

## Question 2

In an effort to “clean up Columbia County,” the County Board of Supervisors recently passed an ordinance, providing as follows:

“(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.

(2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.

(3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.

(4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a \$5,000 fine, or by both.”

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

## Answer A to Question 2

The First Amendment protects the freedom of speech. It is imputed to the states through the Fourteenth Amendment.

### Facial Attacks

#### Prior Restraint

Under the 1<sup>st</sup> Amendment, speech cannot be enjoined before it occurs. With regard to licenses & review panels, which determine whether speech should be allowed before it occurs, they may be valid under certain circumstances. They do not violate the 1<sup>st</sup> Amendment when they: 1) are based on definite criteria and are not left up to the discretion of certain persons; and (2) are appealable.

Here, the statute mandates that sexual material may only be sold if it is first submitted to the panel and the panel, in its sole discretion, determines the item is not pornographic. As indicated above, submission to a panel itself is not unconstitutional.

However, the “sole discretion” of the panel is problematic. Sole discretion allows the panel to prohibit speech it does not like. It may even prohibit speech that it finds acceptable, but due to the person or business attempting to disseminate the material, deny it on those grounds. This discretionary review is inequitable and risks the danger of chilling speech. Because there is no set criteria for the review & it is left to the discretion of the panel, the section is unconstitutional as a prior restraint[.]

In addition, the statute does not mention any procedural safeguard. A person who is denied permission to sell must be able to appeal the decision. Because of the statute’s lack of appellate review procedure, it is unconstitutional as a prior restraint.

### Overbroad

A law is overbroad under the 1<sup>st</sup> Amendment when it prohibits more speech than is constitutionally allowed. Here, the statute prohibits “sexually graphic material.” This would prohibit not only obscene material (which is unprotected & can constitutionally be prohibited – see below), but also the majority of R[-]rated movies which are released. Such R[-]rated movies may be sexually explicit at times, but they are protected under free speech. Therefore, the statute regulates too much & is unconstitutionally overbroad.

### Vagueness

A law is vague under the 1<sup>st</sup> Amendment when one cannot tell which speech is prohibited & which is allowed. The speech prohibited under the statute – “sexually graphic material” – is unclear because you cannot tell what is allowed & what is not. For example, are nude

scenes in art films allowed? Nude scenes in pornographic films? A passage in a classic novel where the protagonist kisses his wife before going off to battle? Due to the vagueness of the statutory standard, it is impossible to discern which speech is allowed & what is prohibited. Therefore, the statute is likely to be found unconstitutionally vague.

## Regulation of Speech

### Content[-]Based Regulations

Again, the 1<sup>st</sup> Amendment protects the freedom of speech. Regulations based on the content of the speech – either its subject matter or its viewpoint – are subject to the highest standard of review, strict scrutiny. The content-based regulation must be necessary to achieve a compelling state interest, and must use the least restrictive means.

However, some content-based regulations concern unprotected speech and need not meet strict scrutiny.

### Obscenity

Obscenity is a form of unprotected speech. It can be regulated, based on content, without meeting strict scrutiny.

There is a three-part test to determine whether material is obscene: 1) it appeals to the prurient interests of people in the community; 2) it is patently offensive to people in the community; and 3) based on a national standard, it lacks any redeeming artistic, literary, or scientific value.

Here, the statute may regulate obscenity without meeting the strict scrutiny test. The provision prohibiting the sale of “sexually graphic material” may be valid if “sexually graphic material” is defined as limited to obscene material as set forth above.

### Profane & Indecent Speech

However, if the statute extends to all sexually graphic material, not merely the “obscene”, the statute may be unconstitutional.

Under the 1<sup>st</sup> Amendment, profane & indecent speech is fully protected (with the exception of such speech disseminated on free broadcast media [like radio] & schools). Therefore, any content-based regulation is subject to strict scrutiny.

Here, the statute is regulating “sexually graphic material”. This is a content-based regulation because it deals with the content[,] or subject matter, of the speech. Therefore, it must be necessary to achieve a compelling statute interest & use the least restrictive means.

## Compelling State Interest

Generally, when indecent speech is involved, the interest is in protecting children from sexual material. This is of the utmost importance in providing a safe & moral environment in which to grow up. Therefor[e] it most likely qualifies as a compelling state interest. Note: merely regulating the morals of the community is not compelling.

## Necessary & Least Restrictive Means

A law is necessary when it provides the only way to achieve the compelling state interest. Here, ther[e] are other ways to prevent the dissemination of indecent sexual material to children. For instance, the statute can limit the sale of sexual material to those over the age of 18. Or, a regulation can validly control the zoning & location of shops which sell sexual material so they are not near schools.

Therefor[e], because there are other options to achieve the compelling interest, least restrictive means have not been used. The law fails strict scrutiny and is therefore an unconstitutional violation of the 1<sup>st</sup> Amendment.

## Punishment

The final issue is whether the provision of the statute which authorizes imprisonment and/or fines for the violation of the statute is valid.

First, for this provision to be valid, the substantive portions of the statute must be valid. Because the statute is unconstitutional as a prior restraint, overbroad & vague & does not meet strict scrutiny (unless the statute is limited to "obscene" material), the punishment clause is invalid.

However, the punishment clause raises the issue of compliance.

## Collateral Bar Rule

The collateral bar rule applies when a person violates a statute. The rule states that if a person does not comply with a statute, the person cannot use the unconstitutionality of the statute as a defense in a criminal contempt proceeding. Therefor[e], even though the statute at issue is likely unconstitutional, a violation of the statute could result in punishment for contempt.

Thus, the best option is to comply with the statute for the time being, while appealing the decision of the panel and/or challenging the constitutional validity of the statute in court.

## **Answer B to Question 2**

### Videorama v. Columbia County

#### State Action

To bring a First Amendment claim, the plaintiff must assert state action, because the First Amendment only applies to the government, not private action. State action is present here because the ordinance was passed by the Columbia County Board of Supervisors, an instrument of the local government.

#### First Amendment Freedom of Speech

The First Amendment, applicable to the states through the 14<sup>th</sup> Amendment, provides that no government shall interfere with the right to free speech.

The Columbia County ordinance interferes with the right to free speech because it restricts the ability of video stores and individuals to sell, and correspondingly to buy, sexually graphic material. The ordinance imposes monetary fines and imprisonment for violation. Thus, the ordinance must be scrutinized under the First Amendment.

#### Overbroad

A statute may violate the First Amendment if it is overbroad. A statute is overbroad if it restricts protected speech as well as unprotected speech. Even if some of the speech restricted is not protected by the First Amendment, the statute will fail if it also draws unprotected speech.

In this case, the ordinance restricts both protected and unprotected speech. Obscene speech is a category of unprotected speech, and enjoys no protection at all under the First

Amendment. Obscenity is speech that (1) appeals to the prurient interest, as defined by a local standard, (2) is patently offensive, as defined by local law, and (3) lacks serious scientific literary, artistic, or political value, as defined by a national standard.

Some of the speech restricted by the Columbia County ordinance may be obscene speech. The ordinance targets sexually graphic material, and obscene speech is probably included in that category. The obscene material restricted by this statute presents a First Amendment problem.

However, the problem is that the ordinance restricts a broader category of speech, including some speech that is protected speech. Sexually graphic material that has serious scientific, literary, artistic, or political value is not obscenity and therefore is protected speech. The ordinance does not adopt the three part obscenity test, or make an exception for material that has serious value. Therefore, the statute is overbroad.

### Unfettered Discretion

The First Amendment is also violated where an official is given complete discretion on whether to allow or prohibit speech. Requiring an individual or entity to obtain a license or authorization to engage in certain speech, before engaging in the speech, is a prior restraint. Prior restraints are disfavored because they quell speech before it is even uttered. However, a licensing scheme, even though a prior restraint, can be constitutional if (i) no official has complete discretion over whether to grant a license, (2) specific, articulated standards are used to grant the licenses, and (3) judicial review or some other appellate process is available as a check.

The ordinance fails this test because it gives “sole discretion” to the Review Panel. The statute does not provide any standards whatsoever that the Panel should use to evaluate requests. The only standard given is that “sexually graphic material” may be prohibited by

the Panel. That is not a standard at all, because it does not articulate the factors the Panel will use to decide requests to sell such material.

Moreover, the ordinance requires potential vendors to get authorization from the Panel before selling any sexually graphic material. Thus, the ordinance is a suspect prior restraint. Without the procedural safeguards listed above – no sole discretion, articulated standards, and appellate review – the ordinance’s authorization scheme is an invalid prior restraint.

The statute gives no indication of any type of appellate review of the Panel’s decisions. The Panel has “sole” and apparently final discretion. This kind of unchecked power over free speech violates the First Amendment.

### Vague

The First Amendment also requires that laws restricting speech not be overly vague. A vague law is one that does not give fair notice of what speech it prohibits and what it allows. As such, it will deter protected speech, speech that is not meant to be restricted by the law, because people will fear that such speech is in fact prohibited.

The ordinance here is vague because it gives vendors no fair warning about what kind of material is “sexually graphic” and what is “not pornographic.” As stated above, the ordinance provides no standards or factors or definitions that enable anyone to determine what exactly is prohibited. Instead, only the Panel knows what is prohibited, and only after they have reviewed the material and decided that it is or is not sexually graphic.

Since material is not clearly “sexually graphic” until the Panel decides that it is, the ordinance does not enable individuals to predict their own liability. They cannot predict ahead of time whether selling certain material will violate the ordinance or not. Since

violation could lead to both a hefty fine and imprisonment, people will err on the side of restricting their own speech to make sure they are not in violation.

As a result, video stores, magazine stores, and often individuals and entities that sell graphic material will all have to censor themselves until they obtain Panel approval. Moreover, Panel approval is required for each individual item, not for each vendor, so the self [-] censorship will be ongoing.

Because the ordinance will end up restricting protected speech, since it does not give fair warning of what is prohibited, it is unconstitutionally vague.

### Content-based Restriction

A content [-] based restriction on speech is one that restricts speech according to what is being said or depicted or expressed, instead of according to the manner of the speech, or its time or place. Content-neutral time, place, and manner restrictions need only pass intermediate scrutiny to be constitutional. However, content-based restrictions must pass strict scrutiny.

The ordinance here is content [-] based because it restricts speech according to what it depicts – sexually graphic material. Although it does regulate the manner in which this speech can be sold, that does not make it a time/place/manner restriction. Because the restriction or the manner of sale only applies to sexually graphic material, the ordinance is targeting certain content. Therefore, it must pass strict scrutiny.

### Strict Scrutiny

For a content-based law to pass under the First Amendment, it must be necessary to achieve a compelling state interest. The government has the



burden of proving that it passes this test.

### Compelling State Interest

Columbia County's purpose in enacting this ordinance is to "clean up Columbia County." Presumably this means to regulate the distribution of sexually explicit material in order to have a more civil, professional, family-friendly atmosphere. The County may have had problems with children being exposed to sexually graphic material in stores or on the streets. The County may be concerned that an excess of such material may deter new residents, cause businesses to leave, harm young children, and even hurt Columbia's tourist industry. All of these concerns are valid state interests, and probably rise to the level of compelling. Assuming Columbia can prove that it has a compelling interest, it will next have to show that the ordinance is necessary to achieving those interests.

### Necessary to Achieve That Interest

This requirement is more than just narrow tailoring. It actually requires that the law be the least restrictive means available for achieving the state's interests. If less restrictive alternatives are available, the state must pursue those alternatives first.

Columbia County will not be able to show that its ordinance is the least restrictive means for protecting children, cleaning up the town's image, and preserving its business and tourist industries. These interests could be accomplished by the use of content-neutral time [,] place and manner restrictions, such as requiring people to keep the material they are selling off of the streets, indoors, during normal business hours. Then children walking on the sidewalk would not necessarily run into sexually graphic material. The County could also require stores that sell such material to post warnings at the front door or window, to announce to customers that such material is sold inside. This would be a less restrictive

ban, although still content [-] based, because it would allow stores to sell such material without pre-approval from a Panel. It would also accomplish the County's goals by enabling residents to avoid that material if they want.

The County could also use zoning laws to regulate where adult-themed book and movie stores can operate. The Supreme Court has upheld the use of zoning in this way to control the secondary effects of such businesses. Zoning would be less restrictive than Columbia's current ordinance because it would not ban all sales or require pre-approval by a Panel. It would still allow Columbia to "clean-up" by regulating where such businesses can operate, and keeping other areas of the County free of them.

Because less restrictive alternatives are available, the ordinance will fail strict scrutiny, and Videorama will win its suit against Columbia.