QUESTIONS PRESENTED

This Petition involves a challenge by Respondent to the judicial review provisions of The City of Littleton's City Code, Title 3, Chapter 14, Section 8 ("the Ordinance"). The Ordinance governs the licensing of adult entertainment establishments within the City of Littleton. When a license is denied pursuant to this Ordinance, its provisions provide for "prompt access to judicial review" through Colorado's mandatory certiorari review procedure under Colo.R.Civ.P. 106(a)(4) (review in the nature of certiorari). This procedure was recently invalidated by the Tenth Circuit in *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). The Tenth Circuit Court of Appeals instead required that cities in Colorado guarantee that judges will render a "prompt judicial decision on the merits" when an adult business challenges an adverse licensing scheme.

This Petition seeks the resolution of a near complete division in the Circuits regarding the sufficiency of prompt access to an independent judicial officer when an adult business license is denied for violations of content-neutral time, place, and manner regulations. This question requires the Court to revisit the plurality decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). The present case asks this Court to resolve the conflict so municipal governments, seeking to regulate the negative secondary effects of sexually oriented businesses, may meet the correct standard for providing judicial review of licensing decisions.

QUESTIONS PRESENTED – Continued

The Questions Presented are:

For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

If prompt access to a court of law is insufficient, then what must a city do to provide sufficient safeguards under the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

The City of Littleton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion (App. 1-39) is published at *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). The Tenth Circuit's order denying rehearing *en banc* (App. 68-69) is unpublished. The District Court's opinion and order (App. 40-67) is unpublished.

JURISDICTION

The Tenth Circuit denied Petitioner's timely petition for rehearing *en banc* on February 5, 2003. (App. 68-69) This court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Article II, Section 10 of the Colorado Constitution and Article III of the Colorado Constitution provide:

Article II, Bill of Rights

Section 10. Freedom of speech and press.

No law shall be passed impairing the freedom of speech; every person shall be free to

speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Article III
Distribution of Powers

The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Reproduced in the appendix is Colo. R. Civ. P. 106, (App. 70-74) and the original and amended versions of Chapter 14 of Littleton's Municipal Ordinance (Section 3-14-1 *et seq.*). (App. 75-116)

STATEMENT OF THE CASE

This case raises an important issue as to whether a content-neutral time, place and manner regulation, which provides prompt access to judicial review, satisfies constitutional requirements.

Background

The City of Littleton's ("Littleton's") Municipal Code, originally passed in 1993, set forth a variety of zoning and

licensing requirements with regard to sexually oriented businesses. (App. 75-111) Before passing its licensing and zoning[1] Ordinance, the City Council considered evidence which addressed the adverse secondary impact of adult businesses, including increased crime, decreased property values and urban blight. (App. 75-82) Prior to the Tenth Circuit's decision, Littleton had amended its Ordinance in an attempt to comply with previous changes in the law. (App. 112-116)

Littleton's Ordinance contains zoning restrictions which mandate where in the City sexually oriented businesses can operate. The Ordinance provides that adult businesses may operate in Littleton's Industrial, or I-1 and I-2 zone districts, subject to certain distance requirements. Respondent Z.J. Gifts D-4, L.L.C. d/b/a Christal's (hereafter "ZJ") is open and operating in Littleton's B-2 (business) zoned district, a zoned district where the use is not permitted.

ZJ's Claims Below

Shortly after it opened, without applying for or having been denied a license, ZJ brought an action under 42 U.S.C. § 1983, challenging Littleton's adult business Ordinance as unconstitutional and seeking declaratory and injunctive relief, as well as attorneys' fees and damages.

Despite ZJ's arguments to the contrary, the District Court found that ZJ's was an adult business. (App. 54-55)

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[1] The zoning issues at stake in the trial court are not at issue here, and, therefore are described only peripherally.

ZJ argued that the Ordinance was unconstitutional because it infringed on ZJ's First Amendment rights. ZJ further argued that Littleton did not have sufficient avenues of communication for sexually oriented businesses. Littleton argued that its Ordinance was constitutional in all aspects.

On cross motions for summary judgment, the District Court granted Littleton's motion and found the Ordinance constitutional in its entirety. (App. 40-67) The Tenth Circuit affirmed the District Court's holdings that ZJ's was an adult business (App. 12, fn. 6), and the Tenth Circuit affirmed the District Court's holding that Littleton's locational restrictions were constitutional and that there were ample avenues of communication open for adult businesses in Littleton. (App. 33-38)

Licensing

ZJ also brought constitutional challenges with regard to several aspects of the Ordinance's licensing provisions. The Littleton Ordinance requires sexually oriented businesses to obtain a license in order to operate. The Tenth Circuit rejected all of ZJ's claims regarding its challenges to the licensing provisions, save three. (App. 15-33) Two of the claims were premised upon the Ordinance's failure to specify a time limit within which the City had to act with regard to the timing of fingerprinting and photographing, and the time frame within which a statement would be provided by the City Zoning Officer. (App. 20-23) The Tenth Circuit found those two provisions unconstitutional, but severable (App. 24), and Petitioner did not seek rehearing on them.

With regard to the third licensing provision, related to the granting or denial of a license, the Tenth Circuit noted that the Circuits were divided over the definition of the "prompt judicial review" requirement as adopted by this Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 107 L. Ed. 2d 603, 620, 110 S. Ct. 596, 606 (1990). The Tenth Circuit overruled the Colorado Supreme Court in holding that prompt judicial review means that there must be a guarantee of a prompt decision.

Under Littleton's Ordinance there are eight narrow grounds upon which a license can be denied[2] and the

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[2] Section 3-14-8 Application/Denial of License provides that after an application has been submitted, the City Clerk has thirty days to approve or deny the license. The Clerk may deny an application based on one or more of eight specified grounds as follows: [t]he applicant is under twenty-one years; [t]he applicant has made a false statement upon the application or gave false information in connection with an application; [t]he applicant or any holder of any class of stock, or a director, officer, partner, or principal of the applicant has had an adult business license revoked or suspended anywhere within the State of Colorado within one year prior to the application; [t]he applicant has operated an adult business which has determined to be a public nuisance under state law or this Code within one year prior to the application; [a] corporate applicant is not in good standing or authorized to do business in the State of Colorado; or [t]he applicant is overdue in the payment to the City of taxes, fees, fines, or penalties, assessed against him/her or imposed against him/her in relation to an adult business; [t]he applicant has not obtained required sales tax licenses; [t]he applicant has been convicted of a specified criminal act. (App. 96) Specified criminal act is defined in the Ordinance as sexual crimes against children sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation. (App. 88 & 112, § 3-14-2 original definitions and as amended)

All of these licensing provisions were upheld by the Tenth Circuit which found that such provisions did not involve or permit unbridled discretion on the part of licensing officials. (App. 29, fn. 13)

Ordinance contains very specific provisions governing the appeal process which provides access to and the guarantee of judicial review in the event of a denial.[3] (App. 96-97 & 114) Pursuant to the Ordinance, an applicant has twenty

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[3] Section 3-14-8(B) (as amended App. 114) provides as follows: In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by certified mail to the address shown in the application within ten (10) days after denial. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11(C) of this Chapter. A written request for such hearing shall be made to the City Manager within twenty (20) days of the date of the denial of the license by the City Clerk. This hearing shall be held within thirty (30) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11(C) of this Chapter.

1. Section 3-14-8(B) (as amended App. 114) (1)(2)(3) (App. 97) At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department or other enforcement officers, the applicant, or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk. In such cases where specified criminal acts are in issue, the provisions of C.R.S. § 24-5-101 shall control.

2. If the City Manager determines that the applicant is ineligible for a license per Subsection (A) hereof, he/she shall issue an order sustaining the City Clerk's denial of the application, within twenty days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address of the application.

3. The order of the City Manager made pursuant to paragraph 2 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

days to appeal a denial of a license to the City Manager who must hold a hearing within thirty days. In the event the appeal is denied, then the applicant may seek review in the State District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4) for certiorari review of a quasi-judicial administrative decision.

The District Court found that the Rule 106 review procedure providing for prompt judicial review met constitutional standards. (App. 63-66) The Tenth Circuit reversed the District Court holding that prompt judicial review requires the City to ensure that a court of law will issue a "prompt judicial decision" on the merits of an adult business' appeal of an adverse decision. (App. 32-33) The Tenth Circuit offered no guidance as to how a municipality could craft such a guarantee, given the inherent limitations on legislative authority over judicial acts.

Littleton filed a petition for rehearing *en banc* on the narrow issue of what process is necessary to satisfy the prompt judicial review requirement in this context, where the government does not pass judgment on the content of an applicant's speech. (App. 117-132) The petition was denied on February 5, 2003. (App. 68-69)

Eight Circuits have now considered the sufficiency of prompt judicial review in the context of content-neutral licensing ordinances. Four have reached a conclusion contrary to the Tenth Circuit. This Court now has an opportunity to clearly define the requirement of prompt judicial review in time, place and manner regulations of expressive conduct.

On these issues, Littleton hereby respectfully submits its Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case presents important and compelling issues of constitutional law which warrant this Court's intervention. The Circuits which have addressed the meaning of "prompt judicial review" are hopelessly deadlocked both as to result and reasoning. The conflicting decisions on this issue illustrate the confusion which has spread through the lower courts, spawned by this Court's plurality decision in *FW/PBS*. The issue will not go away. With time the schism has only become increasingly confusing as municipalities struggle to comply with an undefined and moving target in an attempt to regulate adult businesses.[4] The conflicting and incongruous results have bred additional litigation and have resulted in unwarranted and unnecessary attacks on adult business ordinances that have frustrated the efforts of municipalities to regulate the admittedly "serious problems" caused by sexually oriented businesses. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), citing, *Berman v. Parker*, 348 U.S. 26, 75, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). The well established constitutional concept of analyzing content-neutral adult

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[4] For at least ten years the definition of "prompt judicial review" has been the subject of divergent decisions at both the state and federal levels, commencing with the First Circuit's 1993 decision in *Jews for Jesus v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993), and culminating most recently in a Sixth Circuit decision in *Deja Vu of Cincinnati, L.L.C. v. Union TownShip Board of Trustees,* 2003 U.S. App. Lexis 7720 (April 24, 2003) where that court noted that the Circuit Courts are currently divided about what constitutes "prompt judicial review."

business ordinances under the time, place and manner test has been steadily eroded.

Four Circuits, the First, Fifth, Seventh and Eleventh,[5] which have considered the issues upon which this Petition is predicated, found that the requirement of "prompt judicial review" is satisfied under the First Amendment where there is prompt access to a court of law following a denial of a license to operate. Four Circuits, the Fourth, Sixth, Ninth[6] and now the Tenth, have held that "prompt judicial review" requires a prompt judicial decision. The decisions of these Circuits have resulted in invalidating numerous local ordinances and placing local governments in a "Catch 22" with respect to their efforts to regulate sexually oriented businesses. Either municipalities must allow sexually oriented businesses to operate

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[5] *See, TK's Video, Inc., v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085, 128 L. Ed. 2d 464, 114 S. Ct. 1837 (1994); *Jews for Jesus v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020, 146 L. Ed. 2d 315, 120 S. Ct. 1423 (2000). There is also an indication that the Second Circuit in *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999) would follow the reasoning and logic adopted in the line cases above in noting, but without deciding, that prompt access to judicial review in state courts would be constitutionally sufficient. The Colorado Supreme Court in *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995) has also concluded that the requirement of prompt judicial review is satisfied through Colorado's expedited judicial review procedure as set forth in Colo.R.Civ.P. 106(a)(4)(V) and Colo.R.Civ.P. 106(a)(4)(VIII).

[6] *See, 11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (*en banc*) *cert. denied*, 502 U.S. 819, 116 L. Ed. 2d 50, 112 S. Ct. 76 (1991); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); and *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998).

with impunity or risk adopting licensing ordinances and becoming entangled in the confusing legal morass generated by the divergent state and federal court decisions. These risks include being subjected to damage claims as well as 42 U.S.C. § 1988 attorneys' fees.

This Court previously granted certiorari in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 151 L. Ed. 2d 783, 122 S. Ct. 775, 781 (2002)[7] and in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 148 L. Ed. 2d 757, 121 S. Ct. 743 (2001)[8] to resolve the circuit split in defining "prompt judicial review." Neither case, however, for different reasons, reached this issue. This case provides an ideal opportunity for this Court to finally clarify whether prompt access to the judiciary sufficiently safeguards an adult business's interests.

The question in *Thomas* and *Waukesha* involved the issue of whether a prompt judicial determination of any appeal from a denial of a license or permit is constitutionally required or whether the First Amendment is satisfied by affording unsuccessful licensing applicants prompt access to judicial review.[9]

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[7] In *Thomas*, this Court granted certiorari, recognizing that the Courts of Appeals were divided as to whether the requirement of prompt judicial review means a prompt judicial determination or prompt commencement of judicial proceedings. *Thomas*, 534 U.S. at 316.

[8] In *Waukesha*, this Court granted certiorari on the sole question of whether the guarantee of prompt judicial review must accompany an adult business licensing scheme and whether it means a prompt judicial determination on the merits of a permit denial or simply prompt access to judicial review. *Waukesha*, 531 U.S. at 280.

[9] In *Thomas*, the application was for a park permit, and in *Waukesha* the application was for an adult business license. In *Waukesha*, this

(Continued on following page)

In *Thomas,* this Court found that censorship was not at issue and that a *Freedman* analysis was not necessary. This Court reiterated that time, place and manner regulations contain adequate standards so long as they cabin an official's discretion and render it subject to effective judicial review. *Thomas*, 534 U.S. at 322-323. Petitioner contends that identical safeguards are sufficient in the context of content-neutral adult business regulations. To be sure, the Littleton Ordinance differs from the ordinance in *Thomas* because the Littleton Ordinance is directed at sexually oriented businesses, but this feature merely demonstrates adherence to this Court's requirement that such ordinances be "narrowly tailored" to effect only that category of [businesses] shown to produce the unwanted secondary effects, thus avoiding the flaw [of overbreadth] that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975).

This case provides an ideal vehicle for this Court to finally resolve these issues and eliminate the uncertainties which have placed municipalities in the untenable position outlined above. This case squarely presents the issue upon which the lower courts are split.

In addition, while some of the Circuits that have analyzed this issue have considered the sufficiency of "access to" judicial review within the context of common law certiorari, the Littleton Ordinance specifically provides for and mandates judicial review under Rule 106 of

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Court failed to reach the issue upon which certiorari was granted because the Court found that the issue was moot.

the Colorado Rules of Civil Procedure. This provision, which provides for certiorari review of quasi-judicial decisions, is relied upon to provide prompt judicial review not only by Littleton, but also by many other municipalities in Colorado.[10] Colo.R.Civ.P. 106 is a mandatory review in the nature of certiorari and provides for an expedited review.[11] Although the crevasse dividing the courts centers upon the definition of prompt judicial review, the state and federal courts are further fractured based upon whether the subject ordinance contains a provision on its face for judicial review, whether the ordinance provides for access to the judiciary or whether a judicial hearing is guaranteed, and whether common law certiorari practice, statute, or writs of mandamus are sufficient to avoid constitutional infirmities. Colorado's Rule 106 provision guarantees immediate access to an independent judiciary and it should provide appropriate protection in cases like this where censorship is not at issue and governmental interests are "undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000).

As the Colorado Supreme Court explained:

> The provisions of C.R.C.P. 106(a)(4)(V) and C.R.C.P. 106(a)(4)(VIII) establish procedures for both a stay of the effect of an adverse decision and expedited review thereof. Under these circumstances, we conclude that C.R.C.P. 106 and the

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[10] A review of approximately fifty Colorado municipal codes reveals at least thirty-two municipalities (or approximately 60%) rely on Colo.R.Civ.P. 106(a)(4) or procedures substantially similar to Littleton's Ordinance with respect to licensing schemes in the context of adult businesses and Colo.R.Civ.P. 106(a)(4) provisions are also utilized in other municipal licensing schemes in which free speech is implicated. (App. 135-136 & 138).

[11] Colo.R.Civ.P. 106(a)(4)(VIII) (App. 70-74).

> Ordinance provide adequate safeguards to ensure that any impermissible prior restraint on a particular applicant's protected rights of free speech may be remedied promptly by judicial intervention.
>
> We also conclude that C.R.C.P. 106(a)(4)(V) and C.R.C.P. 106(a)(4)(VIII) provide "an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *FW/PBS*, 493 U.S. at 229 (plurality opinion). The provisions of C.R.C.P. 106(a)(4)(VIII) specifically authorize a district court to accelerate or continue any action, and, as indicated, C.R.C.P. 106(a)(4)(V) authorizes a district court to stay any decision to deny, suspend, or revoke a license. These provisions are adequate to withstand the plaintiffs' facial challenge to the Ordinance.

City of Colorado Springs v. 2354, Inc., 896 P.2d 272, 284 (footnotes omitted)

Thus, Littleton's Ordinance, on its face, provides prompt access to judicial review of content-neutral licensing decisions and thereby adequately safeguards the rights of adult businesses.

The Tenth Circuit, in its ruling, much like the other Circuits who have required a prompt judicial decision, has effectively imposed the third *Freedman*,[12] requirement –

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[12] In *Freedman*, this Court set forth three procedural safeguards to ensure expeditious decisionmaking by a motion picture censorship board, which the *FW/PBS* Court outlined as follows: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor

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which this Court held did not apply in these circumstances – by requiring the City to "bear the burden" upon a license denial. Although the Tenth Circuit's opinion does not address how cities can comply with its "prompt judicial decision" requirement, other "prompt judicial decision" courts have required cities to give offending adult businesses temporary or provisional licenses to operate during judicial review. Thus, the incentives discussed in *FW/PBS*, 493 U.S. at 229-230, are reversed and the adult business itself have every incentive to drag its heels and delay the determination on the merits.

The *Freedman* requirements were designed for a content-based censorship scheme, not for a content-neutral licensing scheme. The Tenth Circuit's holding is in direct contradiction to this Court's holding in *FW/PBS* and further demonstrates the extent to which basic, long standing jurisprudential concepts are either being ignored, misunderstood or misapplied because the tests and standards have become completely muddled.

In *FW/PBS* this Court recognized the significant differences between censorship schemes and content-neutral licensing schemes. This Court explicitly declined to shift the burden of going forward and the burden of proof to the government in a licensing scheme and it set forth in detail the basis for its rationale. *FW/PBS*, 493 U.S. at 230. After delineating those differences, this Court applied only a portion of the *Freedman* requirements to a content-neutral licensing scheme.

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must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *FW/PBS*, 493 U.S. at 227.

The *FW/PBS* Court explained that the licensing scheme at issue did not "present the grave dangers of a censorship system," and that a censorship system creates special concerns for the protection of speech, because "the risks of freewheeling censorship are formidable." *FW/PBS,* 493 U.S. at 229 (citing, *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559, 43 L. Ed. 2d 448, 459, 95 S. Ct. 1239, 1247 (1975)). Censors engage in direct censorship of expressive material, whereas in a licensing scheme the government does not exercise discretion by passing judgment on the content of protected speech. *FW/PBS*, 493 U.S. at 229-230. Censors reach subjective conclusions regarding speech, whereas licensing officials review the general qualifications of the applicant, a review which is objective in nature. The burden of proceeding with litigation is placed upon censors because otherwise the private party may be deterred from challenging any denial, in which case a denial might be tantamount to complete suppression of speech. Licensing applicants, on the other hand, have much more at stake because obtaining a license is the key to maintaining a business and therefore there is every incentive for the applicant to pursue any denial. *Id.* Moreover, licensing laws impinge only incidentally upon protected speech, because such laws are aimed at the secondary effects of such speech, rather than the content of speech. *11126 Baltimore Blvd., Inc.*, 58 F.3d at 1003 (Niemeyer, J., concurring in part and dissenting in part).

The Court in *FW/PBS* did not specifically address the issue of whether prompt judicial review would be satisfied in a content-neutral licensing scheme if the subject ordinance contained a specific provision – such as Colorado's Rule 106 procedure – because the subject ordinance in *FW/PBS* contained neither the possibility of, nor an avenue for judicial review.

FW/PBS did not require a "prompt judicial decision" and did not place the burden of initiating litigation or the burden of proof, once in court, on the City. Citing to *Freedman,* Justice O'Connor referred to the second *Freedman* prong in the following manner: "expeditious judicial review of that decision must be available." *FW/PBS*, 493 U.S. at 227. Justice O'Connor further stated that there must be the "possibility of" or an "avenue for" prompt judicial review. *FW/PBS,* 493 U.S. at 228-29. Notably absent from her opinion was any requirement that there be a "prompt judicial decision." The essence of the safeguard is in the availability of the review. Here, the Tenth Circuit, by requiring a prompt judicial decision, has conflated the standards traditionally used to analyze a content-based censorship scheme onto a content-neutral licensing scheme, and it has also shifted the burden of obtaining judicial review to the government, thereby reinstituting *Freedman's* third prong and applying it within the context of a content-neutral licensing scheme.

The *Renton* and *Young* Courts recognized the inherent value and importance which should be ascribed to the right of municipalities to regulate, through zoning and licensing schemes, the character of a city, using content-neutral time, place, and manner regulations. At the very least, the Tenth Circuit's decision in this case creates significant impediments and dangers for cities who attempt to regulate sexually oriented businesses.

Moreover, municipalities simply cannot assure that an independent judiciary will provide an expedited decision. Such a requirement fails to take into account the Separation of Powers Doctrine. Article III of Colorado's Constitution divides the powers of government into three distinct, co-equal branches, and directs that "no person or

collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." Colo. Const. Art. III.

The Colorado Supreme Court discussed this principle in the case of *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991). The Court reaffirmed long standing jurisprudence that while the three departments of government must co-operate and complement each other, they may not interfere with or encroach on the authority of the other. "It is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source." *Id.* at 511.

Nevertheless, this unworkable requirement has led to the invalidation of almost all adult business regulatory schemes in Colorado. By imposing on municipalities a fundamentally impossible duty to guarantee judicial action, the Tenth Circuit has unreasonably restricted the ability of Littleton and other cities, at least in Colorado, to have a workable regulatory licensing scheme for sexually oriented adult businesses. The unrealistic nature of this requirement has not been lost on other courts:

> In demanding this greater assurance, *Freedman* and *Baby Tam & Co.* may impose an impossible burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California Legislature would do so – at least with respect to state judicial officers – but even the state's authority is doubtful.

Mai Lee Le v. City of Citrus Heights, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999) (unpublished).

In *Mai Lee Le*, the Legislative Counsel of California asserted that even a state law requiring a prompt decision after a petition for writ of mandamus, seeking judicial review of a license denial, would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, *Freedman* and *Baby Tam and Co.* insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – *however impractical they may be* – are the law.

Id. at 24 (*emphasis supplied*).

The First Amendment does not require such impossible results that plainly infringe on the independence of the judiciary and threaten the very purposes behind the separation of powers doctrine. The First Amendment does not require that municipalities grope for solutions which may not work[13] or forego regulation of adult businesses. The decisions of the Circuits requiring a "prompt judicial decision" have also had the effect of requiring that provisional licenses be given to adult businesses in violation of regulations that advance substantial government interest and are "not at all inherently related to expression." *Pap's*

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[13] *See, Deja Vu of Cincinnati, L.L.C. v. Union TownShip Board of Trustees,* 2003 U.S. App. Lexis 7720 (April 24, 2003) (the Sixth Circuit held that a temporary permit given during judicial review was not able to save the municipality from the requirement that it guarantee a judge's prompt determination of the merits of an adult businesses's challenge).

A.M., 529 U.S. at 291 (2000) (plurality opinion) (quoting, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (Souter J., concurring in judgment)).

The Tenth Circuit's decision also assumes that state judges will forsake the duties of their office by refusing to render a prompt decision. Judges in the courts of the State of Colorado have the same duty to apply the protections of the United States Constitution as do federal judges. It must be assumed that a judge hearing a Colo.R.Civ.P. 106 review will recognize an obligation to proceed promptly and exercise the power to grant a stay, to expedite the determination or provide such other temporary relief as may be appropriate.

The Tenth Circuit decision also assumes that Littleton officials charged with licensing decisions should not be trusted. "[A]dult businesses are controversial, and the possibility exists that licensing officials might allow their personal views on the morality of sexually explicit entertainment to sway a decision on an application." (App. 31)

The Tenth Circuit essentially articulated fears that local licensing officials would exceed their authority and view the Ordinance as a "subterfuge for censorship." (App. 31) This theme is inherent in the decisions of the other Circuits that have required a prompt judicial decision. Yet this Court has never endorsed such a supposition. Rather, this Court has consistently held that courts must not presume bias, bad faith, or *ultra vires* action on the part of city officials. Indeed, the required presumption as to public officials is that "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926);

United States v. Armstrong, 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996).[14]

Finally, the requirement to have a prompt judicial decision seems to create the absurd result of favoring the free speech rights of sexually oriented business over such things as core political speech. Long established First Amendment principles have virtually been turned upside down by recognizing fewer restrictions and providing greater protections for speech which is associated with sexually oriented businesses, which have traditionally enjoyed only the outer perimeter of First Amendment protections, than those enjoyed by core political speech. As noted by Justice Stevens writing for the Court in *Young*:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lessor magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see

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[14] Moreover, in this case, Littleton officials perform acts which are essentially ministerial in nature and cannot be argued to be presumptively invalid. As noted by the Tenth Circuit, none of the eight specific reasons to deny a license involved discretion on the part of the licensing official. (App. 29, fn. 13)

> "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Young, 427 U.S. at 70.

Yet the Tenth Circuit's decision has now effectively elevated sexually oriented speech above core political speech.

In *Thomas*, this Court found that a permit which regulated the time, place and manner of core political speech satisfied First Amendment principles. This Court analyzed *Freedman* and found that *Freedman* was inapposite because the licensing scheme at issue in *Thomas* was not subject matter censorship, but rather was a content-neutral time, place, and manner regulation. Indeed, as noted by this Court, the ordinance did not authorize a licensor to pass judgment on the content of speech and none of the grounds for denying the permit have anything to do with what the speaker might say.

Littleton's Ordinance is directly akin to the ordinance in *Thomas*, in that it does not give authorities unbridled discretion to deny a license. Nonetheless, the Tenth Circuit's decision has given sexually oriented businesses the more stringent protections afforded under *Freedman*. This has the dual effect of giving core political speech less protection than sexually oriented speech and treating content-neutral licensing schemes like content-based censorship schemes, although the two concepts have always been treated differently.

CONCLUSION

Under the current state of the law, municipalities are stuck between the proverbial rock and the hard place. The Circuits are hopelessly divided and whether a city can regulate adult businesses by licensing depends more on which Circuit the city is in rather than on whether the regulatory scheme meets the standards set by the Constitution.

This Court should resolve the issue and provide the guidance necessary to permit cities to perform their duty to mitigate the adverse secondary effects of adult businesses. Such guidance would not only resolve the uncertainty which currently exists, but it would help reduce a significant source of litigation and avoid the chill that 42 U.S.C. § 1988 exposure places on governments when they are required to act without guidance at their peril.

For these reasons, Littleton believes that certiorari review by this Court is warranted and compelling, and respectfully requests that its Petition herein be granted.

Respectfully submitted,

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