19-5876

Case No: _____

IN THE UNITED STATES SUPREME COURT

WISCONSIN *ex rel.* JOACHIM DRESSLER, Petitioner,

vs.

RACINE CIRCUIT COURT, Et. Al, Respondents.

ORIGINAL

On a Petition For a Writ of Certiorari To
The Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Joachim Dressler, 230174
Petitioner *pro se*
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P.O. Box 351
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QUESTION PRESENTED

Do this Court's First Amendment "prior restraint" holdings that command "strict procedural safeguards" designed to obviate the dangers of a freewheeling censorship system, see *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) and *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), permit Wisconsin to authorize the seizure – from a home – of any, unspecified, First Amendment-*protected* printed and filmed materials officers can find; permit a court to declare the mere "act of possessing" them as "other acts" evidence to admit their message-content as inculpatory criminal evidence to "prove" the defendant is homosexual; expressly deny a *Freedman* adversary hearing and "prompt judicial review;" and threaten sanctions for seeking *Freedman* compliance any First Amendment merits review in its courts?

List of Parties

A list of the parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Petitioner

JOACHIM DRESSLER

Respondents

Racine Circuit Court

Racine District Attorney

Wisconsin Court of Appeals, Dist. II

Wisconsin Supreme Court

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Opinions Below

The Order of the Wisconsin Court of Appeals denying Mandamus and a Stay dated June 12, 2018, is unpublished and appears at **App. A** to this petition.

The Order of the Wisconsin Supreme Court denying Mandamus and a Stay as a petition for cert. review, dated October 9, 2018, appears at **App. C** to this petition.

Jurisdictional Statement

Jurisdiction of this Court is invoked under both 28 U.S.C.A. §1254 and *Steel co. v. Citizens for a Better Environment*, 532 U.S. 83, 95 (1998) ("[I]f the record disclosed that the lower court was without jurisdiction this court will notice the defect. ...[W]e have jurisdiction on appeal, not of the merits but of the error of the lower court in entertaining the suit.")

Constitutional And Statutory Provisions Involved

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges of immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without the process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Wis. Stat. § 809.51

(1) A person may request the court to exercise its supervisory jurisdiction or is original jurisdiction to issue a prerogative writ over a court and the presiding judge, or other persons or body, by filing a petition and supporting memorandum.

Wis. Stat. § 809.71

A person seeking a supervisory writ from the supreme court shall first file a petition for a supervisory writ in the court of appeals under §809.51 unless it is impractical to seek the writ in the court of appeals. A petition to the supreme court shall show why it was impractical to seek the writ in the court of appeals or, if a petition has been filed in the court of appeals, the disposition made and reasons given by the court of appeals.

Wis. Stat. § 904.01

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would without the evidence.

Wis. Stat. § 904.04(2)

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acts in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Wis. Stat. § 968.13

Search warrant; property subject to seizure: (1) A search warrant may authorize the seizure of the following:

(a) Contraband, ... lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films...

BACKGROUND And FACTS

Exercising their rights guaranteed by the First and Fourteenth Amendments as well as the Wisconsin Constitution, Mr. and Mrs. Dressler merely possessed articles from magazines such as *Time* and *Newsweek*, some of which depict violence; commercially produced erotica of various varieties; and three commercial videos entitled *The Faces of Death*.[1] They were located in their home out of the reach of their children. All are available in a public library or to adults in bookstores or video outlets.

It is undisputed that all are protected by the First Amendment.

None of the materials depict the victim or crime charged: Their commercial publication pre-dated the crime charged by a minimum of two years. Mr. Dressler did not distribute, author, or produce the materials at issue. He did not testify as a witness at his jury trial. The record is void of any evidence that he advocated, expressed an opinion, or espoused the ideas contained or depicted in them. The trial court lacked any evidence from which to make a finding of how the materials came into his possession; under what circumstances; or when, how, or by whom the materials were compiled. (App E: Exh. C: R117, 54-55)

James Madden's dismembered remains, testing positive for illegal drugs, were found in Racine, Wis. in July 1990. A convicted drug offender and informant, Madden supported himself traveling with a rock band selling illegal drugs, including to the Hells Angels who became aware he was an informant. He pled guilty to drug charges in Baltimore, Md., and while on bond, traveled to Wisconsin. Desperate for leads in Madden's death, Racine officials sought a search warrant for Dressler's home. A lengthy affidavit dated July 28, 1990, indicated that the Dresslers possessed three videos entitled *The Faces of Death* (App. E: Exh. A, ¶37).

[1] *The Faces of Death*, a "Grade B" video (at best) is available at most video outlets. Its depictions of violence are fully protected by the First Amendment. *Winters v. New York*, 333 U.S. 507, 510 (1948); *U.S. v. Stevens*, 559 U.S. 460 (2010).

Words such as "homosexual" or "pornography" do not appear in the affidavit. The resulting search warrant for the Dressler home failed to specify any publications whatsoever. It authorized *carte blanche* seizure of any and all:

> 7. Written materials, photographs, ***video tapes, or other materials including but not limited to*** sado-masochism pornography, "snuff films" depicting torture or death scenes; Warrant, July 28, 1990 (Emphasis added) (App. E: Exh. B: ¶7)

Once officials discovered *homosexual* erotica in the Dressler home, all bets were off. Absent a warrant and while simultaneously engaging in a two-day long search of Dressler's home, Racine Sheriff Rohner ordered Dressler "apprehended" at gunpoint when he exited a hardware store, transported handcuffed to a police station for hours of hostile interrogation regarding his presumed homosexual status and Madden's death, and repeatedly threatened him, demanding that he "confess" and "prove his innocence." After two hours Dressler finally asked for an attorney, which was not provided. Instead, he was read *Miranda* rights and released without arrest. The search resulted in no arrest. He has no prior arrest or criminal record.

Denying a defense – and offer of proof – of a drug informant retaliation homicide, and denying the jury any knowledge of Madden's drug dealing or informant status, the state was permitted to invert ***Homosexual Overkill,*** a term describing a "hate crime" where homosexuals are the <u>victims</u> of vicious homophobic assaults, to a theory of prosecution where homosexuals are the <u>perpetrators</u> who "kill, in their panic or rage, or whatever motivates" them.[2] (App. E, R134; 47). It offered the seized First Amendment-protected publications as "other acts" evidence for its case-in-chief and asked the court to review the *content* of the publications in chambers, *ex parte*, and rule them admissible:

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[2] There was no evidence that Madden was homosexual, that he engaged in homosexual conduct, or that his remains showed any homosexual activity. To this day, in the entire universe of federal and state cases reported on LEXIS-NEXIS, there is *not one* reference to ***Homosexual Overkill*** (except, of course, the repeated references in this case). Search conducted Dec. 4, 2018.

THE COURT: We'll take about a ten-minute recess here. I am going to read the facts and law again in the *Evers* case, and I also want to take a look at the items that Mrs. Weber wants me to look at. I will take those into chambers with me and be back in about 10 minutes.

(Recess had)

All right. The record will show that the appearances continue as they were, that we have been in recess for about fifteen or twenty minutes, that in chambers I had a chance to review the materials presented by the State in the briefcase, on the placards and the six paperback books that were presented... The issue is whether or not the State should be allowed to offer information into the record that consists of videotapes, and as referred to in the defendant's motion, collected published materials that some of which were mentioned orally on the record and others which I was able to review.

(App. E: Exh. C: R117:43-44)

The trial court reasoned: "The State's case is in fact by agreement by the defense a weak case. It's a circumstantial case, and that, therefore, this type of evidence is important for the presentation for the State's case, ...it's important to the State's case in order for them to meet their burden of proof." *Id*, at 51. It found that the published materials were lawfully possessed, specifically denied an adversary hearing, and construed and applied Wis. Stat. §904.04(2) as urged by the state:

THE COURT: Well, certainly as the statute defines the terms, there's no crime here. We have all agreed to that. The State hasn't suggested there's a crime in the possession of these materials. Other wrongs, I don't know. **I guess *I don't want to* get into litigation whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession, although again that's a matter of state and national import**, so I'm not making a judgment as to whether or not those are crimes to possess the materials. I don't think I am in a position to do that. I am not being asked to do that.

MR. MATHIE (Defense Counsel): [I]s the only act or wrong or crime, whatever you define it, is the possession of those materials, is that what the court's ruling is?

THE COURT: **Yes.** *Id*, at 53-54 (Emphasis added)

Demonstrating its impermissible content-based reasoning, the court stated: "there was homosexuality on the part of the defendant. He possessed those materials. They clearly depict homosexuality." (App E: Exh. D: R131: 27)

The state failed to seek an adversary hearing and "prompt judicial review" pursuant to *Freedman v. Maryland,* 380 U.S. 51, 58 (1965), and *State v. I, A Woman-Part II*, 53 Wis.2d 102 (Wis. 1971) (Applying *Freedman* to Wisconsin).

> [A]n invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First-Amendment protection. *I, A Woman*, at 112-113 (Citing *Freedman).*
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> The teaching of our cases is that because **only** a judicial determination in an adversary hearing ensures the necessary sensitivity to freedom of expression, **only a procedure requiring a judicial determination** suffices to impose a valid final restraint. *Freedman*, supra at 58 (Emphasis added).

Nothing in the trial or any subsequent proceeding cured twenty-eight years of delay in the unconstitutional suppression of protected speech.

The Right To An Adversary Hearing and "Prompt Judicial Review" is Indisputably Clear

1. Seizure of Expressive Materials Mandates an Adversary Hearing

States must provide procedures amply adequate to safeguard against invasion of speech that the Constitution protects. Because the line between speech *unconditionally* guaranteed and speech that may legitimately be regulated, suppressed, or punished is finely drawn, where the transcendent value of speech is involved, Due Process requires that the state bear the burden of proving that the appellant engaged in criminal speech. Speech must be unencumbered until the State comes forward with sufficient proof to justify its inhibition. *Speiser v. Randall*, 357 U.S. 513, 524-529 (1958). A system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. *Freedman v. Maryland,* supra, at 58.

This Court has mandated an adversary hearing before any speech materials are subject to seizure. "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *A Quantity of Books v. Kansas,* 378 U.S. 205, 213 (1964); *Marcus v Search Warrants,* 367 U.S. 717, 736 (1961). Accordingly, Wisconsin applied a limiting construction to (now) §968.13, Stats. to cure its facial overbreadth – and to forbid warrants and seizures of First Amendment *protected* printed and filmed materials:

> The words "lewd, obscene, or indecent" in the Wisconsin contraband statute **must** be interpreted in the constitutional sense as **including only** printed and filmed materials that are **not protected** by the First Amendment to the United States Constitution as interpreted by the United States Supreme Court. *State v. Voshart*, 39 Wis.2d 419, 429 (1968) (Emphasis added).

This Court reiterated why seizures of expressive materials mandate *Freedman* compliance:

> Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause, ...it is otherwise when materials presumptively protected by the First Amendment are involved. It is the risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials that motivates this rule. ...[M]ere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation. ... [The First Amendment] presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 64 (1989) (Citations and quotations omitted).

"It is clearly established that under federal law a motion picture cannot be seized without a prior adversary hearing." *Detco, Inc. v. Neelen*, 356 F.Supp. 289, 290 (E.D. Wis. 1973). "The same is obviously true for books or any other expressive materials." *Ft. Wayne Books,* at 63. Where Virginia's seizure procedures lacked *Freedman's* requirements of sensitivity to freedom of expression, "The admission of the films in evidence requires reversal of petitioner's conviction." *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636, 637 (1968).

2. Admission of Expressive Materials Mandates an Adversary Hearing and "Prompt Judicial Review"

This Court has never condoned Racine's Orwellian concept of "guilt-by-book-association." When Georgia admitted publications that Angelo Herndon possessed as evidence in prosecuting for inciting insurrection, this Court ruled that the strict vagueness standards of the First and Fourteenth Amendments forbid *any* inference from their possession:

> **No inference can be drawn from the possession of the books mentioned**, either that they embodied the doctrines of the Communist Party or that they represented the views of the appellant. ... The question thus proposed to a jury involves pure speculation as to future trends of thought and action ...[and] licenses a jury to create its own standards in each case. *Herndon v. Lowrey*, 301 U.S. 242, 249, 263 (1937) (Emphasis added).

The First Amendment fully protects "collections of stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes." *Winters v. New York*, 333 U.S. 507, 510 (1948). Relying heavily on *Herndon*, this Court explained why their admission as criminal evidence is unconstitutional:

> [W]e think fair use of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier of fact to know where this new standard of guilt would draw the line between allowable and forbidden publications. ...Collections of tales of war horrors, otherwise unexceptional, might well be found to be so "massed" as to become "vehicles for inciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Winters*, at 519-20.

After *Herndon* and *Winters,* any regulation in the First Amendment area must strictly be limited to conduct that is "specifically defined by the applicable state law, as written or authoritatively construed." *Miller v. California*, 413 U.S. 15, 23-24 (1972). The doctrine forbidding unbridled discretion requires laws applicable to speech to be "explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 770 (1988). Statutes must be carefully drawn or be authoritatively construed to apply only to unprotected speech "and not be

susceptible of application to protected expression." *Gooding v. Wilson,* 405 U.S. 518, 522 (1972). Wisconsin may regulate only unprotected speech. *State v. Douglas D.,* 2001 WI 47 ¶19.

The State must bear the burden to prove that speech is unprotected, because "where particular speech falls close to the line separating lawful and unlawful, the possiblility of mistaken fact-finding – inherent in all litigation – will create the danger that the legitimate utterances will be penalized." Thus, it "can only result in a deterence of speech which the Constitution makes free." *Speiser v. Randall*, supra, at 526.

This Court articulated its strict procedural safeguards in *Freedman v. Maryland,* and repeatedly affirmed what is now indisputably clear:

> We held in *Freedman*, and reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, **must** rest on the censor. Second, **any** restraint prior to judicial review can be imposed **only** for a specified period, and **only for the purpose** of preserving the *status quo*. Third, a prompt final judicial determination **must** be assured. ...
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> And if judicial review is made unduly onerous, by reason of delay or otherwise, the [censor's] determination in practice may be final. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559-560 (1975). (Emphasis added)

Wisconsin's Supreme Court applied *Freedman* and *Blount v. Rizzi,* 400 U.S. 410 (1971), with *State v. I, A Woman, Part II,* supra. The Court incorporated the following "strict procedural safeguards" under the Wisconsin Constitution to guarantee that its courts can never impose – or maintain – any prior restraint of free speech:

- A statute that **permits** an interlocutory order that admits expressive materials into evidence in a criminal trial – where they could have evidentiary weight – is unconstitutional and authorizes an impermissible and unconstitutional prior restraint. "In addition, **the mere issuance** of the interlocutory judgment, **even without its subsequent use in a criminal trial,** constitutes an impermissible chilling of First Amendment rights where there has been no prior adversary adjudication of obscenity." *Id,* at 113-114. (Emphasis added)
- Interlocutory orders not in compliance with *Freedman* are void – and are not subject to any merits review. *Id.* at 110, 115.

- The Court specifically warned Wisconsin judges not to enter such orders precisely because of their constitutional infirmity. *Id,* at 119.

- Wisconsin's Legislature determined that (now) §806.05 is the exclusive means to declare printed and filmed materials "obscene" – thus unprotected by the First Amendment – and "that all possible alternate common law or equitable *in rem* proceedings have been suspended." *Id,* at 109.

- A statute that is interpreted to relieve the state of its burden of proving that the material is an unprotected form of expression is unconstitutional. "Since the public interest is affected in the process of finding any matter not protected by the First Amendment, the [state] is obligated to assume its burden of presenting a prima facie case, default or not." *Id*, at 115 (Emphasis added).

- *Freedman's* "strict procedural safeguards" are jurisdictional. *Id,* at 110 and 121. The adversary hearing provides the constitutionally required element of scienter or *mens rae. Id,* at 116. Wisconsin mandates "prompt judicial merits review." *Id,* at 115, 116, and 119.

Thus, in Wisconsin the doctrine of void judgments controls interlocutory orders entered absent *Freedman* compliance and review. "Judgments entered contrary to due process are void." *Neylan v. Vorwald,* 124 Wis.2d 85, 95 (Wis. 1985). When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time. They cannot be validated by consent, ratification, waiver, or estoppel. *Id,* at 97.

> A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective. ...The judgment may also be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in subsequent proceedings. ...And the substance of these principles are equally applicable to a void state judgment. *Id*, at 99.

A refusal to license signifies the censor's view that a film is unprotected. *Freedman,* at 58. Accordingly, Wisconsin noted that such interlocutory orders affect all citizens and they "call into question whether material is to be given the benefit of the protections of the First Amendment to the Constitution of the United States and section 3, of article I, Wisconsin Constitution." *I, A Woman* at 111. As this Court made clear:

> That a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered. *Vance v. Universal Amusement Co.*, 445 US 308, 317 (1980).

After *Freedman, Blount,* and *I, A Woman,* Wisconsin judges lack jurisdiction – and are simply not empowered to declare: **"I guess I don't want to get into litigation whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession, although again that's a matter of state and national import..."** The *I, A Woman* Court explained:

> Since the trial judge did not make the initial determination that there was reasonable cause to believe the film was obscene, **he was without jurisdiction to proceed further. He was without the power to make any determination whatsoever.** It is apparent, therefore, that the judgment that the film is not obscene and the findings that underpinned that judgment are a nullity and must be set aside. *I, A Woman*, at 109-110 (emphasis added).
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> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

Pornography is fully protected speech. The trial court's belief that pornographic material might be prohibited in terms of its possession is "manifest error" – a wholesale disregard, misapplication, or failure to recognize a controlling legal precedent. *Oto v. Metro Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2001).

A state's power to regulate obscenity simply does not extend to the mere possession by the individual in the privacy of the home. *Stanley v. Georgia,* 394 U.S. 557, 568 (1969). Indeed, "listeners for whom, if the speech is unpopular or indecent, the privacy of their own home may be the optimal place of receipt." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000). The trial court's ruling lacks the compulsory adversary hearing and review

pursuant to *Freedman* that requires the state to prove – to a jury[3] – that presumptively protected materials do not qualify for First-Amendment protection. *I, A Woman, at* 113.

Significantly, the trial court's *ex parte* review of the content of publications, and any determination of relevance, necessarily "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion" – the very elements of an invalid prior restraint. *Southeastern Promotions,* supra, 420 U.S. at 554. It is by necessity content-based and presumptively invalid:

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. ...Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.
> *Regan v. Time, Inc.,* 468 U.S. 641, 648-49 (1984).
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> Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption... This is for good reason...
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> It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the government the benefit of the doubt when it attempted to restrict speech we would risk leaving regulations in place that sought to shape our unique personalities or silence dissenting ideas. **When First Amendment compliance is the point to be proved, the risk of nonpersuasion – operative in all trials – must rest with the Government, not with the citizen.** *U.S. v. Playboy*, 529 U.S. at 817-818 (Emphasis added, internal citations and quotations omitted).

The requirement of an adversary hearing and "prompt judicial review" – as well as the invalidity of content-based prior restraints – are rights that are indisputably clear.

Unavailability of *Freedman* Compliance and "Prompt Judicial Review" In Any Lower Court

"The assumption that defense of a criminal conviction will generally assure ample vindication of [First Amendment] rights is unfounded." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

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[3] See *Court v. State,* 51 Wis. 2d. 683, 699 (Wis. 1971).

A state's procedures are "fatally flawed" if they permit a citizen to initiate judicial proceedings to persuade courts that published expressive materials are First Amendment-protected. "The First Amendment demands that the Government must assume this burden." *Blount v. Rizzi,* 400 U.S. 410, 417-22 (1971) (Citing *Freedman*). Accord; *Southeastern Promotions*, supra, at 562 (condemning procedures that required petitioner to bear the burden of obtaining *Freedman* compliance and "prompt judicial review"); and *Speiser v. Randall,* supra.

Dressler was never obligated to initiate judicial proceedings to obtain *Freedman* compliance and "prompt judicial review" in the first instance – attempts that have been repeatedly denied in *all* Wisconsin courts. Six decades ago this Court made indisputably clear:

> Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, **they were not obligated to take the first step in such a procedure**. *Speiser*, supra, at 529 (Emphasis added).

In the face of this settled standard, Dressler's First Amendment claims in pre-appeal motion to the trial court were summarily denied. Incredibly, finding no error the Court of Appeals declared: "evidence of homosexuality clearly goes to motive" – to commit murder! "[T]he jury had adequate evidence to conclude that Dressler was a homosexual."

It declined to address any First Amendment claims; erroneously concluding they were raised for the first time on appeal.[4] *State v. Dressler,* No: 92-2014-CR, unpub. slip op. Nov. 17, 1993, at 15; 1993 Wisc. App. LEXIS 1470. Wisconsin Supreme Court review was denied.

The federal district court denied §2254 habeas relief. It concluded that the warrant was not a "general" warrant as in *Stanford v. Texas,* 379 U.S. 476, 485-86 (1965), and doubted that Dressler's materials are entitled to the same First Amendment protection of *Stanford's* political speech. *Dressler v. McCaughtry,* No. 97-C-0431, Order April 28, 1999, Pg.19-21. It declined to

[4] The Seventh Circuit found this factual finding erroneous. *Dressler v. McCaughtry,* 238 F.3d 908, 911 n.1 (7th Cir. 2001).

address the admissibility of protected publications, however, it granted a Certificate of Appealability on the question of:

> whether the introducuction into evidence of certain materials, the possession of which were protected by the First Amendment, and which were then used by the State to help prove its theory of "homosexual overkill" violated the petitioner's First Amendment rights. Order, granting C.O.A. June 23, 1999, p.2-3.

Under the unique timing and procedural history of the case, the Seventh Circuit was the very first court to reach any First Amendment merits. *Dressler v. McCaughtry,* 238 F.3d. 908, 913 n.4 (7th Cir. 2001). It declaring the First Amendment claims to be "borderline frivolous at best," at 912-913, and effectively limited the protections of the First Amendment by announcing that it applied only to *convictions* for "possessing, distributing or looking at" protected publications. Just months after this Court decided *U.S. v. Playboy,* supra, it required a habeas petitioner to show First Amendment prejudice:

> The fundamental flaw in Dressler's First Amendment argument, and major distinguishing factor in the string of broad First Amendment cases he relies on is that he was not convicted of possessing, distributing, or looking at the videos and pictures in question. Although they may have helped to convict him, he never explains how his right to possess or look at them was affected by their use as evidence against him. ...
>
> Innocent citizens...need not fear a murder prosecution based on the mere possession of lawful videotapes and photographs. The guilty, however, should be wary. *Id,* at 915.

Disregarding and effectively overruling *Herndon v. Lowrey* and *Winters v. New York,* supra, it declared that a jury may draw any inference it wishes from the contents of a First Amendment-protected home library. *Id.* [5]

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[5] *McCaughtry* is the first court in the history of law in the United States to announce a concept of ***homosexual overkill*** – one in which homosexuals "kill, in their panic or rage, or whatever motivates" them. Its First Amendment rationale lacks *any* citation to authority from this Court, relying instead on in-circuit "public forum" doctrine to apply to the message-content of a protected home library. It announces a circuit split with *Guam v. Shymanovitz,* 157 F.3d 1154 (9th Cir. 1998) (admission of mere possession of gay pornography as "other acts" evidence to show a criminal defendant's gay status denied fair trial).

The same attorney continuously represented Mr. Dressler from pre-trial through federal §2254 denial in this Court. Proceeding *pro se* for the first time, he sought *Freedman* adversary hearing compliance and "prompt judicial review" in Racine Circuit Court pursuant to §974.06, Wis. Stats. He raised lack of subject-matter jurisdiction; Equal Protection; overbreadth; vagueness; and content-based and *Ex Post Facto* challenges to §§ 904.04(2), 904.01, and 968.13, Wis. Stats. The trial court telephonically denied all relief, ruling that the prior Wisconsin appellate finding of "relevance" overcame any First Amendment claims.

The Court of Appeals affirmed, finding no error. Shirking its clear constitutional duty, the Wisconsin Attorney General resorted to seeking sanctions against petitioner for raising First Amendment claims, relying on the Seventh Circuit's declaration of "borderline frivolous." The court of appeals declined any First Amendment review, declaring *Dressler v. McCaughtry* as "law of the case" which cannot be revisited. *State v. Dressler,* 2004AP1497, unpub. slip op Mar. 8, 2006; 2006 Wis. App LEXIS 209.

In light of *Littleton, Colo. v. Z.J. Gifts*, 541 U.S. 774 (2004), Dressler again sought *Freedman* compliance and prompt judicial review *and merits decision* in Racine Court. The court summarily denied even a hearing. On filing of a notice of appeal, the Wisconsin A.G. again sought sanctions, suspecting that Dressler *might* raise First Amendment issues on appeal. The Court of Appeals warned Dressler that he faced sanctions if he were to raise them!

Dressler filed a "Petition for Removal and Complaint" in federal court. The district court denied removal. It stated it wasn't sure if petitioner's pleading was a complaint, but ruled any such complaint would be frivolous in light of *Dressler v. McCaughtry. Dressler v. Ptacek,* 2008 U.S. Dist. LEXIS 7408.

Pursuant to this Court's holding that §1983 "federal remedies would provide "an additional safety valve" to obtain "prompt judicial review," *Littleton* supra, 541 U.S. at 781-82, Dressler sought §1983 *Ex Parte Young* declaratory and injunctive relief in the federal district court on April 10, 2009. He sought "prompt judicial review" pursuant to *Freedman v. Maryland*, and raised overbreadth, vagueness, and content-based challenges to Wis. Stat. §§ 904.04(2), 904.01, and 968.13, and challenged lack of subject-matter jurisdiction, pursuant to *I, A Woman*. The district court "recharacterized" petitioner's *pro se* complaint as one alleging that the defendants had violated Petitioner's civil rights, and sought review of the trial court's relevancy rulings.[6] It dismissed as frivolous at the pre-screening process. Petitioner's Rule 59(e) motion was denied. *Dressler v. Doyle,* 2010 U.S. Dist. LEXIS 152603.

The Seventh Circuit affirmed dismissal and denial of Rule 59(e) relief. It declined to address or to rule on lack of subject-matter jurisdiction. It recognized claims of prior restraint of free speech and injunctive relief against Wisconsin statutes that "might violate the Constitution." It concluded that the "constitutional claims are nothing more than a subterfuge for challenging the propriety of state-court evidentiary rulings," and that Dressler seeks "federal review of [his] trial [and] federal supervision of future Wisconsin trials." It held that *Dressler v. McCaughtry* controls its finding of now "patently frivolous," and further that *Heck v. Humphrey*, 512 U.S. 477 (1994), bars relief. It applied three "strikes" pursuant to 28 §1915(g). *Dressler v. Walker*, 409 Fed. Appx. 947 (7th Cir. 2011).[7]

[6] This Court has condemned "recharacterizing" prisoner *pro se* pleadings, requiring that a court notify the prisoner of its intention to do so, the legal consequences of it, and permitting the prisoner to re-plead. *Castro v. U.S.*, 540 U.S. 375, 383 (2003).

[7] Several weeks after the Seventh Circuit's decision, this Court ruled that *Heck* does not bar prisoners from challenging the constitutionality of a state statute. *Skinner v. Switzer*, 562 U.S. 521 (2011),

After numerous futile attempts to obtain counsel, Dressler sought assistance through the U.W. Law School. After seven years on their waiting list before it was able to review the case, the Law School refused to raise any First Amendment issues in light of Wisconsin's threat of sanctions. Upon its denial of assistance, Dressler sought Mandamus and a Stay in the Court of Appeals pursuant to §809.51, Wis. Stats, serving the Racine Clerk with a copy **(App. E)**. The court's summary denial is attached as **(App. A)**.

Pursuant to §809.71, Wis. Stats, Dressler filed a Supervisory Petition for Mandamus and Stay in the Wisconsin Supreme Court and served the Racine Clerk with a copy **(App. F)**. The Clerk filed it as a "petition for review" pursuant to §809.62, Stats, permitting the court of appeals 30-days to reconsider. **(App. D)**

On July 27, 2018, Dressler wrote the Clerk explaining that he specifically sought the Courts jurisdiction pursuant to Wisconsin's Supervisory Writ statute, §809.71. He specifically did NOT seek certiorari review pursuant to §809.62, and thus did not conform his petition to the requirements of §809.62. He requested that the Clerk accept his petition under §809.71, as filed. **(App. G)**

On August 1, 2018, the Court ordered that it deemed the Petition for a Supervisory Writ and Stay as a "petition for review." It stated: "The July 23, 2018 filing contained the court of appeal's and circuit court's case numbers and attaches the court of appeal's June 12, 2018 order." **(App. D)** That is precisely what §809.71, requires a supervisory writ to include!

On August 1, 2018, the Wisconsin Attorney General filed an affidavit of no service of a petition for review with the Wisconsin Supreme Court.

On October 9, 2018, The Wisconsin Supreme Court ordered that this petitioner's "petition for review/Petition for a Writ of Mandamus and Stay is denied." **(App. C)**

On January 18, 2019, Justice Kavanugh summarily denied an application for a Stay. No. 18A738.

And if it made unduly onerous, by reason of delay or otherwise to seek judicial review, the censor's determination may in practice be final. *Freedman,* at 58. If there is evidence of foot-dragging, immediate judicial intervention will be required, and judicial oversight and review at any stage of the proceedings must be expeditious. *Littleton,* supra. at 787.

On-going Prior Restraints Demonstrate Irreparable Injury

Prior restraints on speech and publication are the most serious and the least tolerable infringements on First Amendment rights. *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 559 (1976). The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before adequate determination that it is unprotected speech. *Pittsburgh Press v. Comm. on Human Rel.*, 413 U.S. 376, 390 (1973). Any system of prior restraint comes to this court with a heavy presumption against constitutional validity. *Freedman,* supra, at 57.

An individual's right to speak is impacted when information he or she possessed is subjected to restraints in which information might be used or disseminated. *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 567 (2011). Each passing day of a prior restraint is irreparable and constitutes a separate and cognizable infringement of the First Amendment. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (1975).

The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

ARGUMENT SUPPORTING CERTIORARI REVIEW

This Courts Supervisory Powers Are Required To Compel Compliance With Its Binding First Amendment Mandates

Freedom of speech and of the press would be totally destroyed if the shadow of the prosecutor fell across the pages of the books or videos we possess in our homes. Even during the evil thralldom of McCarthyism, we did not embrace the concept of guilt-by-book-association because this Court's binding precedents expressly forbid inferences from book possession:

> **No inference can be drawn from the possession of the books mentioned,** either that they embodied the doctrines of the Communist Party or that they represented the views of the appellant. ... The question thus proposed to a jury involves pure speculation as to future trends of thought and action ...[and] licenses a jury to create its own standards in each case. *Herndon v. Lowrey*, supra, 301 U.S. at 249, 263 (Emphasis added).
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> **[W]e think fair use of pictures and stories would be interdicted** because of the utter impossibility of the actor or the trier of fact to know where this new standard of guilt would draw the line between allowable and forbidden publications. ... Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Winters v. New York*, supra, 333 U.S. at 519-20.

Freedoms of expression are vulnerable to gravely damaging yet barely visible encroachments and must be ringed about with adequate bulwarks. The line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools. *Bantam Books v. Sullivan,* 372 U.S. 58, 66 (1963). Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

On federal questions, the determinations of this Court are binding on state courts. *State v. Ward,* 2000 WI 3, ¶39. As this petition demonstrates, when the constitutional rulings of this Court are not enforcable in Wisconsin and lower federal courts, then this Court's jurisdiction and authority as the *Supreme* Court of the United States is severely undermined.

After *Speiser, Marcus, Bantam Books, A Quantity of Books, Freedman, Stanford v. Texas, Stanley v. Georgia, State v. Voshart,* and *Ft. Wayne Books,* supra, no rational judge could deem valid an open-ended warrant that authorizes the seizure – from the privacy of a home – of ANY, unspecified, First Amendment-*protected* printed and filmed materials. When a state's seizure procedures lack *Freedman's* requirements of sensitivity to freedom of expression, "The admission of the films in evidence requires reversal of petitioner's conviction." *Lee Art Theater, Inc. v. Virginia*, supra, 392 U.S. at 637.

Wisconsin incorporated *Freedman* and *Blount* into its Constitution and its Supreme Court specifically warned its judges not to enter any interlocutory orders that admit protected publications into criminal evidence, where they could have weight. They lack jurisdiction to do so; those orders are void as a matter-of-law; impose an invalid prior restraint; and are not subject to any merits review. Wisconsin statutes that permit such interlocutory orders, or are interpreted to relieve the state of proving materials to be unprotected – are unconstitutional. *State v. I, A Woman*, supra, at 109-120.

Where presumptively protected expressive materials are at issue, Wisconsin does not permit a criminal case to proceed to trial or appeal unless the State first complies with *Freedman* "default or not." *Id,* at 115-116. It mandates expeditious judicial review and merits decision. *Id.* Consistent with *Freedman* and *Blount,* Wisconsin's enforcement scheme must:

> ***place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review" – a final judicial determination on the merits within a brief period – to prevent the administrative decisions of the censor from achieving an effect of finality; and limit preservation of the status quo to the shortest, fixed period compatible with sound judicial resolution, any restrain imposed in advance of the final judicial determination. *I, A Woman*, supra at 114 (Quoting *Blount v. Rizzi*, 400 U.S. 410, 417 (1971)).

The constitutional holdings of this Court and Wisconsin's Supreme Court do not permit a Racine court to decree: **"I guess *I don't want to* get into litigation whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession, although again that's a matter of state and national import."** Wisconsin courts lack jurisdiction to create, or enforce, a freewheeling censorship scheme that this Court, and its own supreme court have expressly prohibited.

Nor could a rational court believe that Wisconsin's "other acts" statute, §904.04(2), is constitutional when construed to include within its scope the mere "act of possessing" any, unspecified First Amendment-protected expressive materials within its scope. That construction is facially overbroad: ALL protected expressive publications are included; NONE are excluded.

It is immediately void for vagueness because it provides no notice to the public of what is prohibited, and as here applied to persons the state deems homosexual, "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Kolender v. Lawson,* 461 U.S. 352, 360 (1983). This Court's rationale in striking a statute prohibiting "disrespect for the flag" is particularly fitting to a statute applicable to the "act of possessing" any protected publications:

> This criminal provision is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. ... The language at issue is void for vagueness as applied go Gougen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preference. *Smith v. Gougen,* 415 U.S. 566, 578 (1974).

Significantly, any determination of relevance necessarily "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion" – the very elements of an invalid prior restraint. *Southeastern Promotions,* supra, 420 U.S. at 554. It is by necessity content-based and thus presumptively invalid. *U.S. v. Playboy,* 529 U.S. at 817. *Homosexual Overkill,* by definition applies to no other class except homosexuals. Statutes that single out homosexuals for special First Amendment treatment under the law fail even rational basis Equal Protection scrutiny. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

This Court has long required that to prevent an effect of finality to the censor's determination whether a film constitutes protected expression a criminal conviction must be vacated to afford a defendant the opportunity to litigate, in some forum, the obscenity *vel non* of expressive materials introduced as evidence in a criminal trial. *McKinney v. Alabama,* 424 U.S. 669, 676 (1976). It noted that it decided *Freedman* specifically because Maryland's regulatory scheme did not sufficiently assure "prompt judicial resolution of First Amendment claims." *Dombrowski v. Pfister,* supra, 380 U.S. at 489.

It found prior restraint where denial of municipal facilities for a play failed to provide *Freedman* procedural safeguards: The "system did not provide a procedure for prompt judicial review." *Southeastern Promotions*, 420 U.S. at, 561. "The standard, whatever [the board applied], must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances." *Id.* It has insisted that denial of an unpopular group's First Amendment right of free speech is unconstitutional without the requisite procedural safeguards of appellate review:

> If a state seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. **Absent such review, the State must allow a stay.** *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (Emphasis added, internal citations omitted).

Here, Wisconsin succeed in shirking its clear duty to address or review any First Amendment claims pre-trial – or even on direct appeal. Thus, the Seventh Circuit, addressing the First Amendment for the first time, announced that the protections of the First Amendment are limited to convictions for "possessing, distributing, or looking at" First Amendment-protected publications (all non-existent crimes) – and that a jury may draw any inference it wishes from the message-content of a protected home library. *Dressler v. McCaughtry,* 238 F.3d at 914. This is what this Court specifically rejected in *Herndon* and *Winters*, supra. Its new "free-floating test for First Amendment coverage" is "startling and dangerous." *U.S. v. Stevens,* supra, 559 U.S. at 470. It remains circuit authority for a standardless, freewheeling censorship scheme to any person a prosecutor deems to be homosexual and thus "prove" motive and intent – to commit murder!

> So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression. *Dombrowski v. Pfister,* supra, at 487.

Perniciously, Wisconsin courts have applied *McCaughtry* as authority to deny *Freedman* compliance – and to threaten sanctions for seeking *Freedman* First Amendment merits review – because any First Amendment claim is "borderline frivolous a best." This Court's binding constitutional holdings, including *Littleton*, supra, and its mandate of a *Freedman* prompt merits decision, and its pledge of §1983 as an "additional safety valve" to seek "prompt judicial review and merits decision" are irrelevant, and now "patently frivolous." *Dressler v. Walker*, supra.

The courts of Wisconsin and the Seventh Circuit have so far departed from the accepted and usual First Amendment standards established in decades of this Court's decisions, and sanctioned such a departure from them, that this Court should invoke its supervisory power of review that this petition presents.

For the reasons and authorities presented, petitioner prays that this Court summarily vacate *State v. Dressler*, Racine No. 1990CF584, for lack of subject-matter jurisdiction to enter an interlocutory order that admits protected expressive publications into criminal evidence. *State v. I, A Woman,* supra, 53 Wis.2d at 110; *Steel Co. v. Citizens for a Better Environment*, supra, 532 U.S. at 95. "[I]f the record disclosed that the lower court was without jurisdiction this court will notice the defect. ...[W]e have jurisdiction on appeal, not of the merits but of the error of the lower court in entertaining the suit."

In the alternative, that it summarily stay *State v. Dressler* pursuant to *National Socialist Party v. Skokie,* 432 U.S. 43, 44 (1977), *M.I.C. v. Bedford Township,* 463 U.S. 1341, 1343 (1983), and grant immediate intervention to permit compliance with *Feedman v. Maryland.. Littleton v. Z.J. Gifts*, supra. Or that it summarily reverse pursuant to *Winters v. New York*; *Ft. Wayne Books v. Indiana,* supra, and *Lee Art Theater v. Virginia,* "The admission of the films in evidence requires reversal of petitioner's conviction." Supra, 392 U.S. at 637.

In the alternative, he prays that this Court grant review in this case, appoint counsel, and order full briefing on the question presented.

Very respectfully submitted at Waupun, Wisconsin, March 4, 2019, and resubmitted on September 1, 2019,

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Appendix – Table of Contents