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Law on hours for adult stores hits a detour

AZ high court says restrictions need firm basis

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PHOENIX — The Arizona Supreme Court threw legal doubt Thursday on the ability of state lawmakers to require adult bookstores and similar shops to close every night at 1 a.m.

In a unanimous ruling, the justices acknowledged that the U.S. Supreme Court has concluded such restrictions do not violate the First Amendment.

But the constitutional free-speech protections in Arizona's own constitution are broader, they said.

The result, the justices concluded, is that any law targeting a specific kind of business must be based on evidence of how the restrictions will address specific negative effects. The government has to show it is not simply trying to squelch "disfavored" speech.

Justice Rebecca White Berch, writing the decision, said the government also must prove it has a substantial interest in enacting the regulation and that the law does not "unduly burden" free speech.

Thursday's ruling does not void the law. It sends the case back to a trial judge with specific instructions on what the state has to prove to justify the restrictions if it hopes to enforce the law in the future.

The decision drew criticism from Peter Gentala, attorney for the Center for Arizona Policy, which helped to craft the 1998 law. His group lobbies to restore what it calls traditional principles to public policy.

He said the justices were reading some legal protection for adult bookstores into the state constitution that the framers never intended.

"What you've got is a situation where the Arizona Constitution's meaning has changed over time," Gentala said Thursday. "And the new meaning that the court is announcing today is going to give very little discretion to communities to protect themselves from the harmful effects of sexually oriented businesses."

The law at issue requires certain businesses to close at 1 a.m. daily and not reopen until 8 a.m. Monday through Saturday and noon on Sunday.

The Court of Appeals upheld the law last year, saying the state could prosecute the owners of two Phoenix stores who were accused of breaking that law. Those judges said while legislators cannot censor the businesses' message, the lawmakers do have a legal right to deal with "secondary effects" of these stores, including drug use and prostitution.

The appellate judges said state and federal courts have consistently ruled the government can regulate hours of operation for places offering nude dancing.

But Berch said the federal constitution is the wrong touchstone. Its First Amendment says "Congress shall make no law ... abridging the freedom of speech, or the press."

By contrast, she said, Article 2 Section 6 of the Arizona Constitution says "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

Berch said some interests, such as reducing crime, protecting children or safeguarding constitutional rights, may provide justification, while lesser concerns such as reducing littering "will not justify suppression of speech."

Berch noted that no one was claiming that the items being sold or displayed at the businesses fit the definition of obscenity. She said all are perfectly legal to sell, with the only question being whether those sales should be allowed at all hours of the day or night.

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