

Question 2

State X amended its anti-loitering statute by adding a new section 4, which reads as follows:

A person is guilty of loitering when the person loiters, remains, or wanders about in a public place, or on that part of private property that is open to the public, for the purpose of begging.

Alice, Bob, and Mac were separately convicted in a State X court of violating section 4.

Alice was convicted of loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts in violation of section 4.

Bob was convicted of loitering for the purpose of begging on a waiting platform at a stop on City's subway system in violation of section 4.

Mac was convicted of loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers Building located in the business district of City in violation of section 4.

Alice, Bob, and Mac have each appealed their convictions, and their appeals have been consolidated in the State X appellate court. It has been stipulated that Alice, Bob, and Mac are indigent, that section 4 is not void for vagueness, and that the only issue on appeal concerns the validity of section 4 under the First Amendment to the United States Constitution.

How should the appellate court decide the three appeals, and why? Discuss.

Answer A to Question 2

2)

STANDING

Since the question states that the only issue on appeal concerns the validity of section 4 under the First Amendment, it is assumed that all standing requirements are met.

STATE ACTION

The constitutional provisions of the first amendment are only applicable to state action which deprives a citizen of his/her right to free speech. Here, State X passed a loitering law affecting speech (expression), and later enforced that law by their police. Therefore there is state action and Alice, Bob and Mac can allege their first amendment rights.

SPEECH

The first amendment is raised with respect to a citizen's rights for free speech or religion. Here, State X passed a law concerning loitering. This law concerns the right to free speech, however, because speech is not limited to words spoken or written, but can also apply to free expression or demonstrative speech. Since this law affects where a person can legally go (in public space) and what they can do in that public space, it does affect speech.

CONTENT-BASED

Speech regulations can be either content-based or content-neutral. Content neutral regulations on speech are viewed more favorably than content-based regulations, because there is no discriminatory purpose on the face of the regulation. Here, however, the regulation affecting Alice, Bob and Mac concerns only those on the property "for the purpose of begging." Since the statute concerns only those who have particular purpose, a particular message (i.e. "please give me money if you can spare it"), the statute is content-based and will have to survive stricter scrutiny.

OVERBREADTH

While the statute is not void for vagueness, it could be challenged by all three for being over broad. That is, it may not be narrowly tailored to serve the interest they are seeking to regulate. The statute seems aimed at prohibiting begging. However, it does not merely prohibit begging but "remain[ing] or wander[ing] about in a public place for the purpose of begging." This statute is arguably overbroad. Here, an officer can arrest someone, not for committing the actual act of begging, but for having that purpose. How can an officer, or judge, or a jury possibly know whether a person has the purpose of begging? This statute

invites abuse of indigent or undesirable people. Furthermore, the statute regulates “remaining” or “wandering about” in a public place. Again, this is overboard because it punishes not only the act of begging but the right of a person to remain in a public place or wander about there. Under this statute, an indigent could arguably be arrested for taking a walk on the sidewalk or sitting in a public park -- if the officer believes that he has the “purpose of begging.”

INDIGENCE

It is unconstitutional to pass a statute that places an unreasonable burden on indigents with the respect to compliance (for example, unreasonable fines). Here, the statute & question do not say anything about fines or fees, so it is presumed that there is no undue financial burden on indigent people.

Alice should win her Appeal

SIDEWALK = PUBLIC FORUM

Alice should win her appeal because she was “loitering...for the purpose of begging” on the sidewalk outside the Public Center for the Performing Arts. First, a sidewalk is generally a public forum. In a public forum, a person is given greater leeway to exercise their rights of free speech. The city would have to have a strong justification for repressing Alice’s right of self-expression on a sidewalk, such as public safety.

NO DANGER TO THE COMMUNITY

While Alice might not be able to loiter on the sidewalk begging in front of a Fire Station (for example) for public safety reasons, she should be able to do so in front of the public center. There is no indication that there is any danger to the community in letting her exercise her free speech rights. Rather, her speech rights are being suppressed likely because the well-to-do do not want to suffer a beggar when they go out to the theater. This is not sufficient justification to violate Alice’s right of free expression.

Bob should lose his appeal:

SUBWAY PLATFORM = QUASI-PUBLIC FORUM

A subway is not a public forum, like a park or a sidewalk. To access a subway platform one has to pay money. Therefore, it is more like a private forum, to which the rider has a license to be on the property. However, the grantor of the license is still a public entity (the city). So the subway platform is like a quasi-public forum. It has elements of being both a public and a private forum.

POTENTIAL DANGER

A quasi-public forum faces a standard of scrutiny similar to the public forum. Here, there is arguably a potential for danger to both Bob and the public. Subway platforms can be crowded places, and the subway trains typically approach at dangerous speeds in close proximity to the waiting passengers. Furthermore, even the rails of the train are often electrified. Finally, the crowds of people on subway trains are often hot, sweaty, in a hurry, tired, and thus more likely to have short tempers. For all these reasons, regulating begging has more value in this forum than on the sidewalk. It is possible that the crowds might push or shove one another (or Bob) to get away from the beggar. Furthermore, allowing begging on the platform would further congest an already dangerously congested area as other beggars moved in to beg in a beggar-friendly zone. Therefore, the state and city have reasonable justification to regulate begging on the subway platform (provided, of course, the statute is not overbroad).

Mac should lose his appeal:

STATE ACTION

Even though Mac was arrested in a private building, he was arrested subject to state action, and state action is what is at issue in his case. The state passed the anti-loitering statute, and the state enforced that statute with its police powers.

PRIVATE FORUM -- OPEN TO THE PUBLIC

The Downtown Lawyers Building is a private building. The state could not regulate what kind of speech could occur in a completely private building, in a completely private setting. But in a setting where the private owner(s) invite the public to their private space (e.g. bringing in employees, or, as here, a lobby open to the public) the state has the right to regulate speech.

PUBLIC CONCERN

Mac should lose his appeal because there is a public concern at stake when a beggar begs in a private, customer-driven establishment. There is not the danger that inheres in the subway platform, but there is a strong potential for a loss of revenue due to the begging. Customers will tire of the begging and may stop frequenting the lawyers building. If beggars could beg in every establishment open to customers, the aggregated effect may be that people will go out less and business, the economy, tax revenues and social programs will suffer. Therefore, the state has sufficient reason to regulate Mac's type of begging (again, assuming that the statute is not overbroad).

Answer B to Question 2

2)

Validity of Section 4 Under the First Amendment

Alice, Bob and Mac have challenged their convictions under State X's loitering statute under the First Amendment of the Constitution. Although Alice, Bob, and Mac are indigent, the only issue on appeal is whether their rights under the First Amendment have been violated. Thus, there is no issue on appeal of whether the statute violates their rights under the Equal Protection Clause because they are indigent. There is also no issue of whether the statute is void for vagueness under the First Amendment because the parties have stipulated that is not void for vagueness.

Incorporation of the First Amendment Against State Governments

To challenge a statute on the basis that it violates their First Amendment rights, Alice, Bob, and Mac must demonstrate that there is some type of government action that has violated their rights. Under the due process clause of the Fourteenth Amendment, the limitations that the First Amendment places on federal government action have also been incorporated against the states.

Constitutional Standing

To bring a constitutional claim, a plaintiff must have adequate standing. This requires a showing of a personal injury; causation of that injury by state action; and redressability, which means that a favorable outcome in the case will result in the injury being redressed. Third party standing, which is the bringing of a suit by one person when another has suffered an injury, is prohibited in most circumstances. Similarly, generalized grievances are prohibited in most circumstances. A plaintiff must also show if she is seeking to prevent government action, that the controversy is ripe to be heard by the court, meaning that there is adequate factual development and it is an appropriate controversy for the court to hear. Finally, a case can be dismissed for mootness if the court will not be able to change the outcome, as a result of the Article III prohibition on courts issuing advisory opinions.

State X Government Action

Alice, Bob, and Mac must demonstrate that an arm of the State X government has taken some type of action which has violated their First amendment rights. Here, the state has convicted them of violating the anti-loitering statute. Thus, although it is unclear exactly what the penalty for conviction is, it is clear that Alice, Bob, and Mac have been penalized in some way by State X. Thus, the conviction constituted state action sufficient to allow Alice, Bob, and Mac to challenge the statute.

Implication of the First Amendment

The First Amendment prevents the government from limiting the rights of citizens to free speech. Although there are some circumstances in which this right can be limited, the government action must have sufficient justification. Here, the anti-loitering statute appears to be directed primarily at conduct, because it prohibits loitering, remaining, or wandering about in certain types of places. However, conduct, under certain circumstances[,] can also constitute speech. The statute also prohibits loitering for the purpose of begging, which may mean that people are penalized under the statute for what they are doing in specific areas. Thus, a person's right to both conduct as speech and to begging, which is a type of speech, may be limited under the statute. Therefore, the statute must satisfy the requirements of the First Amendment.

The Statute's Regulation as a Discrimination on Content and the Requirement of Strict Scrutiny.

If a state undertakes to regulate the speech of citizens in a way that discriminates on the basis of certain content, the statute must satisfy strict scrutiny to be upheld when the statute is enforced in certain areas. Similarly, if a statute regulates speech on the basis of the viewpoint it expresses, it also must satisfy strict scrutiny. A discrimination based on content means that certain types of speech are regulated or prohibited on the basis of what they say. Such an exercise of government power in choosing the types of speech that are appropriate is particularly disfavored under the First Amendment.

Here, Section 4 prohibits the activities of loitering, remaining, or wandering on certain property for the purpose of begging. Thus, the statute specifically prohibits activities associated with begging, which is a type of speech. If the statute only prohibited the activities of loitering or wandering, it might be argued that it was content neutral. Then, the statute could be upheld if it was demonstrated to be a reasonable time, place, or manner restriction enacted by the state to regulate the places or times at which speech might occur, rather than the actual content of the speech. But instead, this statute forbids speech related to begging. As a result, it can be argued that it is not content-neutral. The statute thus must withstand strict scrutiny to be upheld.

The Standard for Strict Scrutiny

To demonstrate that a restriction withstands strict scrutiny, the state has the burden of proving that the regulation is narrowly tailored to achieve a compelling government purpose. The regulation must be the least restrictive means of the state achieving its purpose.

Alice's Case

Alice's Standing

Alice has standing to challenge her conviction under the anti-loitering statute. She has been personally injured by being convicted of the statute, which probably carries with it imprisonment, a fine, or some other type of punishment. The injury was caused directly by State X promulgating and enforcing a statute which violates her constitutional rights. Her injury is redressable, because if the appeals court decides on her behalf the conviction will be reversed. There are no ripeness or mootness concerns.

State Action

As discussed previously, the conviction in State X is adequate state action.

Alice Violated Section 4 on a Sidewalk, which is a Public Forum

Alice was convicted for loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts. The location in which Alice was convicted of violating Section 4 is important, because a state has different abilities to restriction[sic] First Amendment rights depending upon where those rights are being exercised. Here, Alice's activities took place in what is called a public forum. A public forum is an area which is traditionally available to the public as a place in which they may exercise their First Amendment rights to free speech. Sidewalks and parks are classic public forums. In addition, the sidewalk on which Alice's activities took place was adjacent to the City's Public Center for the Performing Arts. This appears to be a municipal building. Sidewalks near public buildings are particularly important public forums because those are areas in which people may express their views in an effort to influence the way the city is governed.

Applicable Standard for Content Specific Restriction of First Amendment Rights in a Public Forum is Strict Scrutiny

The fact that Alice's activities took place in a public forum is important for determining the standard the city must satisfy to demonstrate that its restriction of her activities did not violate the First Amendment. As discussed previously, the city has the burden of showing that its regulation is narrowly tailored to achieve a compelling government interest.

The Compelling Government Purpose

Here, the purpose the government is attempting to achieve is unclear. It may be to deter what is seen as nuisance when people ask others for money on the sidewalk. It also might have something to do with the state's interest in preserving its aesthetic environment. These are unlikely to be found to be compelling government purposes that outweigh the exercise of others' First Amendment rights.

If there is crime affiliated with these activities related to begging, that might serve as a government purpose for the statute. Although reducing crime can be a compelling government purpose, the statute will also have to be narrowly tailored.

The Narrow Tailoring Requirement

Because it is unclear what exactly the government's purpose is, it is difficult to tell how narrowly tailored the statute is. However, if the statute was enacted to reduce crime, there are certainly ways that the government could address that crime more specifically by prohibiting the actual criminal activity rather than the begging that creates an environment in which such criminal activity may take place.

Validity of Alice's Conviction

Alice's conviction under the statute is thus invalid, because her activities took place in a public forum. The city may not curtail such activities in a public forum on the basis of content without a compelling government purpose that the statute is narrowly tailored to effectuate. Alice was penalized for exercising her First Amendment rights in an unconstitutional manner, and thus her conviction should be reversed.

Bob's Case

Bob's Standing

Like Alice, Bob has a personal injury in his conviction. That injury was caused by application of the statute to his activities, and may be redressed through the reversal of his conviction. Thus, he has standing to challenge the statute.

Bob's Activities Took Place in a Semi-Public Forum

Bob was convicted of violating the statute on a waiting platform at a stop on the city's subway system. This is likely to be found to be a semi-public forum. Such forums are not always open for speech activities like a public forum. Instead, the standard applied to regulation of speech in a semi-public forum depends on the type of speech the City permits there. If the City permits other First Amendment activities in the semi-public forum, it may not discriminate against other First Amendment activities on the basis of content or viewpoint.

Applicable Standard is Also Strict Scrutiny

If a semi-public forum is open for speech, content or viewpoint neutral restrictions on speech must also satisfy strict scrutiny. However, the type of forum may make this standard easier to fulfill. Here, the government has a compelling interest in making the subway stop a place in which traffic may smoothly operate so that the subway station may

fulfill its duties in transporting people through the city. Thus, activities which may [sic] it difficult for traffic to operate smoothly may be restricted. However, because this statute targets only particular types of speech, it may not be the appropriate method of ensuring that traffic operates smoothly. Such a regulation would likely target particularly problematic conduct, and not types of speech. Therefore, this statute is not narrowly tailored to uphold the state's interest in making sure the subway stop operates effectively.

Validity of Bob's Conviction

Because Bob's conviction for speech at the waiting platform took place under a content-discriminatory statute that was not narrowly tailored to effectuate the government's compelling interest, it should be reversed.

Mac's Case

Mac's Standing

Mac's conviction was a personal injury that was caused by State X's enforcement of its statute and is redressable through the overturning of the conviction. Thus, Mac has standing to challenge his conviction.

Mac was Loitering in a Non-Public Forum, on Private Property

Mac's conviction was for loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers' building in the business district of city. Thus, Mac's conviction took place as a result of his activities on private property.

Mac's Conviction is not Subject to Strict Scrutiny unless the Building is Serving a Public Function

Mac does not have the same right to speak on private property that Alice and Bob had in public of[sic] semi-public forums. The sole exception to this is if the private forum is serving a public function, which means that the private forum is serving a role typically served by public buildings or areas. However, there are very few examples of private property which serve a public function, other than private company towns that replace a public municipal government. This appears to be a private office building which is not implicated in any function of governing. Thus, the building is not a public forum. Therefore, his conviction is not subject to strict scrutiny.

Validity of Mac's Conviction

Mac cannot challenge his conviction under the First Amendment because he was conducting his activities on private property on which he had no First Amendment right to speak. Therefore, his challenge to the statute will be unsuccessful and his conviction will

be upheld.

Validity of the Conviction