

Question 5

City has adopted an ordinance banning tobacco advertising on billboards, store windows, any site within 1,000 feet of a school, and “any other location where minors under the age of 18 years traditionally gather.”

The purpose of the ordinance is to discourage school-age children from smoking. The likely result of the ordinance will be to cause the removal of tobacco advertising from the vicinity of schools, day care centers, playgrounds, and amusement arcades.

The Association of Retailers (AOR) was formed to protect the economic interests of its member retailers. AOR had unsuccessfully opposed the adoption of the ordinance, arguing that it would cause hardship to store owners by depriving them of needed advertising revenue. AOR believes that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising.

AOR is considering filing a complaint for injunctive relief against City in federal district court claiming that the ordinance deprives its members of rights under the Free Speech Clause of the First Amendment.

What arguments could AOR reasonably make to show that it has standing, and that its First Amendment free speech claim has merit, and would it be likely to succeed? Discuss.

Answer A to Question 5

5)

I. Standing

The Association of Retailers (AOR) is an organization seeking to enforce the putative rights of its members. Normally, courts do not allow plaintiffs to represent the rights of third parties. Organizations, however, fall under an exception to this general rule (as do doctors suing on behalf of patients, or accused criminals suing to enforce potential jurors' right not to be peremptorily struck due to their race). An organization will have standing to sue on behalf of its members if: (1) the organization's suit is related to an issue that is germane to the organization's purpose; (2) the organization has members that would themselves have standing to sue; and (3) it is not necessary that the organization's members themselves be party to the case.

Applying this test, it appears likely that the AOR could reasonably show that it has standing. As to the first requirement, the AOR "was formed to protect the economic interest of its member retailers." The AOR hopes to enjoin the application of the ordinance because it will lead to a diminution of retailers (shopkeepers) advertising revenue. The amount of advertising revenue lost due to tobacco advertising prohibition directly affects AOR members' economic interest, and thus the subject of the suit is sufficiently related to the organization's purpose.

As to the second requirement, it appears that at least certain of AOR's members would have the standing required to bring suit themselves. Standing generally requires (1) an injury, (2) causation, and (3) redressability. Courts will not find standing when plaintiff has not suffered a harm (or is not in imminent danger of suffering a harm), the matter at issue cannot be considered to have caused the harm to plaintiff, or, if judicial action occurred, the harm could not be prevented/cured. Here, AOR members who run shops with windows that once featured tobacco advertisements have clearly suffered a harm—the City has passed the ordinance requiring them to remove the ads, and they have (presumably) lost the revenue they once earned from displaying said ads. It is beyond dispute that the City ordinance caused the harm, as but for the ordinance, the advertisements would remain in the storefront windows. Finally, injunctive relief granted by the Court would redress the harm—if it prevented the City from enforcing the ordinance, then AOR members could display the advertisements and resume collecting advertising revenue.

As to the third requirement, there does not appear to be any particular reason why any specific AOR member would have to be party to the litigation. The harm complained of is not particular to any one member, but rather to all members who had tobacco advertisements displayed. The organization itself could represent the aggregate harm to its various members. This is not a situation, such as fraud, where particular facts as to a particular member would play such an important role that the Court should not proceed without that member.

With these arguments, it is likely that the Court would find that AOR has sufficient standing.

II. First Amendment Free Speech Claims

At the start, AOR can predicate its Free Speech claims on the fact that the First Amendment applies to the states (and thus to municipalities) because of incorporation through the Fourteenth Amendment. To have a First Amendment Free Speech claim, AOR must show that there has been state action limiting its members' right to free speech. Again, that is not an issue here because the City (which is certainly a state actor) passed the ordinance at issue.

AOR has three options open to it in challenging the City's ordinance—it can claim (1) that it violates the intermediate scrutiny that Courts apply when the state regulates commercial speech; (2) that the ordinance is void for vagueness; and (3) that the ordinance is void for overbreadth. As we address these three options, we will determine why other avenues, though alluring, are unlikely reasonable.

A. Commercial Speech

The ordinance clearly regulates commercial speech, in that it only bans tobacco advertising (as opposed, say, to tobacco-related art) and cites store windows and billboards as primary locations of regulation.

While the state can outright ban false advertising, or advertisement for illegal purposes, neither is applicable here. There is no evidence that the tobacco advertising is in any way false or misleading, nor is there any evidence that tobacco is illegal in City. As such, the commercial speech at issue is subject to constitutional protection. Unlike non-commercial speech, the state can enact subject-matter based regulations for commercial speech (such as banning tobacco advertising) without triggering strict scrutiny (a showing of a compelling government interest and means necessary to achieve said interest).

Instead, the City must show: (1) that there is an important government purpose unrelated to the suppression of speech; (2) that the regulation directly advances that government purpose; and (3) that the regulation is narrowly tailored to achieve the purpose. If the City meets all three requirements, it can regulate commercial speech even by subject matter.

The City will argue that the health of children, and preventing the detrimental effects of smoking, is an important government purpose. That is essentially inarguable, and AOR should not contest it.

The City will further argue that the regulation directly advances that interest by decreasing children's media exposure to tobacco—that what children do not see, they will not be tempted to buy. AOR can challenge this by arguing that, in fact, the regulation only indirectly advances the government's purpose and that restricting actual access, rather than commercial references, to tobacco would directly advance the government's interest.

However, it cannot credibly be gainsaid that limiting the advertisements would diminish children's exposure to tobacco and directly advance the City's interest. Thus, the AOR will likely not be successful contesting this prong.

AOR's best argument is that the ordinance is not narrowly tailored, and that the ordinance prohibits more advertising than substantially required to achieve its purpose. AOR, however, cannot argue that the City can only regulate so far as necessary to achieve the purpose—that would be applying strict scrutiny rather than intermediate scrutiny. The City will respond that it has "narrowly tailored" the ordinance by limiting it to billboards, store windows, proximity to schools, and "locations" where minors "traditionally gather." That is not the most restrictive means of accomplishing its purpose, but it is more narrow than a blanket prohibition against tobacco advertising. This is a closer call, mainly because of the latter clause, but at least as to the billboards, store windows, and ads near schools, the ordinance is likely narrowly tailored enough. These places are either out in the open or particularly susceptible to children's presence, and thus a Court will likely apply the ordinance as to the specifically identified locations.

AOR is unlikely to prevent the application of at least parts of the ordinance on the grounds of commercial speech.

B. Void for Vagueness and/or Overbreadth

What AOR will be able to do, however, is have the ordinance enjoined in regards to the clause concerning "any other location where minors...traditionally gather." This is unconstitutional both because it is unduly vague (other than bars, offices and funeral homes, where don't minors traditionally gather?) and overbroad (even to the extent that there are more identifiable traditional gathering places, this language included far more than just playgrounds and fairs). This clause will be unconstitutional as applied to at least some of AOR's retailers, and thus the Court will likely consider enjoining enforcement of the non-specified places for advertisements.

Answer B to Question 5

5)

I. Does AOR have organization standing?

Standing requires that the claimant have an actual stake in the controversy. To assert standing, the claimant must have an injury in fact, the injury must be caused by the activity complained of, and the court must be able to redress the injury.

An organization may have standing if certain criteria are met. The organization must show that 1) its individual members have standing to assert a claim; 2) the claim is germane, or, related to the purpose of the organization, and 3) the individual members are not necessary to adjudicate the claim.

1. Do Members have standing in their own right?

Here, the members have standing in their own right because they have an injury in fact, can show causation, and the court can redress their problem. The members have standing in their own right because the ordinance prevents them from engaging in advertising, depriving them of revenue. Therefore, they have an injury in fact. Moreover, the loss of revenue is a direct cause of the City's ordinance. Finally, if the court finds that the ordinance is invalid, it will redress the injury.

2. The claim is germane to the purpose of the organization.

The AOR was formed to protect the economic interests of its member retailers. Here, the ordinance arguably is causing economic hardship to AOR members depriving them of needed advertising revenue. Therefore, the effect of the ordinance is to create the type of harm AOR was formed to protect against - harm to the economic interests of the member retailers. Therefore, it is germane to the purpose of the AOR to fight the ordinance as a violation of free speech that harms economic interest of its members.

3. The individual members are not needed for the court to decide the claim.

AOR is challenging a city ordinance on First Amendment free speech grounds. The court can decide whether the ordinance is a violation of the First Amendment and related issues of vagueness and overbreadth without need for the participation of the individual members of AOR.

Because AOR can show that its members have standing in their own right, that the complaint seeking injunctive relief against the City for enforcement of the ordinance is

related to AOR's purpose of protecting the economic interests of its members, and the members are not necessary to decide the matter, AOR can assert organizational standing.

II. First Amendment Speech Arguments

The protections of the First Amendment apply to the states and local governments through the 14th Amendment. Therefore, as a state actor, City may not violate free speech rights. Generally, a state must have a compelling interest in regulating the content of speech. However, commercial speech is afforded less protection by the First Amendment.

a. Commercial Speech

AOR may first argue that the ordinance does not meet the requirements for restraints on commercial speech. The City may regulate commercial speech if it is false or misleading. Here, there are no facts suggesting that the advertisements are false or misleading.

However, the City will likely argue that the very purpose of the ordinance was to protect minors because the advertisements for cigarettes were inherently misleading [sic] youth into believing that smoking is bad. AOR, however, will note that there is nothing misleading at all about advertisements for a certain product that say nothing aimed at minors, and that the State has offered no evidence showing that there is some attempt by the retailers to mislead youth into buying cigarettes.

Therefore, AOR has a strong argument that the City cannot regulate the advertisements as false or misleading.

i. Regulation of commercial speech generally

Where commercial speech is not false or misleading, the City may regulate the speech only if it meets the three part test set forth by the Supreme Court for calibrating the City's interest and the Retailers' commercial interests. The Supreme Court has applied an intermediate level of scrutiny to commercial speech regulation:

Any regulation of commercial speech must be 1) substantially related to an important government interest; 2) it must directly advance the interest, and 3) there must be no less restrictive means.

Is the ordinance substantially related to an important government interest?

The City will persuasively argue that there is an important government interest in discouraging school-age children from smoking. The state will note the fiscal costs of dealing with health related problems and the addictive nature of nicotine in relation to the maturity and intelligence of school-age children. Moreover, the City may try and analogize

the broad discretion given to the states under the Constitution to regulate the sale and distribution of alcohol.

AOR will argue that the state has an important government interest in regulating school-age smoking, but that the ordinance is not substantially related to that interest. However, AOR will not likely be able to show that an ordinance that is aimed at advertisements within 1,000 feet of a school is not substantially related to the interest of protecting minors from the dangers of smoking because there is a high concentration of youth near schools, particularly youth of young ages.

AOR may argue, however, that the provision in the ordinance prohibiting advertising at any location where youth under the age of 18 gather is not substantially related to an important government interest. AOR will argue that the City's interest is strong in protecting areas around schools where there is a definite and concentrated population of youth who are sent to that location for education. But, AOR will note that this interest decreases when the government is trying to protect gatherings of youth who are free to move about in public.

Does the Ordinance directly advance the government's interest in protecting youth?

By prohibiting the advertisement of tobacco near schools and other public places where minors gather, the ordinance directly advances the interests of the government's interest in discouraging school-age children from smoking. Assuming that the State can draw connections between the advertising and its effect on children, the ordinance directly advances the state's interest.

Is the ordinance the least restrictive means?

AOR has a strong argument that the ordinance is not the least restrictive means for promoting the state's interest in discouraging school-aged children from smoking. Specifically, AOR has already argued that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising. Moreover, AOR will argue that there could be regulations of the types of advertisements or size that would not prevent all advertising in windows or other locations where minors gather. Specifically, AOR will argue that the provision banning advertisement at "any other location where minors under the age of 18 years of age" is not the least restrictive means and that the portion should be struck from the ordinance.

b. Any regulation of speech, even if a valid regulation of commercial speech, still must not be overbroad, vague, or give unfettered discretion to enforcement agencies to be constitutionally valid.

Is the Ordinance overbroad?

A restriction on speech cannot prohibit substantially more protected speech than it may legitimately restrict. If the ordinance is found to prohibit substantially more speech than the City may constitutionally prohibit, then the ordinance will be found invalid and will not apply to any speech.

AOR will argue that the restriction on advertising at “any other location where minors under the age of 18 years traditionally gather” will prohibit substantially more speech than the City may constitutionally prohibit under the commercial speech clause. Specifically, AOR will argue that the City does not have an important interest in preventing advertising of tobacco at all places where minors gather. AOR will argue, as noted above, that while the City may have a strong argument that its interest in [sic] important in regards to advertising near school zones, the City’s interest substantially decreases as the concentration of children goes down. However, this argument will bleed into AOR’s stronger argument that the restriction banning advertising in areas where minors gather is vague, and, therefore, unconstitutional.

Is the Ordinance Vague?

A regulation is vague if it does not put the public on reasonable notice as to what is prohibited. Here, AOR has a strong argument that the ordinance is vague because it prohibits advertisements at any location where minors under the age of 18 traditionally gather. While the provision limiting advertisements within 1,000 feet of a school on billboards or store windows is specific, places where minors gather is not defined.

There is nothing in the ordinance that either specifies places where children traditionally gather or defines how to determine what in fact is a “gathering.” How many children constitute a gathering? Therefore, AOR will likely be able to assert that the ordinance is unenforceable because of a vague provision.

Does the ordinance give unfettered discretion to enforcement?

A regulation restricting speech must be defined and clear. And, if it gives unfettered discretion to whoever enforces it, it will be found invalid.

Because the ordinance offers no guidance as to what constitutes a place where minors traditionally gather, it gives unfettered discretion to enforcement agencies to make their own definition. Therefore, AOR can make a strong argument that the ordinance gives unfettered discretion to City officials in determine [sic] who is in violation, and therefore, the ordinance should be invalidated.

Conclusion

Because AOR can show that the ordinance is vague in part, gives unfettered

discretion, and is not the least restrictive means of promoting the state's interest, it is likely to prevail in its claim to enjoin enforcement of the ordinance.