

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

October 24, 2014

Opinion No. 14-92

Validity of Regulation of Hours of Operation of Adult-Oriented Establishments

QUESTION

Are the hours-of-operation restrictions for adult-oriented establishments set forth in Tenn. Code Ann. § 7-51-1402 constitutionally valid, in light of the decision in *Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136 (7th Cir. 2014)?

OPINION

Yes. Current precedent in the United States Court of Appeals for the Sixth Circuit upholds the constitutionality of Tennessee's hours-of-operation restrictions for adult-oriented establishments.

ANALYSIS

The existing hours-of-operation restrictions for adult-oriented establishments set forth in Tenn. Code Ann. § 7-51-1402 have been upheld as constitutionally valid. *See Richland Bookmart v. Nichols*, 137 F. 3d 435 (6th Cir. 1998), *cert. denied*, 537 U.S. 823 (2002). Applying the intermediate-scrutiny test to Tennessee's Adult-Oriented Establishment Act, Tenn. Code Ann. §§ 7-51-1401 to -1406, the United States Court of Appeals for the Sixth Circuit held that:

reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhood surrounding adult establishments is a "substantial government interest." The Tennessee Legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation.

Richland Bookmart, 137 F. 3d at 440.

The Sixth Circuit has reaffirmed and applied the rationale in *Richland Bookmart* in upholding other hours-of-operation restrictions regarding adult-oriented establishments. *See, e.g., 84 Video/Newsstand, Inc. v. Sartini*, 455 Fed. Appx. 541, 562-63 (6th Cir. 2011), *cert. denied*, 132 S.Ct. 1637 (2012); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 294, 298-99 (6th Cir. 2008); *Deja Vu of Cincinnati, LLC v. Union Twp. Bd. of Trustees*, 411 F.3d 777 (6th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1089 (2006). Other courts have likewise upheld the constitutionality of

hours-of-operation restrictions for adult-oriented establishments. *See, e.g., Center For Fair Public Policy v. Maricopa Cnty.*, 366 F.3d 1153 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004); *Fantasyland Video, Inc. v. Cnty. of San Diego*, 373 F. Supp. 2d 1094, 1106-09 (S.D. Calif. 2005), *aff'd*, 505 F.3d 996, 1001-02 (9th Cir. 2007).

The holdings in these cases stand in stark contrast to the decision of the United States Court of Appeals for the Seventh Circuit in *Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136 (7th Cir.), *cert. denied* (U.S. Oct. 6, 2014) (No. 13-1441), where the court determined that the City of Indianapolis had failed to demonstrate the reasonableness of its hours-of-operation restrictions for adult bookstores as a means of addressing deleterious secondary effects. The court reversed the judgment of the district court, which had found after trial that the city's single justification of fewer armed robberies at or near adult bookstores was adequate to support the ordinance. *Id.* at 1137-38. The Seventh Circuit decision in *Annex Books*, however, is not controlling in Tennessee, and it does not change Sixth Circuit law, which does control.

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