

## Question 5

For many years, the Old Ways Fellowship, a neopagan religious organization, received permission from the City's Building Authority to display a five-foot diameter symbol of the sun in the lobby of City's Municipal Government Building during the week surrounding the Winter Solstice. The display was accompanied by a sign stating "Old Ways Fellowship wishes you a happy Winter Solstice."

Last year the Building Authority adopted a new "Policy on Seasonal Displays," which states:

Religious displays and symbols are not permitted in any government building. Such displays and symbols impermissibly convey the appearance of government endorsement of religion.

Previously, the Building Authority had allowed access to a wide variety of public and private speakers and displays in the lobby of the Municipal Government Building. Based on the new policy, however, it denied the Old Ways Fellowship a permit for the sun display.

After it was informed by counsel that courts treat Christmas trees as secular symbols, rather than religious symbols, the Building Authority decided to erect a Christmas tree in the lobby of the Municipal Government Building, while continuing to prohibit the Old Ways Fellowship sun display.

The Old Ways Fellowship contests the Building Authority's policy and its decision regarding the Christmas tree. It has offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. The Building Authority has turned down this offer.

The Old Ways Fellowship has filed suit claiming violation of the First Amendment to the United States Constitution.

What arguments may the Old Ways Fellowship reasonably raise in support of its claim and how are they likely to fare? Discuss.

## QUESTION 5: SELECTED ANSWER A

### OLD WAYS FELLOWSHIP'S FIRST AMENDMENT CLAIMS

The Old Ways Fellowship ("Old Ways") has several arguments to support its First Amendment Claims. The threshold question for all of its claims is whether there is government action. Government action occurs when the government acts, when a private entity takes on a public function, or when the government is entangled (encourages, participates in, or enables) in private conduct.

Here, Old Ways' claim is against the City Building Authority, which is a part of the City's Municipal Government. Thus, the First Amendment applies because state action is involved.

#### First Amendment Right to Freedom of Speech

Old Ways has several arguments related to its first amendment right to freedom of speech.

Content-Based Restrictions. Old Ways may also argue that the Policy is an invalid restriction of speech in a public forum. Here, the speech is occurring in the City's Municipal Government Building, which is open to the public, and has permitted public use for speech purposes for many years.

All content-based restrictions on speech conducted in a public or designated public forum are subject to strict scrutiny. Under the strict scrutiny standard, the government has the burden to show that a law is narrowly tailored, using the least restrictive means, to reach a compelling governmental interest. Content-based restrictions on speech arise when the government regulates either subject-matter based speech, or viewpoint based speech. Content-neutral speech conducted in a public or designated public

forum must further an important government interest, be narrowly tailored, leave alternatives for speech open, but need not be the least restrictive means available.

Here, Old Ways would first argue that its five-foot diameter symbol of the sun constitutes symbolic speech, as it symbolizes the religion organization's beliefs. It would then argue that the Building Authority's Policy on Seasonal Displays ("Policy") is a content-based regulation because it bars the use of "religious displays and symbols" rather than all symbols and/or displays. If it successfully shows that the Policy is content-based, the city has the burden to establish a compelling interest, and that the Policy is narrowly tailored to reach that interest.

The City will likely argue that the purpose of the policy is not to stop symbolic speech, but to avoid the appearance of government endorsement of religion, which likely qualifies as a compelling interest. It would then argue that completely barring religious symbols and displays is the least restrictive means of accomplishing this goal. Although such an argument may be persuasive in a vacuum, these facts do not indicate that the Policy is the least restrictive means available. Old Ways offered to put up a disclaimer along with its symbol, stating that the sun is not endorsed by the City, but the Building Authority rejected this offer. Such an option restricts Old Ways' speech less, while arguably avoiding government endorsement of religion, but the Building Authority will not allow it. The City's refusal to adopt a less restrictive alternative is a failure to meet the requirements of strict scrutiny.

Prior Restraint. Old Ways can also argue that the Policy is an impermissible prior restraint on speech. Prior restraints are subject to strict scrutiny because they put a barrier on speech before the speech can occur. One such type of prior restraint is a permit that permits speech. To be valid, a permit must further an important government interest, involve little to no discretion by the person or group issuing the permit, there must be clear criteria to obtain the permit, and there must be a procedure in place for timely resolution of the permit and/or an immediate appeal of a decision.

Here, the fact that Old Ways needs a permit to display its sun arguably constitutes a prior restraint. Old Ways would argue that the permit requirement is impermissible because the Building Authority does not have a clear description of what items are and are not permitted to be displayed, beyond a bar on the religious symbols. Because the Building Authority decided to put up a Christmas tree, Old Ways can argue that the standards are not applied in an equal way because certain religious symbols are permitted (the Christmas tree), while other symbols (the sun) are not permitted. Also, Old Ways can point out that the Building Authority uses discretion in determining what to erect in the government building, and that there is no set policy in place for review of a decision rejecting a display. The City may, again, argue that its interest in avoiding the appearance of government endorsement of religion permits the permit requirement, and that there is no discretion involved in the policy because the City completely bars the use of any religious displays and symbols. It will also argue that the Christmas tree does not constitute a religious symbol. However, it is unlikely that the City will prevail in these arguments because there is no set procedure in place for determining who gets a permit, nor an appeals process for rejection of the permit.

Overbreadth. A government regulation of speech is overbroad and invalid where it regulates more speech than intended.

Old Ways may also argue that the Policy is an overbroad regulation of speech. It is unlikely that it will succeed in this argument, however, as the Policy clearly applies to "religious displays and symbols" and there are no facts indicating that the Policy has extended to restrict speech beyond religious speech.

Vagueness. A regulation of speech is vague and invalid where it is unclear what speech is prohibited and what speech is not prohibited.

Old Ways could argue that the Policy is vague because it does not define exactly what constitutes a religious display and symbol. It can argue that because the Christmas tree is not considered a religious symbol, the Policy is vague because Christmas trees are

often interpreted to be religious symbols. Such an argument might succeed here. The Building Authority's position is that "courts treat Christmas trees as secular symbols," but the Policy itself does not include a description of what does and does not constitute religious displays or symbols. The lack of specificity in the Policy results in confusion, and thus Old Ways likely will succeed in challenging the Policy on vagueness grounds.

### First Amendment Right to Freedom of Religious Expression

Old Ways can also contend that the new policy on seasonal displays unjustifiably infringes upon its freedom to exercise its religion. The general rule regarding freedom of expression is that neutral laws of general applicability that have the effect of infringing on freedom of expression do not violate the right to freedom of expression. However, when a law is not neutral, strict scrutiny applies, requiring the government to show that the law is necessary to further a compelling government interest, and that the law is the least restrictive means possible.

Here, Old Ways would argue that the Policy is not neutral because it bars religious displays and symbols specifically, not just any displays and symbols. Old Ways would also point out that the policy interferes with its ability to spread its Winter Greeting, which is an important aspect of its religion. Thus, strict scrutiny likely applies. As explained above, although the City may have a compelling interest in avoiding government endorsement of religion, the policy is not the least restrictive means available. Thus, Old Ways will likely succeed in challenging the Policy on freedom of expression grounds.

### First Amendment Right That the Government Will Not Establish Religion

Old Ways can also contend that the Policy, in practice, establishes religion.

Establishment Clause. The government may not establish a particular religion under the Establishment Clause of the First Amendment. To determine whether government

action violates the establishment clause, the court applies what is called the Lemon test, which analyzes the government action under 3 prongs: (1) whether the government action has a secular purpose, (2) whether the action has the effect of promoting or inhibiting a particular religion or religion in general, and (3) whether the action results in excessive entanglement between the government and religion.

Secular Purpose. Here, Old Ways may concede that the purpose of the Policy is secular, and a court would likely agree. The Policy states outright that it is meant to avoid the appearance of government endorsement of religion, and so the first prong does not indicate a violation of the establishment clause.

Effect. Old Ways will argue that the effect of the Policy actually inhibits its religion and promotes a certain religion -- Christianity -- because the Building Authority permitted erection of a Christmas tree but no other religious symbols. The court would likely agree that the effect does promote Christianity and not other religions because the Christmas tree -- and only the Christmas tree -- is displayed. Had the Building Authority permitted other types of symbols along with the Christmas tree, the effect may not be to promote Christianity, but the winter season generally. Thus, this factor supports a finding that the Policy establishes religion.

Entanglement. Finally, Old Ways would argue that the Policy results in excessive entanglement between the government and religion. The City would argue that the Policy seeks to avoid religious involvement completely. Although the Policy appears on its face to attempt to avoid entanglement with religion, because the Building Authority erected the Christmas tree, the City's position is weaker, and the court may find that entanglement has occurred because the Building Authority has permitted an arguably religious symbol, but not others.

Balancing the three factors, it is likely that Old Ways' argument would succeed, and that the court would find that the Policy, as applied by the Building Authority, establishes religion, and is unconstitutional.

## QUESTION 5: SELECTED ANSWER B

### First Amendment: Freedom of Speech

Old Ways Fellowship will argue that the Building Authority's (BA) "Policy on Seasonal Displays" violates its right to free speech under the First Amendment.

### State Action

In order for Old Ways to challenge the Policy under the Constitution there must be state action. Here, BA is the City's agency that issued the policy restricting religious displays and symbols from government property. Thus, since BA is a branch of the City, there is state action.

### Content-Based vs. Content-Neutral

Old Ways' success under the First Amendment Free speech clause will depend on whether the Policy is found to be content-based or content-neutral. Here, BA adopted the Policy on Seasonal Displays which expressly prohibits "religious" displays and symbols on government property but does not appear to apply to non-religious displays. Old Ways will argue that the policy does not restrict groups or organizations from displaying other forms of artwork or paintings but directly is singling out religious displays and other secular symbols. Thus, the policy will likely be found to be content-based.

City may try and argue that the Policy does not single out a particular religion and thus it should be found to be content neutral but this is a weaker argument since religious content, by itself, is a category of speech and thus the policy will likely be found to focus on this content.

## Strict Scrutiny

Laws that are content-based and restrict speech must pass strict scrutiny. The government bears the burden of showing that the law or statute is necessary to achieve a compelling state interest with no less discriminatory alternatives.

City/BA will claim that the policy is designed to prohibit the appearance of government endorsement of religion. City will further attempt to show that certain symbols are clearly religiously oriented and that simply by their presence in the Municipal building, this gives off the impression that the City endorses the religions associated with those symbols or displays. The prevention of endorsement of religion is likely a compelling interest since the First Amendment does not permit the government to favor one religion over another.

The weakness in City's arguments is that the law does not appear to be necessary, even if the City has a compelling interest in preventing the appearance of religious endorsement. Old Ways will argue that the City has a long history of allowing it to display its Winter Solstice display along with a variety of other public and private speakers and displays in the lobby. Old Ways will claim that the city is randomly choosing to single out religious displays by completely preventing them in government buildings via its new Policy. The law is likely not necessary to achieve the City's interest here.

As Old Ways will point out, there are less discriminatory alternatives in achieving the City's desired purpose. Old Ways offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. Presumably people that take the time to observe the displays in the Municipal building would also notice the disclaimer assuming it was prominently displayed beside the various displays. This would be sufficient to allow Old Ways to continue its time-honored tradition of wishing people a Happy Winter Solstice through its display while not suggesting that City endorses Old Ways religious beliefs. City could also hand out pamphlets at the entrances to



government buildings describing its policy of allowing the displays and putting the disclaimer there as well.

Thus, as strict scrutiny is a difficult standard to meet, it appears that BA will have a difficult time showing the policy is necessary when there are less discriminatory alternatives present. The law should be struck down as unconstitutional.

### Time, Manner, Place

Even if the court were to find that the BA Policy is not content-based but rather is content-neutral because it does not single out any particular religion and appears to apply to all religions equally, Old Ways will argue that it is still an invalid time, place and manner regulation.

Time, manner and place regulations are permitted for content neutral and viewpoint neutral regulations depending on the type of location where the speech is being regulated. Traditionally, public forums are those that have historically been open to the public such as sidewalks and parks, while designated or limited public forums are those that the government has chosen to hold open to public speech but can close at any time. Public forums and designated/limited public forums must meet intermediate scrutiny, such that the law is substantially related to an important government and there must be other nondiscriminatory alternatives available.

Here, the Policy is affecting government buildings, including the lobby of the Municipal building. A lobby of a government building would not be a public forum but rather a designated public forum since it appears that City has for some time chosen to allow various organizations to put their displays and speakers in the lobby of the Municipal building. City could certainly close off the lobby to such displays if it wanted to.

Old Ways will argue that, while City may have an important interest, even a compelling interest as discussed above, in preventing the appearance of government endorsed

religion, the Policy is simply not substantially related to this interest. Furthermore City will have the burden of demonstrating the substantial relation. City will likely claim that the law is substantially related because it singles out displays from buildings that are government owned and that the Policy only focuses on the interior of government buildings. City will claim that there are other nondiscriminatory alternatives such as Old Ways displaying its displays outside the buildings or on the plazas in front of the building. This argument will likely fail however, because while Old Ways may indeed have other options for displaying its Winter Solstice display, it cannot join the other displays that are permitted to be inside the Municipal building and this particular location is where people have come to expect to see the Winter Solstice display each year.

Therefore, because the Policy still singles out only religious displays from government buildings, the City may have a difficult time prevailing on a time manner place argument since there are other less discriminatory options that would allow Old Ways to actually continue to display the displays inside the building while notifying viewers that there is no endorsement by City of any particular religion.

### Symbolic Speech

Old Ways will argue that the policy impermissibly regulates symbolic speech. Symbolic speech can be regulated if it is done in a way that is unrelated to the suppression of speech and if there are other less discriminatory alternatives.

City will argue that by adopting the Policy it was not attempting to regulate Old Ways' right to free speech through the Winter Solstice displays. While there may be other alternatives, as previously mentioned, for Old Ways to continue this form of symbolic expression, City will likely lose on the ground that the Policy was related to the suppression of speech. The Policy directly bans symbols and displays with religious content. Thus, it would appear that the BA, in considering the adoption of the Policy, had a direct motive to regulate what types of displays would and would not be allowed.

Furthermore, Old Ways will argue that City continues to allow the display of Christmas trees in the buildings and that Christmas trees are typically associated with a religious holiday. Thus the policy may be found to impermissibly regulate only certain religious symbolic speech while other groups attempting to display Christmas displays will be allowed.

Since Old Ways' displays are not permitted in the buildings and the policy directly and expressly provides for this, the law will likely be found to be an unconstitutional restriction of symbolic speech.

### Vagueness and Overbreadth

Old Ways may bring a vagueness or overbreadth challenge to the Policy. Laws are vague if one cannot tell what speech is banned and what is permitted. Overbreadth laws are those that impermissibly burden more speech than is allowed.

Here, the Policy could be struck down as vague because it does not define what exactly constitutes religious displays; thus it is insufficient to put one on notice as to whether its display is or is not affected by the policy. Furthermore, the policy may be overbroad in that it bans all symbols and displays, even if they do not have any religious meaning associated with them. Old Ways may or may not succeed on these grounds.

### Free Exercise of Religion

The free exercise clause of the Constitution prohibits the government from preventing one's free exercise of his or her religion. Laws of general applicability are permissible while laws that target a specific religion must meet strict scrutiny.

Here, the Policy, while it does apply to all religious displays and symbols, does not appear to single out any particular religion. Nor is there any evidence of BA singling out Old Ways' particular religious beliefs as a motive for adopting the law. Thus, Old Ways

would have a better likelihood of success challenging the policy under the Establishment clause.

### Establishment Clause

Old Ways will argue that the Policy respects an establishment of religion since the City is allowed to display Christmas trees while other religious displays and symbols are banned. The Establishment clause prohibits the government from respecting the establishment of a religion. If a law has a secular purpose on its face, it must meet strict scrutiny. Laws that are not secular on their face must pass the three part lemon test.

First the law must have a nonsecular purpose. Here, the law bans all religious displays and symbols. If the court finds that this is a secular purpose because it specifically targets religious displays, then this requirement will fail.

Second, the law must neither advance nor inhibit religion. The law appears not to advance religion since it bans displays to prevent government endorsement of religion so this requirement is satisfied.

Third, the law must lead to no excessive government entanglement with religion. Here, the problem is that the City policy is banning Old Ways displays while allowing the erection of a Christmas tree in the same space as where Old Ways displays were permitted. Thus, the court may find that the policy impermissibly entangles the government with religion if it finds that the City is really making space for its own preferred religious displays while forcing out other displays such as Old Ways that it finds unattractive or not interesting.

Thus, Old Ways may have a colorable claim under the Establishment Clause.