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City of Littleton v. Z.J. Gifts D-4, L.L.C.: Are We Losing the First Amendment, or Just Adult Businesses

Karen Cynn

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Casenotes

CITY OF LITTLETON V. Z.J. GIFTS D-4, L.L.C.: ARE WE LOSING THE FIRST AMENDMENT, OR JUST ADULT BUSINESSES?

I. INTRODUCTION

Nearly twenty years ago, the Supreme Court ruled that adult businesses and sexually oriented materials were entitled to some, but not full, First Amendment protection. Since then, courts have tried to determine the boundaries of this lesser protection. For years, circuit courts were split over whether ordinances governing adult businesses were required to provide a prompt judicial decision, or access to prompt judicial review in the event an adult business license application was denied. In City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C., the Supreme Court finally helped clarify the limits of the constitutional protection given to the adult entertainment industry. Specifically, the Court held adult businesses are en-

2. See Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976) (holding erotic nonobscene material was protected, but to lesser degree than other forms of speech). For a further discussion of the First Amendment protection of adult businesses, see infra notes 43-89 and accompanying text.
3. See George Merritt, Littleton case may decide fate of adult-store licensing, DENVER POST, Oct. 15, 2003, at A20 (recognizing thirteen year dispute over one aspect of level of protection adult businesses should receive); see also Julie Hilden, Does The Guarantee of a “Prompt” Judicial Decision Apply to Adult Business Zoning Cases?, at http://writ.news.findlaw.com/hilden/20040203.html (Feb. 3, 2004) (discussing ambiguities in defining scope of protection adult businesses are entitled to under First Amendment). According to Hilden, even if it were established that adult businesses receive a prompt judicial decision “on whether they’d complied with obscenity censorship law[,] . . . did that also mean that adult businesses were entitled to a prompt judicial decision on whether they had complied with zoning law?” Id. For further discussion of the debate, see infra notes 63-89 and accompanying text.
4. See Hilden, supra note 3 (explaining distinction is significant because while decision is pending, speakers may be silenced until final decision is made). A prompt judicial decision would ensure that a speedy determination was available. See id. Access to prompt judicial review, however, requires only “an ‘avenue’ for review, as opposed to the need for a final judicial decision.” Id. For detailed discussion of the circuit split, see infra notes 77-85 and accompanying text.
6. See id. For details of decision, see infra notes 21-42, 90-122 and accompanying text.
titled to a prompt judicial decision. It also found that the ordinary state judicial review rules at work in the case were sufficient to ensure constitutionality.

The First Amendment guarantees, among other things, the freedom of speech. While freedom of speech is one of the most fundamental rights Americans enjoy, there are limits to what is considered protected expression. Z.J Gifts, like every case that implicates the First Amendment, was essential because it had the potential to change the culture of our democratic society. These are the cases where the Court is given the power to restrict or grant First Amendment freedoms, an essential basis of our society.

Jurisprudential history indicates that the First Amendment was largely defined before 1950, indeed, recent trends show a decline in the number of free speech cases the Supreme Court has agreed to hear. Maintaining the adult business industry as a form of pro-

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7. See Z.J Gifts, 124 S. Ct. at 2224 (holding adult business licensing schemes were required to provide prompt judicial decision).
8. See id. at 2224-26 (indicating normal state judicial review procedures are adequate as long as courts remain sensitive to potential First Amendment wrongs). For detailed discussion of the four reasons why ordinary state rules are sufficient, see infra notes 108-18 and accompanying text.
9. See U.S. Const. amend. I (dealing with religious and political freedom). It reads: “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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id.
10. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964) (stating there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”). In the context of sexually oriented material, obscenity is not protected. See id. For a full discussion of the First Amendment, its importance, and its limits, see infra notes 43-46.
11. See Rodney Smolla, Speech - Overview, at http://www.firstamendmentcenter.org/speech/overview.aspx (last visited Mar. 25, 2005) (noting “direct link [exists] between freedom of speech and vibrant democracy” because “[f]ree speech is an indispensable tool of self-governance in a democratic society”). According to Smolla, the promotion of democracy is not the only reason the First Amendment is so important. See id. The First Amendment also promotes individuality and shapes the way Americans think, thereby defining our “humanity.” See id. For a further discussion of the link between the First Amendment and democracy, see infra notes 168-71 and accompanying text.
12. See Smolla, supra note 11 (stating “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression”) (quoting Procunier v. Martinez, 416 U.S. 396, 427 (1974)); see also Hilden, supra note 3 (contending if Court does not give adult businesses same treatment as other First Amendment protected businesses, adult business causing controversy in Littleton, Colorado will most likely have to move its location and speech will become “less free”).
tected expression is particularly controversial because it invokes strong moral, religious, and First Amendment responses. Further controversy surrounds Z.J. Gifts because it is one of only three freedom of expression cases the Court chose to hear this past term. Given the infrequency of First Amendment cases that make it to the Supreme Court, Z.J. Gifts has generated a substantial amount of attention from both the public at large and the legal world.

This Note discusses the role adult businesses play in the development of First Amendment law and how Z.J. Gifts fits into that evolution. The Note analyzes the implications of this case from three angles. First, it discusses whether Z.J. Gifts is just another instance of First Amendment protections being reduced and the potential impact if this contention were true. Second, it presents


15. See Collins, supra note 13 (discussing three cases Court has heard in past term, including Z.J. Gifts). For a discussion of the attention given to, and organizations interested in, the Z.J. Gifts decision, see infra notes 86-88 and accompanying text.

16. For a list of some of the organizations that have gotten involved, see supra note 14. For a detailed discussion of those organizations’ arguments, see infra notes 86-88.


criticisms of the argument that *Z.J. Gifts* exemplifies erosion of the First Amendment protections.\textsuperscript{19} Third, the Note addresses the impact *Z.J. Gifts* may have on society and on future adult business cases.\textsuperscript{20}

II. FACTS

Littleton, a city in Colorado with a population of 33,661, was concerned with maintaining certain values.\textsuperscript{21} In 1993, in an effort to preserve its community, Littleton passed an “adult business” ordinance which required that adult businesses obtain licenses to operate.\textsuperscript{22} In nineteen detailed sections, the ordinance governs almost every aspect of an adult business in Littleton.\textsuperscript{23} The provision rele

who said “I think Americans better wake up and realize pieces of their liberties are slowly being taken away”). For a full discussion of the decline of the First Amendment and the negative impact that has followed, see infra notes 157-61 and accompanying text.

19. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2226 (2004) (holding First Amendment claimant does not deserve especially fast judicial decision because it does not rise to level of censorship, and Colorado’s rules are sufficiently flexible enough so judges may reach decisions quickly while using judicial power to prevent substantial First Amendment harms). The argument is essentially that the Court provided for a lesser constitutional protection for adult businesses. See id. For a further discussion of the argument, see infra notes 154-56 and accompanying text.

20. For commentary on some of these effects such as increased litigation, potential censorship, and decrease in number of adult businesses across the country, see infra notes 149-77 and accompanying text.

21. See General History of Littleton, at http://www.littletongov.org/history/genhist.asp (last visited Mar. 25, 2005) (describing history of Littleton); see also Community Development, at http://www.littletongov.org/communitydev/default.asp (last visited Mar. 25, 2005) (stating that Community Development Department is group whose purpose is specifically to “ensure quality, viable development that encourages a community-minded balance and promotes the values, goals, and welfare of the city of Littleton”).

22. See generally LITTLETON, COLO., CITY CODE § 3-14 (2004) (regulating adult business industry in Littleton). Littleton amended its ordinance in 2001 after the District Court for the District of Colorado’s decision. See id. In the amendment, the city clarified certain corporate disclosure requirements and changed the age restrictions for adult businesses that do not provide live entertainment. See LITTLETON, COLO., ORDINANCE 13 (2001) (codified as LITTLETON, COLO., CITY CODE § 3-14-2, -5, -8, -16 (2002)). These amendments were not relevant to ZJ or to the case.

23. See LITTLETON, COLO., CITY CODE § 3-14 (2004) (listing specific requirements and restrictions on adult businesses in Littleton, Colorado). The following is a list of Littleton’s adult business Code Sections, under Title 3: Business Regulations, Chapter 14: Adult Entertainment Establishments:

§ 3-14-1: Purpose
§ 3-14-2: Definitions
§ 3-14-3: Location Of Adult Businesses; Amortization
§ 3-14-4: License Required; Fee
§ 3-14-5: License Application
§ 3-14-6: Application Fee
ADULT BUSINESS LICENSING SCHEMES

vant to this case requires an "adult bookstore, adult novelty store, or adult video store" to obtain an adult business license. It restricts the areas where such businesses may be located. Additionally, the ordinance lists criteria which may provide the basis for Littleton to deny a license request.

In the fall of 1999, the company Z.J. Gifts D-4, L.L.C. ("ZJ") opened a store named "Christal's" in Littleton, Colorado. The location they selected was not zoned to accommodate adult businesses. ZJ knew they would not be able to operate an adult business at this site. ZJ sold adult books among other merchandise, however, they claimed they were not planning to operate an adult business without a license.

§ 3-14-7: Investigation
§ 3-14-8: Approval/Denial of License
§ 3-14-9: Term Of License
§ 3-14-10: License Renewal
§ 3-14-11: Suspension Or Revocation of License
§ 3-14-12: Display; Transferability; Change Of Ownership
§ 3-14-13: Manager; Change Of Manager
§ 3-14-14: Hours Of Operation
§ 3-14-15: Standards Of Conduct
§ 3-14-16: Age Restrictions
§ 3-14-17: Lighting Requirements
§ 3-14-18: Right Of Entry
§ 3-14-19: Exemptions, Generally

Id.

24. See id. § 3-14-4 (stating "[n]o person shall conduct an adult business without first having obtained an annual adult business license").

25. See id. § 3-14-3 (making it unlawful to operate adult businesses in any location in Littleton except as provided in Code). Section B states:

It shall be unlawful to operate or cause to be operated an adult business within five hundred feet (500’) of:

1. A church;
2. A school or childcare facility;
3. A public park (not including trails);
4. A massage parlor licensed under provision of the city code; or
5. A community correctional facility.

Id. § 3-14-3(B).

26. See id. § 3-14-5, -8, -17 (including errors and omissions in application, applicant status, and failure to meet certain lighting requirements); see also Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220, 1224 (10th Cir. 2002) (explaining purpose of Littleton’s ordinance was to require all adult businesses in Littleton to obtain licenses to operate in city borders and to restrict those businesses to specific areas in Littleton).

27. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2222 (stating ZJ opened store that sold “adult books” on South Broadway in Littleton).

28. See LITTLETON, COLO., CITY CODE § 3-14-3 (2004) (addressing where adult businesses may be located within city limits). For the language of the ordinance, see supra note 25.

29. See Z.J. Gifts, 311 F.3d at 1224 (revealing Littleton told property owners their location was not zoned to accommodate adult businesses).
business. ZJ did not apply for an adult business license as required by the Littleton ordinance because only adult businesses required one. Facing this quandary, prior to Christal’s opening, ZJ brought a lawsuit claiming Littleton’s ordinance was facially unconstitutional. ZJ argued the ordinance was unconstitutional for several reasons. The most salient was that it did not provide for a prompt judicial decision if there was an administrative denial of a license application. According to ZJ, this failure violated the First Amendment because the lack of expeditious decision making created the risk of indefinitely stifling constitutionally protected

30. See id. (discussing while ZJ argued it was not planning on operating as adult business, the district court found it qualified as one). The Tenth Circuit Court of Appeals concluded that ZJ would most probably constitute an adult business under Littleton’s ordinance Section 3-14-2, because a “commercial establishment falls into this category if, as judged by percentage of stock-in-trade, revenue, or advertising, it is primarily devoted to the depiction or description of specified sexual activities or specified anatomical areas, regardless of whether the establishment has other business purposes.” Id. at 1224-25.

31. See LITTLETON, COLO., CITY CODE § 3-14-5 (A) (requiring all persons operating adult business to obtain annual adult business license first). This provision states: “All applicants for an adult business license shall file an application for such license with the city clerk on forms to be provided by the clerk. Each principal owner and all managers and employees shall be named in the application form.” Id. Section 3-14-5 goes on to state other adult business application criteria, such as what information is required to be provided on the application, what happens if the information is wrong, omitted, or improperly completed, and the duty to continually update any information that may change. See id. §§ 3-14-5(B)-(F).

32. See ZJ Gifts, 124 S. Ct. at 2222 (indicating plaintiffs argued city ordinance infringed on their First Amendment rights).

33. See ZJ Gifts, 311 F.3d at 1224 (seeking monetary, declaratory, and injunctive relief against Littleton).

34. See id. at 1227; see also LITTLETON, COLO., CITY CODE § 3-14-8(B) (describing procedures when finding license ineligible). The relevant portion of this section of Littleton’s Code states:

2. If the city manager determines that the applicant is ineligible for a license per subsection (A) of this section, he/she shall issue an order sustaining the city clerk’s denial of the application, within two (2) days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to the applicant at the address supplied on the application.

3. The order of the city manager made pursuant to subsection (B)2 of this section shall be a final decision and may be appealed to the district court pursuant to Colorado rules 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.

Id. §§ 3-14-8(B)(2), (3); see also ZJ Gifts, 311 F.3d at 1224 (stating ZJ claimed Littleton’s ordinance intruded on their rights making Littleton liable to them under 42 U.S.C. § 1983).
ADULT BUSINESS LICENSING SCHEMES

The Tenth Circuit Court of Appeals agreed, in part, with ZJ and held certain provisions of the statute unconstitutional. The United States Supreme Court accepted this case to settle the conflict surrounding adult business licensing schemes. In particular, the Court examined whether a scheme was required to provide a prompt judicial decision or simply access to prompt judicial review of an administrative decision denying a license in order to comply with the First Amendment. The Supreme Court agreed with the Tenth Circuit that a prompt judicial decision was required under the First Amendment. Departing from the lower court, it held that the existing rules in Colorado governing judicial review were adequate to ensure the judicial decision would be prompt. Any inappropriate delays may be adjudicated on a case by case ba-
III. BACKGROUND

The First Amendment encourages free expression, one of the most fundamental ideals in American society. The freedom of expression guaranteed by the First Amendment is not restricted only to speech, it also includes other forms of expression. The Supreme Court of the United States has held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. This has been recognized in a variety of contexts, including the protection of symbolic speech, the protection of the right to petition, and the protection of the right to assemble. The Court has also recognized that the First Amendment protects the right to protest, to speak out, and to engage in political processes. The protection of these rights is essential to the functioning of a democratic society, and is a cornerstone of American constitutional law.

41. See Z.J. Gifts, 124 S. Ct. at 2224 (holding whether courts are sensitive to First Amendment harms should be determined on case by case determination, not on facial challenge).
42. See id. at 2226 (reversing judgment of Tenth Circuit).
43. For the text of the First Amendment, see supra note 9; see also Reno v. ACLU, 521 U.S. 844, 885 (1997) (indicating presumption that regulation of speech will hurt freedom of ideas). The Court in Reno stated:

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

521 U.S. at 885; see also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) (recognizing importance of free speech in society as reason for presumption of invalidity). “This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.”

Playtime Theatres, 475 U.S. at 46-47; see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (asserting that despite differences in religion and politics, “liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy”;) (quoting Cantwell v. Conn., 310 U.S. 296, 310 (1940)); Tony Mauro, First Amendment plays second fiddle this term, at http://www.firstamendmentcenter.org/analysis.aspx?id=13690 (last visited Mar. 26, 2005) (citing former Justice William Brennan Jr.'s opinion that First Amendment was most important part of Constitution and that remainder of Constitution flowed from it); Smolla, supra note 11 (discussing how Americans have internalized value of freedom of speech and now it is core belief that is fundamental to society as “article of constitutional faith”).

44. See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”). See generally Smolla, supra note 11 (discussing evolution of First Amendment in Supreme Court decisions over past fifty years). Smolla, the Dean of the University of Richmond School of Law, asserted that during the past half-century, the decisions of the Supreme Court have given Americans the liberty under the First Amendment to:
- Desecrate the national flag as a symbol of protest.
- Burn the cross as an expression of racial bigotry and hatred.
- Espouse the violent overthrow of the government as long as it is mere abstract advocacy and not an immediate incitement to violence.
- Traffic in sexually explicit erotica as long as it does not meet a rigorous definition of “hard core” obscenity.
- Defame public officials and public figures with falsehoods provided they are not published with knowledge of their falsity or reckless disregard for the truth.
Supreme Court has held, however, that there are limits to First Amendment protection and freedom of expression is not absolute. In particular, the Court has ruled while adult entertainment is considered a protected form of expression, it is entitled to less protection than other types of expression. A problem may arise when determining how much protection will be sufficient for adult businesses under the lesser protection standard.

Even though it may be a lesser protection, the First Amendment still protects adult businesses. Therefore, any regulation that seeks to inhibit protected expression must satisfy certain requirements. To ensure constitutionality, regulation of protected speech may not result in prior restraint before it reaches "the marketplace of ideas." Cities are allowed to regulate the industry as long as there is sufficient governmental interest in the activity.

- Disseminate information invading personal privacy if the revelation is deemed "newsworthy."
- Engage in countless other forms of expression that would be outlawed in many nations but are regarded as constitutionally protected here.

Id.

45. See Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976) (acknowledging there are First Amendment guarantees regarding expression, but there is more interest in protecting certain types of speech over others); see also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding freedom of expression is not end of inquiry because Constitution does not require absolute freedom at all times in all places). See generally Collins, supra note 13 (stating whether free speech claim is upheld often will depend on type of expression that is involved).

46. See Young, 427 U.S. at 70-71 (holding erotic, nonobscene materials are protected by First Amendment, but get less protection than other forms of speech such as political speech). The Court decided lesser protection for sexually based materials was appropriate because:

...[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 lesser, magnitude than the interest in untrammeled political debate.

Id. at 70.

47. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (stating procedural safeguards are necessary to ensure constitutionality).

48. See United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (discussing tradition of First Amendment and banning censorship or prior restraint because publishers bid "for the minds of men in the marketplace of ideas").

49. See United States v. O'Brien, 391 U.S. 367, 376 (1968) (holding "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"); see also City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 439-40 (2002) (referring to City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) as premise for allowing city to rely on data showing adult businesses attract crime and holding to be significant government interest). As the Court in Alameda Books explained, Renton drew a distinction between the two inquiries that are made when analyzing an ordinance. See
Negative secondary effects of the adult business industry have been ruled to be a significant governmental interest. This secondary effects doctrine was initially enforced in zoning of adult businesses, but was expanded to include other activities such as nude dancing. There are several types of zoning plans that are used to handle adult businesses in a city. Regardless of the method a city

Alameda Books, 535 U.S. at 440. The first inquiry is whether the municipal ordinance is content neutral, which “requires courts to verify that the ‘predominate concerns’ motivating the ordinance ‘were with the secondary effects of adult [speech], and not with the content of adult [speech].’” Id. at 440-41 (quoting Renton, 475 U.S. at 47). The second is whether the ordinance is designed to serve a significant government interest and does not unreasonably limit other avenues of communication. See id. at 441. This second inquiry goes further and asks the municipality to demonstrate a connection between the activity sought to be suppressed and the secondary effects the ordinance supposedly prevents. See id. The Court determined that municipalities have more experience and understanding of the secondary effects, so the Court only required municipalities to “rely upon evidence that is ‘reasonably believed to be relevant’ to the secondary effects that they seek to address.” Id. at 442; see also Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773, 783 (S.D. Ind. 2004) (stating First Amendment is implicated any time city “seeks to single out adult entertainment businesses and regulate them through licensing, operational and zoning laws,” but ordinances are constitutional as “long as they are content-neutral regulations of speech which are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication”).

50. See Young, 427 U.S. at 71 (holding local governments are allowed to restrict adult businesses to prevent negative secondary effects such as crime, deterioration of retail trade, and decrease in property value, and that city’s “interest in attempting to preserve the quality of urban life is one that must be accorded high respect”); see also Renton, 475 U.S. at 49 (stating zoning regulations designed to prevent undesirable secondary effects of adult businesses are legitimate “content-neutral” time, place and manner regulations”). The Court in Renton held because the ordinance was designed to serve a significant governmental interest, it was deemed content neutral. See id. at 47-49.

51. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991) (recognizing nude dancing is constitutionally protected expression, but deciding Indiana’s public nudity ban did not violate First Amendment). “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Id. at 570 (quoting O’Brien, 391 U.S. at 376). The Court criticized the expansive interpretation of “speech” because if construed broadly enough, almost anything would be considered expressive conduct. See id.; see also City of Erie v. Pap’s A.M., 529 U.S. 277, 289 (1999) (“Being ‘in a state of nudity’ is not an inherently expressive condition . . . . [N]ude dancing . . . is expressive conduct, although we think it falls only within the outer ambit of the First Amendment’s protection.”); Dream Palace v. County of Maricopa, 384 F.3d 990, 1014 (9th Cir. 2004) (referring to Alameda Books determination that ordinances do not have to be limited to expressive activities, they may also apply to massage parlors which city has found cause secondary effects).


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uses, the First Amendment prohibits a municipality from completely prohibiting adult businesses simply because the city does not want them there. Critics argue the secondary effects doctrine is simply a disguise for government officials to zone undesirable businesses out of their cities. This is particularly true, they argue, because the First Amendment prohibits a municipality from completely prohibiting adult businesses simply because the city does not want them there.

Critics argue the secondary effects doctrine is simply a disguise for government officials to zone undesirable businesses out of their cities. This is particularly true, they argue, because the First Amendment prohibits a municipality from completely prohibiting adult businesses simply because the city does not want them there.

Moreover, the First Amendment protects nonobscene adult expression under the First Amendment, government regulators simply use secondary effects doctrine to shut adult businesses down.
cause the correlation between adult businesses and negative secondary effects is highly suspect.\textsuperscript{55} Therefore, using secondary effects as the basis to restrict the entire adult entertainment industry is problematic.\textsuperscript{56}

The operation of adult businesses and pornography tends to be a sensitive issue, and tension has existed between adult businesses and city officials since the Supreme Court decided adult entertainment was a constitutionally protected industry.\textsuperscript{57} Some argue that prohibition is essential to maintain morality in society and to prevent the deleterious effects the industry has on the community and on individuals.\textsuperscript{58} Conversely, regulation of adult busi-

\textsuperscript{55} See Hudson, supra note 54 (citing Florida-based land use planner, Bruce McLaughlin, who has analyzed many secondary effects studies). McLaughlin claimed there were two main flaws with these studies. See id. First, there was an "incestuous relationship among the various studies" because most of the studies that the government uses are not independent. See id. Second, of the forty studies that McLaughlin himself has conducted, he found almost no evidence of the adverse secondary effects. See id.

\textsuperscript{56} See id. (discussing McLaughlin's skepticism of relying on outdated studies that have not been conclusively proven).

\textsuperscript{57} See James Lawlor, Adult Business License Laws Must Provide Prompt Judicial Decision, Planning, Oct. 2004, at 39 ("Of all the decisions handed down during the 2003-04 term, this [Z.J. Gifts] has most practical significance for planners and municipal officials."); see also Young, 427 U.S. at 70-71 (acknowledging First Amendment prohibits complete suppression of adult businesses). See generally Marcus v. Search Warrant of Property, 367 U.S. 717, 730 (1961) (discussing obscenity and constitutionally protected speech). The regulation of the adult industry began with obscenity, however, the Court in Marcus acknowledged that there was a distinguishing line between constitutionally unprotected obscenity and constitutionally protected nonobscene material. See id. The Court explained that it had "expressly recognized the complexity of the test of obscenity . . . and the vital necessity in its application of safeguards to prevent denial of the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." Id. (quoting Roth v. United States, 354 U.S. 476, 488 (1957)).

\textsuperscript{58} The adult business industry may have negative secondary effects such as increase in crime and decrease in property value. For further discussion of negative secondary effects, see supra note 50; see also Victor B. Cline, Ph.D., Pornography's Effects on Adults and Children, at http://www.moralityinmedia.org/pornsEffects/clineart.htm (last visited Mar. 28, 2005) (discussing numerous dangerous effects of pornography on both adults and children). Dr. Cline, a clinical psychologist and professor at the University of California at Berkeley, treated approximately 350 sex addicts and sex offenders and came to several conclusions. See id. According to Cline, pornography viewing is a four step process starting with addiction and ending with acting out sexually. See id. In this last stage, a person will act out sexual behavior seen in pornography. See id. The major consequence of pornography addiction, however, is not the possibility of committing a violent sex act; rather, it is the "disturbance of the fragile bonds of intimate family and marital relationships. This is where the most grievous pain, damage, and sorrow occur. There is repeatedly an interference with or even destruction of healthy love and sexual relationships with long-term bonded partners." Id.; see also Paul J. McGeady, The Harmful Effects of Pornography, at http://www.moralityinmedia.org/pornsEffects/harmfuleffects.htm (Sept. 22, 2000) (discussing effects of pornography and sum-

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nesses involves the suppression of free speech, and therefore, intrudes on the fundamental principle that uninhibited free speech is essential.\(^{59}\)

Once adult businesses became protected, there was a rapid increase in the number of businesses across the country.\(^ {60}\) It has become a very lucrative industry, profitable enough for major corporations to notice and get involved, which has increased the stake city planners have in regulating adult businesses.\(^ {61}\) In response, city governments began drafting regulations as a way to monitor these businesses.\(^ {62}\) One element of the licensing scheme is what type of review the applicant is entitled to in the event that the application is denied. The issue is whether the applicant receives a prompt judicial decision or access to prompt judicial review, and

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<td>5. Harm of Violence Toward Women</td>
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<td>6. Harm of Degradation of Women</td>
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<td>7. Harm to Children</td>
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<td>8. Harm of stimulations resulting in Rape</td>
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<td>9. Harm of Contracting AIDS and other Venereal Diseases in Peep Show Booths and Spreading the Same to the Public</td>
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<td>10. Harm to Performers in the production of porno films and videos</td>
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<td>11. Harm to Performers in Nude Dancing Establishments</td>
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<td>12. Harm to innocent persons criminally assaulted and murdered by those stimulated by porn, including Serial Murderers</td>
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\(^{59}\) For discussion of the importance of the First Amendment, see supra note 43 and accompanying text; see also Joseph Gerth, Adult-store case could aid local law, Courier-J. (Louisville, Ky.), June 9, 2004, at B1 (quoting adult business attorney, Frank Mascagni, stating "[w]hat scares me is this conservative court allowing government to continue placing regulations on lawful businesses").

\(^{60}\) See John Gilmore, Zoned Out: A new take on regulating adult uses, Planning, Feb. 1999, at 16 (citing survey conducted in 1994 which showed in New York City, there was thirty percent increase in adult businesses in preceding five years).

\(^{61}\) See id. at 20 (commenting that "[a]dult businesses are here to stay"); see also James Harder, Porn 500, Insight on News, Jan. 8, 2001, at 10 (stating pornography sales in United States was over $10 billion in 1999, and as result, General Motors Corp. and AT&T have tried to get involved and make profits).

\(^{62}\) See Gilmore, supra note 60, at 15 (discussing how increase in adult businesses in New York City has created "a powerful incentive for the new regulations"); see also Daniel Yi, Adult Businesses Determined to Run in Anaheim, L.A. Times, Nov. 7, 1999, at B1 (discussing California cities strict view on adult businesses and their hostility towards it). The city of Tustin, California, has an ordinance regulating adult businesses, but there are not any adult businesses in the city. See id. Anaheim, California, was the first known city to criminally prosecute a violation of municipal adult business regulation. See id.
the uncertainty surrounding the question is not a new development.\textsuperscript{63}

The Supreme Court has passed up the opportunity to resolve this issue in the past, forcing circuits to decide for themselves.\textsuperscript{64} As a result, the circuits have drawn their own conclusions resulting in a fairly even split.\textsuperscript{65} The split is caused by conflicting interpretations of the two leading Supreme Court cases in this area.

In the first case, \textit{Freedman v. Maryland},\textsuperscript{66} the defendant challenged the constitutionality of a Maryland statute that required submission of all motion pictures to the Maryland Board of Censors before exhibition.\textsuperscript{67} The Court held a statute seeking to regulate protected speech required procedural safeguards to prevent inhibiting protected expression.\textsuperscript{68} The \textit{Freedman} court fashioned a three-prong test to ensure that a statute had the necessary procedural safeguards to prevent the danger of censorship.\textsuperscript{69} Every constitutional statutory scheme must fulfill the following: the State must bear the burden of showing the expression is unprotected, the procedure must require judicial determination, and the procedure

\textsuperscript{63} See Merritt, supra note 3, at A20 (recognizing there has been circuit split on this issue for thirteen years).

\textsuperscript{64} See Thomas v. Chi. Park Dist., 534 U.S. 316, 325 (2002) (acknowledging this was one question that Court granted writ of certiorari to answer, but not reaching it); see also City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 281 (2001) (recognizing question of whether judicial decision or prompt judicial review must accompany adult business licensing schemes was raised, but dismissing petition and not disturbing judgment of Wisconsin court).

\textsuperscript{65} See Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 297-98 (5th Cir. 2003) (recognizing circuit split on issue, but holding because Supreme Court passed up opportunity to resolve issue, it must follow own precedent set in TK's Video, Inc. v. Denton County, 24 F.3d 705, 709 (5th Cir. 1994)).

\textsuperscript{66} 380 U.S. 51 (1965).

\textsuperscript{67} See id. at 52-55 (stating facts of case). This case did not involve adult businesses directly, but it set forth the standard of review required in licensing schemes. See id. at 58-59. The Maryland statute challenged in this case states: It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner, or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors...\textit{Id.} at 52 n.1 (citing Md. Code Ann., Art. 66A, § 2 (1957)).

The Court reversed the Maryland Supreme Court decision which held this statute to be valid and enforceable. \textit{See id.} at 59-60. "The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint." \textit{Id.} at 60.

\textsuperscript{68} See id. at 57 ("[U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech.") (quoting Marcus v. Search Warrant, 367 U.S. 717, 731 (1961)).

\textsuperscript{69} See \textit{id.} (describing three-prong test).
must assure "prompt final judicial decision." It is the language of this last requirement which causes the problem at issue.

In the second case, *FW/PBS, Inc. v. City of Dallas*, which was decided twenty-five years later, the plaintiff sought review of the court of appeals' decision that the city's licensing ordinance was constitutional. The plaintiff argued that the ordinance failed to provide a definitive time limit for judicial review, and therefore, it was unconstitutional. The plurality of an extremely fragmented Court held the licensing scheme was invalid because it constituted an "impermissible prior restraint upon protected expression." 74

70. See id. at 58-59 (stating these requirements are necessary to ensure "sensitivity to freedom of expression," to "minimize the deterrent effect of an interim and possibly erroneous denial of a license," and without them, it may be "too burdensome to seek review of the censor's determination"). The Court recognized it would be too burdensome to seek review of the censor's determination without the safeguards. See id. at 59. The third requirement is necessary because "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." Id. at 58. Furthermore, "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." Id. at 59. The Court recognized a "censor's business is to censor," so a censor will likely be less sensitive to First Amendment freedoms than a court would be. See id. at 57.


72. See id. at 220-22 (stating facts of case). *FW/PBS* involved a sexually oriented business run by the Petitioner in Dallas. See id. at 220-21. The Dallas Code challenged in this case defined a "sexually oriented business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." See id. at 220 (citing DALLAS CITY CODE, ch. 41A, § 41A-2(19) (1986)). The ordinance regulated sexually oriented businesses through zoning, licensing, and inspections. See id. at 220-21.

73. See id. at 223 (citing Freedman v. Maryland, 380 U.S. 51 (1965)). The Supreme Court granted certiorari to determine whether the licensing scheme was "an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland*." Id. Because the licensing scheme did not provide the requisite procedural safeguards, the plurality held the licensing provision was an invalid prior restraint. See id. at 243.

74. See id. (commenting on separate opinions). In very brief summary, the division among the justices was the following:

Justice O'Connor writing for the plurality with Justice Stevens and Justice Kennedy, concluded the ordinance's licensing scheme violated the First Amendment and only the first two safeguards from *Freedman* were necessary for all licensing schemes. See id. They were undecided as to what role the third safeguard had. See id. at 225-29. Justices Brennan, Marshall, and Blackmun, concurring, agreed the ordinance's licensing scheme was invalid under the First Amendment under the *Freedman* doctrine, but held that all three safeguards needed to be applied, not just the first two. See id. at 238-43.

Three justices dissented. See id. Justice White, writing for himself and Chief Justice Rehnquist, argued the *Freedman* safeguards were inapplicable to defeat the facial challenge in this situation because the ordinance had sufficiently important government interest to justify limiting First Amendment freedoms. See id. at 244-
The Court summarized the procedural safeguards required by the *Freedman* Court as the following:

(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 must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.\(^{75}\)

The language used by the *FW/PBS* Court is slightly different in that it states "expeditious judicial review" is necessary rather than requiring "prompt final judicial decision" like the Court in *Freedman* required.\(^{76}\)

The circuits were split over whether *FW/PBS* changed the meaning of the procedural safeguards given in *Freedman*.\(^{77}\) Five of the circuits held prompt judicial review was sufficient to satisfy the procedural safeguards requirement.\(^{78}\) Furthermore, the Eleventh Circuit claimed there was a significant difference between regulating adult businesses through licensing schemes and censorship of

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48. Justice Scalia wrote a separate opinion, dissenting in part and concurring in part. See id. at 250. He believed the ordinance should be held constitutional in all respects because Dallas could have prohibited the activities, but chose to limit them with the licensing scheme. See id. at 253. Because Dallas could have constitutionally prohibited the activity, the details of the licensing scheme did not have to comply with First Amendment standards. See id.

75. *Id.* at 227 (citing *Freedman* v. Maryland, 380 U.S. 51, 57-60 (1965)).

76. Compare *FW/PBS*, 493 U.S. at 227 (stating "expeditious judicial review" is all that is necessary), with *Freedman*, 380 U.S. at 59 (using language "prompt judicial decision"). It is the difference in interpretation between the Court's use of the words "review" and "decision" that has caused this debate. For further discussion of the circuit split, see *infra* notes 77-79.

77. The First, Second, Fifth, Seventh, and Eleventh Circuits support the view that prompt judicial review is sufficient. For detailed discussion of the arguments of these circuits, see *infra* notes 78-81 and accompanying text. The Fourth, Sixth, Ninth, and Tenth Circuits support the view that a prompt judicial decision is required for a licensing scheme to satisfy the First Amendment requirements. For further discussion of the arguments of these circuits, see *infra* notes 83-85 and accompanying text.

78. See *Beal* v. *Stern*, 184 F.3d 117 (2d Cir. 1999) (noting without deciding that prompt judicial access would be sufficient to satisfy *Freedman*); *TK's Video*, Inc. v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) (interpreting *FW/PBS* to only require fair opportunity to complete administrative process and access to courts within brief period); *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (questioning need for procedural safeguards at all because writ of certiorari should be proper method of review of administrative decisions, but recognizing Supreme Court has required safeguards in First Amendment cases even when writ of certiorari was available); *Jews for Jesus*, Inc. v. *Mass. Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993) (implying access to judicial review is sufficient).
constitutionally protected speech. 79 Freedman’s higher standard of prompt judicial decision still controls when censorship is involved, however, licensing schemes of adult businesses are not entitled to as much protection. 80 The argument is that the purpose of the First Amendment protection is to prevent censorship. 81

Four circuits disagreed with the view that access to prompt judicial review was sufficient to ensure constitutionality of a licensing scheme. 82 They argued the higher standard of a prompt judicial decision was required in licensing schemes for adult businesses. 83 There were two main reasons these circuits argued a prompt judi-

79. See Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256 (11th Cir. 1999) (stating licensing schemes are different than censorship decisions and are entitled to less protection, and therefore, prompt judicial access is sufficient).

80. See id. at 1256 (holding it is appropriate to give licensing schemes less protection than censorship); see also City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2227 (2004) (Stevens, J., concurring) (stating Justice O’Connor in FW/PBS recognized there was differences between censorship and ordinary licensing schemes, and thus, there were different requirements from each).

81. See Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 95-96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.”); see also Freedman v. Maryland, 380 U.S. 51, 61-62 (1965) (Douglas, J., Black, J., concurring) (arguing any kind of censorship is unacceptable); Kingsley Books, Inc. v. Brown, 354 U.S. 437, 446 (1957) (Douglas, J., Black, J., dissenting) (stating censor has “paralyzing power”); M.E. Sprengelmeyer, Supreme Court backs Littleton, ROCKY MOUNTAIN NEWS (Denver, Colo.), June 8, 2004, at 23A (quoting ZJ’s attorney, Arthur M. Schwartz, that freedom is law, not just prevention of censorship, and adult businesses are entitled to prompt judicial ruling).

82. The Fourth, Sixth, Ninth, and Tenth Circuits. For further discussion of the position of these circuits, see infra notes 83-85.

83. See Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220, 1256 (10th Cir. 2002) (holding FW/PBS does not weaken Freedman and review without decision is worthless); Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 893 (6th Cir. 2000) (“[I]f mere access to a judicial forum were sufficient, then the second Freedman safeguard would be rendered virtually meaningless . . . to ensure entire review process will be expeditious [because first two safeguards work together].”); Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097, 1101 (9th Cir. 1998) (“The phrase [judicial review] necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless.”); 11126 Balt. Boulevard, Inc. v. Prince George’s County, Md., 58 F.3d 988, 999-1000 (4th Cir. 1995) (listing four reasons why prompt decision is necessary). According to the Fourth Circuit, there are four reasons why a prompt decision is required and not prompt judicial review. See 11126 Balt. Boulevard, 58 F.3d at 999. First, FW/PBS was a fragmented decision, so it cannot alter Freedman. See id. Second, FW/PBS does not relax the prompt judicial review requirement as given in Freedman. See id. at 1000. Third, the phrase “prompt judicial review” does not support the conclusion that FW/PBS relaxed the requirement because the two phrases are often used synonymously. See id. Lastly, the court argues that Justice White’s dissent in FW/PBS presents an argument that there is no suggestion that licensing decisions are not subject to immediate appeal to the courts. See id.
cial decision was required. First, the three procedural safeguards work together to be effective, and review of an administrative decision without a determination of its validity would be worthless. 84 Second, the term “judicial review” necessarily implies a decision will be rendered. 85

Adult businesses and the First Amendment are both sensitive issues that often invoke strong feelings in opposition or support, and as a result, Z.J. Gifts generated attention from various organizations. 86 A fair number of individuals from the general public be-

84. See Z.J. Gifts, 311 F.3d at 1236 (stating review without decision is worthless); see also Nightclubs, 202 F.3d at 893 (stating safeguards work together and decision is necessary).

85. See Baby Tam, 154 F.3d at 1101 (stating judicial review must have both review of dispute and decision).

86. There were many amici curiae briefs for both the Petitioner and the Respondent which represent the wide variety of organizations that became involved in this case. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) (listing organizations that filed briefs). For a full discussion of the amici curiae briefs, see supra note 14. The First Amendment Lawyer's Association wrote an amicus curiae brief in support of the Respondent. See Brief of Amicus Curiae First Amendment Lawyers Association at 1, City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) (No. 02-1609) (noting First Amendment Lawyer's Association (“FALA”) is dedicated to battling governmental abuses of licensing ordinances throughout country). Additionally, FALA stated if the decision of Tenth Circuit is reversed “these abuses are likely to continue” and “[s]uch a result not only adversely affects the clients of nearly every FALA attorney, but it also contravenes the First Amendment protections FALA and its members are dedicated to preserving.” Id. at 2. The American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, International Periodical Distributors Association, Publishers Marketing Association, and Video Software Dealers Association wrote an amici curiae brief in favor of the Respondent. See Brief of Amici Curiae American Booksellers Foundation for Free Expression, et al. at 2-4, City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) (No. 02-1609) (demonstrating interest in case by noting all these businesses own and operate retail establishments that sell books, videos, and other materials, and finding it “both intolerable and unconstitutional to permit an existing business selling First Amendment-protected material to be closed” or “prevented from commencing business while waiting for a court to render an opinion”).

The Conference of State Legislatures, National Association of Counties, and U.S. Conference of Mayors joined the American Planning Association as amici curiae in support of the Petitioner. See Brief of Amici Curiae the National League of Cities, et al. at 1-2, City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) (No. 02-1609) (stating regulation of adult businesses is vital to well being of developing communities and “essential for the prevention of crime, the preservation of property values, and the maintenance of neighborhood quality”). Ohio and fourteen other states wrote an amici curiae brief in support of the Petitioner. See Brief of Amici Curiae Ohio et al. at 1, City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) (No. 02-1609) (stating States have right to regulate businesses within borders, including adult businesses, and there is strong interest in ensuring success of regulation especially for adult businesses because they bring in negative secondary effects). Lastly, the Community Defense Counsel wrote an amicus curiae brief in support of the Petitioner. See Brief of Amicus Curiae Community Defense
ADULT BUSINESS LICENSING SCHEMES

There were arguments supporting both views, including organizations and people such as religiously affiliated morality groups, the American Civil Liberties Union ("ACLU"), and present and past employees of the adult business industry. Additionally, before and after the decision was rendered, people tried to predict the practical impact the decision would have. These predictions have varied from having no effect at all to having a significant influence upon every city in the United States.

IV. NARRATIVE ANALYSIS

The Supreme Court held that in order to ensure constitutionality, the adult business licensing scheme in Littleton, Colorado was required to provide a prompt judicial decision when an applicant...

87. See Enforcing Morality, supra note 17, at 14 (discussing views of various groups on why this area of law is important). Some of the reasons that Hudson provides are the First Amendment, attempting to regulate human sexuality, or attempting to enforce morality in society. See id.

88. See David Grogan, Free Speech Defeat: Supreme Court Sides With Littleton, Colorado, at http://news.bookweb.org/freeexpression/2636.html (June 17, 2004) (noting First Amendment supporters disappointed with decision because accelerated procedures with two to three day limits do not apply to city licensing schemes); see also Hilden, supra note 3 (discussing importance of prompt decisions). Hilden argues that the speaker and other potential speakers who are aware of the situation may be silenced during waiting period. See Hilden, supra note 3. So, a prompt decision is essential. See id.; see also David Sherman, Sexually Oriented Businesses: An Insider's View, Proponent Testimony, S.B. 251, Ohio S. Judiciary Comm. on Civil Justice (Dec. 3, 2002) (discussing dangers and rampant illegal activities of adult entertainment industry); Jerry Lyon, Dancer Hotline Launched in Cincinnati, Ohio Citizens' Courier, Dec. 2002, at 1 (discussing dangers of adult entertainment on society and particularly on girls that work in industry); Tony Mauro, Advocates find little to cheer in free-speech victory, at http://www.firstamendmentcenter.org/analysis.aspx?id=13488 (June 8, 2004) [hereinafter Little Cheer] (discussing why this may not be victory at all for supporters of First Amendment); Sotos, supra note 54, at 6 (discussing balance between politicians who attempt zoning and those who believe ordinances are just method for religious right to try and enforce morality on society).

89. See George Merritt, Adult bookstore loses ruling, Denver Post, June 8, 2004, at B5 [hereinafter Loses Ruling] (stating some think this ruling will have impact on all cities, while others think decision is narrow and will only impact Colorado law); see also Merritt, supra note 3, at A20 (discussing impact decision may have on cities' ordinances); Jennifer Netherby, Court win for adult biz, Video Bus., June 14, 2004, at 8 (discussing impact of ruling is unclear because court issued no rule changes on how lower courts must meet requirements); The U.S. Supreme Court; Slants & Trends; Brief Article, Land Use L. Rep., June 16, 2004, at 89 [hereinafter Slants] (stating decision will most likely lead to additional litigation).
appealed a denied license. Although the Court established that a prompt judicial decision was necessary, it did not provide a definitive time limit that would satisfy the “prompt” requirement. It argued the First Amendment does not require the ordinance to specifically state special judicial review rules, rather, just that prompt judicial review must be provided in some way.

Littleton sought review of the decision of the court of appeals, claiming the Tenth Circuit erred in finding the ordinance unconstitutional. The Court accepted the case, but agreed with the lower court’s decision that a prompt judicial decision was necessary to comply with the First Amendment. The underlying reason for requiring the Freedman procedural safeguards in licensing schemes regulating First Amendment protected businesses is to prevent undue delay, which results in the unconstitutional suppression of protected speech. Acknowledging this purpose, the Court decided the language of FW/PBS indicating “prompt judicial review” necessarily encompassed giving a prompt judicial decision.

Littleton argued there was significance to the linguistic difference between “judicial review” and “prompt final judicial decision.” Several other circuits have also used this argument in making their determination that access to prompt judicial review

90. See Z.J Gifts, 124 S. Ct. at 2224 (stating Court rejected Littleton’s argument that prompt judicial review does not encompass prompt judicial decision).
91. See id. (accepting Littleton’s argument that First Amendment does not require specific time limits to be written directly into licensing schemes in cases like these, and finding Colorado’s ordinary judicial review procedures were adequate as long as courts remembered potential threat of First Amendment harms).
92. See id. (“[T]he First Amendment does not require special ‘adult business’ judicial review rules; and the First Amendment does not insist that Littleton write detailed judicial review rules into the ordinance itself.”).
93. See id. at 2222-23 (giving two reasons Littleton used to support claim). Littleton had two arguments. See id. The first was that the First Amendment procedural requirements of FW/PBS required prompt access to judicial review, but the First Amendment did not require prompt judicial determination. See id. Second, Littleton argued even if the First Amendment does require a prompt judicial determination, Colorado law satisfied any such requirement. See id. at 2223.
94. See id. at 2222, 2224 (holding prompt judicial review encompasses judicial decision and stating Court granted certiorari because of uncertainty in lower courts on issue). There has been a circuit split on this issue for the past thirteen years. See Merritt, supra note 3, at A20 (giving overview of circuit split on issue).
95. See Z.J Gifts, 124 S. Ct. at 2224 (holding licenses for constitutionally protected business must be issued within reasonable amount of time to prevent suppression, and discussing how safeguards were meant to prevent undue delay in both judicial and administrative procedures).
96. See id. (rejecting any of Littleton’s arguments that were contrary).
97. See id. at 2222-25 (explaining plurality in FW/PBS did not use word “decision,” they only spoke of “possibility of prompt judicial review” and O’Connor intentionally chose to use different language than Freedman).
was sufficient.\textsuperscript{98} The Court, however, rejected this argument as trivial.\textsuperscript{99} \textit{FW/PBS} specifically stated it was not radically changing the procedural safeguards from \textit{Freedman}.\textsuperscript{100} The distinction Littleton sought between the language of the two cases would be a substantial departure from the purpose of the \textit{Freedman} procedural safeguards.\textsuperscript{101} The \textit{Freedman} procedural safeguards were intended to prevent delays in both the administrative and judicial procedures of a licensing scheme.\textsuperscript{102} Furthermore, the Court found \textit{FW/PBS} also recognized this purpose so, in effect, there was no basis to Littleton’s argument in the semantic distinction.\textsuperscript{103}

Once the Court established a prompt judicial decision was required for every constitutional licensing scheme, it had to decide what standards to use to ensure that a prompt judicial decision would occur.\textsuperscript{104} The Court decided Colorado’s regular judicial review rules were sufficient to ensure “not only that access to the courts can be promptly obtained, but also that a judicial decision will

\textsuperscript{98} See Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256 (11th Cir. 1999) (noting language used in \textit{FW/PBS} was intentional because it acknowledged difference between censorship and licensing schemes and was attempting to treat unlike things differently); see also Z.J. Gifts, 124 S. Ct. at 2227 (Stevens, J., concurring) (holding Justice O’Connor in \textit{FW/PBS} recognized there were differences between censorship and ordinary licensing schemes); \textit{FW/PBS}, Inc. v. City of Dallas, 493 U.S. 215, 240-41 (1990) (Brennan, J., concurring) (discussing distinction made by plurality between judicial review and judicial decision was intentional). Justice Brennan argued that, in \textit{FW/PBS}, Justice O’Connor intentionally wanted judicial review to apply only to licensing schemes that did not involve censorship. See \textit{FW/PBS}, 493 U.S. at 240-41. She wanted, however, to preserve the higher standard of a judicial decision in cases involving censorship. \textit{See id.}

\textsuperscript{99} See Z.J. Gifts, 124 S. Ct. at 2223-24 (“[T]he city’s argument makes too much of too little.”).

\textsuperscript{100} See \textit{FW/PBS}, 493 U.S. at 228 (stating first two safeguards of \textit{Freedman}, that licensor’s decision must be made within reasonable time and prompt judicial review, are both essential); see also Z.J. Gifts, 124 S. Ct. at 2224 (deciding prompt judicial decision was necessary). Consequently, the Court also had to reject Littleton’s first contention that \textit{FW/PBS} only required prompt access to judicial review. \textit{See Z.J. Gifts,} 124 S. Ct. at 2224.

\textsuperscript{101} See Z.J. Gifts, 124 S. Ct. at 2224 (stating Littleton wants to change \textit{Freedman} core requirements from judicial decision to judicial review).

\textsuperscript{102} See \textit{id.} (“A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being ‘issued within a reasonable period of time.’”) (quoting \textit{FW/PBS}, 493 U.S. at 228). The Court here draws the conclusion that this statement means prompt judicial review must encompass a prompt judicial decision. \textit{See id.}

\textsuperscript{103} See \textit{id.} (inferring \textit{FW/PBS} plurality’s reference to prompt judicial review and Justice Brennan’s separate opinion read together meant prompt judicial decision was required).

\textsuperscript{104} See \textit{id.} (acknowledging \textit{Freedman} created model for what was meant by “prompt,” however, court disagreed with First Amendment requiring special specific time limit be put directly in ordinance).
be promptly forthcoming.\textsuperscript{105} According to the Court, the First Amendment does not require special detailed judicial review rules written into the ordinance itself.\textsuperscript{106} In general, court procedural rules and practices of each state, Colorado included, are sufficient to ensure undue delay does not occur as long as the courts remain aware of the need to prevent possible First Amendment violations.\textsuperscript{107}

The Court gave four reasons as the basis for its holding that Colorado's judicial review rules were sufficient to ensure a prompt judicial decision.\textsuperscript{108} The first reason was "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm."\textsuperscript{109} Second, there was "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."\textsuperscript{110} Third, the Court recognized the First Amendment harm at risk in this case was different than the harm in \textit{Freedman}.\textsuperscript{111} The

\begin{itemize}
  \item \textsuperscript{105} Id. Littleton had two arguments, first that there was a significant semantic difference between the language used in \textit{Freedman} and \textit{FW/PBS} and so prompt judicial decision is different than access to prompt judicial review. \textit{See id.} at 2223. For full discussion of this argument, see \textit{supra} notes 97-103 and accompanying text.
  
  The Court rejected this first argument as trivial. \textit{See id.} at 2223-24. The second argument Littleton made was that Colorado's judicial review laws were sufficient to ensure undue delay will not result in the licensing scheme. \textit{See id.} at 2224. In making its decision, the Court accepted the second argument and concluded the judicial review laws of Colorado, and most states, provided enough protection from the harms of potential delays in an adult business licensing scheme. \textit{See id.} at 2224-25.
  
  \textsuperscript{106} \textit{See Z.J Gifts,} 124 S. Ct. at 2224 (stating "the First Amendment does not require special 'adult business' judicial review rules; and the First Amendment does not insist that Littleton write detailed judicial review rules into the ordinance itself").
  
  \textsuperscript{107} \textit{See id.} (finding "ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly"). The Court decided whether a court has met its burden of judicial review and is adequately sensitive to potential First Amendment threats should be decided on a case-by-case basis. \textit{See id.} This is not to be decided on a facial challenge. \textit{See id.}
  
  \textsuperscript{108} \textit{See id.} (stating Court reached conclusion for four reasons).
  
  \textsuperscript{109} \textit{Id.} at 2224-25. The Court determined that state courts have the power to "arrange their schedules to 'accelerate' proceedings" and "higher courts may quickly review adverse lower court decisions." \textit{Id.} at 2225. Both of these powers show the procedural rules within the states are enough to prevent undue delay in a licensing scheme. \textit{See id.}
  
  \textsuperscript{110} \textit{Id.} at 2225. The assumption was that courts are aware First Amendment harms exist and they need to avoid undue delay because undue delay will result in the suppression of protected speech. \textit{See id.}
  
  \textsuperscript{111} \textit{See Z.J Gifts,} 124 S. Ct. at 2225 (distinguishing \textit{Freedman}). In particular, \textit{Freedman} involved the approval of a political film. \textit{See Freedman v. Maryland,} 380 U.S. 51, 52 (1965) (naming French film "Revenge at Daybreak" as movie sought to
difference was significant enough to decrease the need for imposing a special, procedural decision-making time limit in this situation.\textsuperscript{112} Lastly, the Court noted neither \textit{FW/PBS} nor \textit{Freedman} require a city or state to put the judicial review safeguard in the ordinance.\textsuperscript{113}

The Court took these four criteria and concluded that Colorado’s ordinary rules of judicial review were adequate to satisfactorily prevent the First Amendment harms concerning this particular ordinance.\textsuperscript{114} This would not necessarily be the case for every ordinance, only the ones that do not seek to censor constitutionally protected expression.\textsuperscript{115} In cases like this one, which did not involve censorship, Colorado’s ordinary rules of judicial review provide enough assurance that First Amendment harms will be avoided.\textsuperscript{116} There does not need to be extra protection written into the ordinance itself unless censorship of constitutionally protected speech is involved.\textsuperscript{117} Littleton’s ordinance was an attempt to ensure adult businesses’ compliance with neutral and objective criteria; it involved no censorship of constitutionally protected expression, and

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\textsuperscript{112} See \textit{Z.J Gifts}, 124 S. Ct. at 2225 (finding ordinance was easy to review so it is unlikely to completely suppress any particular item of adult material from adult businesses in Littleton, unlike censorship found in \textit{Freedman}).

\textsuperscript{113} See \textit{id.} at 2226 (recognizing how and whether state is to “incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide”) (quoting \textit{Freedman}, 380 U.S. at 60).

\textsuperscript{114} See \textit{id.} (finding Colorado’s ordinary judicial review rules are adequate for purposes of facial challenge to ordinance).

\textsuperscript{115} See \textit{id.} at 2225 (recognizing Littleton’s ordinance does not seek to censor, and it is objective and nondiscretionary). According to the Court, the criteria of the ordinance is easy to apply so its use will be easy to review. \textit{See id.} Furthermore, some adult businesses will satisfy the criteria and others will not. \textit{See id.} Therefore, the threat of unconstitutionality is reduced because there is still an outlet to sell the protected material which will not result in a complete censorship of the businesses. \textit{See id.}

\textsuperscript{116} See \textit{id.} at 2226 (holding ordinances that do not censor content are not entitled to “an unusually speedy judicial decision of the \textit{Freedman} type”).

\textsuperscript{117} See \textit{Z.J Gifts}, 124 S. Ct. at 2224 (accepting Littleton’s argument that \textit{Freedman} special judicial review rules did not apply in this case).
therefore, was not entitled to an especially prompt judicial decision.\textsuperscript{118}

There were three concurring opinions: Justice Scalia and Justice Stevens each wrote one, and Justice Souter and Justice Kennedy shared one. The significant opinion for purposes of analyzing judicial review of the states is that of Justice Stevens.\textsuperscript{119} Justice Stevens, concurring in part and concurring in the judgment, wanted to emphasize that neutral licensing criteria was a “ministerial act” that regulated speech.\textsuperscript{120} It was not an “exercise of discretionary judgment that prohibits speech.”\textsuperscript{121} Stevens expressed concern this decision may eliminate an important and intentional distinction between “prompt judicial decision” required in censorship cases and access to prompt judicial review available in non-censorship cases.\textsuperscript{122}
V. CRITICAL ANALYSIS

In deciding a prompt judicial decision was required in every constitutional licensing scheme, the Supreme Court expressly overruled the precedent and reasoning of five circuits. Instead of directly overturning its own precedent set in *FW/PBS*, the Court arrived at its desired conclusion by recharacterizing that decision. Even though *FW/PBS* used the phrase “prompt judicial review,” this phrase was interpreted in the context of this case to encompass a prompt judicial decision.

This decision makes a blanket rule for all licensing schemes. Regardless of whether censorship of political speech or regulation of adult businesses is involved, a prompt judicial decision is required if a license is denied. The Court, however, indicated where a regulation “simply conditions the operation of an adult

There is an important difference between an ordinance conditioning the operation of a business on compliance with certain neutral criteria, on the one hand, and an ordinance conditioning the exhibition of a motion picture on the consent of a censor. The former is an aspect of the routine operation of a municipal government. The latter is a species of content-based prior restraint.

He argued *FW/PBS* intentionally used the language “possibility of prompt judicial review” because it recognized the “differences between ordinary licensing schemes and censorship systems warrant imposition of different procedural protections, including different requirements with respect to which party must assume the burden of taking the case to court, as well as the risk of judicial delay.”

123. The First, Second, Fifth, Seventh and Eleventh Circuits have all interpreted *FW/PBS* to hold that prompt judicial review is sufficient to ensure adult business licensing schemes are constitutional. Most argue that the plain language of *FW/PBS* states only “prompt judicial review” is necessary, and if more were required, it would have been explicit. For discussion of the arguments of the First, Second, Fifth, Seventh, and Eleventh Circuits, see supra notes 78-81.

124. See Z.J Gifts, 124 S. Ct. at 2224 (rejecting Littleton’s argument that plain language of *FW/PBS* says “prompt judicial decision” is semantically different than access to prompt judicial review). Essentially, the Court looked at the policy reasons for requiring the safeguards in the first place. See id. Their purpose is to prevent undue delay, so the Court concluded this must encompass both judicial and administrative delay. See id. Therefore, “prompt judicial review” must include a prompt judicial decision. See id.

125. See id. at 2225-26 (“Littleton’s ‘adult business’ licensing scheme does ‘not present the grave ‘dangers of a censorship system.’”’) (quoting *FW/PBS*, Inc. v. City of Dallas, 493 U.S. 215, 228 (1990)). The Court points out that Littleton’s adult business ordinance does not rise to the level of censorship. See id. It further holds that the licensing scheme must provide a prompt judicial decision. See id. However, because the ordinance does not seek to censor, Colorado’s courts can prevent potential harm through their ordinary judicial review procedures; special rules were not required to be written into the ordinance itself. See id. at 2226. So, while the Court provides the required prompt judicial decision, it is of a lesser degree than that provided in *Freedman*. See id.
business on compliance with neutral and nondiscretionary criteria, and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the Freedman type." 126 In other words, all licensing schemes regulating constitutionally protected material must provide a prompt judicial decision, but different industries are entitled to different levels of protection. 127 Adult business ordinances that are neutral and nondiscretionary will still receive a prompt judicial decision, but it will not be as prompt as licenses that seek to censor content. 128 There is, therefore, a spectrum of protections given through the safeguards, and courts must decide where along the range a particular ordinance will fall. 129 If Justice Stevens and the Eleventh Circuit are correct, then FW/PBS must be read to maintain that there are different types of First Amendment protections that should and were intended to be treated differently. 130

126. Id. at 2226 (citation omitted); see also City of L.A. v. Alameda Books, 535 U.S. 425, 440 (2002) (recognizing content neutral ordinances were only entitled to intermediate scrutiny because there was less chance they would be used "to discriminate against unpopular speech").

127. See Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (discussing whether certain speech is protected under First Amendment will depend on its content, and even when speech was found to be protected, different kinds of content may require different governmental responses).

128. See Z.J Gifts, 124 S. Ct. at 2226 (recognizing real threat is chilling effects of censorship and censorship is not consequence of Littleton's licensing scheme, so less protection is needed to ensure First Amendment rights are not stifled); see also Freedman v. Maryland, 380 U.S. 51, 61-62 (1965) (Douglas, J., Black, J., concurring) (recognizing real problem is censorship). Justice Douglas does not agree that "any form of censorship — no matter how speedy or prolonged it may be — is permissible." Freedman, 380 U.S. at 62. He argued that he "would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment." Id.

129. See Z.J Gifts, 124 S. Ct. at 2225 (recognizing there were different severities of First Amendment harms and ones that were less threatening will suffer less from delays caused by judicial review, so not every First Amendment harm was entitled to Freedman-speed judicial decisions); see also Collins, supra note 13 (discussing trends on how different justices rule on First Amendment cases). Collins conducted some research on the voting records of the justices. See Collins, supra note 13. At one time, there used to be a correlation between voting records and how liberal a Court was, but it is not as simple anymore. See id. In commercial speech claims, the percentage of statutes that were upheld by the justices were as follows: Justices Scalia and Thomas: more than 75%, Justice Breyer: 33%, Justice Ginsburg: 44%. See id. In sexual expression claims, however, the statistics are as follows: Justice Scalia: 10%, Justice Thomas: 50%, Justice Ginsburg: 80%, Justice Stevens: 90%. See id.

130. Justice Stevens wrote a separate opinion specifically to ensure that the decision of the majority would not diminish the difference between licensing schemes that censor and licensing schemes for adult businesses. See Z.J Gifts, 124 S. Ct. at 2227 (Stevens, J., concurring). Justice Stevens and the Eleventh Circuit have held that the "prompt judicial review" language used in FW/PBS was intentional because adult businesses are afforded less constitutional protection than
Regulations of adult businesses, a constitutionally protected form of expression, are acceptable because of the significant government interest involved in controlling the negative secondary effects. The criteria for proving the negative secondary effects, however, is very easy because a city is not required to conduct its own research and may rely on studies done in other places. It could be argued that any regulation is premature because the significant government interest has not been proven if there is no evidence of the existence of the secondary effects, and governments often rely on outdated studies.

Those who support First Amendment rights argue that a judicial decision is required and that lesser protection afforded to the licensing schemes of adult businesses may be detrimental to society. Specifically, the possibility of judicial review without the promise of a quick decision is meaningless because court delays may "lead to 'chilling effects' that can cause irretrievable losses — which take the form of speech unheard, and messages unsent." It follows from this reasoning that unless all First Amendment pro-censorship of protected speech. See id. Therefore, licensing schemes should only be entitled to prompt judicial review, whereas, censorship should receive a prompt judicial decision. See id. For full discussion, see supra notes 79-81 and accompanying text.

131. For support of the secondary effects doctrine, see supra notes 50-51 and accompanying text.

132. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986) (stating First Amendment does not require city to conduct its own separate study or produce independent evidence of secondary effects, and it may rely on studies done by other cities as "long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

133. See Hudson, supra note 54 (quoting John Weston, First Amendment lawyer, who argued Alameda Books before Supreme Court). Weston argues the city in Alameda relied on a study done six years earlier in a different city. See id. The Supreme Court reversed the appeals court grant of summary judgment to the bookstore because it found that the city’s conclusion was not reasonable. See id. Weston argues that these effects do not exist and there is no evidence of them. See id. (summing up advocate’s contentions in case).

134. See Hilden, supra note 3 (discussing chilling effects this decision may have on everyone, not just adult business owners); see also Loses Ruling, supra note 89, at B5 (quoting Larry Berkowitz, lawyer for Littleton, who predicts ZJ Gifts "will have an impact on cities across the country"); Sprengelmeyer, supra note 81, at 23A (quoting ZJ’s attorney Arthur M. Schwartz that, “’[o]n a national scale, it [the decision] put (governments) on notice that freedom is still the law. We are entitled to a prompt judicial ruling . . . .’”).

135. Hilden, supra note 3 (discussing how cases involving speech are different than cases about money). In cases that involve money, court delays can be compensated. See id. No similar remedy is available in free speech cases, however, because no money is involved. See id. At stake is the constitutionally protected freedom of expression sought to be prevented. See id. Therefore, court delays in speech cases will result in "chilling effects" on that freedom of expression. See id. (describing possible adverse consequences of lack of "a quick decision").
ected businesses are given the same rights, an ethical judgment must be made that some businesses are somehow unworthy of protection. The problem is the “First Amendment is supposed to protect the right to say what one chooses – not only the right to say what others think is worthy.”

There are several arguments supporting the view that there should not be regulation in the form of licensing schemes at all. Licensing schemes, such as the one in Littleton, force a court to render a prompt judicial decision, and thus, introduce issues implicating the separation of powers doctrine. A city cannot guarantee a prompt decision from the judiciary because they cannot tell a state or federal judge when they must rule. Furthermore, supporters of non-regulation argue adult business ordinances are just a

136. See id. (discussing why Z.J. Gifts has important First Amendment implications). According to Hilden, the only way an adult business may be given less than the full First Amendment protection is for someone to make that decision. See id. For that conclusion to be made, the decision-maker must have made an ethical judgment that adult businesses are not entitled to the full protection of the First Amendment. See id. This is where the true trouble lies because the First Amendment is not limited in application only to areas the decision-maker deems are worthy. See id. (summing up essential constitutional issues of case).

137. Id.; see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964) (asserting that constitutional protections do not depend on whether view is popular, or even true, because fundamental principle is that debate remain open and uninhibited); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 446-47 (1957) (Douglas, J., Black, J., dissenting) (discussing nature of free speech). In his dissent, written in 1957, prior to Freedman, Justice Douglas recognized the importance of a prompt hearing and ruling on the issue of obscenity. See Kingsley Books, 354 U.S. at 446. People have the right to defend their speech on the merits. See id. Not doing so leads to the “power to restrain publication before even a hearing is held. This is prior restraint and censorship at its worst.” Id. Furthermore, Justice Douglas argued:

One is entitled to defend every utterance on its merits and not to suffer today for what he uttered yesterday. Free speech is not to be regulated like diseased cattle and impure butter. The audience (in this case the judge or the jury) that hissed yesterday may applaud today, even for the same performance.

Id. at 447 (Douglas, J., dissenting); see also Hilden, supra note 3 (comparing treatment of adult businesses to other First Amendment protected businesses). Hilden argues Z.J. Gifts tests the extent that adult businesses will be treated like other First Amendment protected commercial entities. See Hilden, supra note 3. She concludes if adult businesses are not given the same full protection that the other protected businesses receive, then speech will become “a little less free.” Id.

138. See Enforcing Morality, supra note 17, at 14 (quoting Scott Bergthold who claims “requiring a prompt judicial decision would violate separation of powers”). Mr. Bergthold is a lawyer and expert on adult businesses; he also filed an amicus brief for the International Municipal Lawyer’s Association supporting Littleton. See id. (providing biographical information on Mr. Bergthold).

139. See id. (quoting Bergthold who states cities cannot guarantee prompt judicial decisions because city councils cannot tell state or federal judges when to rule in case).

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method for religious organizations to try and enforce morality on society.\textsuperscript{140}

Although \textit{Z.J. Gifts} established that a prompt judicial decision is required, it did not give criteria as to what would qualify as prompt. Some point out that this lack of guidance may result in excessive litigation.\textsuperscript{141} One solution to this problem would be to write specific timelines into the ordinance itself, which may present a new set of issues. Critics do not believe adult businesses' rights are so threatened that it warrants them to jump ahead in dockets to be decided before other, equally important cases.\textsuperscript{142} Alternatively, if the First Amendment issue is legitimately severe enough, courts should hear it instead of having the mandate written into law.\textsuperscript{143}

While there is criticism of \textit{Z.J. Gifts}, \textit{ZJ} still received First Amendment protection and the risk of censorship was reduced by decreasing the amount of discretion the government has in regulating adult businesses.\textsuperscript{144} There are two parts to the decision: first,

\begin{quote}
140. \textit{See id.} (quoting First Amendment expert and Florida attorney, Lawrence Walters, who often represents adult businesses, that "'[t]he religious right has made an issue of trying to enforce morality in our society'"). Religious groups argue the Supreme Court has taken adult business zoning cases because they are important to society. \textit{See id.} Paul J. McGeady, General Counsel for the conservative group Morality in Media, whose function is to monitor obscenity issues, claims that "the lives of and souls of our children and our nonconsenting adults [are] at heart in these matters." \textit{Id.; see also Sotos, supra note 54, at 6 (discussing how zoning is not method used to impose morality). Sotos also claimed that:

As a practical matter, local politicians often react to community outrage over such establishments by strictly applying zoning laws and building codes as a means of forcing the businesses out of town. When this occurs, federal courts must be careful to ensure that such measures are not mere vehicles for imposing morality.

Sotos, \textit{supra} note 54, at 6.

141. \textit{See Slants, supra note 89, at 89 (stating decision will most likely lead to more litigation). The result of this ruling is that adult business owners will challenge review ordinances on a case-by-case applied basis. See id.}

142. \textit{See Phone Business, supra note 54, at C6 (discussing importance of adult businesses in First Amendment context). This article quotes Justice Scalia who was skeptical of the importance of adult businesses in the First Amendment realm. Justice Scalia stated:

Somehow adult bookstores are so significant to the life of the community because of the First Amendment that they have to get special treatment . . . . I have to wait two years before I can put in my bedroom, but the adult bookstores go to the front of the line. That seems strange and if that is where we've arrived, maybe we need to retrace our steps.

\textit{Id.}

143. \textit{See id.} (stating "without prompt review the ordinance could be 'a subterfuge of censorship'").

that ZJ was not entitled to an especially speedy judicial decision that Freedman provides, and second, that Colorado’s ordinary judicial rules were sufficient to fulfill the requirement. Accoring to its own precedent, adult businesses are entitled to less constitutional protections than other forms of protected speech. The Court gave ZJ First Amendment protection, but conceded that it was less than what other forms of protected expression would receive. This would be consistent with the precedent set in previous Supreme Court cases dealing with the First Amendment protection of adult businesses.

V. IMPACT

Now that the Supreme Court has resolved the dispute and decided that licensing schemes regulating adult business require prompt judicial decisions, the practical effects of this decision remain to be seen. Some argue that the decision will impact all cities in this country, while others maintain its effect will remain limited to Littleton, Colorado. Part of the uncertainty results from the fact that the Court did not issue a clear rule on how lower courts must meet the requirements of Freedman.

licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.” (quoting City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 757 (1988)).

145. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2226 (2004) (holding ZJ is not entitled to especially fast judicial decision like Freedman and Colorado’s rules are flexible enough so judges may come to rulings promptly in ordinary cases while using judicial power to stop substantial First Amendment harms).

146. See Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976) (holding erotic, nonobscene materials are protected by First Amendment, but get less protection than other protected forms of expression).

147. See Z.J. Gifts, 124 S. Ct. at 2226 (stating Z.J. is not entitled to heightened protection because ordinance does not seek to censor content); see also Freedman v. Maryland, 380 U.S. 51, 60 (1965) (determining how procedural safeguards are applied is for state to decide). Freedman, decided in 1965, nearly forty years before Z.J. Gifts, stated “[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide.” Id.

148. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991) (holding that society’s interest in protecting expression of adult businesses is different “and lesser, [in] magnitude than the interest in untrammeled political debate”) (citing Young, 426 U.S. at 70); see also Young, 427 U.S. at 70 (giving sexually based material less constitutional protection than that concerning “untrammeled political debate”).

149. For a brief discussion of predictions on the impact of the case, see supra note 89 and accompanying text.

150. See Netherby, supra note 89, at 8 (claiming Court did not issue clear rule on how requirement must be met, so it is unclear what impact this decision will have).

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One main effect most experts seem to expect is an increase in litigation. Part of this trend will be due to adult businesses that now need to challenge ordinances on an "as applied" basis. Another area of expected increased litigation will be devoted to flushing out the meaning of the decision and discovering its outer boundaries.

Prima facie, Z.J. Gifts seems to be in favor of adult businesses by requiring a stricter standard of review in adult business licensing schemes. Some skeptics argue, however, that it does not sufficiently protect adult business owners because it gives courts too much discretion. Courts will have the power to decide what type of protection to apply, which will likely result in inconsistencies depending on the particular licensing scheme and what it seeks to regulate. The opening of adult businesses, and pornography in general, often invoke strong opposition from cities and its residents. Therefore, delays will result from adult businesses who appeal the denial of a license and, although the delays suppress constitutionally protected expression, they will be found acceptable.

First Amendment supporters fear this decision may be just another in a long list of constitutional protections that have been

151. See Z.J. Gifts, 124 S. Ct. at 2224 (holding that whether state courts meet requirement of being sensitive to potential First Amendment harms should be made on case-by-case basis); see also Slants, supra note 89, at 89 (recognizing increased litigation from Court's holding that ordinances need to be challenged on as applied basis, and stating everyone has to wait and see whether prompt review will remain norm).

152. See Little Cheer, supra note 88 (predicting new round of litigation to find out what decision meant as applied to efforts by local governments to hamper adult businesses).

153. See id. (discussing that at first glance, this decision may seem to be victory for adult bookstore owners).

154. See id. (laying out criticisms of Court's rulings). Skeptics of the decision include Cincinnati lawyer H. Louis Sirkin, who filed a brief on behalf of the First Amendment Lawyers Association, and New York lawyer for the American Booksellers Association Michael Bamberger, who also filed a brief in the case. See id. Neither lawyer is happy with this decision because, despite requiring prompt judicial decisions, it gives "little ammunition to challenge lower courts' handling of appeals by adult-business owners." Id.

155. See id. (indicating what power courts have after Z.J. Gifts). Under this decision, courts will only be required to treat appeals "from adult businesses no worse than other types of suits." Id. Attorneys Bamberger and Sirkin "fear, any kind of slow handling of their cases will suffice." Id.

156. See id. (stating adult business cases could be on appeal for months and that might be found acceptable). Mauro claims the "trust the courts" to do what is required of them attitude is unwarranted because it is unrealistic to just assume that courts will always do what they are supposed to do. See id.
taken away from the public. The Court does not have to overrule its precedent, that pornography and adult businesses are constitutionally protected, because this decision will have the same effect in practice. Finding the ordinary judicial rules of a state adequate enables local governments to ensure constitutional protection without adding any special safeguards in the ordinance. Potential suppression of a supposed protected industry may result because adult businesses will not receive the same full protection as other First Amendment protected business. Limiting the protection in this way is an example of the gradual, but continual, deterioration of the application of the First Amendment.

Many cities and their residents do not disguise their disdain for the adult business industry. Pursuant to this decision, state courts have seized the opportunity to find their state judicial rules sufficient to prevent First Amendment harms. There are two

157. See Collins, supra note 13 (stating Court's record is typically mixed regarding First Amendment issues, but has recently become hostile towards First Amendment claims concerning speech, press, petition, and assembly). Collins lists this case as one of only three freedom of expression opinions this past term. See id. Furthermore, the Court has denied almost every free speech claim it has agreed to hear since the 2002-03 term. See id. In effect, this means the Court is giving fewer freedom of expression opinions and denying more of the First Amendment claims than it hears. See id.

158. See Grogan, supra note 88 (quoting Chris Finan, president of American Booksellers Foundation for Free Expression, who filed amicus brief on behalf of ZJ, that decision is disappointing). Opponents of the decision claim not establishing a set time frame for licensing schemes to ensure constitutionality leaves the decision to the discretion of the courts. See id. The impact on free speech is that adult businesses face the choice between closing and being prevented from opening.

159. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2226 (2004) (stating ordinary court rules in Colorado and other states are adequate to "give reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm"). Furthermore, the city is not required to place the judicial review safeguards in the licensing scheme ordinance because how the state chooses to incorporate safeguards is for the state to decide. See id.

160. See Hilden, supra note 3 (stating unless nonobscene, sexually oriented speech receives full First Amendment protections, to which it is entitled, speech becomes less free).

161. See Mauro, supra note 43 (discussing gradual but undeniable decline in attention Supreme Court gives to First Amendment).

162. See Hudson, supra note 54 (explaining how cities use secondary effects doctrine as method to "conceal their thinly disguised dislike for adult entertainment behind claims of harmful effects"); see also Maimon, supra note 18, at A1 (discussing response from community of Knox County, Kentucky, who describe adult business as "trash and filth", "a major invasion on the community", not family friendly, and that it would not be accepted in community).

163. See Dream Palace v. County of Maricopa, 384 F.3d 990, 1002 (9th Cir. 2004) (recognizing precedent set in Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) is no longer good law and that ZJ Gifts now provides adequate framework for analyzing judicial review provisions of ordinances).
possible results once cities establish ordinary state judicial rules as the constitutional timeframe. First, fewer applications will be accepted so there will be a decline in the amount of adult businesses.\textsuperscript{164} Second, since decisions are only entitled to the speed ordinary court rules provide, appeals of denied licenses may result in lengthy court delays.\textsuperscript{165} During this delay the business must be closed.\textsuperscript{166} Both of these result in near censorship in the form of protected expression being unheard.\textsuperscript{167}

The First Amendment has become an integral part of American society, forming the underlying basis for a successful democracy.\textsuperscript{168} The power of free speech is not only in democracy, but in the idea that it is "a value intimately intertwined with human autonomy and dignity."\textsuperscript{169} The significance of this decision may not be limited to its impact on the adult business industry.\textsuperscript{170} Its real significance may be in its practical consequence on future society re-

\begin{quote}
\textit{Dream Palace}, pursuant to \textit{Z.J. Gifts}, the Ninth Circuit found Arizona's rules of procedure were sufficient to prevent significant First Amendment harms. \textit{See id.} at 1004; \textit{see also} Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773, 780 (S.D. Ind. 2004) (upholding city ordinance and stating \textit{Z.J. Gifts} "paved the way for our conclusion").
\end{quote}

\textsuperscript{164.} \textit{See Loses Ruling, supra} note 89, at B5 (indicating decision could spell closing for \textit{Z.J. Gifts}).

\textsuperscript{165.} \textit{See Little Cheer, supra} note 88 (explaining courts may treat appeals from adult businesses same as any other business even though it implicates First Amendment, and therefore, they may wait for ruling on appeal for months).

\textsuperscript{166.} \textit{See Loses Ruling, supra} note 89, at B5 (stating because business is shut down during appeal, delays result in prior restraint); \textit{see also} Hilden, \textit{supra} note 3 (explaining judicial decisions that are left unresolved for too long result in messages unheard until decision is made and those chilling effects causing irretrievable losses).

\textsuperscript{167.} \textit{See Brief of Amicus Curiae First Amendment Lawyers Association at} 13, City of Littleton v. \textit{Z.J. Gifts D-4, L.L.C.}, 124 S. Ct. 2219 (2004) (No. 02-1609) ("Absent a Guarantee that a Judicial Decision Will be Promptly Reached, Licensing Schemes that Target Protected Expression May Be Used as Subterfuge for Censorship.").

\textsuperscript{168.} For discussion of the importance of the First Amendment, see \textit{supra} note 43; \textit{see also} Smolla, \textit{supra} note 11 (quoting Justice Brandeis discussing importance of free speech to democracy that "'freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth'").

\textsuperscript{169.} \textit{See Smolla, supra} note 11 (explaining freedom of speech is not just important because helps democracy but also because of its value on individual and personal level). Smolla elaborates on this idea by stating:

\begin{quote}
Freedom of speech is thus bonded in special and unique ways to the human capacity to think, imagine, and create. Conscience and consciousness are the sacred precincts of mind and soul. Freedom of speech is intimately linked to freedom of thought, to that central capacity to reason and wonder, hope and believe, that largely defines our humanity.
\end{quote}

\textit{Id.}

\textsuperscript{170.} For a further discussion of the impact on the adult business industry, see \textit{supra} notes 164-67 and accompanying text.
resulting from the anticipated degradation of the First Amendment.\textsuperscript{171}

While this decision has generated a significant amount of attention, it may be too soon to determine its true impact.\textsuperscript{172} The thrust of the holding is that adult businesses are entitled to First Amendment protection, although limited, which is what they had received prior to the decision.\textsuperscript{173} It has already been established that cities may not completely prohibit adult businesses from operating within city limits.\textsuperscript{174} Therefore, if cities begin to use the decision as an excuse to zone the adult business industry out, it will result in censorship and violate this principle.\textsuperscript{175} This is not the intended result, however, because adult businesses are constitutionally protected.\textsuperscript{176} It seems rather unlikely to become an issue and if it does, state courts will be able to adequately remedy the problem through "prompt judicial decision" on appeal to enforce the proper First Amendment protection.\textsuperscript{177}

Karen Cynn

\textsuperscript{171} See Gerth, \textit{supra} note 59, at B1 (quoting adult business attorney, Frank Mascagni, who indicates his biggest concern is "the tone it [Z.J. Gifts] sets - not the immediate impact" on his current case); \textit{see also} Little Cheer, \textit{supra} note 88 (quoting First Amendment attorney, Michael Bamberger, who filed amicus brief in case on behalf of American Booksellers Association, who claims decision is "at least a half-step backwards" and not victory because of First Amendment impact).

\textsuperscript{172} For a full discussion of various organizations who have expressed interest in decision, see \textit{supra} notes 86, 88 and accompanying text.

\textsuperscript{173} See \textit{City of Littleton v. Z.J. Gifts D-4}, L.L.C., 124 S. Ct. 2219, 2226 (2004) (stating adult business ordinances that do not seek to censor content are not entitled to especially speedy judicial decisions). Even before \textit{Z.J. Gifts} was decided, state courts were aware that adult businesses were entitled to First Amendment protection and it should be less than other speech cases; this was established almost thirty years ago. \textit{See Young v. Am. Mini Theatres, Inc.}, 427 U.S. 50, 70-71 (1976).

\textsuperscript{174} For full discussion of limits to city prohibitions on adult businesses, see \textit{supra} note 52 and accompanying text.

\textsuperscript{175} It is established that a city cannot completely zone an industry out of operation because it results in censorship. For a further discussion, see \textit{supra} note 53 and accompanying text.

\textsuperscript{176} \textit{See Z.J. Gifts}, 124 S. Ct. at 2221 (recognizing ordinances must meet First Amendment requirement of some sort of judicial review). For discussion of constitutional protections under the First Amendment, see \textit{supra} notes 43-44 and accompanying text.

\textsuperscript{177} \textit{See Z.J. Gifts}, 124 S. Ct. at 2224-25 (stating ordinary court procedural rules give reviewing courts adequate tools to avoid delay and there is no reason to doubt willingness of courts to want to avoid threat of delay). For further discussion, see \textit{supra} notes 108-18 and accompanying text.