



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**

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**STATE OF ARIZONA v. HUBERT AUGUST STUMMER and  
DENNIS ALLEN LUMM**  
CR-07-0429-PR

**PARTIES AND COUNSEL:**

*Petitioners:* Hubert August Stummer and Dennis Allen Lumm, represented by Richard J. Hertzberg.

*Respondent:* State of Arizona, represented by Scott E. Boehm of Law Office of Scott E. Boehm, P.C., and deputy Maricopa County Attorney James P. Beene, filed a “Response to Petition for Review and Cross-Petition for Review”. Stummer and Lumm did not respond.

**FACTS:**

Hubert Stummer and Dennis Lumm are operators of two sexually-oriented businesses. The men allegedly sold adult magazines in the early morning hours in violation of time restrictions contained in A.R.S. § 13-1422(A) (2001). The version of the statute in effect at the time of their sales provided that such adult businesses “shall not remain open at any time between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday.” Thus, the statute required such businesses to close for eleven hours on Sundays and seven hours on all other days.

The State brought misdemeanor charges against them. The Maricopa County Superior Court judge, to whom both cases were assigned, granted the defendants’ First Motion to Dismiss after finding he was bound by *Empress Adult Video and Bookstore v. City of Tucson*, 204 Ariz. 50, 59 P.3d 814 (App. 2002). The Arizona Court of Appeals, Division Two, held in *Empress* that A.R.S. § 13-1422 was unconstitutional as to adult businesses that do not offer live entertainment. In *Empress*, the appellate court held that the Arizona Constitution, art. 2, § 6, afforded more protection to such “speech” than the free speech provision of the First Amendment to the United States Constitution. The State appealed.

Division One of the appellate court consolidated the Stummer and Lumm cases on appeal and considered two issues raised by the State:

(1) Does the free speech provision of Article 2, Section 6 of the Arizona Constitution provide broader protection to sexually-explicit speech than the First Amendment to the United States Constitution?

(2) Does A.R.S. §13-1422, as applied to sexually-oriented businesses that do not feature live entertainment, violate Article 2, Section 6 of the Arizona Constitution?

The court answered, “No,” to both questions.

**ISSUES:**

**A. Petition for Review**

“The court below held that A.R.S. § 13-1422, restricting hours of operation of businesses offering sexually oriented material for rental or sale, was constitutional under Article 2, Section 6 of the Arizona Constitution. This ruling should be reviewed. It conflicts with a decision of Division Two on the same issue. See Empress Adult Video and Bookstore v. City of Tucson, 204 Ariz. 50, 59 P.3d 814 (App. 2002), (review denied 2003).”

**B. Cross-Petition for Review**

None specifically stated. The State asked the Court to accept its cross-petition for review to overrule *Empress* and resolve a conflict of law between opinions of the divisions of the appellate court.

**DEFINITIONS:**

Article 2, section 6, of the Arizona Constitution provides: “*Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.*”

The United States Constitution provides in the 1<sup>st</sup> Amendment: “*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 to peaceably to assemble, and to petition the Government for a redress of grievances.*”

A.R.S. § 13-1422 (A) provided at the time these cases were filed: “*An adult arcade, adult bookstore or videostore, adult cabaret, adult motion picture theater, adult theater, escort agency or nude model studio shall not remain open at any time between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday.*” Subsection (B) provided that a violation of this statute is a class 1 misdemeanor. Amendments made to the statute in 2006 (after the conduct charged in these consolidated cases took place) changed the letters of the subsections, but did not change the substance of the statute. In its opinion, the Appellate court referred to the statute as “section A” for purposes of consistency in the consolidated appeals.

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