Case No. 01-1220

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff-Appellant,

v.

THE CITY OF LITTLETON,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF AMICUS CURIAE THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC, WITH CONSENT OF THE PARTIES

Counsel for Amicus Curiae:

Colorado Municipal League
Carolynne C. White
1144 Sherman Street
Denver, CO 80203
303.831.6411

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THE HONORABLE EDWARD NOTTINGHAM
UNITED STATES DISTRICT JUDGE
District Court Case No. 99-N-1696

BRIEF OF AMICUS CURIAE THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC, WITH CONSENT OF THE PARTIES

Opinion decided November 18, 2002 by the Honorable Circuit Judges Briscoe, Brorby, and Lucero

Colorado Municipal League
Carolynne C. White
1144 Sherman St.
Denver, CO 80203
(303) 831-6411

December 13, 2002

COUNSEL FOR AMICUS CURIAE
COLORADO MUNICIPAL LEAGUE

COLORADO MUNICIPAL LEAGUE'S CORPORATE DISCLOSURE STATEMENT

The Colorado Municipal League ("CML") is a non-profit, voluntary association of 265 municipalities located throughout the state of Colorado. All of CML's member municipalities are governmental entities, which exempts them from Fed. R. App. P. Rule 26.1. However, CML is registered with the Colorado Secretary of State as a non-profit Colorado corporation in good standing. CML has no parent corporations, and is not owned by any publicly held company.

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INTERESTS OF AMICUS CURIAE

The Colorado Municpal League is a non-profit, voluntary association of 265 municipalities located throughout the state of Colorado (comprising 98.68 percent of the total incorporated state population), including all 82 home rule municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. CML has been appearing as an amicus before the Colorado Court of Appeals, the Colorado Supreme Court and this court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

Many of CML's municipal members have created business licensing schemes for the regulation of adult businesses. These municipalities seek to preserve the health, safety and welfare of their community by regulating such businesses. CML as an amicus would provide the Court with a statewide municipal perspective on the issues presented in this case, and would assure that the general interest of those other member municipalities is represented. CML members have a great deal at stake in the proper resolution of this matter.

All parties to this case have consented to CML's participation as an *amicus* in this case. FED. R.APP.P. Rule 29(e) provides that an *amicus curiae* must file its brief no later than 7 days after the principal brief of the party being supported. The City of Littleton filed its brief on December 6, 2002. This brief is filed on December 13, 2002. Therefore, it is timely filed and no delay will result from the participation of CML as *amicus curiae*.

ARGUMENT

A rehearing *en banc* is essential because the decision in this case jeopardizes the existing regulatory schemes of many Colorado municipalities.

Many Colorado municipalities regulate adult businesses to protect the health, safety and welfare of their communities, primarily to prevent or limit the demonstrated negative secondary effects such as neighborhood blight, decline of property values, increased crime in general (such as disturbing the peace, public indecency, public drunkenness, and drug-related violations), increased sexually-related crimes (such as rape, prostitution, and sexual assault), noise, litter, traffic congestion, and the spread of sexually transmitted diseases. Many of those municipalities have adopted a licensing scheme for the regulation of adult businesses that is substantially similar to Littleton's, including specifically the reliance on C.R.C.P. 106(a)(4) to provide "prompt judicial review" once a municipality has rendered a final decision. While an exact count is not possible, a preliminary review of approximately fifty municipal codes reveals at least thirty-two municipalities (or approximately 60%) that rely on a process substantially similar Littleton's. These cities range in size and scope from small rural communities of fewer than 250 persons to large urban communities of more than 275,000.

These ordinances generally require the owner or operator of a business to apply for a license, and to provide certain information on the license application. The ordinance specifies the grounds for denial, revocation or suspension, and provides a process of administrative review of such decisions, within specified timeframes.

Although the final decision-maker and deadlines vary, most provide for a hearing and a final decision by the City Manager within thirty days. Upon a final decision of the municipality, the applicant may appeal to the state district court under the procedures set forth in C.R.C.P. 106(a)(4). These ordinances are duly adopted legislative policies of the municipality, enacted under the valid exercise of police power in accordance with the Colorado and United States Constitutions.

As the panel noted, the Circuits are split on the question of whether "prompt judicial review" means that an applicant must have prompt ***access*** to a court, or must receive a prompt ***decision*** from a court.[1] Resolving this split becomes all the more important when viewed in light of the U.S. Supreme Court's recent decisions, declining to resolve it in **City News and Novelty, Inc., v. City of Waukesha,** 531 U.S. 278 (2001) *cert. Dismissed* and **Thomas v. Chicago Park District**, 227 F.3d 921 (7th Cir. 2000), 534 U.S. 316, 122 S.Ct. 775 (2002).

A rehearing is essential in this case because until a clarification of prompt judicial review is obtained it is impossible for a municipality to design with confidence a constitutional ordinance to validly regulate adult businesses. CML agrees with

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1 The panel in its decision noted that the 11th, 5th, 7th, and 1st Circuits have found access sufficient; while the 6th, 9th, and 4th have found that a decision is required, and that the circuits were thus split 4 to 3. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994);*Graff v.City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). See also *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 1000-01 (4th Cir. 1995). However, as the 5th Circuit noted in *Encore Videos Inc. v. City of San Antonio*, No. 00-51119, slip op. at 12 (W. D. Tex. Oct. 29, 2002) it appears that the 2d Circuit also has found access sufficient. *Beal v.Stern*, 184 F.3d 117, 129 (2d Cir. 1999). Thus the circuits are now actually split 5 to 4, with the 10th Circuit making up the fourth circuit to find that a decision is required.

Defendant-Appellee that, given the split of authority in the Circuits, and even between this decision and previous district court decisions, and given the availability of 42 U.S.C. §1988 attorney's fees, it is unfair to require cities to either forego adult licensing schemes or experiment at their peril with solutions until the standard is clarified.

If the decision of the panel stands, it will be impossible for a municipality to design an adult licensing scheme that provides sufficient prompt judicial review to meet the standard articulated by the court, namely a stated time frame within which a state district court judge must reach a decision.

Other courts have recognized the impossibility of a municipality directing, ordering, or otherwise influencing a district court to render an opinion in a particular case within a time certain. ***Mai Lee Le v. City of Citrus Heights***, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999). In Colorado, it is highly questionable whether even a legislative amendment by the Colorado General Assembly could achieve this result, given the separation of powers. Nonetheless, the existing opinion suggests that this is the only possible way to render Littleton's ordinance – and by extension, those of numerous other municipalities –constitutional.

Finally, rehearing is necessary because this opinion jeopardizes not only adult business regulatory schemes, but also other municipal licensing schemes with First Amendment or free speech implications that rely on C.R.C.P. 106(a)(4) to provide prompt judicial review. While the particular issue in this case happens to relate to the licensing of adult businesses, the same analysis could apply to invalidate other municipal

licensing schemes in which free speech is implicated. For example, many Colorado municipalities have ordinances requiring licenses for placing newspaper boxes in public places. Denial of such a license may be appealed, as with adult business ordinances, to the district court through the procedures outlined in C.R.C.P. 106(a)(4). If a Littleton-style ordinance is constitutionally infirm for failure to provide prompt judicial review in the context of an adult business, it is likely so in the context of a newspaper box. Newspaper box cases have also been held to have First Amendment implications. See for example, *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750 (1988).

CONCLUSION

For the foregoing reasons, *amicus curiae* Colorado Municipal League requests that the court grant Defendant-Appellant City of Littleton's Petition for Rehearing En Banc.

Respectfully submitted,

COLORADO MUNICIPAL LEAGUE.

Carolynne C. White
Colorado Municipal League
1144 Sherman St.
Denver, CO 80203
(303) 831-6411
Counsel for Amicus Curiae Colorado Municipal League, in support of Defendant-Appellee City of Littleton

Date: December 13, 2002

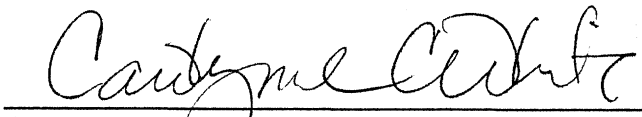
CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Counsel for *Amicus Curiae* Colorado Municipal League ("CML") certifies the following:

Pursuant to Fed. R. App. P. 32 and 10th Cir. R. 32.1, the attached brief for Amicus Curiae CML is printed using a proportionally spaced, 13 point, Times New Roman Typeface and contains fewer than 7,000 words.

Dated this 13th day of December, 2002.

COLORADO MUNICIPAL LEAGUE.



Carolynne C. White
Counsel for *Amicus Curiae*
Colorado Municpal League

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of December, 2002, a true and correct copy of the foregoing *Brief of Amicus Curiae the Colorado Municipal League in support of Defendant-Appellee's Petition for Rehearing En Banc* was deposited into the United States Mail, postage prepaid and addressed to:

Arthur M. Schwartz, Esq.
Michael W. Gross, Esq.
SCHWARTZ & GOLDBERG, P.C.
1225 17th Street,
Suite 1600
Denver, CO 80202

Larry Berkowitz, Esq.
Brad D. Bailey, Esq.
City Attorney
City of Littleton
2255 W. Berry Avenue
Littleton, CO 80165

Nathan, Bremer, Dumm & Myers, P.C.
J. Andrew Nathan
Heidi J. Hugdahl
3900 East Mexico Avenue, Suite 1000
Denver, CO 80210
(303) 691-3737