because -- I don't think so.

14 QUESTION: Really?

15 MR. WESTON: Because one would -- well, I suppose  
16 theoretically --

17 QUESTION: Sure you could.

18 MR. WESTON: Unless --

19 QUESTION: You don't have to sell, the state in order -  
20 - in order for you to avoid the licensing scheme, the state is  
21 not requiring you to -- to promulgate other speech, so long as  
22 you have other business which makes the sale of the sexually  
23 explicit material not a primary purpose.

24 MR. WESTON: I -- I think that is probably a fair  
25 observation. One could sell 95 percent a box of five cent



1 Kleenex, or "Kleenices" and at the same time have one's entire  
2 other selection be sexually oriented expression, and  
3 conceivably, and again we don't know how the legislation will  
4 be dealt with, but of course the point would be what is one's  
5 principal business purpose. And if the purpose was deemed to  
6 be the sexually oriented material, notwithstanding the acres  
7 and acres of shelves of Kleenex boxes, apparently the  
8 ordinance would still require qualification.

9 In my experience with these kinds of ordinances around  
10 the country, and it now spans more years than I would like to  
11 admit -- these definitional aspects are expanded consistently  
12 to deal with whatever attempts are made by businesses to  
13 exempt themselves from the scope of the -- of the legislation.

14 And so we would conclude, with respect to this portion,  
15 by simply noting that in a fair and principled sense this  
16 legislation is indeed a prior restraint. One may not  
17 disseminate the speech of one's choice in a real sense, and  
18 depending on which of the media are involved, without applying  
19 for and being granted the permit. And it is manifestly clear  
20 that none of the Freedman level safeguards are contained  
21 within it, there is no time period within which the city must  
22 grant the license or go to court to justify the denial. There  
23 is no obligation on the part of the city to go to court to  
24 justify the denial at all, and manifestly there is no --

25 QUESTION: Well, how would that fit in here? I mean,

1 in those cases it was a question of some -- something being  
2 banned by a sensor, as I recall.

3 MR. WESTON: But not in Riley, Mr. Chief Justice, where  
4 it was exactly a periodic --

5 QUESTION: Well, let's -- let's take Free -- didn't you  
6 also mention Freedman?

7 MR. WESTON: Well, yes, but the significance of Riley,  
8 of course, is that Riley expands the item specific factual  
9 setting of Freedman and many of the subsequent cases, and  
10 applies it to the totally so-called content neutral  
11 requirement of obtaining a periodic license as a precondition  
12 to be able to engage in speech where the purpose of the speech  
13 was to raise money. Riley is, with all respect, an  
14 unequivocal application of the Freedman doctrine to the  
15 general, mere license as a precondition for speech.

16 And what I find most eloquent in the city's brief is  
17 that at no point, despite our frequent references to Riley and  
18 discussions of it and its being a new and important case, not  
19 one mention of Riley or attempt to distinguish its -- its, we  
20 respectfully submit, clear holding. What we would submit is  
21 for all of the reasons which underlie the Riley decision and  
22 the absence of the Freedman safeguards with respect to the  
23 entirety of this --

24 QUESTION: Well, what -- what would you -- you say you  
25 are entitled to a quick hearing, in effect, on what?

1 MR. WESTON: On whether the applicant is entitled to  
2 the license, so that the applicant may then commence the  
3 applicant's speech-oriented business. Imagine, let me just,  
4 if I may --

5 QUESTION: So -- so what would you be arguing,  
6 supposing the city turns down the license, that you qualified  
7 under the terms of -- of the statute?

8 MR. WESTON: Yes, it may -- it may well, the  
9 disqualification potential --

10 QUESTION: Is that -- is that what Riley held, that you  
11 had an, a -- a right to appeal, whether or not you qualified  
12 under the state law? I -- I didn't read it that way.

13 MR. WESTON: But isn't that the absolute implication?  
14 The state sets us a licensure requirement which says that  
15 before you may speak you must obtain a permit. You are to  
16 stay in limbo --

17 QUESTION: Before you may sell these things. You know,  
18 call it speak if you want, but this -- the owner of these  
19 stores isn't speaking. He's selling books.

20 MR. WESTON: Mr. Chief Justice --

21 QUESTION: Do you mean that every bookstore, I think  
22 this is the point, do you mean that every bookstore cannot be  
23 subjected to normal licensing requirements, but you have to  
24 have a -- a special accelerated provision for the licensing of  
25 that type of business that engages in expression. Bookstores,

1 I suppose, stores -- I don't know, stores that tell -- sell  
2 television sets, they cannot be subjected to normal business  
3 licensing, which don't have time limits on -- on when the city  
4 council must act.

5 MR. WESTON: Justice Scalia, I don't think it is fair  
6 to include television sets within it, and I know that's not  
7 the --

8 QUESTION: All right, leave out -- sorry about that, I  
9 went too far. Forget television sets, just -- just -- just  
10 bookstores.

11 MR. WESTON: Yes. The burden on municipal government  
12 with respect to it is de minimis.

13 QUESTION: Is that the practice in -- in communities  
14 throughout the country, that there are special licensing  
15 provisions for bookstores?

16 MR. WESTON: Absolutely. In many, many communities, if  
17 not most, particularly where those communities truly are not  
18 interested in stifling any message or eliminating any  
19 materials disseminated at the businesses. What those  
20 ordinances provide is that they have special time periods for  
21 First Amendment businesses, for expressive-oriented  
22 businesses, they have special provisions so that either the  
23 businesses may operate on the filing of an application fee, or  
24 they have a provision that states that either the permit is  
25 granted, or -- is denied within 30 days or deemed granted, or

1 some -- or some time period.

2 QUESTION: Well, what -- what -- what if a city has an  
3 ordinance that simply says in order to do business you've to  
4 show you have got a sales tax certificate, you are going to  
5 pay your sales tax, you have to have a -- a zoning certificate  
6 to show your business in compliance with the zoning. And it  
7 applies that across the board to everybody, including  
8 bookstores. Now, do bookstores but nobody else have a right  
9 to a quick hearing on that sort of thing?

10 MR. WESTON: Well, with respect --

11 QUESTION: You -- you can answer that yes or no, can't  
12 you?

13 MR. WESTON: Yes.

14 QUESTION: Bookstores do.

15 MR. WESTON: Certainly. And this Court has on many  
16 occasions made separate and -- and set more sensitive  
17 requirements in connection with speech businesses or speech --  
18 speech-involved circumstances, simply because the cost of not  
19 doing so is terribly, terribly great. We know that --

20 QUESTION: Well, what on earth -- what on earth is the  
21 cost of not doing so? Why shouldn't a proprietor of a  
22 bookstore be held to the same zoning requirements and sales  
23 tax requirements as everybody else?

24 MR. WESTON: But, Mr. Chief Justice, we're not  
25 suggesting in any way that the bookstore shouldn't be subject

1 to the same requirements.

2 QUESTION: Well, then why does the Constitution require  
3 a special deal for the bookstore owner?

4 MR. WESTON: Because we have placed speech and the  
5 First Amendment at a -- at a special --

6 QUESTION: But there is no case from this Court that  
7 comes anywhere close to supporting what you are saying.

8 MR. WESTON: That what, Mr. Chief Justice, that have to  
9 be special concerns --

10 QUESTION: That -- that a bookstore, subjected to a  
11 general license requirement like everybody else to show that  
12 it is in compliance with a zoning ordinance, is entitled to a  
13 special hearing.

14 MR. WESTON: The special hearing --

15 QUESTION: Now, isn't -- what -- what is your closest  
16 case?

17 MR. WESTON: If I may --

18 QUESTION: Could you tell me what the case most closely  
19 supporting that position is?

20 MR. WESTON: Yes, well, Riley is the one that most  
21 immediately comes to mind. But the contemplation that there  
22 is some special hearing which we seek in connection with this  
23 is simply not the position. One has, municipally, the  
24 opportunity to appeals. One has the opportunity to  
25 litigation. But what we are saying here is that, whereas,

1 just as a store -- a municipality may ban bowling alleys or  
2 may ban hardware stores or incinerators, or may subject that  
3 kind of activity to very, very long periods of time before  
4 permitting that activity to go, there is very little impetus  
5 on the part of a municipal government to do anything to  
6 frustrate or delay or retard the granting of the permit.  
7 There is simply no issue that the speech involved in the  
8 concern will play any role. This is not --

9 QUESTION: How about a convenience store that sells  
10 newspapers and magazines? Are they -- they entitled to a  
11 special accelerated hearing, too?

12 MR. WESTON: It would seem --

13 QUESTION: Or a supermarket that, you know, sells --

14 MR. WESTON: No, I -- I think that's a fair question --

15 QUESTION: I think it is.

16 MR. WESTON: -- and in order to balance it out it would  
17 seem that if businesses are primarily involved with expressive  
18 activity, then they should be dealt with in a way that permits  
19 the businesses to be protected from what we all know to be the  
20 case. And that is that government will silence by delay  
21 indirectly if it cannot silence directly.

22 QUESTION: And that is a constitutional principle, that  
23 if -- if you sell nothing but newspapers you are entitled to  
24 an accelerated hearing, but if you sell newspapers and bubble  
25 gum or, you know, a lot of other things in a convenience

1 store, you are not? That's a constitutional principle?

2 MR. WESTON: I think the point -- well, I think that is  
3 a fair implication in the fair sense, Justice Scalia, of what  
4 this Court's opinions have -- have indicated, and certainly a  
5 fair sense of what the First Amendment protections have been  
6 designed to be, and must be, in order to make anything more  
7 than a hollow promise, the guarantees that speech will not be  
8 interfered with before a final judicial determination of its  
9 unprotectedness. And what these pieces of legislation do is  
10 simply permit the cities to be able to do indirectly what they  
11 cannot do directly.

12 And unless we can maintain this kind of principled  
13 articulation of -- of indication to government that where the  
14 First Amendment is concerned, and where we deal with primarily  
15 First Amendment or expressive businesses, given the minimal  
16 cost to government, and I assure you that these are minimal  
17 costs. We are not dealing with nuclear power plants. What  
18 the issue is here is a retail establishment to be able to sell  
19 books or to show movies. That is the bulk of what the conduct  
20 is.

21 QUESTION: And what, in a nutshell, are the  
22 requirements that you say have to be met?

23 MR. WESTON: Three, Justice O'Connor, with respect to  
24 this, and -- and particularly dealing with the municipal piece  
25 of legislation where surely the municipal government is not in



1 a position to control the progress of the courts, as the -- as  
2 state government may well be. That there must be a reasonable  
3 time period within which government must either grant the  
4 permit which government has said is -- is required in -- in  
5 order to do the speech conduct. Secondly, that if government  
6 does not grant the permit within the reasonable period of  
7 time, then government must go to court to explain why it has  
8 failed to grant the permit. And lastly, as part of that  
9 judicial proceeding, government must bear the burden of  
10 justifying its failure to grant the permit.

11 On that basis, there will be a meaningful opportunity  
12 for -- for businesses not -- to -- to be protected at the  
13 trench level, at the -- at the street -- municipal level from  
14 censorship by delay and administrative and bureaucratic  
15 silence.

16 QUESTION: Counsel, do you take it, take the position  
17 that the requirement for the license be denied for one who has  
18 been previously convicted of a crime as an independent basis  
19 for striking either that provision or the whole ordinance?

20 MR. WESTON: With respect, I think I understand your  
21 question, Justice Kennedy. With respect to the Freedman  
22 argument that I have made, that would be with respect to the  
23 totality of the ordinance. With respect to the specific non,  
24 either speech or nonspeech criminal conviction  
25 disqualification provisions, we would attack those

1 independently. Most immediate --

2 QUESTION: My question is to those, I take it that a  
3 court, in sentencing, could impose these as a condition of  
4 parole, could it not?

5 MR. WESTON: Or probation --

6 QUESTION: Or probation.

7 MR. WESTON: Surely.

8 QUESTION: Well, then why can't the city exercise that  
9 same power here?

10 MR. WESTON: The aspect of a court imposing that  
11 particular post-probationary limitation is simply a substitute  
12 for the court's having the opportunity to place the defendant  
13 in jail, and by so doing deprive the defendant of doing  
14 anything, whether it be any sort of speech, any sort of  
15 business, any sort of normal human relationships. That's a  
16 far cry, it seems, in terms of the analysis of a city not  
17 involved in the conviction situation, but the city more  
18 importantly dealing with the absolute license to speak.

19 QUESTION: Well, it seems to me the prohibition is --  
20 the same in either case, and -- and the court is certainly  
21 bound by the First Amendment just as the city council is.

22 MR. WESTON: The -- but once again we know that a  
23 prisoner contained, confined in -- in some custodial setting,  
24 simply loses basic rights of all dimensions. And the  
25 probationary notion is simply a vicarious extension of the

1 fact that the defendant's body could otherwise be imprisoned.  
2 The term beyond the penal period is simply not subject to  
3 continuing restraint with respect to virtually any civil  
4 rights, at least as -- that is not quite entirely true, we  
5 know that one may not possess a gun, in -- in that sense, but  
6 in terms of fundamental rights, one, those -- those restraints  
7 simply do not endure.

8 With respect to this setting, and what we stress, of  
9 course, is the obscenity conviction as a basis for  
10 disqualification or revocation, is, in this circumstance, the  
11 obscenity conviction clearly violates the classical prior  
12 restraints of *Mere Citizens for Better Austin v. Keefe*.

13 QUESTION: I -- I still don't see -- I still don't see  
14 why a court can do it but the legislature can't. The court  
15 says instead of giving you ten years I am going to give you  
16 five years and a probationary period during which you can't  
17 sell this kind -- this kind of material. Why can't a  
18 legislature say the same thing: well, we were going to make  
19 it ten years for obscenity, but instead we'll make it only  
20 five years and for the next, and permanently you can't go into  
21 the obscenity business afterwards, or the pornography  
22 business.

23 MR. WESTON: At the risk of sounding simplistic, the --  
24 the legislature, with respect to the Dallas city council, is  
25 simply not the legislature which has created the original

1 punishment which provided the judge the opportunity to keep  
2 somebody in jail for ten or 15 years.

3 QUESTION: Well, you're -- you're avoiding the  
4 hypothetical though. As a matter of state law, this hasn't  
5 been challenged beyond the authority of the city to do it.  
6 Let's assume the legislature passed the law, in order to  
7 answer the question.

8 MR. WESTON: Well, but with respect to -- I'm seeking  
9 to answer the question, it is not simply a question of  
10 legislative power. Justice Scalia's question, Justice  
11 Kennedy, was simply why, if a court can keep an individual on  
12 probation where the court had the opportunity to confine that  
13 body, why can't a different legislature set a series of  
14 criteria for its own -- for its own regulated business. And  
15 the two, with all respect, strike me as complete non  
16 sequiturs. The judge has the ability to keep that individual  
17 in jail; the judge owns that person. The -- the difference --

18 QUESTION: Well, the legislative body of course  
19 determines the penalties for criminal offenses. Why can't the  
20 legislative body say, in addition to whatever else is imposed  
21 in criminal sentencing, we determine it's inappropriate for  
22 someone convicted of certain crimes, for a certain period of  
23 time, to go into the business of selling sexually explicit  
24 material?

25 MR. WESTON: I -- I

1 QUESTION: You may answer the question.

2 MR. WESTON: Thank you, Mr. Chief Justice.

3 I note, Justice O'Connor, really there are two aspects.  
4 One, of course, are the speech predicate offenses, which then  
5 trigger the remedy to which the Court refers, or the nonspeech  
6 predicates to which -- which trigger the same remedy. With  
7 respect to the speech predicates I would simply note that it  
8 was the State of Minnesota in Near which sought to create the  
9 disqualification on Near for following the determinations that  
10 he had engaged in criminal libel or -- or -- or libel. So it  
11 would appear that, for this Court, merely ceding the right to  
12 create this disqualification to the legislature is of no  
13 moment.

14 With respect to the analyses for the nonspeech  
15 predicate conduct, which are legion throughout this  
16 legislation --

17 QUESTION: I think you have answered the question, Mr.  
18 Weston. Your time has expired. Thank you.

19 MR. WESTON: Thank you, Mr. Chief Justice, I'm sorry.

20 QUESTION: Ms. Muncy.

21 ORAL ARGUMENT OF ANALESIE MUNCY

22 ON BEHALF OF THE RESPONDENT

23 MRS. MUNCY: Mr. Chief Justice, and may it please the  
24 Court:

25 While the Petitioners have raised a myriad of issues, I

1 believe the critical issue in this case is whether the city  
2 has a justification for the licensing provisions in the  
3 ordinance that is unrelated to the -- to the suppression of  
4 speech, and whether these provisions are substantially broader  
5 than necessary to achieve the city's purpose.

6 It is clear from the circumstances that led to the  
7 adoption of the ordinance that the city has ample  
8 justification for these provisions. In 1985 and 1986 the City  
9 of Dallas was experiencing a proliferation of sexually  
10 oriented businesses in the city, as were many other large  
11 urban areas. They were beginning to cluster in some areas and  
12 then they were beginning to open up in small neighborhood  
13 shopping centers.

14 So the city council determined that it should  
15 investigate the effects of these businesses, and did so by  
16 looking at studies from other cities. It -- it became  
17 evidence from these studies that there are serious problems of  
18 crime and urban blight associated with sexually oriented  
19 businesses.

20 The city -- the city staff collected studies from nine  
21 cities, including Los Angeles, Phoenix, St. Paul and Austin,  
22 Texas. Each of these studies was consistent in their findings  
23 that these businesses foster higher crime rates and lower  
24 property values in the areas where they are located.  
25 Secondly, the city council looked at Dallas itself.

1 QUESTION: Didn't those studies have to do with the  
2 problems arising from the concentration of such businesses?

3 MRS. MUNCY: The studies looked at both areas, where  
4 there were concentrations of those types of businesses, and  
5 they looked at areas where maybe there was only one located,  
6 and I refer especially to the study from the City of Austin  
7 which looked at both --

8 QUESTION: I thought the studies basically -- address -  
9 - addressed the concentration or the location of the in  
10 neighborhoods or adjacent to schools. Did any of them address  
11 the question -- I guess Dallas has zoning ordinances in effect  
12 requiring that such businesses, the businesses in question  
13 here, be spread out and located in only certain areas. Is  
14 that right?

15 MRS. MUNCY: That is correct. This ordinance created  
16 location requirements for sexually oriented businesses, and  
17 this Court did not accept any of the questions on that --

18 QUESTION: That is not at issue here. What is at issue  
19 is an additional requirement, to wit, the licensing  
20 requirement.

21 MRS. MUNCY: Yes, but we do have --

22 QUESTION: Did the studies have to do with the effect  
23 of letting someone who has been previously convicted of any of  
24 these offenses go into businesses again?

25 MRS. MUNCY: No, the studies did not address that, only

1 --

2 QUESTION: I mean, they really supported the zoning  
3 aspects, didn't they?

4 MRS. MUNCY: They were --

5 QUESTION: Not the licensing aspects?

6 MRS. MUNCY: Yes. They were initiated to justify  
7 zoning, but they approached the crime that is generated by the  
8 businesses. In addition, the city council looked at what was  
9 happening in Dallas and did studies around, or did a study  
10 around an area in Dallas where there were a number of these  
11 businesses. And we do -- while they are not in the Joint  
12 Appendix, there are exhibits in the record that describe what  
13 was happening in Dallas, and particularly an affidavit from a  
14 Dallas police officer that describes graphically what actually  
15 goes on in these businesses. And if you are interested in  
16 looking, those are Defendant's exhibits number 19, 20, 21, 22,  
17 and 23.

18 The city council then decided to regulate the -- the  
19 businesses and enacted the ordinance which is -- which under  
20 attack here today. Now, the question is, is there any  
21 constitutional problem with what they did. While the  
22 Petitioners have attacked almost every provision in the  
23 ordinance, as best I can tell, there are -- there are  
24 primarily two matters that are at issue. Number one, whether  
25 persons convicted of certain crimes can be disqualified from



1 operating sexually oriented businesses for a temporary period  
2 of time. And secondly, --

3 QUESTION: Are you raising any question of standing  
4 here at all to attack that particular position?

5 MRS. MUNCY: We did not raise the question of standing  
6 at this level. We looked at the cases on standing and it  
7 seemed to us that we would not have a chance of prevailing on  
8 that issue, and we did not raise it at this level, although we  
9 did raise it at the lower levels.

10 QUESTION: Do you think there is standing here?

11 MRS. MUNCY: I believe that there are one or two of the  
12 Petitioners that have had their licenses denied based on  
13 criminal conviction. In that -- in that case I would have  
14 standing.

15 The second issue that I think is of some --

16 QUESTION: Before you leave that, would you refresh my  
17 recollection. Does this just prevent the licensee himself, I  
18 mean disqualify the licensee himself if he has a prior  
19 conviction, or does it also prohibit him from employing people  
20 who have prior convictions?

21 MRS. MUNCY: No, just the licensee.

22 QUESTION: Just the licensee.

23 MRS. MUNCY: Yes, the person operating --

24 QUESTION: Well -- well, the spouse of the licensee can  
25 be convicted of one of these crimes and that disqualifies the

1 licensee, does it not?

2 MRS. MUNCY: Yes, it does.

3 The second that I think --

4 QUESTION: One other point. If someone is living or  
5 residing with the licensee and that person is convicted of one  
6 of the specified offenses, is that not grounds for denying the  
7 license?

8 MRS. MUNCY: Yes, it is. But the second issue that the  
9 Petitioners have discussed most frequently is the, is whether  
10 the Freedman procedural safeguards apply to the licensing  
11 portion of the ordinance. In response to the issue on --

12 QUESTION: Could you -- I -- I -- I didn't quite  
13 realize what Justice Kennedy just pointed out. Does this mean  
14 that if somebody, say in a family, one member of the family,  
15 worked in a bookstore and got sometimes convicted of selling  
16 one obscene magazine, then everybody who lives in that family  
17 could be disqualified from -- in that home, would be  
18 disqualified from getting a license?

19 MRS. MUNCY: No. What it means is that if a person is,  
20 owns or operates or is the applicant or licensee for a  
21 sexually oriented business is convicted of one of the offenses  
22 that disqualifies, then that person's spouse or a person  
23 residing with that person cannot become the applicant or the  
24 licensee for that -- for that business, or for a similar  
25 sexually oriented business in the city.

1           QUESTION: The person has to have been operating a  
2 business at the time of the conviction. Is that what you are  
3 saying? In other words, say just before the ordinance was  
4 passed, Mr. X -- Mrs. X was convicted of selling obscene  
5 magazines, working in a store.

6           MRS. MUNCY: Then Mr. X would not be able to obtain a  
7 sexually oriented business license. And the basis for that is  
8 that under Texas community property law both marriage partners  
9 have the same interest -- financial interest, in the business  
10 as the other.

11           QUESTION: And what if they were not married, if he  
12 just lived with Ms. X and she was convicted?

13           MRS. MUNCY: You have hit on the basis for that  
14 provision being in the ordinance. At least in Texas, common  
15 law marriages are quite prevalent, and that is the reason for  
16 having that --

17           QUESTION: Well, say it's not a common law marriage. I  
18 want to get away from the marriage. They just live together,  
19 and therefore he's barred under the ordinance.

20           MRS. MUNCY: That is correct.

21           QUESTION: How -- how can you justify that?

22           MRS. MUNCY: As I said, the -- the base for including  
23 that provision in the ordinance is the prevalence of common  
24 law marriages in Texas. And so, I suppose if they are not  
25 married and it is not a common law marriage, it's easy enough

1 to move to a different apartment, if that is what it takes to  
2 get their license. But --

3 QUESTION: Or couldn't one say it is wholly arbitrary  
4 if you have those facts. I mean, the ordinance isn't intended  
5 to make people break up their social relationships, is it?

6 MRS. MUNCY: No, it is not.

7 QUESTION: So to that extent you are conceding, I  
8 think, the ordinance is over broad. Maybe it's not very  
9 important --

10 MRS. MUNCY: Well, I won't concede that it is over  
11 broad. The -- I think there are remedies for -- for the  
12 person who is living with another one, but I -- I -- the best  
13 representation I can make to you about those two provisions is  
14 they are to get at the marriage situation.

15 QUESTION: What if they are brother and sister? Does  
16 it still apply?

17 MRS. MUNCY: It still applies, and in that case --

18 QUESTION: So, if the sister is convicted of something,  
19 the brother cannot get a license?

20 MRS. MUNCY: In that case I think our -- our argument  
21 would be that the close family relationship really means that  
22 the person who -- who will continue to operate the business is  
23 probably the one that had the conviction in the first place.

24 QUESTION: Well, what if the facts are just the  
25 opposite? It was an isolated incident. The woman worked for

1 a convenience store that sold one obscene magazine; she  
2 happened to get convicted. That disqualifies her brother.

3 MRS. MUNCY: That disqualifies him if they are living  
4 together, from operating a sexually oriented business.

5 QUESTION: If it disqualifies her brother, I suppose it  
6 disqualifies her father, too.

7 MRS. MUNCY: If they are living together.

8 QUESTION: They live in the same home. And then I  
9 don't understand the justification for that. I think you have  
10 said there is none, I think that's it.

11 (Laughter)

12 MRS. MUNCY: The best justification I can give is that  
13 the intimate relationship that they have from living together  
14 probably indicates that in the operation of the business,  
15 we'll have the same operator that we had before the new  
16 license was issued.

17 QUESTION: Well, I'm assuming there never was an  
18 operator before. This is a brand new license. The father or  
19 the brother applies for it, and a member of the family --  
20 household, has previously been convicted of one offense  
21 involving the sale of one obscene magazine. And that  
22 disqualifies the whole household.

23 MRS. MUNCY: I understand your question.

24 QUESTION: Mrs. Muncy, do we have somebody who has  
25 standing to challenge this particular provision of the

1 ordinance? You say we have people who have been convicted.  
2 Have -- have they been convicted on the basis of being  
3 somebody's brother or sister, or live-in, noncommon law  
4 spouse?

5 MRS. MUNCY: To my knowledge, none of the Petitioners  
6 has been disqualified on the basis of either of those  
7 provisions.

8 QUESTION: So, maybe that provision is not before us.

9 MRS. MUNCY: It is possible.

10 QUESTION: That goes back to my question. I -- I'd  
11 like to get away on your responses to the implications of  
12 immorality. Suppose the individual is an old World War II  
13 buddy who lost a leg, and he is sympathetic to him, and  
14 invited him to live in his house. He'd still be disqualified?

15 MRS. MUNCY: I would -- yes, he would, but that is  
16 certainly not --

17 QUESTION: Since we are getting into this matter,  
18 counsel, I -- I -- I think there are two different provisions.  
19 One is, is that there is a disqualification if a spouse has  
20 been convicted of a crime. The second is a disqualification  
21 if someone is residing with an applicant and that person has  
22 been denied a license. Is that not the distinction? So I  
23 think your case is slightly stronger than it sounds, unless I  
24 am misreading the ordinance.

25 MRS. MUNCY: That is correct. That person --

1 QUESTION: So the only -- the only nonspousal  
2 disabilities are for persons who are residing with the  
3 applicant, if those persons themselves have been denied a  
4 license. Is that not correct?

5 MRS. MUNCY: That is correct, that is exactly correct.

6 QUESTION: Thank you.

7 MRS. MUNCY: Yes, thank you. But --

8 QUESTION: Which explanation is quite apparent. Its  
9 purpose is to prevent the evasion of the provision by simply  
10 when you are denied a -- a license, getting it granted to  
11 someone else who is closely related to you, and you are the  
12 actual person running the business.

13 MRS. MUNCY: That is exactly the purpose of the  
14 provision, yes.

15 But, getting to the individual whose license is denied  
16 or revoked because of a criminal provision, the first point I  
17 want to make on that is that the First Amendment rights of  
18 consumers is in no way -- no way affected by that provision.  
19 These people are -- intermediaries who are purveying the  
20 messages of others. And if one individual has a license  
21 denied, there will be another to step in and take his place to  
22 operate that business. Because, as the Petitioners pointed  
23 out in their Brief to the Fifth Circuit, the competition for  
24 locations under the location restriction is going to be  
25 fierce.

1           And again, the distributors, the national distributors  
2 of this material which are represented by the attorneys here  
3 today, have a vested interest in making sure that the number  
4 of outlets of these do not diminish. And what we hope is that  
5 the result of this provision will make sure that these  
6 national companies that distribute this material will be  
7 motivated to find responsible people to operate the businesses  
8 that service their local outlets.

9           QUESTION: Well, we don't have cases which say that a  
10 licensing procedure can be imposed on the press or the media  
11 on the grounds that other segments of the press or the media  
12 can promulgate the same message, do we?

13           MRS. MUNCY: No.

14           QUESTION: You -- you are asking us really to strike  
15 out on -- on very new ground on that argument, are you not?

16           MRS. MUNCY: All I -- all I'm saying is that the  
17 availability will not be diminished. The First Amendment  
18 rights --

19           QUESTION: All I'm saying is that that is a new  
20 argument for which you have no precedent.

21           MRS. MUNCY: The question of availability was referred  
22 to in --

23           QUESTION: Is that correct or not?

24           MRS. MUNCY: -- in Justice Powell's concurring opinion  
25 in Young. And I -- he -- he made quite a bit of that, and



1 expressed the importance of availability of the material to  
2 the customers that -- that seek -- that seek it, to read it.

3 The second point that I want to make is that the only  
4 conceivable First Amendment interest that I think one can  
5 really be concerned about is that of the individual whose  
6 license is denied. And we contend that this is an attenuated  
7 First Amendment interest at best because it has absolutely  
8 nothing to do with the content of the material that is being  
9 sold in the -- inside the establishment or its creation. It  
10 solely relates to the running of a commercial business. Now,  
11 we're not saying that these --

12 QUESTION: It has something to do with the content of  
13 the material that is sold, because it has -- it is limited to  
14 sexually explicit material, isn't it?

15 MRS. MUNCY: That is correct, Mr. Chief Justice, but  
16 this ordinance is content neutral under the analysis in the  
17 Renton case, and the disqualification has nothing to do with  
18 the content of the material that is sold inside the  
19 establishment. The disqualification is based on whether this  
20 individual has been convicted of prostitution or public  
21 lewdness or promotion of prostitution, or one of the other of  
22 13 crimes that serve as a disqualification.

23 But we are not saying that individuals cannot express  
24 themselves through sexually explicit material, if that is what  
25 they want to do, just because they have had this license

1 denied. They may sell this same material, either wholesale  
2 through the mail, even door to door, and in fact, the day  
3 after a license is denied or revoked, they can sell the same  
4 material that was sold inside the business out on the street  
5 corner. There is nothing to prohibit it.

6 I think that graphically illustrates that this  
7 ordinance has nothing to do with restraining any particular  
8 expressive material or an individual's right to sell it. It  
9 only relates to the operation of a commercial business.

10 I think, given the legitimate and substantial interest  
11 that the city has that led to the passage of this ordinance,  
12 the city's position is that the minimal incidental burden that  
13 it places on the individual's right is more than outweighed by  
14 the city's substantial interest.

15 QUESTION: Mrs. Muncy, what is it take to establish  
16 that a principal purpose of the business is the sale of -- of  
17 -- these -- these materials portraying sexual acts? Is --  
18 suppose I run a general bookstore and my overall purpose is to  
19 sell books, and it turns out that a substantial portion of the  
20 books, I don't know what you want to consider a substantial  
21 portion, but a substantial portion does contain either  
22 pictures or verbal descriptions of sexual activities that --  
23 that come under the ordinance. Could it be said on that basis  
24 that I have as a principal purpose of that business, or do I  
25 have to have explicitly in mind when I go into the business --

1 business, I am going to run a porno shop. I -- I want to have  
2 either a whole shop that is devoted to pornography, or I am  
3 going to have a, you know, a section of the store devoted to  
4 it. Which, is there some scienter requirement?

5 MRS. MUNCY: No, there isn't.

6 QUESTION: There isn't.

7 MRS. MUNCY: No. As a practical matter, in the City of  
8 Dallas, we -- there has been no confusion over that question  
9 because these businesses for the most part are 100 percent  
10 sexually explicit material. However, we've had -- given some  
11 thought to how -- if we were called on to draw the line, how  
12 would we do it. I think there are several factors that would  
13 enter into that. One would be the percentage of the business  
14 in terms of display in the store and amount of sales, but  
15 equally important, I think, is the way the proprietor  
16 advertises the business. Because a sexually explicit business  
17 has to attract a certain clientele, and if you don't advertise  
18 it you won't get that clientele.

19 QUESTION: Well, that sounds like a scienter  
20 requirement. I mean, that -- that seems to me to be direct --  
21 directed precisely at what I asked you was a purpose and you  
22 said it wasn't. You -- you -- you seem to be -- to be saying  
23 the person must want to sell sexual material, that that's --

24 MRS. MUNCY: I'm saying that could be one of the  
25 factors in the determination. The other is the amount of

1 display and the percentage of sales. In -- in -- in  
2 discussing what percentage would -- would it take to make this  
3 a sexually explicit business, I think we have discussed 10  
4 percent to 25 percent of the business being in that type of  
5 materials as triggering that that is a principal business  
6 purpose of that particular business.

7 QUESTION: All right, well, let's assume Barnes and  
8 Noble's is running a bookstore in Dallas and 10 percent of its  
9 books contain description of sexual acts that come under the  
10 ordinance, which might not surprise me, and only one of those  
11 books has no literary or artistic value. That's all it would  
12 take, right, if one book --

13 MRS. MUNCY: No, that would not be a principal business  
14 purpose of that store.

15 QUESTION: Why wouldn't it?

16 MRS. MUNCY: One book? Out of thousands?

17 QUESTION: No, no, no. Ten percent of the books.

18 MRS. MUNCY: Oh.

19 QUESTION: Ten percent of the books contain description  
20 of sexual acts --

21 MRS. MUNCY: Oh, I see.

22 QUESTION: -- but all of them except one book have  
23 literary value.

24 MRS. MUNCY: Literary value.

25 QUESTION: They would come within the ordinance,

1 wouldn't they?

2 MRS. MUNCY: No, because --

3 QUESTION: There is an exception for literary --

4 MRS. MUNCY: There is exception from the licensing  
5 requirements for, and from the location requirements, for  
6 books with literary value.

7 QUESTION: No, there isn't. The -- the exception says  
8 it is a defense if every book has --

9 MRS. MUNCY: Each.

10 QUESTION: -- each book has literary or artistic value.  
11 That is quite different. So if Barnes and Noble's happens to  
12 sell one book that has no literary value, and sells 10 percent  
13 of its overall sales of, you know, Ulysses and other books  
14 that describe sexual acts, Barnes and Noble is under the  
15 ordinance then, right?

16 MRS. MUNCY: What I am saying is, you have told me that  
17 only one book qualifies for the licensing provisions under the  
18 ordinance, and what I am saying is that means that it is not a  
19 principal business purpose of that store. Because the other,  
20 remainder of the 10 percent, are exempt under the exception  
21 for literary value.

22 QUESTION: But no, they are not exempt. They are not  
23 exempt. You -- you just acknowledged that the exception  
24 applies only if every --

25 MRS. MUNCY: All right. I think we're talking past

1 each other.

2 QUESTION: I know I hope so.

3 MRS. MUNCY: The, each book of the 10 percent, except  
4 one, is exempt from the licensing requirement. Each but one.  
5 And only one book qualifies as sexually explicit with no  
6 literary value, if I understand your hypothetical correctly.

7 QUESTION: That's not how it reads. Now -- now, if you  
8 are telling me that is how it is interpreted, it will make it  
9 a lot easier case. But that is certainly not the way it  
10 reads. The -- do you have the exception handy? I forget what  
11 -- I forget what section it is, but it says it shall be a  
12 defense to any prosecution that each -- each of, each item of  
13 the sexually explicit material has literary value.

14 MRS. MUNCY: I think I understand your question. What  
15 I'm saying is that it will not qualify as a principal business  
16 purpose, so if only one of the books doesn't meet this  
17 exception, or this defense, that's my -- that's what I am  
18 saying to you.

19 QUESTION: But the business purpose has to be a purpose  
20 to sell sexually explicit material, which is simply defined as  
21 material that describes these sexual acts, whether it has  
22 literary value or not. So, if you have as a business purpose  
23 selling this stuff, whether it has literary value or not, you  
24 have the -- the offending purpose.

25 MRS. MUNCY: I understand what you are saying, and my

1 response would be that it wasn't the intent --

2 QUESTION: Mrs. Muncy, were there any of the bookstore  
3 Plaintiffs in this action correspond to Justice Scalia's  
4 hypothetical, like Barnes and Noble --

5 MRS. MUNCY: No. All the Petitioner bookstores in this  
6 case are 100 percent sexually explicit materials. And just --

7 QUESTION: Was there a finding of fact on that?

8 MRS. MUNCY: I don't believe so, no. No. It's -- no.  
9 But just to --

10 QUESTION: This was a facial challenge to the  
11 ordinance?

12 MRS. MUNCY: Yes, a facial challenge. It was decided  
13 on the motions for summary judgment.

14 But just to comment once more on Justice Scalia's  
15 question. The way I am describing the ordinance is the intent  
16 and the way that it is enforced.

17 QUESTION: All right.

18 QUESTION: Mrs. Muncy, may I ask, the ordinance  
19 contains none of the Freedman procedures, does it?

20 MRS. MUNCY: That's correct.

21 QUESTION: Why?

22 MRS. MUNCY: There -- there --

23 QUESTION: Why isn't that, without them isn't it  
24 fatally unconstitutional?

25 MRS. MUNCY: The Court has invalidated two types of

1 licensing ordinances that don't contain the Freedman  
2 protections. First is, where the issuance of a license, is  
3 dependent upon the content of the material. And the second  
4 is, where the issuance of a license, is dependent upon  
5 totally, unbridled discretion of the issuing official. And  
6 neither of those situations applies in this case. There is  
7 nothing in the issuance of the license that has anything to do  
8 with the content of the material in this licensing system.  
9 And secondly --

10 QUESTION: Do you think that's what the Riley case  
11 found?

12 MRS. MUNCY: I don't think the Riley case is applicable  
13 here at all. First -- first of all, I believe the Court in  
14 the Riley case said that that was a content-based statute.  
15 This is a content-neutral ordinance. And second of all, the  
16 licensing portion of the ordinance -- of the law in the Riley  
17 case, was invalidated because there was no time limit on when  
18 -- it license could be issued. And in this case we have a 30-  
19 day time limit. The chief is required to issue the license  
20 within 30 days.

21 QUESTION: And if it's -- if it's denied, there is no  
22 provision that the city must take it to court and bear the  
23 burden of proof.

24 MRS. MUNCY: That's -- that's correct. But each of the  
25 requirements for the license is objected, and it serves and



1 provides criteria for a court to determine very easily if  
2 there has been any abuse of those requirements.

3 QUESTION: Did Riley say that was an exception?

4 MRS. MUNCY: I don't believe Riley addressed that  
5 issue.

6 QUESTION: He doesn't have to issue it in 30 days  
7 unless there has already been obtained the certain other  
8 permissions -- fire and -- and other --

9 MRS. MUNCY: Petitioners argued --

10 QUESTION: -- permission from other city's authorities  
11 that are needed, isn't that right?

12 MRS. MUNCY: Yes. Petitioners argued in their reply  
13 brief that that was -- could be used as a delaying tactic.  
14 But let me say, the way the ordinance is administered, when an  
15 applicant puts in his application he is given the telephone  
16 numbers of the inspectors, he is told to call them, set up an  
17 appointment for when he will be there to allow the inspectors  
18 to inspect the business, and every effort is made to get  
19 everything done within 30 days. If --

20 QUESTION: I suppose that if that is bad anyway it is  
21 bad because the fire licensing ordinance is bad. That is to  
22 say, even without this ordinance, if you didn't issue a fire  
23 permit to a -- to a bookstore within -- within a specified  
24 period you would be in violation anyway.

25 MRS. MUNCY: That is correct. And -- and with respect

1 to the inspection provisions, because much has been made of  
2 that, under the Dallas development code every -- every  
3 business is required to get a Certificate of Occupancy when it  
4 moves into a new location and -- and the use of that structure  
5 changes. Those requirements for a Certificate of Occupancy  
6 and the inspections that are required in that instance are  
7 exactly the same as the inspection -- provisions that are in  
8 this ordinance. So there is nothing different or unique about  
9 these inspection provisions than apply to all businesses that  
10 operate in the city.

11 QUESTION: You don't have special provisions for  
12 bookstores?

13 MRS. MUNCY: No, we do not. It is the same for --

14 QUESTION: Do you know if any Texas cities do?

15 MRS. MUNCY: I can't answer for other Texas cities.  
16 All -- all businesses must have a Certificate of Occupancy  
17 that require these inspection provisions.

18 For just a -- a moment, let me comment on some of the  
19 arguments that counsel made. On the question of principal  
20 business purpose not being in the language regarding video  
21 arcades and movie theaters, there the language is "regularly  
22 features sexually explicit films." I have already addressed  
23 the question of the time period, there is a 30 day time period  
24 with regard to issuance of the license under this ordinance.

25 If the Court has a problem with analyzing the licensing

1 provisions under a time, place and manners standard, I don't  
2 think the Court should have any problem in applying the  
3 O'Brien standard to the Dallas ordinance. The -- the  
4 incidental restriction that this ordinance places on a -- a --  
5 an individual's First Amendment rights is not substantially  
6 broader than necessary to accomplish the city's crime control  
7 interests. And the requirements and -- and the  
8 disqualifications apply only to businesses that are documented  
9 to cause these types of sex-related crimes, and only sex-  
10 related crimes serve as disqualifications.

11 So I believe that the Court can apply the O'Brien  
12 standard, and it's our position that -- that the provisions of  
13 this ordinance pass muster very easily under that intermediate  
14 level of First Amendment analysis.

15 QUESTION: May I ask one question about the findings  
16 that the city made to justify the ordinance? You said there  
17 was an increase of crime in the areas where these business  
18 take place. Does that mean there was an increase in sex-  
19 related crime, or in all kinds of crime?

20 MRS. MUNCY: The studies that are conducted by the  
21 other cities generally found the increase was in sex-related  
22 crime. The study that the City of Dallas conducted in the  
23 areas that it looked at were in other kinds of crime as well,  
24 and in fact found that the increase in crime in the Dallas  
25 area around where these businesses were located was 90 percent

1 higher than comparable commercial areas where they are not  
2 located.

3 QUESTION: More robberies and -- and things of that  
4 kind.

5 MRS. MUNCY: Yes, assaults --

6 QUESTION: But -- but they don't disqualify people for  
7 having been prior felons, other than just -- disqualification  
8 is only for prior sexually related crime.

9 MRS. MUNCY: It is only for sex-related crimes, and the  
10 lower -- we had other crimes serving as disqualifications and  
11 the district court found that those were not sufficiently  
12 related to the licensing purpose, and so we removed those  
13 other crimes from the ordinance before it was appealed to the  
14 Fifth Circuit.

15 The licensing provisions of the Dallas ordinance have  
16 considerably less direct impact on the First Amendment rights  
17 of these individuals than do the location requirements in the  
18 ordinance, but they are equally important to the city's crime  
19 control purposes. And so, for sound policy reasons as well as  
20 cogent legal justifications, we submit that the Court should  
21 affirm the court of appeals in this case. Thank you very  
22 much.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mrs. Muncy. The  
24 case is submitted.

25 (Whereupon, at 11:03 a.m., the case in the above-

1 entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of The United States in the Matter of:

No. 87-2012 - FW/PBS, INC., dba PARIS ADULT BOOKSTORE II, ET AL., Petitioners V. CITY

OF DALLAS, ET AL.;

No. 87-2051 - M.J.R., INC., ET AL. Petitioners V. CITY OF DALLAS, ET AL.; and

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No. 88-49 - CALVIN BERRY, III, ET AL., Petitioners V. CITY OF DALLAS, ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

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