No. 2018-351-M.P.

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RHODE ISLAND SUPREME COURT

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Gulliver's Tavern, Inc., d/b/a The Foxy Lady,

Petitioner

v.

City of Providence, Board of Licenses, et al.

Respondents.

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# BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

Since 1959, the ACLU of Rhode Island ("ACLU") has worked to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States, and in particular the right to freedom of speech guaranteed by the First Amendment. In that regard, the ACLU, through volunteer attorneys, has appeared in numerous cases in both this Court and the federal courts—as amicus curiae and as counsel for third parties—in cases raising important issues governing freedom of speech, including, but not limited to, challenges involving municipal entertainment licenses. *See*, e.g., D & J Enterprises, Inc. v. Michaelson, 401 A.2d 440 (R.I. 1979) (ruling state obscenity statute unconstitutional); State v. Lead Industries Association, Inc., 951 A.2d 428 (R.I. 2008) (reviewing First Amendment standards in concluding that Attorney General was not in contempt for making public statements regarding a pending case); Atlantic Beach Casino v. Morenzoni, 749 F.Supp. 38 (D.R.I. 1990) (striking down Town ordinance governing revocation of entertainment licenses); AAK, Inc. v. City of Woonsocket, 830 F.Supp. 99 (D.R.I. 1993) (striking down City entertainment licensing ordinance charging a higher fee for adult cabaret licenses than for other entertainment licenses).

## STATEMENT OF THE CASE

This case addresses the authority of the City of Providence to permanently foreclose Petitioner's ability to engage in protected speech. The First Amendment imposes substantial constraints on municipal licensing schemes that restrict a person's ability to engage in protected speech, including the licensing of adult entertainment like that provided by Petitioner. The Supreme Court has recognized two requirements for a constitutionally valid licensing ordinance that are directly relevant to this case. First, the denial or revocation of a license to engage in protected speech must be immediately appealable as a matter of right, and the status quo must be

preserved pending judicial review. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Freedman v. Maryland, 380 U.S. 51, 58 (1965). Second, a licensing scheme that conditions a person's ability to engage in protected speech comports with the First Amendment only if specifies "narrow, objective, and definite standards" for making licensing decisions, Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969), and does not provide a licensing board "[u]nbridled discretion" to deny or revoke licenses. FW/PBS, Inc., 493 U.S. at 246.

To effectuate these requirements, this Court must immediately grant a stay of the order revoking Petitioner's licenses and must hold that the revocation order is invalid.

**1. Petitioner's Exercise of Protected Speech**

For nearly forty years, Petitioner Gulliver's Tavern, d/b/a Foxy Lady, has been in the business of presenting adult entertainment, also known as exotic or erotic dancing. There can be no doubt that the First Amendment protects its right to do so. See City of Erie v. Pap's A.M., 529 U.S. 277, 299 (2000) ("[N]ude dancing of the type at issue here is expressive conduct."); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment."); Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation").

To be sure, the exotic dancing at Foxy Lady is not the Bolshoi Ballet, and few would argue that it "represents high artistic expression," Schultz v. City of Cumberland, 228 F.3d 831, 839 (7th Cir.2000). Some consider it "low value" speech, Colacurcio v. City of Kent, 163 F.3d 545, 550 (9th Cir. 1998), and some condemn it as demeaning to women, as offensive, or immoral. Yet the

fact that some members of society may frown on this type of expression provides no basis to suppress it. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) ("When the government, acting as censor, undertakes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power.").

Rather than deferring to a public body's discretion to restrict Petitioner's speech, courts must be especially vigilant to protect exotic dancing and other types of unpopular speech precisely because they face the greatest threats of suppression. Cf. Abrams v. United States, 250 U.S. 616, 630 (1919) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe.") (Holmes, J., dissenting).

**2. The Revocation of Petitioner's Licenses to Engage in Protected Speech**

On December 18, 2018, the Providence Board of Licenses ("Board") issued an order that immediately revoked all of Petitioner's licenses—three liquor licenses, an entertainment license, a food license, and a license to operate on holidays. The order effectively shut down Petitioner's operations, putting over 225 people out of work, and prohibiting it from engaging in protected speech. The Board did so based on allegations that on December 11, 2018, undercover police officers at Foxy Lady reported three instances in which Petitioner's workers made solicitations of prostitution. Although solicitation is a misdemeanor, R.I. Gen. Laws § 11-34.1-2, and there was no history of license violations at Petitioner's establishment, the Board concluded that the infraction warranted immediate revocation of all of Petitioner's licenses.

Under its operating ordinance, the Board has nearly unlimited discretion to decide when to suspend or revoke a license. Its governing ordinance provides the Board with authority to "suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any

reason which the board may deem to be in the public interest." Providence Home Rule Charter, Art. XI, Sec. 1102(b)(3). In its "Objection and Memorandum in Opposition to Motion for Stay," submitted to this Court on December 21, 2018, the Board likewise emphasizes that the State of Rhode Island has given the City of Providence "wide discretion" to issue and regulate licenses, p.3, and the City in turn has given the Board "broad authority to issue, suspend, revoke and regulate" licenses, id. at 4.

In revoking Petitioner's licenses, the Board identified no "narrow, objective, and definite standards" it employed in deciding that revocation is warranted. Instead, it explained that it was "mindful of the standard outlined in the case of *Jake and Ella's, Inc. v. Department of Business Regulation*," apparently in reference to an unreported decision of the Superior Court, No. NC01-461, 2002 WL 977812 (R.I. Super. Ct. Apr. 22, 2002). That decision, which reviewed a decision by the Newport Board of Commissioners, provides a set of subjective criteria for assessing the severity of a license infraction: "The factors to be considered in weighing the severity of the violation should include: the number and frequency of the violations, the real and/or potential danger to the public posed by the violation, the nature of any violations and sanctions previously imposed, and any other facts deemed relevant in fashioning an effective and appropriate sanction." Examining these factors, the Board concluded that solicitation of prostitution at Foxy Lady "constitutes a danger to the health, welfare, and quality of life of the public." Petition for Cert., Exh. 1 at 2. Based on this assessment, the Board concluded that immediate revocation of Petitioner's licenses was justified.

Revocation of Petitioner's licenses is a far more severe sanction than the Board has imposed for more serious infractions involving felony-level violence at other licensed establishments:

- In March 2018, a double stabbing occurred inside Club Ultra, and the Board imposed a four-day license suspension and required a permanent police detail on Saturday nights. Minutes, Board of Licenses (Apr. 11, 2018), p. 5, http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8187&Inline=True; see also Dan McGowan, *Club Ultra allowed to reopen after double stabbing*, WPRI (Mar. 22, 2018), https://www.wpri.com/news/crime/club-ultra-allowed-to-reopen-after-double-stabbing_20180403012405456/1094836016.

- In June 2017, a bouncer at the Rock & Rye Bar, who was admittedly hired by the establishment without proper licensing, started a fight with and stabbed a patron. The Board imposed a 12-day suspension of its licenses, mandated weekend police details, and a $1,500 fine. Minutes, Board of Licenses (July 27, 2017), p. 2, http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=5479&Inline=True; see also see also Jennifer Bogdan, *License of Federal Hill Bar Suspended After Stabbing*, Providence Journal, https://www.providencejournal.com/news/20170727/license-of-federal-hill-bar-suspended-after-stabbing (July 27, 2017).

- In October 2018, after a patron at the XS Lounge fired shots outside the bar, the owner of the club was found to have ordered employees to delete surveillance footage the night of the shooting. The Board ordered a thirteen-day suspension of licenses, reduced the club's hours of operations for 90 days, and mandated a police detail. Minutes, Board of Licenses, http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8773&Inline=True (Oct. 24, 2018); see also *Licensing Board Orders Providence Nightclub to Close Early for Next 3 Months After Shooting*, Providence Journal (Oct. 24, 2018), https://www.providencejournal.com/news/20181024/licensing-board-orders-providence-nightclub-to-close-early-for-next-3-months-after-shooting.

- In November 2018, a patron at the Art Bar shot into the ceiling of the building, and the establishment was found not to have had an appropriate security plan in place. The Board imposed a 30-day license suspension, a 90-day reduction in hours, and a requirement to revamp security and install video cameras. Minutes, Board of Licenses (Nov. 15, 2018), at p.9; see also *Art Bar Remains Closed After Shooting Saturday Morning*, Providence Journal (Nov. 4, 2018), https://www.providencejournal.com/news/20181104/art-bar-remains-closed-after-shooting-saturday-morning.

### 3. The Stay Order Issued by the Department of Business Regulation

On December 24, 2018, the Department of Business Regulation (DBR) granted a stay of the order revoking Petitioner's liquor licenses. Under R.I. Gen. Laws § 3-7-21, DBR has jurisdiction to review that revocation, but it lacks jurisdiction to review the revocation of Petitioner's other licenses, including its entertainment license.

DBR concluded that the Board's revocation order was inconsistent with statewide policies on the revocation of liquor licenses. As DBR explained, consistency of treatment for similar violations is necessary because "excessive variance would be evidence that an action was arbitrary and capricious." Mem. at 1-2. DBR further explained that it "supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline." Id. at 3. "The revocation of a liquor license," DBR declared, "is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety." Id. at 4. DBR cited a small number of cases in which revocation of a liquor license was justified, including instances in which patrons at a club had been shot, or where a club had a series of infractions over several years involving sales of alcohol to minors. Id. at 4.

DBR ruled that the allegations of solicitation at Foxy Lady did not rise to the level requiring immediate revocation of Petitioner's liquor licenses. A 2013 incident involving prostitution at the Satin Doll, another adult entertainment venue, resulted in a 20-day suspension of the club's liquor license. Id. at 9. Suspension of licenses, not revocation, has likewise been imposed in cases involving drug sales at a licensee's premises and in cases involving underage sales of alcohol. Id.

**4. The Petition for Certiorari and Stay of the Revocation Order**

On December 20, 2018, Petitioner filed a petition for certiorari in this Court and also requested a stay pending appeal. State law provides Petitioner a right to de novo review by the DBR of the revocation of its *liquor* license, R.I. Gen. Laws § 3-7-21, and further provides a right of appeal to the Superior Court from a final decision by DBR, R.I. Gen. Laws § 42-35-12. No appeal of right is provided for the revocation of Petitioner's *entertainment* license, and Petitioner's only avenue for judicial review of that decision is through a writ of certiorari in this Court. See Cullen v. Town Council of Town of Lincoln, 893 A.2d 239, 249 (R.I. 2006).

As is well-established, "certiorari is a prerogative writ and its issuance and the relief it provides are discretionary and not a matter of right." New Harbor Village, LLC v. Town of New Shoreham Zoning Bd. of Review, 894 A.2d 90, 907 (R.I. 2006). Judicial review of a licensing board's decision through a writ of certiorari is "very narrow and is limited to whether '[the Board] exceed[ed] its jurisdiction or any other serious irregularity inhere[d] in its action upon a matter within its jurisdiction.'" Cullen, 893 A.2d at 249 (quoting The Aldee Corp., 72 R.I. at 201-02, 49 A.2d at 470).

No provision of Rhode Island law grants Petitioner a right to a stay of the revocation decision pending appeal. Instead, this Court employs the four-factor test for a stay set forth in Narragansett Elec. Co. v. Harsch, 367 A.2d 195 (R.I. 1976), and Town of N. Kingstown v. Int'l Assn. of Firefighters, 65 A.3d 480 (R.I. 2013). Those standards give this Court considerable discretion to determine whether a stay is warranted. Applying these standards, on December 21, 2018, Justice Flaherty, as the Duty Justice, issued a preliminary decision denying the request for a stay and placed the petition for writ of certiorari on the Court's conference calendar for January 3, 2019, at which time the motion for reconsideration may be reconsidered by the full Court.

## STANDARD OF REVIEW

Although this Court ordinarily reviews administrative decisions with a deferential standard, that standard does not apply to the review of licensing decisions that effectively foreclose protected speech. Instead, this Court's review of the Board's decision to revoke Petitioner's licenses must be searching, and the Court must determine *de novo* whether the decision satisfies constitutional standards. As the Sixth Circuit has declared, a heightened standard of review in license revocation actions "accords with the longstanding principle that courts should apply

searching review to actions impinging on the freedom of speech." 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485, 498 (6th Cir. 2008).

Numerous courts have agreed that heightened review, not deferential review, governs judicial review of license revocation decisions that restrict protected speech. See, e.g., Adcock v. Board of Educ., 10 Cal.3d 60, 66-67 (Cal. 1973) ("Although the 'substantial evidence' rule has been held to be applicable to determinations of local administrative boards, it has been essential to adopt a special rule or standard to review administrative decisions when constitutional rights are assertedly limited."); In re Hughes & Coleman, 60 S.W.3d 540, 544 (Ky. 1999) ("[W]hen a regulatory body, directly or indirectly, undertakes the responsibility of restricting constitutionally protected speech . . . it must resolve any doubts in favor of permitting the constitutionally protected speech."); cf. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964).

The principle underlying the need for heightened review in this context is that administrative bodies lack authority or expertise to determine constitutional rights. As the Supreme Court has explained, administrative bodies cannot be granted final authority to restrict protected speech: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." Freedman v. Maryland, 380 U.S. 51, 58 (1965); see also Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526 (1970) (explaining that the rationale for requiring judicial evaluation of First Amendment

claims and not deferring to administrative bodies rests upon "the most fundamental considerations—the inherent institutional differences between courts and administrative agencies, no matter how judicial the administrative proceedings may be. First, long judicial tenure frees judges, in most cases, from direct political pressures. Judicial insulation encourages impartial decision making; ... Second, the role of the administrator is not that of the impartial adjudicator but that of the expert—a role that necessarily gives an administrative agency a narrow and restricted viewpoint.").

Accordingly, because this case addresses whether it is permissible for the Board to revoke Petitioner's right to engage in protected speech, a constitutional question beyond the competence of the Board, this Court cannot apply the deferential review it ordinarily applies to Board decisions but must instead apply heightened review to ensure that the Board's decision is consistent with constitutional standards.

## SUMMARY OF ARGUMENT

The First Amendment requires that this Court immediately grant a stay of the order revoking Petitioner's licenses for two independent reasons:

*First*, without regard to the four-factor test that ordinarily governs stay decisions, the First Amendment by its own force mandates a stay pending appeal. The Supreme Court has held that judicial review must be immediately available for any licensing decision that restricts protected speech, and "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo." Freedman v. Maryland, 380 U.S. 51, 59 (1965). Granting a stay of the revocation order is necessary to preserve the status quo and thereby prevent an unconstitutional deprivation of Petitioner's free speech pending judicial review.

*Second*, even if the usual four-factor test for determining a stay applied, Petitioner is entitled to a stay because it is overwhelmingly likely to prevail on the merits of its free speech claim. Ordinances that require licenses to engage in protected speech must provide administrative bodies "narrow, objective, and definite standards," Shuttlesworth v. Birmingham, 394 U.S. 147, 150–151 (1969), and must not provide "unbridled discretion," *FW/PBS*, 493 U.S. at 225. The ordinance governing the Board's revocation decision, however, grants it authority to revoke a license "for any reason which the board may deem to be in the public interest." Providence Home Rule Charter, Art. XI, Sec. 1102(b)(3). That standard exemplifies the "unbridled discretion" that the Supreme Court has repeatedly found to be inconsistent with the requirements of the First Amendment. The Board's history of providing less severe sanctions for more serious crimes at other licensed establishments, including felony acts of violence, illustrates the Board's unconstitutionally broad power to arbitrarily restrict protected speech. As the Supreme Court has observed, "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (quoting Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)).

## ARGUMENT

### I. THE FIRST AMENDMENT REQUIRES A STAY TO MAINTAIN THE STATUS QUO PENDING JUDICIAL REVIEW

Longstanding free speech principles require that this Court grant a stay pending appeal. The First Amendment places significant constraints on licensing schemes that require governmental permission to engage in protected speech. As the Supreme Court long ago declared,

"the freedoms of expression must be ringed about with adequate bulwarks." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963). Statutes and ordinances that require a license before a person can engage in protected speech amount to prior restraints. FW/PBS, Inc., 493 U.S. at 225. As the Court has made clear, "prior restraints are not unconstitutional *per se*." Id. To overcome the presumption against prior restraints, licensing schemes must provide a right to prompt judicial review whenever an administrative board restricts protected speech, and "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo." Freedman v. Maryland, 380 U.S. 51, 59 (1965).

Unlike the Board's revocation of Petitioner's liquor license, Rhode Island law does not give Petitioner a right to appeal the Board's revocation of its entertainment license but instead relegates Petitioner to discretionary review through a petition for certiorari. Cullen v. Town Council of Town of Lincoln, 893 A.2d 239, 249 (R.I. 2006). At the same time, Rhode Island law provides no automatic right to a stay of the revocation decision pending appeal through certiorari. While a limited appeal through the discretionary procedure for seeking certiorari may be adequate in cases that do not involve the deprivation of constitutionally protected rights, these procedures are deficient when a licensing board has denied or revoked a license necessary to engage in protected speech. Without providing appeal as of right and without a stay pending appeal, a decision of the Board may completely and permanently foreclose Petitioner from engaging in protected speech without any meaningful judicial review. As the Supreme Court has long held, such limited procedures for reviewing restrictions on protected speech are constitutionally deficient.

In Freedman v. Maryland, 380 U.S. 51 (1965), the Court reviewed a Maryland statute that required a film board to review and provide a license before any motion picture could be exhibited.

The Court held that a statute that requires a license to engage in protected speech must provide substantial procedural safeguards, including a right to prompt judicial review and the preservation of the status quo during the pendency of judicial review. Id. at 59. In FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), the Court applied the principles of *Freedman* to a licensing scheme regulating adult entertainment. Although the Court was fragmented on some issues, six Justices agreed that ordinances licensing adult entertainment must contain, at a minimum, two procedural safeguards. First, "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." Id. at 228. Second, "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." Id.

Limited, discretionary review provided through a petition for a writ of certiorari is inadequate to meet the procedural requirements of *Freedman* and *FW/PBS*.. In Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville, 274 F.3d 377, 401 (6th Cir. 2001), the Sixth Circuit held that a municipal ordinance for licensing adult entertainment was facially invalid because judicial review of licensing decisions could only be pursued through a petition for a writ of certiorari: "the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a 'final judicial adjudication on the merits,' as required under *Freedman*'s first safeguard." The Sixth Circuit held that the discretionary nature of the writ made the licensing scheme facially unconstitutional: "we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman*." Id. at 401; see also Deja Vu of Kentucky, Inc. v. Lexington-Fayette Urban County Government, 194 F.Supp.2d 606, 617 (E.D. Ky. 2012) ("The fact that judicial review is discretionary fails to meet the constitutional requirement of a 'final judicial adjudication on the

merits' and serves as a second independent reason for finding the entire Ordinance facially unconstitutional.")

The procedure for pursuing discretionary judicial review of the revocation of Petitioner's licenses in this case is identical to the procedure found deficient in *Deja Vu.* A limited discretionary review categorically fails to provide adequate protections for the freedom of expression.

The discretionary stay procedure available to Petitioner is likewise constitutionally deficient. Pursuant to the U.S. Supreme Court's caselaw, the status quo must be preserved during the pendency of judicial review. *Freedman*, 380 U.S. at 59; see also Bronco's Entertainment, Ltd. v. Charter Tp. of Van Buren, 421 F.3d 440, 444 (6th Cir. 2005) ("[T]he decision whether to issue a license must be made within a specified-and brief-time period, and the status quo must be maintained during that period and during the course of any judicial review.").

In the context of revocation decisions, courts have uniformly ruled that preserving the status quo requires a stay pending judicial review. As the Ninth Circuit has ruled, when judicial review is sought for an order suspending or revoking an adult entertainment license, "preservation of the status quo means that the suspension or revocation cannot be enforced, and the business is allowed to continue to operate under its license." 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108, 1114 (9th Cir. 1999). In *Convoy*, the Ninth Circuit held that the procedures for revoking an adult entertainment license were facially invalid because California law did not provide for an automatic stay pending judicial review:

> California's statutory framework provides that a court "may stay the operation of the administrative order or decision pending the judgment of the court" unless a stay would be contrary to the public interest. Cal. Code Civ. Pro. § 1094.5(g). Thus, there is no guarantee of a stay—if the court is satisfied that a stay would not be contrary to the public interest, it may grant the stay, but is not required to do so. This gives rise to the possibility of the suppression of protected expression before judicial review of the case on

> the merits, and is therefore contrary to the principles which underlie the procedural safeguards set forth in *FW/PBS*. Thus, while the maintenance of the status quo in the license suspension and revocation context may save an ordinance which does not provide for a prompt judicial hearing or decision, we cannot conclude that a discretionary stay provides the requisite protection in such a case. . . . Accordingly, we must conclude that the City's scheme for suspending and revoking licenses fails to satisfy the judicial review safeguard and is therefore unconstitutional.

183 F.3d at 1106.

Courts have uniformly agreed that the First Amendment requires a stay pending judicial review of any administrative order revoking or suspending licenses to engage in protected speech. See Grand Brittain, Inc. v. City of Amarillo, Tex., 27 F.3d 1068, 1071 (5th Cir. 1994) ("The status quo required by *FW/PBS* mandates that the city cannot regulate under the adult business regulation an operating adult business during a revocation proceedings until the Chief of Police's licensing decision is final."); Vivid Entertainment, LLC v. Fielding (C.D. Cal. 2013) (holding the procedures of a municipal ordinance "unconstitutional because they provide for suspensions and revocations before a judicial determination"); City of Colorado Springs v. 2354 Inc., 896 P.2d 272, 284 (Colo. 1995) ("[I]f the sexually oriented business is operational, preservation of the status quo will in all probability require that the suspension or revocation be stayed pending final judicial resolution on the merits.").

As these cases demonstrate, the inadequacies of the procedures governing the revocation of Petitioner's license—both the failure to provide for judicial review as of right and the failure to provide an automatic stay pending judicial review—would provide sufficient grounds to find the licensing ordinance unconstitutional on its face. Because this case arises as an as-applied challenge to a specific revocation decision, this Court may correct the constitutionally deficient procedures

by granting an immediate stay of the revocation order and by recognizing Petitioner's right to judicial review.

For every day that the revocation order remains in place without a stay, Petitioner has been deprived of its ability to engage in constitutionally protected speech without any judicial review. The First Amendment does not allow this result.

## II. THE REVOCATION ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT REFLECTS "UNBRIDLED DISCRETION" AND ARBITRARY DECISIONMAKING

As discussed above, the usual four-factor test for deciding whether to grant a stay pending appeal does not apply in this case because the First Amendment by its own force mandates a stay to preserve the status quo and thereby preserve Petitioner's free speech rights pending judicial review. Even if the ordinary standards for granting a stay pending appeal applied, however, Petitioner would be entitled to a stay because of the overwhelming likelihood that it will prevail on the merits of its appeal.

The First Amendment requires that a licensing system for engaging in protected speech specify "narrow, objective, and definite standards" for determining when to grant or revoke a license, Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969), and cannot provide licensing boards "unbridled discretion," *FW/PBS*, 493 U.S. at 225. As the Supreme Court has concluded, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth*, 394 U.S. at 151.

This Court cannot let stand the revocation of Petitioner' licenses because the Board lacks any definite criteria to determine when it is justifiable to revoke a license to engage in protected speech. The ordinance under which the Board operates gives the Board exactly the "unbridled discretion" that the Supreme Court has repeatedly found to violate the First Amendment. The

Board's decision to revoke Petitioner's license, a far more severe sanction than it has imposed in response to serious incidents of violence, illustrates the Board's power to suppress speech arbitrarily that the prohibition against "unbridled discretion" is intended to prevent. As the Supreme Court has observed, "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (quoting Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)).

### A. The Revocation Order Is Invalid Because the Board Lacks Any Definite Standards to Determine When Revocation Is Justified

The Providence Home Rule Charter, which created the Board of Licenses, provides the Board with authority to "suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any reason which the board may deem to be in the public interest." Providence Home Rule Charter, Art. XI, Sec. 1102(b)(3). Under this provision, the Board has authority to revoke an entertainment license—and thereby permanently prohibit constitutionally protected speech—based on "any reason which the board may be deem to be in the public interest." The ordinance does not provide the Board with the "narrow, objective, and definite standards" that are constitutionally required to guide the Board in deciding when to revoke an entertainment license and thereby deny Petitioner the right to engage in protected speech. The revocation order must therefore be rejected because it was based on a facially invalid ordinance.

In *Shuttlesworth*, the Supreme Court found unconstitutional a strikingly similar Birmingham ordinance that provided a city commission broad discretion to grant or deny parade permits. The ordinance provided that the commission should grant a parade permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience

require that it be refused." 394 U.S. at 349-350. Like the Providence ordinance governing the Board of Licenses, the Birmingham ordinance gave the Commission authority to deny a permit on any basis that the commission deemed to involve the public interest. The Court declared that the ordinance was facially unconstitutional because it provided no concrete criteria for deciding when constitutionally protected speech could be curtailed. As the Court explained:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

394 U.S. at 151-152; see also Vivid Entertainment, 965 F.Supp.2d at 1129 ("Measure B allows, under some circumstances, for the denial of permits when adult film makers violate unnamed, undescribed 'standards affecting public health.' This is unbridled discretion.").

In subsequent cases, the U.S. Supreme Court made clear that the invalidity of licensing ordinances that provide administrative boards "unbridled discretion' applies equally to ordinances for licensing adult entertainment. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 226 ("It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.") (quoting *Shuttlesworth*, 394 U.S. at 151). The Eleventh Circuit succinctly described the constitutional requirement that licensing schemes for adult entertainment must

provide license boards with definite criteria to guide their decisions: "An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid." Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1362 (11th Cir. 1999).

The requirement that licensing ordinances provide definite criteria and must not provide "unbridled discretion" applies to ordinances authorizing the revocation of licenses, just as it applies to decisions whether to grant a license. See New England Regional Council of Carpenters v. Kinton, 284 F.3d 9, 25 n.8 (1st Cir. 2002) ("[T]he power to revoke a permit prior to the event presents the same *Shuttlesworth* concerns as the power to deny it in the first place."); 4805 Convoy, 183 F.3d at 1113 (holding that the First Amendment standards for licensing schemes "apply to license suspensions and revocations as well as license denials").

The absence of any definite criteria for revoking Petitioner's license is fatal to the revocation decision, regardless of whether the Board acted in good faith and regardless of whether it intended to suppress Petitioner's speech. As the Supreme Court has explained, "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988) (plurality decision). Unfettered discretion to deny or revoke speech-related licenses arbitrarily invites the suppression of free speech, while also making it nearly impossible to determine whether officials acted for the purpose of suppressing speech. In the absence of definite criteria for revoking a license, "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing

unfavorable, expression. . . . In sum, without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as-applied' challenges render the licensor's action in large measure effectively unreviewable." Id. at 761.

It may well be that the Board acted in good faith and did not revoke Petitioner's licenses out of hostility to the kind of expressive conduct on display at Foxy Lady. But the Board's good faith and lack of animus cannot justify a revocation decision made without definite standards. As the Supreme Court ruled in *City of Lakewood* in declaring a similarly broad ordinance unconstitutional on its face:

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows.

468 U.S. at 770. Accordingly, the revocation order here is invalid regardless of the asserted good faith of the Board in determining that the public interest justifies revocation.

To be sure, the Supreme Court has suggested that an ordinance that does not itself provide any definite criteria to guide administrative discretion might be saved if such criteria were imposed by other sources, such as other statutes incorporated by reference or by "binding judicial or administrative construction, or well-established practice." Id. No such law or practice has been adopted, however, that provide the ""narrow, objective, and definite standards" that the Board's governing ordinance manifestly lacks. State law provides the Board authority to impose sanctions on a licensee that breaches the terms of a license or permits crimes on its premises, see R.I. Gen. Laws §§ 3-5-21, 3-5-23, but those statutory provisions establish no criteria for the Board to employ in deciding what sanctions to impose. In its decision in this case, the Board pointed to the "standard

outlined in the case of *Jake and Ella's, Inc. v. Department of Business Regulation*," apparently referring to an unreported decision of the Superior Court, No. NC01-461, 2002 WL 977812 (R.I. Super. Ct. Apr. 22, 2002). The referenced decision, however, is not a binding judicial interpretation of the authority of the Providence Board of Licenses but instead identifies a set of open-ended factors applicable to the Newport Board of License Commissioners under a different municipal ordinance. It does not supply any definite, narrow, and objective criteria for the Board to employ in deciding whether to revoke Petitioner's right to engage in protected speech.[1]

### B. The Revocation of Petitioner's Licenses Illustrates the Board's Unconstitutionally Broad Authority to Suppress Protected Speech Arbitrarily

Although the lack of any definite criteria governing the revocation decision by itself demonstrates the invalidity of the revocation order, the unconstitutionally arbitrary nature of the decision becomes manifest when considered in light of other Board decisions. The Board has routinely suspended licenses rather than imposing revocation following much more serious infractions involving violence. Yet the Board chose to impose the ultimate penalty it has available—immediate and permanent revocation—based on Petitioner's first offense involving allegations of a non-violent misdemeanor.

When an as-applied challenge is brought to the application of a license ordinance that restricts free speech, rather than to the facial validity of the ordinance, a court may look to how the

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[1] Even if the broadly phrased *Jake & Ella's* factors established constitutionally sufficient criteria for guiding the Board's revocation decision, it is impossible to understand how they justify the decision in this case. Those factors include (1) "the severity of the violation"—in this case, the violation involves allegations of misdemeanor solicitation; (2) "the number and frequency of the violation"—in this case, the violation involves three incidents occurring on a single night; (3) "the real and/or potential danger to the public posed by the violation"—the Board offered no explanation for its conclusion that the solicitation incident creates a danger to the public; and (4) "the nature of any violations and sanctions previously imposed"—in this case, Petitioner had no prior violations.

ordinance has been applied in other areas to determine if the challenged application bears the hallmarks of an arbitrary and unconstitutional decision. As the Supreme Court has stated, "the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 761 (1988) (plurality decision).

The Board has been much more lenient when serious acts of violence occurred at licensed establishments. To cite just a few of many examples:

- The Board imposed a four-day license suspension after a double stabbing occurred inside Club Ultra. Minutes, Board of Licenses (Apr. 11, 2018), p. 5, http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8187&Inline=True.
- After a bouncer at the Rock & Rye Bar started a fight with and stabbed a patron, the Board imposed a 12-day suspension. Minutes, Board of Licenses (July 27, 2017), p. 2, http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=5479&Inline=True.
- When a patron at the XS Lounge fired shots outside the bar, and the club's owner was found to have ordered employees to delete surveillance footage the night of the shooting, the Board ordered a thirteen-day suspension of licenses. Minutes, Board of Licenses, http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8773&Inline=True (Oct. 24, 2018)
- The Board imposed a 30-day suspension against the licenses held by the Art Bar after a patron shot into the ceiling of the building, and the establishment was found not to have had an appropriate security plan in place. Minutes, Board of Licenses (Nov. 15, 2018), at p.9.

These examples demonstrate the arbitrary nature of the decision to impose revocation based on allegations of solicitation of prostitution, a nonviolent misdemeanor, in contrast to the lenient sentences imposed following serious instances of violence. As these examples illustrate, the revocation of Petitioner's right to engage in protected speech is precisely the type of arbitrary suppression of speech prohibited by the First Amendment. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).

The Department of Business Regulation (DBR) has already determined that revocation of Petitioner's liquor licenses cannot be squared with decisions across the state involving more serious crimes occurring at licensed establishments. As DBR noted, revocation of licenses "is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety." DBR Decision at 4. Revocation has not been imposed for drug sales at licensed establishments. Id. Most notably, DBR found that allegations of prostitution at Satin Doll, another venue for exotic dancing, did not justify the revocation of Satin Doll's licenses. Id. Accordingly, DBR found that revoking Petitioner's liquor licenses would be inconsistent with the treatment of other similar cases.

The Board's past rulings and DBR's stay order demonstrates what should be apparent: the Board's decision was manifestly arbitrary and therefore was inconsistent with the dictates of the First Amendment.

### C. Providence Ordinance § 14-17 Compounds the Constitutional Infirmities of the Revocation Decision

The unbridled discretion of the Board and the arbitrary sanction imposed in this case is not cured by Providence City Ordinance § 14-17, cited by the Board in its submission to this Court, which appears to require the immediate revocation of all licenses upon a finding that the use of a licensee's premises for prostitution "resulted from the gross negligence of the licensee."[2] As an initial matter, it is not clear that this ordinance can properly be invoked to justify revocation

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[2] The ordinance is not a model of draftsmanship and its import is far from clear. On the one hand, it appears to be targeting licensed businesses engaged in adult-oriented entertainment, in that section (b) prohibits a licensee from allowing minors to be present on premises where workers appear nude or semi-nude, as those terms are defined in the ordinance. On the other hand, section (c) appears to be directed at businesses operating with any type of license regulated by the Board. In its submission to this Court in opposition to a stay, the Board appears to take the position that the ordinance applies to entertainment licenses and not liquor licenses. City of Providence, Objection and Memorandum in Opposition to Motion for Stay at 6.

because it was not identified in the show cause order and Petitioner therefore had no notice that it would need to defend itself against a charge of "gross negligence." As this Court has recognized, "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." In re Cross, 617 A.2d 97, 102 (R.I. 1992) (quoting Mathews v. Eldridge, 424 U.S. 319, 348 (1976)). Even if Petitioner had received notice of an allegation of "gross negligence," the Board made no finding of gross negligence to satisfy the terms of the Ordinance. Accordingly, it is not clear that the ordinance has any bearing in this matter.

Moreover, the Board did not read Ordinance 14-17 to providing the "narrow, objective, and definite" standard that mandates revocation. Instead, the Board's decision reflects its view that it has broad discretion to determine whether revocation is in the public interest.

In any event, to the extent that Ordinance 14-17 has any bearing on this Court's consideration of the revocation order, it compounds the constitutional problems instead of resolving them. The DBR decision makes clear that the Ordinance cannot be applied to the revocation of liquor licenses because, as the DBR found, it would be inconsistent with statewide policies to revoke liquor licenses based solely on a first offense that solicitation of prostitution occurred on a licensee's premises. As a result, the ordinance can only be applied to Petitioner's entertainment license, which does not fall within DBR's jurisdiction. In its submission to this Court, the Board apparently takes the position that the ordinance gives it greater power to revoke entertainment licenses than it has to revoke liquor licenses: "The general rule applied to liquor licenses matters requiring progressive discipline is not a requisite in entertainment license matters." City of Providence, Objection and Memorandum in Opposition to Motion for Stay at 6.

The Board's position turns the First Amendment on its head. Under the Board's position, establishments like the Foxy Lady that require entertainment licenses to engage in protected First Amendment activities face more severe punishment for the same conduct—allowing solicitation of prostitution on its premises—than businesses that do not engage in protected speech. In the Board's view, Foxy Lady can be shut down for a first offense, while nightclubs that sell liquor but are not in the business of providing adult entertainment cannot be shut down when they engage in identical conduct. The Board's position cannot be squared with the First Amendment, which prohibits the government from imposing more severe sanctions on licenses because they are engaged in protected speech than it would impose for identical infractions by licensees not engaged in speech. Whatever else the First Amendment means, it does not allow the government to punish Petitioner, or punish it more harshly than other establishments, because it engages in protected speech.

## CONCLUSION

For the foregoing reasons, this Court should grant an immediate stay of the revocation order and reverse the revocation decision.

Dated: December 31, 2018
Providence, Rhode Island

Respectfully submitted,
For amicus curiae ACLU of Rhode Island

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## CERTIFICATION

I hereby certify that on this 31st day of December, 2018, I filed and caused to be mailed the Motion for Leave to File Brief as Amicus Curiae upon the following parties:

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