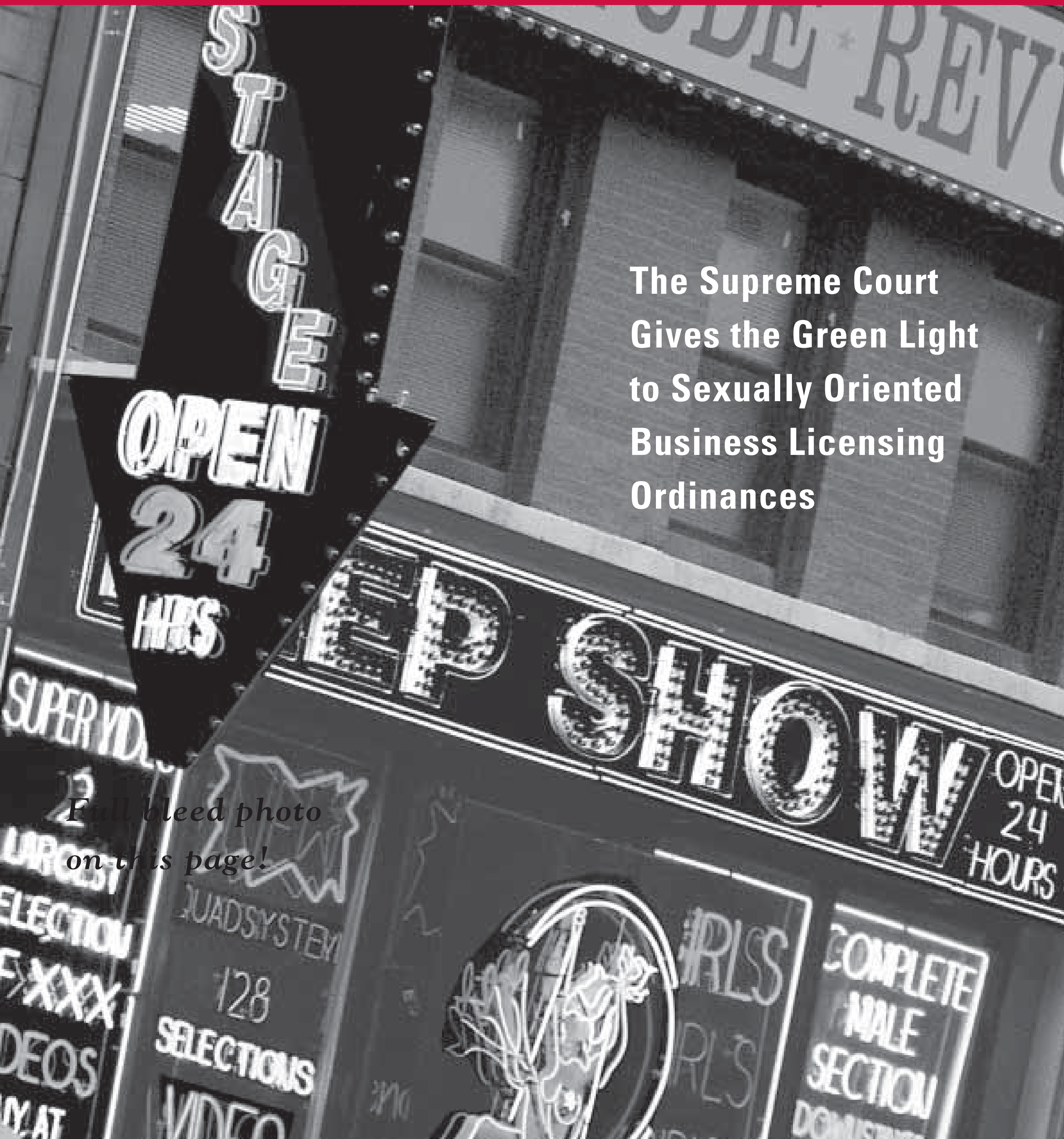
# City of Littleton v. Z.J. Gifts

— by Scott D. Bergthold —




## The Supreme Court Gives the Green Light to Sexually Oriented Business Licensing Ordinances

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It appears that the third time *is* a charm—the decision in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*[1] represents the third time in recent history that the Supreme Court has granted certiorari to clarify the kind of judicial review that is required when a city, pursuant to a time, place, and manner ordinance, denies a license to a speech-related entity for content-neutral reasons.[2] Although the first two cases did not reach the issue, the *City of Littleton* case gave the Court a vehicle through which to squarely resolve the wide circuit split over the requirement of "prompt judicial review" from adverse decisions under sexually oriented business licensing ordinances.

## The Ordinance and Proceedings in the Lower Courts

In 1993, the *City of Littleton* adopted a comprehensive adult business ordinance that contained requirements addressing both location and licensing. The ordinance requires that any "adult bookstore, adult novelty store or adult video store"—establishments with a "substantial portion" of their inventory, floor space, revenues, or advertising expenditures dedicated to, or deriving from, sexually explicit materials—locate in a specified zoning district, and at least 500 feet away from specified other uses, including churches and day-care centers.[3]

In 1999, Z.J. Gifts, doing business as "Christal's," opened in a location not zoned for adult businesses and within 500 feet of both a church and a day-care center.[4] Without applying for a license, Z.J. brought a preemptive federal suit under 42 U.S.C. § 1983, challenging the city's ordinance as facially invalid under the First Amendment. At the close of discovery, the district court granted summary judgment *in toto* to the city.[5]

The Tenth Circuit affirmed in part and reversed in part.[6] On review of the record, including a videotape of the interior of Z.J.'s business, the Tenth Circuit concluded that Z.J.'s was "unquestionably" an adult business and rejected its claim that the definition of "adult bookstore, adult novelty store or adult video store" was unconstitutionally vague.[7] The court also rejected Z.J.'s challenge that the ordinance did not provide sufficient zoning sites for adult businesses.[8]

However, the appellate court reversed the district court on two issues. First, it held that certain provisions of the Littleton ordinance threatened lengthy administrative delay,[9] although this defect was severable from the remainder of the ordinance.[10] Second, the Tenth Circuit surveyed the split in the circuits over

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the "prompt judicial review" requirement of *FW/PBS, Inc. v. City of Dallas*[11] and held that the First Amendment required the City of Littleton to guarantee, through its ordinance, a prompt *judicial decision* from any license denial.[12] In other words, the appellate court held that, although the city's ordinance was properly aimed at preventing the negative secondary effects of adult businesses—and not the "speech" of such businesses—it was, nevertheless, required to provide the special judicial review procedure mandated for censorship schemes in *Freedman v. Maryland*.[13]

In response to the Tenth Circuit's decision, the city amended its ordinance to cure the administrative delay issue, and then petitioned the Supreme Court to grant certiorari to resolve the confusion over the question of "prompt judicial review" that had split the circuits.[14]

## The Supreme Court's Decision: *Freedman* Does Not Apply

In essence, the city made one core argument: *Freedman*'s special judicial review rule did not apply to well-drafted adult business ordinances, like the City of Littleton's, that did not present the dangers of censorship or unbridled discretion in licensing decisions. In a 9-0 decision,[15] the Supreme Court reversed the Tenth Circuit's ruling on the prompt judicial review issue and identified two separate arguments for doing so: First, the *FW/PBS* court's description of the "prompt judicial review" requirement for secondary effects ordinances deviated from the

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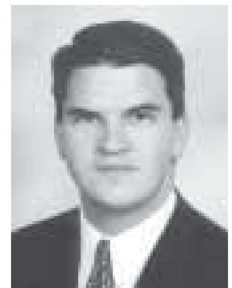
**Scott D. Bergthold** is a private practitioner whose national practice focuses on the drafting and defense of adult business regulations. He was a brief writer for the City of Littleton before the Supreme Court, and previously co-authored *Protecting Freedom of Speech and Expression: The First Amendment and Land Use Law* (ABA State and Local Government Section, 2001). For complimentary resources on developing or defending constitutionally sound adult use ordinances, e-mail Scott at sbergthold@adultbusinesslaw.com.



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language used to describe that safeguard in the "significantly different" censorship context of *Freedman*. Second, ordinary judicial review under state law provided, in any event, for a sufficiently prompt judicial determination.[16]

While rejecting the city's invitation to interpret *FW/PBS* as modifying the *Freedman* prompt judicial decision requirement, the Court nevertheless embraced the city's core contention that the rationales of *Freedman* simply did not apply to adult business ordinances with time-limited, objective, licensing standards which had nothing to do with the content of speech.[17] Thus, the Court read Justice O'Connor's plurality opinion in *FW/PBS* "as encompassing a prompt judicial decision"[18] but, nevertheless, "modify[ing] *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules apply in this case."[19]

The Court presented four reasons for agreeing with the city that *Freedman* was inapposite in this context. First, the Court held that "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm."[20] The Court specifically noted that state trial courts reviewing licensing decisions could accelerate those proceedings, and state appellate courts could expedite review of lower court decisions. Second, in a refreshing statement recognizing the principles of federalism, the Court stated that it had "no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm."[21] Moreover, the Court noted a lack of any problems of delay in Colorado, and stated that 42 U.S.C. § 1983 provided "an additional safety valve" should any such problems arise.[22] Third, embracing the city's analysis, the Court distinguished *Freedman*. *Freedman* involved a law containing "rather subjective standards and where a denial likely meant complete censorship. In contrast, the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display."[23] The Court explained:

> These objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of any specific item of adult material in the Littleton community. Some license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller. Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold. The upshot is that Littleton's 'adult business' licensing scheme does 'not present the grave 'dangers of a censorship system.' And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious.[24]

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Fourth, commenting on how this was to be done, the Court noted that "nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme."[25] It recognized the obvious fact, repeated and reiterated by municipalities in the appellate courts for the last decade, that "cities and towns lack the state-law legal authority to impose deadlines on state courts."[26] The Court concluded that adult business licensing decisions made pursuant to "neutral and nondiscretionary criteria" do not require "an unusually speedy judicial decision of the *Freedman* type."[27]

## The Early Fallout: Rejection of "Prior Restraint" Challenges

Two recent cases, both of which rejected prior restraint challenges to adult business licensing ordinances, demonstrate that the decision in *City of Littleton* is already benefitting municipalities.

In *Annex Books, Inc. v. City of Indianapolis*,[28] the district court had originally granted a preliminary injunction against the enforcement of an Indianapolis adult bookstore licensing requirement on the grounds that it failed to provide for a quasi-judicial administrative hearing.[29] Thus, the court had previously held that the ordinance "deprived the applicant of meaningful access to judicial review because, without a 'quasi-judicial' proceeding such as a hearing, no record would be produced for a trial court to review. If access to judicial review were stymied by lack of an administrative record, so would be a prompt judicial determination."[30] At summary judgment, Indianapolis cited the *City of Littleton* case and argued that the paper record that would be developed in any license denial—including a letter specifying, pursuant to the ordinance, the objective grounds for denial—was constitutionally sufficient. The court agreed. Noting that the Littleton ordinance and the Indianapolis ordinance both contained "'reasonably objective, nondiscretionary criteria unrelated to the 'content' of the expressive materials that an adult business typically sells or displays,"[31] the court

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held that judicial review of any license denial would be both simple and expeditious. It went on to conclude that, under *City of Littleton*, a quasi-judicial hearing on a license denial was not required for meaningful judicial review. The need for such a hearing was "obviated by the fact that the four grounds for denial [in the ordinance] are objective and ministerial in nature, requiring no exercise of judgment on the part of the government, only an 'up or down' decision on each factor."[32] Accordingly, the court granted summary judgment to the City of Indianapolis on the "prompt judicial review" issue.

A similar result occurred in *Doctor John's, Inc. v. City of Roy, Utah.*[33] In this case, the city's ordinance not only guaranteed a prompt administrative decision based on objective criteria, but also required, in the event of a denial, that a "provisional license" be issued which ensured the continued operation of the adult business until the judicial resolution of any court challenges to the license denial.[34] Under these circumstances, the court held that the issue "present[ed] none of the dangers of prior restraint," finding the scheme constituted "a well-drafted way for the City to deal with the secondary effects of sexually oriented businesses while protecting First Amendment principles."[35]

## Conclusion

The Supreme Court's decision in *City of Littleton* has eliminated much confusion in the lower courts over the constitutionality of licensing sexually oriented businesses to prevent the negative secondary effects they generate. This is not to say, however, that the courts will tolerate sloppy draftsmanship or unbridled discretion in licensing criteria. Cities must still be very careful when implementing such ordinances, and must ensure that the language they employ is up-to-date given the ever-changing landscape of adult business regulation. But *City of Littleton* makes it clear that when a municipality denies an adult business license based on objective, content-neutral standards, it no longer does so under the cloud of *Freedman*'s special judicial review requirement.

## Notes

1. 124 S. Ct. 2219 (2004).
2. *See* City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001); Thomas v. Chicago Park District, 534 U.S. 316 (2002).
3. 124 S. Ct. at 2222.
4. *Id.*
5. *Id.*
6. Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220 (10th Cir. 2002).
7. *Id.* at 1228-30.
8. *Id.* at 1241.
9. *Id.* at 1233-34.
10. *Id.* at 1234.
11. 493 U.S. 215 (1990).
12. Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220, 1238 (10th Cir. 2002).
13. 380 U.S. 51 (1965).
14. 124 S. Ct. 2219, 2222 (2004).
15. All nine justices voted to reverse the decision of the Tenth Circuit. Justice Scalia concurred in the judgment, but wrote separately to reiterate his position that under *Ginzburg v. United States*, 383 U.S. 463 (1966), Z.J.'s was engaged in pandering sex, an activity that was not protected by the First Amendment. Justice Stevens, concurring in part and concurring in the judgment, refused to join part II-A of the majority opinion, and further wrote to emphasize the need to maintain stringent judicial review requirements for true censorship schemes. 124 S. Ct. at 2226-27. Finally, Justice Souter, joined by Justice Kennedy, concurred in part and concurred in the judgment, declining to join part II-B of the Court's opinion. Justice Souter wrote "to emphasize that the state procedures that make a prompt judicial determination possible need to alight with a state judicial practice that provides a prompt disposition in the state courts." *Id.* at 2227.
16. 124 S. Ct. at 2222-23.
17. *Id.* at 2223-24.
18. *Id.* at 2224. The Court noted that the *Freedman* court set forth a "model" of promptness that involved a hearing the day after joinder of issue, and a decision two days after that. *Id.*
19. *Id.*
20. *Id.* at 2224-25.
21. *Id.* at 2225.
22. *Id.*
23. *Id.*
24. *Id.* at 2225-26 (emphasis added; internal citations omitted).
25. *Id.* at 2226.
26. *Id.*
27. *Id.*
28. 333 F. Supp.2d 773 (S.D. Ind. 2004).
29. *Id.* at 778.
30. *Id.*
31. *Id.* at 781.
32. *Id.*
33. 333 F. Supp.2d 1168 (D. Utah 2004).
34. *Id.* at 1176.
35. *Id.* at 1181. **ML**