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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF LITTLETON, COLORADO, :

Petitioner :

v. : No. 02-1609

Z.J. GIFTS D-4, L.L.C., :

A LIMITED LIABILITY COMPANY, :

DBA CRISTAL'S. :

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Washington, D.C.

Wednesday, March 24, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

J. ANDREW NATHAN, ESQ., Denver, Colorado; on behalf of the Petitioner.

DOUGLAS R. COLE, ESQ., Ohio State Solicitor, Columbus, Ohio; on behalf of Ohio, et al., as amici curiae, supporting the Petitioner.

MICHAEL W. GROSS, ESQ., Denver, Colorado; on behalf of the Respondents.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 02-1609, the City of Littleton v. Z.J. Gifts.

Mr. Nathan.

ORAL ARGUMENT OF J. ANDREW NATHAN

ON BEHALF OF THE PETITIONER

MR. NATHAN: Mr. Chief Justice, and may it please the Court:

This case presents the narrow issue of the judicial review appropriate for a license denial under Littleton's ordinance where clear, objective standards guide the city's quick and guaranteed decision to grant or deny a license and render that decision subject to effective review in the courts.

As FW/PBS has made clear, none of the three risks the Court has articulated to justify the extraordinary remedy of a mandated judicial deadline exist here. Those risks are: the government will err in line-drawing between protected and unprotected speech; self-censorship stemming from a censored decision that speech is not protected; and foot-dragging when the government is the plaintiff seeking to vindicate its decision to censor.

Instead, where the decision to grant or deny a

1 license for expressive activity is bounded by valid time,  
2 place, and manner considerations, this Court has held that  
3 certiorari review is appropriate. That is because the  
4 alleged risk here that the city clerk will violate the  
5 ordinance when it requires a granting of a license is not  
6 a risk that flows from the language of the licensing  
7 standards at all, but rather a refusal to apply those  
8 objective standards. In short --

9 QUESTION: Mr. Nathan, would you explain to me  
10 how this generally operates with adult shops? In the --  
11 in the film context, the film can't be shown. These were  
12 in the old days when they had censor boards. So there was  
13 a great impetus to have quick action.

14 But here, I take it that the business was up and  
15 running and it was the city that said you need a license.  
16 And my question is, do these questions -- does the  
17 business start first and the city come in and say you need  
18 a license, or do -- does the entrepreneur wait until --  
19 and -- and apply for a license before starting up in  
20 business?

21 MR. NATHAN: Typically the latter, Your Honor.  
22 The entrepreneur would apply for a license and, assuming  
23 it is granted, would then start the business.

24 QUESTION: So this is an atypical case where the  
25 business was running and the city came in and said, you

1 need a license?

2 MR. NATHAN: This is a case where a business  
3 started and filed litigation at the same time as it  
4 started against the city in Federal court.

5 QUESTION: I suppose the city could have sought  
6 to enjoin the operation of the business until it got the  
7 license. It didn't in this case, I take it, but they  
8 could have.

9 MR. NATHAN: The city -- yes, Your Honor. The  
10 city did do that.

11 QUESTION: The Freedman case seemed to require  
12 prompt judicial determination, didn't it?

13 MR. NATHAN: Yes, it did, Your Honor.

14 QUESTION: And it's your position that the  
15 subsequent case involving PBS changed that standard?

16 MR. NATHAN: In the licensing context, a  
17 requirement of a prompt judicial decision we believe is  
18 unnecessary and that's what FW/PBS held.

19 QUESTION: Well, that surprises me to hear. I  
20 didn't know that's what we had done.

21 MR. NATHAN: Well, the decision mentioned the  
22 availability of judicial review as the second Freedman  
23 standard.

24 QUESTION: What -- what about the proposal some  
25 of the States have made whereby a provisional license

1 could be given pending the eventual judicial  
2 determination?

3 MR. NATHAN: The problem with the provisional  
4 license is twofold. First, it would allow the secondary  
5 effects that the licensing ordinance seeks to prevent  
6 while the provisional license is granted. And second, it  
7 would allow the business to drag its feet in court,  
8 whereas a business that needs a license has every  
9 incentive to pursue that.

10 QUESTION: Well, if -- if there's a danger of  
11 delay in litigation that -- that both parties fear -- and  
12 apparently you feared -- isn't that all the more reason  
13 that before you have a license which restricts the  
14 publication of allegedly lawful speech, that you should  
15 have a -- a system for prompt judicial determination?

16 MR. NATHAN: But where you have an ordinance,  
17 Your Honor, that does not deal directly with speech, has  
18 separate objective licensing standards that do not have  
19 anything to do with speech, the government does not bear  
20 the burden of going to court first. But more importantly,  
21 the court should be able to determine if -- readily from a  
22 record that's created by the administrative process as to  
23 whether or not the decision to deny the license is a  
24 subterfuge to deny speech. And in that case, what happens  
25 is -- is that a mandated judicial remedy would require

1 courts to determine even those cases where the business is  
2 not claiming that there's a First Amendment reason for the  
3 denial. They're just claiming that the denial is  
4 incorrect.

5 QUESTION: Well, I -- I -- you could -- if we're  
6 sitting here drafting a model ordinance, which is of  
7 course part of the problem that I'm presented with so far  
8 as the respondents are concerned, but if you're -- if  
9 we're trying to envisage a model ordinance, just account  
10 for that contingency, saying our prompt judicial  
11 determination procedure applies only if there's a First  
12 Amendment claim.

13 MR. NATHAN: But I guess the question goes back  
14 to whether or not the risks justify imposing a mandated  
15 judicial deadline.

16 QUESTION: How serious is the burden? There are  
17 now a few circuits that have said that prompt judicial  
18 resolution, not merely access, is required. I think it's  
19 the Fourth, Sixth, and Ninth. What has been the  
20 resolution there? What have cities done?

21 MR. NATHAN: Well, cities have been groping for  
22 a solution to that question. In Colorado, we would have a  
23 separation of powers issue. It's very difficult to  
24 engraft in Littleton's ordinance a requirement that courts  
25 that it does not control rule within a set period of time.

1 Some of the cities have attempted to pass legislation.  
2 Some have attempted to create their own court systems.  
3 None of those is guaranteed to work and none of them are,  
4 we believe, mandated by the risks entailed.

5 QUESTION: Do any of the courts which have said  
6 that prompt disposition, rather than just access -- have  
7 they gone on to say that prompt appellate disposition,  
8 because presumably you can appeal from the ruling of -- of  
9 a superior court or a trial court, that that also is  
10 required?

11 MR. NATHAN: I do not believe they have held  
12 that, Your Honor. But I don't think that it is clear as  
13 to exactly how that is to be done.

14 QUESTION: Because ordinarily, even if you get a  
15 prompt disposition in the trial court, you can wait, you  
16 know, a good year before you get a disposition on appeal.

17 MR. NATHAN: Yes, that's true, Your Honor.

18 QUESTION: Has -- has anyone suggested that your  
19 -- I don't know the -- the merits of this separation of  
20 powers problem that you raise, but has anyone suggested  
21 that the answer to that may simply be not to try to  
22 directly control the courts to come down with a decision  
23 after X days or weeks or whatnot, but simply have a kind  
24 of circuit breaker provision that if they don't, the  
25 license will be deemed to be granted?



1                   MR. NATHAN: Well, I -- I think that that's in  
2 the nature of a provisional license which would be that  
3 after --

4                   QUESTION: It could be provision. It could be  
5 permanent. If -- if the -- if the State doesn't want to  
6 move fast, you would get the license in the meantime, or  
7 -- or perhaps get it permanently. But that would avoid  
8 separation of powers.

9                   MR. NATHAN: But it would also create the  
10 secondary risk by having an unqualified applicant, since  
11 that is what we're talking about in the standards that  
12 we're --

13                  QUESTION: Well, but we -- we don't know.  
14 That's -- that's the whole point. We don't know whether  
15 the applicant is qualified. That's why you're in court.  
16 And the -- the way, in effect, I -- to -- it seems to me  
17 to ensure your interest is simply to -- to have an  
18 encouragement to a prompt disposition. And if the  
19 machinery of the State cannot somehow pull itself together  
20 to give the prompt disposition, then I don't know what  
21 you've got to complain about.

22                  MR. NATHAN: But this Court has always presumed  
23 the State courts will honor their obligations to review  
24 these types of cases and determine if there are First  
25 Amendment issues.

1           QUESTION: Oh, I'm sure the State courts will,  
2 but I've come from a State court and I -- I know what --  
3 what caseloads are. And unless there is an inducement to  
4 move quickly, the -- the State courts, you know, may have  
5 obligations to other litigants and -- and not move as fast  
6 as the -- as the First Amendment would call for.

7           MR. NATHAN: But that's why in -- in Colorado  
8 the rule 106 gives the court the ability to in its  
9 discretion, determine if accelerating the case is  
10 necessary. And --

11           QUESTION: In -- in which case then, if there  
12 were this kind of circuit breaker provision, the -- the  
13 courts would -- would have every procedural basis for  
14 honoring it.

15           MR. NATHAN: But, of course, if the city doesn't  
16 bear the burden of going to court and it's the business  
17 that goes to court, it would then have every incentive to  
18 move as slowly as possible because it would automatically  
19 get a license even if it weren't --

20           QUESTION: I just didn't -- would have every  
21 incentive to? I just didn't hear.

22           MR. NATHAN: Move slowly because it would  
23 automatically get a license if a certain period of time  
24 went by even if it weren't qualified under the objective  
25 standards of the ordinance.

1           QUESTION: But it would have to have filed its  
2 appeal.

3           MR. NATHAN: It would have to have filed its  
4 appeal, but it would have every incentive not to ask that  
5 that --

6           QUESTION: Then -- then simply have your circuit  
7 breaker saying if there's going to be an appeal, file the  
8 appeal within X days.

9           MR. NATHAN: And --

10          QUESTION: I mean, these are simply things that  
11 States can provide by -- by law, it seems to me, without  
12 any great difficulty.

13          MR. NATHAN: That's true, and I guess the  
14 question is -- is whether the risks entailed require that  
15 they be imposed on the cities who have these types of  
16 licensing ordinances. And we would seek to prevent the  
17 secondary effects that this Court --

18          QUESTION: Well, if -- if you take the position  
19 that in fact the State should move promptly here, what is  
20 the State going to lose by, in effect, a fail-safe  
21 requirement that it must? On your theory, it's not going  
22 to be doing anything more than it ought to do in the first  
23 place. So -- so we would -- we would be providing, on  
24 your theory, for the outlier case. So what would be the  
25 -- what would be the reason for complaint here?

1                   MR. NATHAN: Just that when the plaintiff goes  
2 to court, the business goes to court, it would have every  
3 incentive to -- to try to go as slowly as possible,  
4 whereas the incentive should be, if it wants a quick  
5 decision, for it to move to expedite, to -- to brief  
6 quickly and to argue quickly and ask the court for an  
7 expedited decision, and if one is not availing, to go up  
8 and ask the appellate court, under our rule 21 of the  
9 Colorado Appellate Rules, to order the court to rule  
10 quickly.

11                   QUESTION: Mr. Nathan, I gather that a -- I  
12 gathered from your brief that your -- your principal  
13 point, or at least a principal point in this case, is your  
14 contention that this case is different from censorship  
15 cases where the judgment is left to a -- a board with --  
16 with no standards as to whether a particular movie can be  
17 shown or not. There immediate review is necessary. Your  
18 claim here is that the matters that are determined by the  
19 administrative organ are not matters of censorship, but  
20 rather quite discernible, physical, and practical points.

21                   What -- what specifically was the basis for  
22 turning down the -- the license here?

23                   MR. NATHAN: Well, there's never been an  
24 application for the license in this case.

25                   QUESTION: I see. Well, what -- what would have

1    been -- what would have been the issues if the application  
2    had been filed?

3               MR. NATHAN:  In point of fact, except for the --  
4    its location -- it's in an improper zone and it's within  
5    500 feet of a church and day care center -- Z.J. probably  
6    would have been granted the license, Your Honor.

7               QUESTION:  But they say they're not an adult  
8    business, and that's the preliminary characterization.  I  
9    mean, they -- they don't have a license.  They didn't  
10   apply for one because they said, we don't need a license.  
11   We're not that kind of business.

12              MR. NATHAN:  But, Your Honor, that issue was  
13   litigated fully in the district court and the district  
14   court held that not only were they an adult business, but  
15   that their arguments to the contrary were essentially  
16   frivolous.  Now, it took some doing, in terms of discovery  
17   where we had to provide photographs, videotapes, layouts,  
18   an accountant's determination of the amount of adult  
19   materials, but the district court ruled on that issue and  
20   found that they were unquestionably an adult business and  
21   even cautioned counsel about rule 11 in their claim that  
22   they weren't.

23              QUESTION:  This is the Federal district court.

24              MR. NATHAN:  Yes, Your Honor.

25              QUESTION:  Is -- is there no court, municipal

1 level court, in Colorado as there was in Baltimore? I  
2 mean, the -- the reaction of Maryland to the Freedman case  
3 was to set up a proceeding in the Baltimore City court,  
4 and it had explicit time lines. And then it provided for  
5 an expedited appeal to the Maryland Court of Appeals.

6           So why -- I -- I thought that the FW/PBS case  
7 said, we're -- we're not going to follow -- the -- the  
8 government has to go into court because it isn't like  
9 censorship. But the other two apply. So why don't you  
10 just -- why isn't that the solution, the one that was  
11 adopted in Freedman for -- for the proceedings in court?

12           MR. NATHAN: Well, there's a serious question in  
13 the issues before the Colorado Supreme Court now as to  
14 whether a municipal court can handle a 106 review or  
15 whether it has to be a district court from the State. But  
16 again, if you eliminate the -- what has been called the  
17 third Freedman requirement of requiring the government to  
18 go to court, then since it -- the -- the business is the  
19 captain of that litigation, there's no reason to force the  
20 government to mandate a decision within a set period of  
21 time.

22           QUESTION: Do you concede that the second  
23 Freedman requirement demands that judicial review -- or  
24 that -- that a judicial determination be concluded?

25           MR. NATHAN: I do not, Your Honor.

1           QUESTION: I thought that that's the whole issue  
2 here, whether it's enough that you can promptly begin a  
3 suit or whether, in fact, what -- what Freedman requires  
4 is that a suit has to be raced through to termination in  
5 these cases.

6           MR. NATHAN: Yes, Your Honor. And our position  
7 is -- is that the elimination of a third requirement makes  
8 it more rational to have the second requirement be prompt  
9 access and -- and effective access to the courts which --

10          QUESTION: But everyone who complains about  
11 administrative action, adverse administrative action, has  
12 a right to promptly open the door. So that, if you read  
13 it to just to say access, then it essentially does  
14 nothing.

15          MR. NATHAN: In this case, however, and in many  
16 others, when you have clear objective standards, a quick  
17 exit from the administrative process, a record of the  
18 reasons for the denial, then access to the court is  
19 meaningful because a court can readily determine if  
20 there's a subterfuge to suppress speech through the  
21 licensing mechanism.

22          QUESTION: And I suppose that interpreting the  
23 second requirement that way does prevent the  
24 administrative agency from delaying matters by simply  
25 delaying the issuance of its opinion.

1 MR. NATHAN: Exactly, Your Honor.

2 QUESTION: May I ask this general question? I  
3 understand the standards are different, but just in terms  
4 of the procedure, if I applied for a license to run a dry  
5 cleaning establishment, would I have a different  
6 procedural set of hurdles than this litigant does?

7 MR. NATHAN: The -- the licensing requirements  
8 in this case involve adult businesses.

9 QUESTION: Right.

10 MR. NATHAN: And so I'm not sure what sort of --

11 QUESTION: I know the standards are different to  
12 qualify for it, but I'm just wondering if you're denied  
13 the -- the license, are you treated any differently than  
14 if I had applied for -- to get into some entirely  
15 different business?

16 MR. NATHAN: I don't believe so, Your Honor.

17 QUESTION: There's one curious feature in this  
18 and maybe you could explain it to me. Apparently this  
19 business was denied a sales tax license and yet they were  
20 in business.

21 MR. NATHAN: They didn't apply for a sales tax  
22 license until 8 months after they opened, and by that  
23 time, because they had initiated litigation in the Federal  
24 district court, we had already determined that they were  
25 clearly an adult business and therefore they were denied



1 the sales tax license because they were in an improper  
2 location, which is the only reason --

3 QUESTION: Can -- can a business start up and --  
4 a retail business without such a license?

5 MR. NATHAN: No. That's why they were cited in  
6 court.

7 I'd like to reserve, if there are no further  
8 questions of me --

9 QUESTION: Very well, Mr. Nathan.

10 Mr. Cole, well hear from you.

11 ORAL ARGUMENT OF DOUGLAS R. COLE

12 ON BEHALF OF OHIO, ET AL.,

13 AS AMICI CURIAE, SUPPORTING THE PETITIONER

14 MR. COLE: Mr. Chief Justice, may it please the  
15 Court:

16 It is neither necessary nor appropriate to  
17 require licensing schemes like Littleton's to provide  
18 prompt judicial determination. It's not necessary  
19 because, as this Court's cases demonstrate, the type of  
20 judicial review required in licensing schemes must be  
21 correlated to the First Amendment concerns that the  
22 ordinances present. The First Amendment risks here are  
23 far less than the risks of freewheeling censorship that  
24 were at issue in Freedman and its progeny. The ordinance  
25 here does not license speech. It licenses businesses.

1 Thus, prompt access is sufficient.

2 In fact, it would be inappropriate to impose a  
3 judicial deadline requirement for at least three reasons.

4 First, it would impede State and local efforts  
5 to control secondary effects.

6 Second, it would offend notions of comity and  
7 federalism by assuming that State judges will ignore their  
8 constitutional obligations to be sensitive to the First  
9 Amendment.

10 And finally, it would require local officials to  
11 impose time limits on those over whom they have no  
12 control. Excuse me.

13 Thus, both constitutionally and  
14 jurisprudentially, prompt access to meaningful review is  
15 all that the Constitution requires.

16 The Freedman decision was motivated by two  
17 concerns, neither of which is present here. There's  
18 neither the -- the problem of unbridled discretion, nor a  
19 risk of self-censorship. Unbridled discretion occurs only  
20 in two situations where you have either the possibility of  
21 administrative delay or standardless discretion. And as  
22 this Court has recognized in a number of cases, the  
23 latter, standardless discretion, presents unique  
24 challenges for judicial review. It makes sense in that  
25 context to require some type of judicial deadline because

1 essentially meaningful judicial review on an expedited  
2 basis is impossible if there's no standard to give any  
3 indication as to why the administrative decision was made.

4 QUESTION: I -- I suppose that if we're  
5 concerned, as I -- as I think the courts are concerned,  
6 about protecting First Amendment rights, one thing we  
7 could do is just say that if there's any apparent delay in  
8 determination, the United States district courts under  
9 1983 are free to -- are free to intervene at once.

10 MR. COLE: And -- and, Your Honor, if --

11 QUESTION: I'm not sure if that helps you or if  
12 it helps the respondent.

13 MR. COLE: Well, 1983 is, of course, always  
14 available as a vehicle for someone that's asserting that  
15 their constitutional rights have been violated.`

16 QUESTION: Well, except that I -- I would think  
17 the municipalities and the States would raise questions  
18 about deferring to the State courts for determination of  
19 State law issues and so forth.

20 MR. COLE: Abstention doctrines, Younger  
21 abstention, for instance, might come to play. Here the  
22 court -- or I'm sorry -- the city waived any abstention  
23 argument in order to allow the 1983 case to proceed.  
24 Potentially it could have, notwithstanding the abstention  
25 argument, but of course, there would be the issue of

1 abstention which is one reason why prompt access to some  
2 type of State remedy is so important in -- in the case if  
3 1983 is not an effective vehicle.

4 QUESTION: Of course, I guess we'd have to have  
5 either a statute, such as the statute that requires  
6 Federal district courts to expedite criminal cases. I'm  
7 not sure a Federal district court can both take the case  
8 and also bump it up to the top of its docket. Can they do  
9 that, leaving -- leaving behind people who have been  
10 waiting several years to be heard? I don't know that that  
11 will work without a Federal statute.

12 MR. COLE: Well, and I guess at -- at core, it  
13 doesn't matter whether you go to the Federal court under  
14 1983 or to State court. Presumably the sensitivity of the  
15 judge to the First Amendment concerns in both cases would  
16 be the same and their willingness to move it to the front  
17 of the docket would be the same.

18 We look -- I mean, this Court has definitely in  
19 the past shown that where State courts are not  
20 sufficiently sensitive to First Amendment concerns, for  
21 instance, in the Skokie case, the Court demonstrated that  
22 it could fashion tools to handle what it felt was undue  
23 delay in the court system.

24 QUESTION: But we've also held that Federal  
25 courts are -- should be very loathe to intervene in

1 ongoing State proceedings. Wait till the State proceeding  
2 is over and then you can go to Federal court.

3 MR. COLE: Absolutely, and in the Skokie case,  
4 it came up through the State court system and directly  
5 into this Court rather than via a district court model.  
6 But -- but the point is as long as you have prompt access,  
7 you're going to get access to a judicial official who is  
8 going to be sensitive to First Amendment concerns and, if  
9 necessary, has all the traditional tools of equity  
10 available to provide immediate relief, TRO's, PI's.

11 QUESTION: What -- what does prompt access mean  
12 as opposed to relaxed access? I -- I just don't  
13 understand the content of prompt access if -- if access is  
14 getting into court. That's easy. You file a complaint.

15 MR. COLE: Well, you need -- under State  
16 systems, most State systems have some form of requirement  
17 that -- that the court knows that the administrative  
18 process is over so it knows it doesn't have to defer to  
19 the administrative process anymore. So by having a clear  
20 exit, as well as a -- a vehicle that's either prescribed  
21 by rule or by statute so everybody knows the appropriate  
22 vehicle and there aren't any questions about the  
23 jurisdiction of the court to hear the matter, as well as a  
24 record that -- that they can use to make a -- a prompt  
25 review when it gets before them, we would contend that

1 that meets what this Court was talking about with respect  
2 to the second prong in FW/PBS.

3 QUESTION: Does the local ordinance provide a  
4 limit, time limit, for the administrative proceeding?

5 MR. COLE: Absolute, Your Honor.

6 QUESTION: What is -- what is that?

7 MR. COLE: I believe, as it's currently drafted,  
8 it is up to about 40 days, but it could be even quicker  
9 than that. I say up to. There are certain periods of  
10 time within which the applicant can act within the next 10  
11 days, and so if they act within the first day, then that  
12 would shorten the time frame even further.

13 QUESTION: Do you think those administrative  
14 requirements are -- are mandated under the Constitution  
15 when First Amendment issues are -- are present?

16 MR. COLE: A prompt administrative decision,  
17 yes, Your Honor. I believe that -- that comes from  
18 FW/PBS, as -- as well as to the -- I mean, FW/PBS's  
19 interpretation of Freedman in the context of content-  
20 neutral licensing schemes.

21 QUESTION: Well, why would you go that step  
22 unless you're being -- you just think you're forced to  
23 under our decision? Why would you go that step and -- but  
24 -- but then moot the whole thing out by having a -- an --  
25 a protracted judicial process? What -- what sense does

1 that make?

2 MR. COLE: Well, Your Honor, there's been no  
3 showing here that there would be a protracted judicial  
4 process. The --

5 QUESTION: No, no, but I -- I asked you if -- if  
6 you concede that there is a requirement of expedition at  
7 the administrative process -- at -- at the administrative  
8 level, it then seems to me that it also follows there has  
9 to be one at the judicial level.

10 MR. COLE: Well, Your Honor, the -- the question  
11 before the Court today, though, is what does Littleton's  
12 or a town like Littleton's licensing scheme need to  
13 provide. There may be some independent constitutional  
14 obligations on State court judges to act promptly with  
15 respect to First Amendment concerns, but the question is,  
16 does that need to appear in the text of Littleton's  
17 ordinance?

18 QUESTION: Do you concede that there are such  
19 obligations?

20 MR. COLE: I concede that -- that courts have an  
21 obligation under cases like Skokie to be sensitive to the  
22 time concerns that are presented by First Amendment  
23 issues. I don't know that there's any --

24 QUESTION: Mr. Cole, do you know whether there  
25 are any license -- city licensing schemes that say if the

1 -- in the administrative proceeding it's determined that  
2 the license should issue and it is the city that's  
3 appealing, that then it has to be expedited? On the other  
4 hand, if in the administrative proceedings, it's  
5 determined the license should not issue, then there the  
6 burden would be on the appellant applicant for the license  
7 to go forward.

8 MR. COLE: I'm not aware of any such city  
9 ordinances. The California statute, which was passed as a  
10 result of the Ninth Circuit decision, I believe allows  
11 either the city or the applicant to proceed to court,  
12 whatever the licensing decision is. Either the Tennessee  
13 or the -- I believe it's the California one. But -- but  
14 I'm not aware of any city ordinances that do that.

15 The -- Z.J. Gifts relies heavily at page 18 of  
16 their brief on a quote from Southeastern that says a free  
17 society prefers to punish the few who abuse rights of  
18 speech after they break the law rather than throttle them  
19 and all others beforehand. To me, that puts a real point  
20 on the difference between the prior restraints that were  
21 at issue in Freedman and Southeastern and cases like that  
22 and the situation here. That assumes we need to do some  
23 sort of sorting, bad speech and good speech, and we want  
24 to know should we do the sorting beforehand or after, and  
25 the Court says, not surprisingly, let's them talk and then



1 we'll punish the ones who utter things that are not  
2 protected by the First Amendment.

3 Here there's no need to engage in that kind of  
4 sorting. Any adult business has the prospect for creating  
5 the secondary effects that this Court has recognized in  
6 Renton and Young and -- so it's not a matter of sorting  
7 them. It's a matter of if you're an adult business, you  
8 need a license and that license might include requirements  
9 like where you can locate within the city.

10 QUESTION: Well, it is a matter of sorting them  
11 to the extent you have to figure out what's an adult  
12 business. Now, you -- you say that that issue is not in  
13 this case. Maybe we don't decide very much if that issue  
14 is not in this case. Why isn't that --

15 MR. COLE: Well, Your Honor, I --

16 QUESTION: -- a sorting type issue? You claim  
17 you're not an adult business, in which case you're not  
18 even subject to this ordinance.

19 MR. COLE: Well, but if you're not subject to  
20 this ordinance, you're not going to be seeking judicial  
21 review under this ordinance, and you'll do what -- what  
22 Z.J. Gifts did here, which is bring a facial challenge  
23 under the First Amendment before you've even subjected  
24 yourself to the licensing scheme. One would assume that  
25 the judicial review that we require to be part of the

1 licensing scheme would be to deal with those cases that  
2 come up through the licensing scheme and to which the  
3 judicial review would then apply.

4 If the -- if the question is it's ex ante, does  
5 it even apply to me, that will be litigated in a different  
6 forum than what we're talking about here.

7 QUESTION: All of which is true unless the --  
8 the city chooses to do, as it did not do here, and that is  
9 to enjoin the operation of the business in the absence of  
10 the license.

11 MR. COLE: Well, and it -- if they -- if they  
12 seek to enjoin the business at that point, then you're  
13 right. They could raise the constitutional defense  
14 presumably that they would have. And at that point  
15 then --

16 QUESTION: Thank you, Mr. Cole.

17 MR. COLE: Thank you, Your Honor.

18 QUESTION: Mr. Gross, we'll hear from you.

19 ORAL ARGUMENT OF MICHAEL W. GROSS

20 ON BEHALF OF THE RESPONDENT

21 MR. GROSS: Mr. Chief Justice, and may it please  
22 the Court:

23 The core policy in *Freedman*, recognized in this  
24 Court's decision in *FW/PBS*, is that a decision to issue a  
25 license to present -- protect the expression must be made

1 within a brief, specified period of time because undue  
2 delay results in the unconstitutional suppression of  
3 protected speech.

4 QUESTION: But Freedman was actual censorship  
5 and this is not that.

6 MR. GROSS: That's correct, Your Honor. This  
7 doesn't involve a single film. This involves a  
8 determination by the licensing officer, in this case  
9 especially, of the content of an entire business.

10 QUESTION: Well, are you saying that the -- the  
11 claims of the owner here are just as urgent under the  
12 First Amendment as in Freedman? Because certainly PBS  
13 suggested they weren't.

14 MR. GROSS: FW/PBS did relax the third Freedman  
15 safeguard. There's no question about that. However, I  
16 think in the Court's analysis of -- when the Court  
17 undertook that direction, the Court indicated that the  
18 license is the key to obtaining and maintaining a  
19 business. And that's why the -- the -- why there's every  
20 incentive for a business to move forward with judicial  
21 review in the --

22 QUESTION: Has there -- has there ever been any  
23 proceeding here at all to determine what the issues are?

24 MR. GROSS: There's been a lot of proceedings in  
25 this case, Your Honor, as Mr. Nathan indicated.

1                   QUESTION: But -- but they're all on a challenge  
2 to the overall constitutionality of the -- of the city  
3 ordinance?

4                   MR. GROSS: That's not entirely accurate, Your  
5 Honor. There -- there was a nuisance case filed in the  
6 State court, in the Arapahoe County District Court, and  
7 the city in fact got an order enjoining the operation of  
8 its business. It was brought on the basis of zoning  
9 violation, sales tax violation, and sexual business  
10 violation.

11                   QUESTION: Is it -- is it operating now, the  
12 business?

13                   MR. GROSS: The -- the business is operating  
14 now. That order --

15                   QUESTION: On what basis?

16                   MR. GROSS: Well --

17                   QUESTION: I mean, happened to -- to --

18                   MR. GROSS: With regard to that State court  
19 case, there was an order enjoining the -- the operation of  
20 the business entered in September of 2001. The business  
21 made a motion for a stay, pending appeal. That motion was  
22 denied on December 27th of that year. There was a  
23 contempt hearing. The business was moved to be held in  
24 contempt. At the contempt hearing, the trial judge in the  
25 State court, for the first time hearing the case -- he

1 found that the business was not in contempt of court. In  
2 fact, the Federal court determined in the light most  
3 favorable to the -- to the bookstore that 33 percent of  
4 the business was allocated towards regulated adult items.  
5 The district court and State court, once he saw what was  
6 going on, there's testimony that 18 percent of the  
7 business was devoted to adult material, and the State  
8 district court made a determination that the business was  
9 not in contempt. In fact, the injunction order in State  
10 court was later reversed in the State court of appeals in  
11 February of last year. And so at the current time, there  
12 is no injunction order against the business. The business  
13 is operating.

14 QUESTION: It -- it seems to me that it's just  
15 much simpler for us to acknowledge, for the system to  
16 acknowledge that there's a strong First Amendment interest  
17 here, so expedition is important, rather than write some  
18 model ordinance. You can go to Federal -- if -- if the  
19 State isn't complying with that rule, go to the Federal  
20 court.

21 MR. GROSS: And -- and there was a facial  
22 challenge filed at the time the business was opened back  
23 in August of 1999. They went to Federal court first. The  
24 State did seek its remedies as a State court nuisance  
25 action and tried to shut down the business and was

1 unsuccessful ultimately.

2 QUESTION: I'm just not sure why that isn't  
3 adequate if a Federal judge thinks that the -- the city --  
4 that the State system is delaying matters and that speech  
5 is at risk, the Federal court could issue an injunction.  
6 Why should we write a model ordinance up here?

7 MR. GROSS: Well, the Federal courts are -- I  
8 think, as indicated before, there are some issues of  
9 abstention, comity, and so forth, and those issues have  
10 come up quite a bit, especially if there's pending State  
11 court proceedings. Here the -- the State did go to State  
12 court. The -- you can always go to Federal court to  
13 vindicate your First Amendment rights. And in -- that's  
14 what we -- what the business chose to do in this case on  
15 the facial challenge. I think once the case gets started,  
16 once you apply for a license and your license is denied,  
17 you really need to go through the State court process.

18 QUESTION: Well, but -- what -- what is the  
19 problem in the case? I mean, I -- I had thought, perhaps  
20 naively, that the reason that one opinion used the word  
21 judicial access, prompt judicial access, and the other  
22 opinion used the word, prompt judicial decision, is that  
23 there really isn't any difference between the two. Once  
24 you have prompt judicial access, the courts have loads of  
25 devices to give you a prompt decision. And if you feel

1 the decision isn't prompt enough, well, you can ask the  
2 appellate court to make sure you get your quick decision.  
3 What's the problem?

4 MR. GROSS: Well, I think Freedman said prompt  
5 judicial review means prompt judicial determination. I  
6 think the courts may have discretion to fashion the  
7 remedy, but again, getting the case under the State court  
8 dockets, getting --

9 QUESTION: Once you say that, the courts have  
10 discretion to fashion the remedy, that's the end of it,  
11 isn't it? Of course, you get into court and then it's up  
12 to the judge, and if in fact the judge, as I just said,  
13 delays unreasonably, you like any other litigant have a  
14 host of judicial remedies. So what is it? How do you win  
15 this case once you agree to what I just said?

16 MR. GROSS: Well, the core policy behind  
17 Freedman -- it was enunciated in FW/PBS -- is that delay  
18 could -- results in unconstitutional suppression of  
19 speech. And in fact --

20 QUESTION: We're all against delay. I mean, I  
21 just don't -- I mean, everybody is against delay. And my  
22 question is what is it that you want in that respect that  
23 you haven't had.

24 MR. GROSS: Well, in this case there was an  
25 erroneous deprivation of constitutional rights. There

1 was --

2 QUESTION: You mean you have not had -- you've  
3 had unreasonable delay.

4 MR. GROSS: Yes, and --

5 QUESTION: Aren't -- isn't your client running  
6 his bookstore?

7 MR. GROSS: The -- the client --

8 QUESTION: Then what's the delay?

9 MR. GROSS: The client -- there -- there's no  
10 injunction order entered in this case. The delay is that  
11 on its face that the -- the ordinance needs to provide for  
12 prompt judicial review.

13 QUESTION: Oh, that's a different matter. You  
14 think it isn't enough, the ordinary remedies. You want  
15 the ordinance to say in words judicial -- prompt judicial  
16 review. That's contrary, I think, to what you just said.

17 QUESTION: Well, I thought it does say prompt  
18 judicial review in the sense of access.

19 QUESTION: Yes. Right.

20 QUESTION: What doesn't it say?

21 MR. GROSS: It provides -- rule -- it provides  
22 for judicial review under rule 106 of the Colorado Rules  
23 of Civil Procedure. That process involves judicial review  
24 of the record, 90 days for the record, briefing schedules,  
25 30 days for each side, 15 days --



1                   QUESTION: You don't like the briefing schedule.

2   Is that it?

3                   MR. GROSS: Well, the -- the period of time it  
4   takes -- it's a very long time. It -- generally judicial  
5   review -- it's an appellate -- appeal to the district  
6   court. It takes at least a year.

7                   QUESTION: Well, a municipal -- a municipality  
8   in most States can't prescribe the procedures in a State  
9   -- in a State court.

10                  MR. GROSS: That -- that is correct, Your Honor.  
11   California -- the legislature did enact a statute, as  
12   referred to by the State of Ohio that --

13                  QUESTION: It's -- it's not even clear that the  
14   legislature can do it in some States. Indeed, you know, I  
15   -- I think there are limits to what a legislature can tell  
16   a court. I think it can't tell a court to pump out a  
17   decision in 10 days. You think it -- you think it can do  
18   that?

19                  MR. GROSS: I think it can -- it can -- it  
20   depends on the court -- on a State --

21                  QUESTION: Why would you think under the  
22   Constitution that an adult bookstore has to have something  
23   written into an ordinance which -- it's entitled to a fast  
24   decision. I agree with you about that. But why does it  
25   have to have it written in an ordinance when a person

1 who's put in prison arbitrarily who also should have a  
2 very speedy decision is required to rely on ordinary court  
3 processes to get that speedy decision?

4 MR. GROSS: Well, under the First Amendment --  
5 and this is not a -- this is not directly on Freedman,  
6 censorship of a single item. However, decisions of  
7 administrative officials -- certainly administrative  
8 officials are subject to much greater pressures to censor.

9 QUESTION: Yes, but the administrative  
10 procedures the city provides here all have these prompt  
11 deadlines. You -- and -- and your business did not apply  
12 for that. It just opened its doors apparently.

13 MR. GROSS: It went to court. It did file a  
14 Federal case. It did open its doors. The city has been  
15 very --

16 QUESTION: And the business knew, when it did  
17 that, that it was omitting the city review altogether,  
18 although it had been available very promptly. So I --  
19 it's hard to get a focus on what -- how -- how your client  
20 has been hurt.

21 MR. GROSS: The city -- well, the city indicated  
22 before the business opened its doors that it perceived it  
23 to be an adult business before they even opened their  
24 doors. They said, we've heard you're coming to town and  
25 we think you're adult business. And so that -- and then

1 the city did deny a sales tax license on the basis that it  
2 was an adult business. They won't define what that means.  
3 They won't put any -- any indication what those terms  
4 actually mean.

5 QUESTION: Well, this -- this goes maybe over  
6 the same ground, but let's assume that in the -- in a  
7 circuit court in -- in -- say, in the Tenth Circuit, it's  
8 recognized that licensing restrictions that apply and --  
9 and permit requirements that apply to First Amendment  
10 materials are most sensitive. And the -- and the courts  
11 of the circuit, both the district court and the court of  
12 appeals, are -- are very faithful in -- in implementing --  
13 in implementing that rule. Why do we have to have an  
14 ordinance? Go to the Federal court and say speech is  
15 being chilled, speech is being suppressed, there's  
16 unreasonable delay. The court says, I agree.

17 MR. GROSS: I -- I guess --

18 QUESTION: End of case.

19 MR. GROSS: We'd have to wait an unreasonable  
20 period of time to initiate that case. I think 37  
21 Photographs talks about the 60-day judicial review.

22 QUESTION: No. The whole -- no. The whole  
23 premise of my question -- maybe you're going to tell me  
24 it's hypothetical. The whole premise is the Federal  
25 courts are open to hear claims of unreasonable delay that

1 -- that chills the expression of speech.

2 MR. GROSS: The Federal courts are open to that.

3 I -- I would agree with that. Certainly if there are  
4 State court proceedings pending, there may be issues of  
5 abstention that we talked about before.

6 QUESTION: Mr. Gross, can I ask you sort of a --  
7 a basic question that I haven't really thought through?  
8 Should there be a different time schedule for the person  
9 who wants to operate just an ordinary bookstore that just  
10 sells textbooks for schools and -- and trade books, on the  
11 one hand, and an adult bookstore on the other hand? Would  
12 one of them be entitled to more prompt review of his  
13 license application than the other?

14 MR. GROSS: I -- I would -- yes, Your Honor. I  
15 think under FW/PBS, the Court indicated that there was an  
16 additional burden placed upon adult bookstores and that  
17 Freedman had to be complied with.

18 QUESTION: So you think the Constitution  
19 commands more prompt treatment of an application by an  
20 adult bookstore than by an ordinary bookstore.

21 MR. GROSS: I -- I think it -- there's -- you  
22 get into the issue of -- of some kind of content --  
23 correlated content based restriction. It may be based  
24 upon non-content based factors.

25 QUESTION: Do you need a license to open an

1 ordinary bookstore in Littleton?

2 MR. GROSS: No, you don't, not a special  
3 license. You need a sales tax license.

4 QUESTION: Well, there are other restrictions.  
5 You -- I'm sure you can't open it in the middle of a  
6 residential neighborhood, can you?

7 MR. GROSS: A commercial business you can't  
8 open. I mean --

9 QUESTION: But you don't --

10 QUESTION: Anywhere?

11 QUESTION: You don't need a license.

12 QUESTION: There's no zoning?

13 MR. GROSS: There's an adult zoning provision  
14 in --

15 QUESTION: Well, there's not just an adult  
16 zoning. I assume there's a commercial zone.

17 MR. GROSS: Commercial zoning. That's correct.

18 QUESTION: Well, so -- so they can't open it  
19 anywhere. They have to go through a procedure.

20 MR. GROSS: They have -- they have to go through  
21 the commercial -- yes, be approved for a commercial zone  
22 and if this --

23 QUESTION: But what -- what is the commercial  
24 other than if they -- if they're going to set it up in a  
25 place where you can have businesses -- in other words,

1 there isn't the same license requirement for these two  
2 businesses. There's a special licensing requirement for  
3 adult bookstores because of their secondary effects.

4 MR. GROSS: Yes.

5 QUESTION: What do you mean a special licensing?  
6 You mean there are special zoning requirements? What else  
7 besides special zoning requirements? I assume there are  
8 special zoning requirements for -- I don't know -- sulfur  
9 factories and -- and, you know, all sorts of things.

10 MR. GROSS: Certainly, and slaughterhouses.  
11 There's commercial --

12 QUESTION: For slaughterhouses, sure. Sure,  
13 there are.

14 (Laughter.)

15 MR. GROSS: -- commercial zones, and there are  
16 -- and there are residential zones.

17 QUESTION: Right.

18 MR. GROSS: Certainly. And --

19 QUESTION: Right, so I mean, this is just the  
20 city has decided that it doesn't -- and -- and we said  
21 it's perfectly reasonable for the city to say that, that  
22 -- that we don't want too many of these and we want them  
23 in certain areas.

24 MR. GROSS: And -- and that was --

25 QUESTION: And it can say that about

1 slaughterhouses.

2 MR. GROSS: Certainly, and about adult  
3 bookstores. And -- and, in fact, there was challenge to  
4 the adult zoning in this case and the Tenth Circuit upheld  
5 the adult zoning, and these bookstores are limited to less  
6 than 1 percent of the area of the City of Littleton.  
7 This --

8 QUESTION: Is this bookstore now operating in a  
9 place where it isn't permitted to be under the Littleton  
10 ordinance?

11 MR. GROSS: It's -- the location -- yes. It's  
12 operating its -- if the city says it's an adult bookstore,  
13 it's in an improper zone. If it's not an adult  
14 bookstore --

15 QUESTION: And --

16 QUESTION: It's -- I didn't hear you.

17 MR. GROSS: If -- if the bookstore is determined  
18 to be an adult bookstore, it's in an improper zone. If it  
19 is not an adult bookstore, it is in a proper zone. It's  
20 in a location which was formally occupied by a fast food  
21 restaurant on a highly --

22 QUESTION: And you take the position that if you  
23 just sell 18 percent of the merchandise is adult, then it  
24 doesn't qualify? I don't understand.

25 MR. GROSS: That -- that was what the Arapahoe

1 County District Court ruled. We -- we were trying to  
2 ascertain what the term, substantially significant, means.  
3 The city refuses to provide any definitive determination  
4 of what that means. So we had to go to court, and that's  
5 what the court determined in that particular case.

6 QUESTION: Now, what I don't understand is you  
7 -- you are concerned about the -- the efficacy of judicial  
8 review. You picked your forum. You picked the Federal  
9 court rather than the State court.

10 MR. GROSS: Yes.

11 QUESTION: You got a review of that ordinance,  
12 every piece of it, for constitutionality. I don't  
13 understand what complaint you have now about judicial  
14 review, having had judicial review in the Federal court  
15 and having had the Federal court uphold most of this  
16 ordinance. So you've -- you've had judicial review. How  
17 -- how -- how are you a proper complainant about what  
18 access you might have had in the State courts if you chose  
19 to go there?

20 MR. GROSS: Well, we -- we brought the facial  
21 challenge in the -- in the Federal court. There is -- and  
22 there is continuing injury in this case. The -- the  
23 business has been cited with 2,620 violations of the  
24 licensing ordinance. And in the event the Court -- the  
25 law is declared unconstitutional, those -- those



1 violations would go away. Each carries a \$1,000 fine. So  
2 there's potentially \$2 million in fines.

3 QUESTION: But you -- the -- the  
4 unconstitutional area left is this prompt judicial review,  
5 but you've already had judicial review. That's why I  
6 don't understand what is your current complaint.

7 MR. GROSS: The current complaint is it's -- we  
8 brought the facial challenge on the basis that it doesn't  
9 comply with FW/PBS and Freedman. And there was --

10 QUESTION: You think somebody else might not get  
11 prompt judicial review and that's enough to strike down  
12 the ordinance. Right? That's what the facial challenge  
13 is all about.

14 MR. GROSS: Well, it's -- yes, Your Honor. I  
15 mean, this --

16 QUESTION: Your real complaint -- your real  
17 complaint is we granted certiorari. Isn't that the --

18 (Laughter.)

19 MR. GROSS: Well, we -- we would -- we would be  
20 happy to live with the Tenth Circuit order, for sure.

21 QUESTION: I have to confess to another problem.  
22 As I understand part of your argument, you're contending  
23 you're not an adult bookstore, an adult establishment,  
24 aren't you?

25 MR. GROSS: That's correct.

1 QUESTION: So you're contending you don't have  
2 challenge -- standing to challenge the ordinance.

3 MR. GROSS: Well, the city says we do.

4 (Laughter.)

5 MR. GROSS: But we do have -- there is an injury  
6 in fact in this case because the city has initiated 2,620  
7 license violations, up to \$2 million in fines in a  
8 municipal court. That -- that's a real injury. And, I  
9 mean, this isn't the case like or Pap's or like Waukesha.

10 QUESTION: Maybe that's because you decided to  
11 go into business without getting a license, which might  
12 have been a fairly reckless thing to do, I would think.

13 MR. GROSS: Well, we went to Federal court and  
14 the -- the city, you know, did pursue their claims in  
15 State court.

16 Certainly, I mean, the -- the business can't be  
17 faulted for -- too much for being a business. I mean, in  
18 the Waukesha case and in the Pap's case, those businesses  
19 were out of business. I mean --

20 QUESTION: Is -- is what you're saying that  
21 there is a reliance interest on the part of these  
22 businesses? They should know that there is a -- an  
23 efficient licensing procedure with judicial review so they  
24 can factor into their costs of -- of doing business  
25 whether or not they can afford, say, 3 months of expedited

1 litigation and that this is a -- a First Amendment  
2 interest.

3 MR. GROSS: That's correct, Your Honor. The --  
4 with regard to a -- an ongoing business, as opposed to an  
5 individual work of art, getting the license is key -- is  
6 key to the -- to the ability to maintain a business. And  
7 so an investor, an entrepreneur, trying to start a  
8 business, hire employees, get a location, supply  
9 inventory, needs an assurance that there will be a  
10 decision within a specific period of time by a court.

11 This is not your run-of-the-mill administrative  
12 decision. This -- this involves the First Amendment issue  
13 based upon content of the speech, based upon this  
14 ordinance that is focused upon one class of businesses  
15 that --

16 QUESTION: If -- if the States know that the --  
17 that the penalty they suffer for not doing that is having  
18 to submit themselves to Federal court litigation where the  
19 Federal courts really sweep abstention aside and so forth  
20 because of the urgency, I guess that's maybe the decision  
21 that States should make.

22 MR. GROSS: Well, I think the States -- they  
23 need to -- it's our position they need to expedite the  
24 judicial review, and -- and the provisional license  
25 doesn't really solve the problem.

1           I would note that the municipal court -- the  
2 municipalities do have the ability to -- to enact laws, to  
3 have review in the municipal court. In fact, last week I  
4 just went through a process where there's a requirement  
5 that review occur within 75 days of the administrative  
6 decision. That was in Aurora, Colorado. And that  
7 ordinance is attached to our response for the petition for  
8 rehearing in the Tenth Circuit.

9           QUESTION: You are content with the review in  
10 municipal court?

11          MR. GROSS: No. Well, it depends on how it  
12 comes out.

13          QUESTION: No, I don't think so.

14          MR. GROSS: But -- but certainly --

15          (Laughter.)

16          MR. GROSS: And we're -- we may well prevail in  
17 that case, but certainly we have a right to an appeal. In  
18 this case, we prevailed on the appeal in the court of --  
19 State court of appeals and the Tenth Circuit on this  
20 issue.

21          QUESTION: If the -- if the municipal court was  
22 good enough in Freedman, where you had a real censorship  
23 problem, why shouldn't it be adequate, entirely adequate,  
24 for adult bookstores?

25          MR. GROSS: It may well be, Your Honor. I think

1 the -- you know, in that -- there may -- it may be -- it  
2 may well be adequate if there's an independent judicial  
3 officer as opposed to a -- a licensor, you know, going  
4 back to the Printing Act of 1662, a licensor of speech of  
5 a bookseller. And here the definition of adult bookstore  
6 is -- is really dim and uncertain. We don't know what it  
7 means.

8 QUESTION: Yes, but -- but we're not talking  
9 about censorship. I mean, we're not talking about a  
10 licensor who says you can sell this book or you can't sell  
11 it.

12 MR. GROSS: We're not talking about a licensor  
13 that talks a specific book. We --

14 QUESTION: Is a -- when you talk about a  
15 municipal court, do you mean the municipal court, say, of  
16 the City of Littleton or a municipal court created by the  
17 State of Colorado?

18 MR. GROSS: This would be the City of Littleton  
19 municipal court or the City of Aurora is the one I was  
20 referring to before.

21 QUESTION: Would -- would you explain one  
22 puzzling thing? Mr. Nathan told us that the district  
23 court said, of course, they're an adult bookstore. That's  
24 so clear. On that basic characterization whether you are  
25 or are not adult business, the Federal court, according to

1 Mr. Nathan, said you were an adult business. Is that over  
2 and done with now so what you're left with is you are an  
3 adult business and you have to get a license?

4 MR. GROSS: On that day? I mean, that was the  
5 Federal court's decision. The Tenth Circuit did affirm  
6 the decision, in little bit less harsh terms than the  
7 district court, but certainly the decision was affirmed.  
8 That is the final determination in this part of the case.  
9 The business --

10 QUESTION: And yet, you're still operating in a  
11 place where you can't be if you are an adult business.

12 MR. GROSS: Well, in response to that court  
13 order, the business has changed its operation quite a bit.  
14 This is not a -- a theater. This is not an arcade. This  
15 is not a cabaret with live entertainment. This is a store  
16 that has a certain percentage of its stock and trade in  
17 regulated adult material. It reduced that number. It  
18 created a separate section. It's tried to comply with the  
19 city. It is willing to comply even further as long as --

20 QUESTION: But that issue is not before us and  
21 isn't open. That's been decided, hasn't it?

22 MR. GROSS: Yes, yes.

23 QUESTION: So we can take this case and decide  
24 it on the basis this -- that it is an adult bookstore  
25 we're talking about --

1 MR. GROSS: Yes.

2 QUESTION: -- that must get a license.

3 MR. GROSS: Yes.

4 QUESTION: So we don't have to get tangled up in  
5 this other business, do we?

6 MR. GROSS: No, we don't. The Court does not.

7 I would note that, however, the -- the city says  
8 that there's no discretion in this case, that it's purely  
9 a ministerial decision. And to the extent that there's  
10 inherent vagueness in the definition of substantial and  
11 significant, it indicates that a licensing official can,  
12 in fact, exercise judgment and exercise some discretion --

13 QUESTION: But that issue is not here.

14 MR. GROSS: That -- that's -- it's correct. I'm  
15 just --

16 QUESTION: I thought we were just -- I thought  
17 we took the case to decide whether the requirement for  
18 prompt judicial review means prompt judicial decision at  
19 the end of the day or just prompt access to the review.

20 MR. GROSS: And that --

21 QUESTION: There's a split of authority on that  
22 point.

23 MR. GROSS: Yes. And that is --

24 QUESTION: And that's what we took the case to  
25 decide.

1 MR. GROSS: Yes.

2 QUESTION: Not whether there's substantial  
3 discretion or not.

4 MR. GROSS: No. No, that's -- I'm just trying  
5 to counter their argument, but certainly it really doesn't  
6 matter if there's discretion or not. It's our position  
7 that even if there's not discretion, there needs to be a  
8 prompt judicial determination.

9 The licensors are subject to many pressures.  
10 They're -- they're humans. It's a human situation and as  
11 the Tenth Circuit recognized, these businesses are very  
12 unpopular. These businesses can be subject to a -- the  
13 discretion in -- in the decision. And there needs to be a  
14 prompt --

15 QUESTION: I'm not -- I'm not sure whether that  
16 -- that helps or hurts your case. What -- what I find  
17 really peculiar is that if, you know, some homeowner has  
18 another child, need -- needs to put in a new bedroom in  
19 the home, that person has to go through the normal zoning  
20 procedures and get -- you know, get -- get approval from  
21 the -- from the electrician licensing board and everything  
22 else and then go through judicial review. Likewise, if a  
23 new hospital seeks to locate, they -- they have to go  
24 through zoning and all the other approvals and then  
25 through normal judicial review.



1           And -- and what you're arguing is that somehow  
2 adult bookstores are -- are so significant to the -- to  
3 the life of the community, because of the First Amendment,  
4 that -- that we have to give them special treatment. You  
5 know, I -- I have to wait 2 years before I can put in my  
6 bedroom, but the adult bookstore goes right to the head of  
7 the line. That seems to be very strange. And if -- if  
8 that's where we've arrived at, we -- we ought to retrace  
9 our steps perhaps.

10           MR. GROSS: Well, I would -- those are laws of  
11 general application, and certainly an adult bookstore, if  
12 it went through the normal process, would have to go  
13 through the same process as any other bookstore or any  
14 other commercial business or -- or the residential person  
15 adding addition.

16           In this case they've created a special burden  
17 upon adult bookstores. The city -- if the adult bookstore  
18 opens or any bookstore opens and doesn't follow along with  
19 these -- with these particular --

20           QUESTION: But the -- the only burden is as to  
21 location, is it not?

22           MR. GROSS: There's additional burdens in terms  
23 of licensing fees, inspections, applications. There's  
24 additional burdens for hours of operation, for -- cabarets  
25 and arcades have additional restrictions, regulations that

1 don't apply to this store.

2 QUESTION: But those -- those really don't raise  
3 First Amendment concerns, do they, the fact that you might  
4 be limited in your hours, you couldn't go past 2:00 p.m.  
5 -- 2:00 a.m.?

6 MR. GROSS: Arguably they -- they raise First  
7 Amendment concerns in terms of time, place, and manner  
8 arguments, and I think there may -- there's a case out of  
9 the Ninth Circuit. It may be before this Court on a cert  
10 petition with regard to an hours operation. But they  
11 arguably raise that there are additional burdens. Just  
12 like in FW/PBS, there was an additional burden placed upon  
13 these stores on -- by virtue of the content of the  
14 material that is sold and distributed from the bookstore.

15 Now, there's been many proceedings in State  
16 court in this case and that's -- that's what we've talked  
17 about. The court -- in fact, there was an injunction  
18 issued and the State has the power to enforce laws of  
19 health, safety, and welfare against the bookstore.

20 QUESTION: How about the sales tax? You're  
21 still operating without a sales tax license, but you're  
22 selling things.

23 MR. GROSS: We -- we have worked out an  
24 agreement with the city where they do pay the sales tax.  
25 They did not grant the license, but we have managed to

1 resolve that issue. The store has been collecting sales  
2 tax and has been paying the sales tax.

3 But the city -- and at the current time, the  
4 city has not moved to follow up on their -- their nuisance  
5 case in State court to enjoin for not having a sales tax  
6 license. Of course, that -- that is based upon the --  
7 whether the definition of a store is adult or not adult.  
8 But the city retains the power to -- to enforce the law  
9 through nuisance cases, just like any other case, in time  
10 -- with regard to health, safety, and welfare of  
11 businesses.

12 QUESTION: Not enforce the licensing law.  
13 Enforce the secondary -- go after the secondary effects  
14 nuisance laws.

15 MR. GROSS: They could enforce those too. The  
16 license -- the zoning law would be a secondary effects  
17 law, and there -- and at this point there is no injunction  
18 in State court. The city is not proceeding on that case  
19 at this point, in which there's an injunction issued based  
20 upon the State court order -- excuse me -- the Federal  
21 court order. That injunction was reversed on appeal in  
22 the State court. There's been litigation on all different  
23 fronts in this case, in State court, district court,  
24 municipal court, as well as the Federal court. Of course,  
25 we're here on the Federal case.

1                   QUESTION: It sounds like you've got a lot of  
2 access.

3                   (Laughter.)

4                   MR. GROSS: We -- it's -- you can file a  
5 lawsuit. I mean, there's -- certainly you can -- you have  
6 a right to file a lawsuit everywhere you can, and we've --  
7 we've -- there has been lawsuits filed by both the city.  
8 And the city had access on the -- on the injunction case.  
9 There was a stay denied, in fact, after -- after the  
10 injunction was issued. I mean, this business has been  
11 fighting to stay open. It's been fighting and has stayed  
12 -- in fact, stayed open unlike the case in Waukesha and  
13 Pap's, you know.

14                   I mean, it's clear municipalities have taken  
15 every opportunity to try to regulate these businesses, try  
16 to put in every obstruction possible with regard to  
17 getting these businesses to -- to be closed down.

18                   Now, the issue -- the answer to the question  
19 before this Court is that the essential constitutional  
20 requirement -- and that was identified in -- in the FW/PBS  
21 case as an essential requirement -- is that prompt  
22 judicial determine does actually mean prompt judicial --  
23 does mean prompt judicial determination without an  
24 actual --

25                   QUESTION: It didn't say it in -- it said prompt

1 judicial review, whatever that meant.

2 MR. GROSS: That's correct, based upon Freedman.

3 And if -- if we take it back to Freedman, you read  
4 Freedman and Freedman does -- did provide a right of  
5 access, a right of appeal and talked about judicial review  
6 interchangeably with prompt judicial determination,  
7 disposition, and so forth.

8 Now, without an actual judicial disposition, the  
9 administrative officials will have the power to shut down  
10 an entire business, not simply a single work of art, but  
11 it will be an entire business. If there's an error -- if  
12 there's an error with regard to -- to what is -- what the  
13 licensing official says, that's why prompt judicial review  
14 is so important in this case. The erroneous deprivation  
15 of the speech rights will -- will cause irreparable  
16 injury, and that's the core policy behind the Freedman  
17 case.

18 Now, in the absence of prompt judicial review,  
19 the -- the status quo will be silenced. In this case, the  
20 bookstore went to court and get -- got the access, but --  
21 and the trial court will be understandably reluctant to  
22 alter the status quo of silence. And that is essentially  
23 the default position of any trial court. So without an  
24 explicit statement from this court with regard to the  
25 second prong of Freedman, it's not -- I think it's

1 difficult to assume that a State court with its heavy  
2 docket will actually provide a prompt decision.

3 QUESTION: Is there any experience in that  
4 regard? This ordinance has been on the books for a time.  
5 Have the State courts been dragging their heels?

6 MR. GROSS: Well, yes, this law was enacted in  
7 1993. It's been amended many times. In this case, the  
8 State nuisance action was filed in January of 2000, and  
9 the district court issued its order in September of 2001,  
10 and that order was reversed in February of 2003. That's  
11 the normal course of -- of events in the State court  
12 litigation. The city did not move for a preliminary  
13 injunction. They did move for contempt. It took a few  
14 months to get the contempt heard, and once the contempt  
15 was heard, it came out in favor of the bookstore. So  
16 that's -- that's the experience in this case.

17 This is the only adult business that's ever  
18 existed in the City of Littleton. There's never been one  
19 before. There were apparently a couple of massage parlors  
20 about 10 years ago. And the city has put --

21 QUESTION: Thank you, Mr. Gross.

22 Mr. Nathan, you have 2 minutes remaining.

23 MR. NATHAN: Unless there are any questions, I  
24 have -- I feel no need for rebuttal. Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nathan.

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The case is submitted.

(Whereupon, at 11:07 a.m., the case in the  
above-entitled matter was submitted.)