

## Question 2

City recently opened a new central bus station.

Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish because City's population is about equally divided between English- and Spanish-speaking people.

City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advised of the time and place of meetings and solicited memberships at \$10 each.

Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the U.S. Constitution? Discuss.

## Question 2 Answer A

### Free Speech

Under the 1<sup>st</sup> Amendment as applied to the states via the 14<sup>th</sup> A, all persons have the right to free speech. While this right is not absolute, there are only certain instances when the government may infringe upon this right.

### Strict Scrutiny

America for Americans Organization (AAO) will argue that strict scrutiny should apply. Normally when a government actor limits or regulates speech based on its content, it will have to survive strict scrutiny analysis. Under this, a law will only be upheld if it is necessary to achieve a compelling government interest.

AAO will claim that the city is a government actor so the protections of the 1<sup>st</sup> A will apply. Further, they will say that the law regulates the content of their speech—that it must include parts in Spanish. The court will probably not agree because it is not regulating what they say, rather how they say it. Therefore, it will take it out of strict scrutiny analysis.

### Time, Place, & Manner Restrictions

One way a government may validly regulate speech is by controlling the time, place, and manner of the speech. These regulations are put under less scrutiny because they are not limiting what the people can say but rather how and where they can say it.

### Public Forum

A public forum is a place that is traditionally open to the public and allows somewhat unrestricted speech. These include parks, sidewalks, open fields. The bus station bulletin boards are likely not considered a public forum.

## Limited Public Forum

Limited public forums are not traditionally open to public speech, but the government opens them up to the public. Therefore, they receive the treatment of a public forum while open.

AAO will claim this is a limited forum because the boards, while not traditionally open to public speech, are open here to post documents for free. The court will likely agree.

While open to public speech, a limited public forum may only regulate the time, place, and manner of speech if:

1. Content neutral
2. Alternative channels of communication are available, and
3. Regulations are narrowly tailored to achieve a significant government interest.

### 1. Content Neutral

As mentioned, AAO will claim that the requirement that all posted documents be in both English and Spanish is a regulation based on the content of the speech. The city will claim it is content neutral because it doesn't matter exactly what you say, just how you say it. City will claim this regulates the manner of the speech.

AAO may counter by saying that since the organization has a primary goal of restricting immigration, the regulation goes to the content of their speech because they're speaking out and trying to make it clear that everyone in America should speak/read English. The court may agree with this point but will likely side with the city because the overall requirement that docs be in English and Spanish is not regulating content of the docs but rather the manner in which their speech is conveyed.

Therefore, the regulation is likely content neutral.

### 2. Alternative Channels

City will also likely show that AAO has other channels of communication available. They can post on other boards or directly hand out fliers. The English/Spanish requirement appears to only apply to this bus station's bulletin board.

### 3. Narrowly Tailored to Further Significant Interest

City will also argue that this final element is satisfied. They will say they have a significant interest in communicating with and including the Spanish speaking population, which make up about ½ of the people.

Because it is necessary to communicate with your residents, the court may agree with City that this is a significant interest. AAO may argue that City may have a significant interest in relaying government communications, but its interest shouldn't expand to private communications. Further, the burden it would impose on everyone to translate communications into Spanish would be immense, AAO will say.

Even if the court finds the interest in communicating significant, AAO will say this regulation is not narrowly tailored to it. They'll say they could achieve this in other , less restrictive ways, like making communications around heavily populated Spanish speaking areas be in both English/Spanish.

Narrowly tailored means a tight fit. However, because this is a central bus station, it is likely that many Spanish speaking people use it and therefore need the translation.

Therefore, so long as the court finds this regulation is content neutral and is narrowly tailored to a significant gov interest, it will likely be able to refuse to post AAO's flyer for not being in Spanish.

NonPublic Forum

The city may also try to argue this is a nonpublic forum, where speech has traditionally been able to be severely limited. Such places include military bases, airports, and gov buildings. The court has also found a bus advertising signs to be nonpublic.

City will argue this isn't like the inside of a bus where people cannot escape looking at the ads because this is at the station where they could just leave. Court will agree.

Gov can regulate speech in nonpublic forums [as] long as it is reasonable and viewpoint neutral.

Here, the law is likely reasonable due to the ½ Spanish speaking population. Also it is viewpoint neutral because it doesn't discrim on only one side of a viewpoint. It applies to all communications.

## Commercial

City may also try to argue this is commercial speech so they can regulate more. That speech can be regulated if not false/misleading, directly advances substantial gov interest, and narrowly tailored into it.

However, even though it seeks membership, City denied it because not in Spanish too.

## QUESTION 2

### Answer B

**Justiciability:** In order for a matter to be justiciable there must be standing, the case must be ripe, and not moot. Here, AAO has not filed suit yet, however, it must have standing to raise any objections to the city's requirements.

Standing: standing requires that there be an injury in fact, causation and redressability. Here, AAO is injured as it cannot post its flyers in English only, without potential reprimand. Moreover, the city requirement directly causes its injury, and a court decision in favor of AAO would remedy it. However, an organization will not have standing unless 1) its members have individual standing 2) the interest is germane to the purpose of the organization, and 3) neither the remedy nor the claim would require individual member participation. Here, an individual member who would want to post only flyers in English would have standing, the interest is germane to the purpose of the organization as its primary goal is to restrict immigration and therefore, posting flyers in Spanish would be against its interest and finally, neither a claim or remedy by AAO would require individual member participation.

**Ripeness:** a court will not award pre-enforcement review for purposes of an advisory opinion. Here, the city has already implemented these requirements. It is unclear whether it is an actual ordinance, regulation or law, but assuming that there are reprimands for violating the city requirements, then the issue is ripe, as AAO would be violating the city requirements if it only posted the flyer in English.

**Mootness:** there must be a dispute at all times of the litigation. Here, if the city removed its requirement during the litigation the matter would be moot. However, because the city would be free to apply the restriction again whenever it wants there [sic] matter is not moot.

**Government conduct:** in order for there to be a constitutional violation, there must be government conduct. Here, the city is implementing the requirement; therefore there is government conduct.

**First Amendment:** the government may not restrict an individual's or organization's freedom of speech unless the speech is not protected or less protected.

**Content-Based Restrictions:** if a law restricts speech based on its content, whereby it is based on the subject matter or viewpoint of the speech, strict scrutiny review applies. The government must show that the law is necessary to achieve a compelling state interest and it must be the least restrictive means of accomplishing its purpose. Here, AAO will argue that the law is content-based, because it is only allowing flyers that are posted in Spanish and English, and therefore, it is restricting the AAO's message against immigration which would require only posting flyers in English, as posting flyers in Spanish would communicate to the Hispanic community, which is an immigrant population. This is a very far stretched argument. It does not appear that the restriction is based on the subject matter or viewpoint of the speech. AAO could post the same flyer in Spanish stating that its primary purpose is to restrict immigration and advise of the time and place of meetings. Therefore, this argument will fail.

**Content-Neutral Restrictions:** if a law is content-neutral, then the government must show that the law is substantially related to an important government purpose and is narrowly tailored. As discussed above, the restriction is not content-based, rather, it is content-neutral. The city will argue that the restriction is substantially related to the purpose of communicating to all individuals in its population. The city's population is about equally divided between English and Spanish speaking people, and therefore it has an important purpose of making sure that messages posted on the board for free will be communicated to all its population. Moreover, the city has narrowly tailored the restriction by not requiring that people post the flyers in multiple languages, but only in two. A court will likely uphold the restriction.

**Prior Restraint:** if a law restricts speech prior to its communication there is a prior restraint and strict scrutiny applies. The law must be reasonably, narrowly tailored, and definite. Moreover, the government must seek a prompt injunction, and there must be a prompt determination of the validity of the law. Here, AAO will argue that this restriction is a prior restraint on speech. It will argue that because it is required to post flyers in two different languages and expend the money to have the English flyer translated into Spanish it is a prior restraint on speech. As discussed above, however, the restriction is not a prior restraint on speech. The restriction is allowing speech; however, it is requiring that it be posted in two different languages. This is not a prior restraint because it is not prohibiting speech.

**Vagueness:** a restriction is unconstitutional if it is vague and a reasonable person could not understand the type of speech that is being regulated. Here, the restriction is not vague; it is requiring that all free-posted documents be in both English and Spanish. Therefore, the restriction is valid.

**Overbroad:** the restriction is unconstitutional if it restricts more speech than is constitutionally allowed. Here, the restriction is not overbroad because it is only requiring free-posted documents to be in both English and Spanish; therefore, it is valid.

**Symbolic Speech:** the government may restrict symbolic speech when it is narrowly tailored to achieve an important state interest, and it is not directed at the suppression of speech. The burden of proof is on the government. Here, posting flyers will be deemed symbolic speech as they communicate a message. As discussed above, the government will argue that it has an important state interest because it want its entire population to understand the flyers that are posted. The restriction is narrowly tailored as it is only requiring the flyers to be in the languages that are dominant in the population, and the restriction is not directed at the suppression of speech. Rather, it provides the opportunity of communicating to the entire population. AAO will argue that the speech is directed at the suppression of speech, because it is directed at the suppression of AAO'S message against



immigration. However, this argument will likely fail as AAO can communicate this same message of its purpose in restricting immigration in Spanish; therefore, the restriction would not suppress AAO's message.

**Public Forum:** public forums are areas which the constitution requires that the government open to speech. These areas typically includes [sic] parks and sidewalks. Here, the restriction is taking place within the central bus station, wherein the city has provided a large bulletin board that is available for free posting of documents. Because the bulletin board is within the central bus station which is likely government owned this forum will not be deemed a public forum, as it is not a constitutionally required forum for the government to open up to speech. Nevertheless, if it were to be considered a public forum the following analysis would apply:

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the language.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

**Designated/Limited Public Forum:** this is a forum which the government is not required to open up to speech, but it has chosen to open up to speech regardless. The same analysis as the public forum applies as to designated public forums. Content-based speech must pass strict scrutiny, while in content-neutral speech the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication.

It is likely that the bulletin board within the central bus station will be considered a designated public forum. The government is not required to place a bulletin board in the bus station for organizations and individuals to post flyers, nor is it required to open the central bus station to speech at all; nevertheless it has chosen to do so.

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the speech. AAO can get the same message across in both languages.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

**Nonpublic forum:** A nonpublic forum is a forum wherein the government may constitutionally restrict speech. These include military bases, sidewalks next to a post office, ad space on buses, and solicitation for money in airports. The restriction, however, must be viewpoint neutral and must pass the rational basis test. Here, AAO would have to argue that the restriction is not rationally related to a legitimate government interest.

The city will argue that the central bus station is a nonpublic forum and that the government must not open it to speech. Although the central bus station is likely to be deemed a nonpublic forum, the city has changed the status of the forum by providing a large bulletin board and making it available for people to post their flyers and messages. By doing so the city transformed the public forum to a nonpublic forum. However, the city may also argue that because AAO is soliciting money (\$10 for its membership) that it is a nonpublic forum as it can restrict speech of solicitation for money in bus stations as it can in airport. However, this argument is unlikely to apply since AAO is not directly soliciting money by standing at the central bus station and asking for money, rather, only if individuals show up at the time and place of the meeting would it ask for membership fees. At that point, the government would be unable to regulated [sic] the speech. Nevertheless, assuming that the court would deem that this is a nonpublic forum, which it will not, the following analysis would apply.

AAO would argue that the law is not rationally related to a legitimate purpose. However, the city can easily counter this by arguing that its purpose is to have its entire population be able to read the flyers. Therefore, AAO's argument will fail. AAO will then argue that the restriction is not viewpoint neutral as it restricts only anti-immigration speech and not pro-immigration speech. This argument will again fail, as AAO can post the same message of anti-immigration in both languages and it would not deter its purpose. Therefore, AAO would not prevail under this argument.

**Freedom of Association:** the government may not punish individuals for joining any association unless the individuals know of the 1) unlawful purpose of the association, 2) the individual actively participates, and 3) the individual intends to advance the illegal purpose. Here, AAO's primary goal is the restriction of immigration. This is not an unlawful purpose; therefore, the government may not punish anyone for their freedom to associate with the AAO. AAO will argue that it is violating its freedom of association by restricting its message. It will argue that the requirement is unconstitutional because the AAO is an intimate association and it would chill its expressive activities. However, this argument is unlikely to prevail as argued above, because AAO's message of anti-immigration can be communicated in multiple languages and would not violate its freedom of association rights.

**Equal Protection/Substantive Due Process:** AAO would also have potential argument under the equal protection and substantive due process clause of the 14th Amendment. The equal protection requires that the government afford its citizens and organization equal protections of the law. If the law does not discriminate against a suspect or quasi-suspect.

### Question 3

Paul sued David in federal court for damages for injuries arising from an automobile accident.

At trial, in his case-in-chief, Paul testified that he was driving westbound, under the speed limit, in the right-hand lane of a highway having two westbound lanes. He further testified that his passenger, Vera, calmly told him she saw a black SUV behind them weaving recklessly through the traffic. He also testified that, about 30 seconds later, he saw David driving a black SUV, which appeared in the left lane and swerved in front of him. He testified that David's black SUV hit the front of his car, seriously injuring him and killing Vera. He rested his case.

In his case-in-chief, David testified that Paul was speeding, lost control of his car, and ran into him. David called Molly, who testified that, on the day of the accident, she had been driving on the highway, saw the aftermath of the accident, stopped to help, and spoke with Paul about the accident. She testified further that, as soon as Paul was taken away in an ambulance, she carefully wrote down notes of what Paul had said to her. She testified that she had no recollection of the conversation. David showed her a photocopy of her notes and she identified them as the ones she wrote down immediately after the accident. The photocopy of the notes was admitted into evidence. The photocopy of the notes stated that Paul told Molly that he was at fault because he was driving too fast and that he offered to pay medical expenses for anyone injured. David rested his case.

Assuming that all appropriate objections and motions were timely made, should the court have admitted:

1. Vera's statement? Discuss.
2. The photocopy of Molly's notes? Discuss.

Answer according to the Federal Rules of Evidence.