

A city ordinance prohibited individuals from picketing in residential neighborhoods unless the picketing related to the neighborhood zoning requirements. This exception to the ordinance was adopted in response to local citizens' strong views about proposed rezoning of residential neighborhoods.

A group that wished to picket in front of a business owner's home because of the business owner's employment practices challenged the ordinance as unconstitutional under the First Amendment.

Will the group's challenge likely prevail?

- A. No, because the ordinance is a content-neutral regulation of speech.
- B. No, because the ordinance regulates conduct rather than speech.
- C. Yes, because the ordinance irrationally discriminates between different types of protesters.
- D. Yes, because the ordinance is a content-based regulation of speech.

## Explanation:

The First Amendment's preeminent task is to protect the free flow of ideas, so **content-based restrictions** on speech are **presumptively unconstitutional** and subject to **strict scrutiny**. As a result, the government can only regulate speech based on what is said (ie, its message or ideas) by showing that the regulation is **necessary and narrowly tailored** to achieve a **compelling government interest**—a nearly impossible task.

The ordinance here is a content-based regulation because it allows speech on one topic (neighborhood zoning requirements) but no other. And since it is highly unlikely that the ordinance can survive strict scrutiny, the group's challenge will likely prevail.

**(Choice A)** Unlike content-based restrictions (as seen here), content-*neutral* regulations are constitutional if they pass intermediate scrutiny—ie, the government proves that the regulation (1) is narrowly tailored to achieve an important or substantial government interest and (2) leaves open alternative channels of communication.\*

\*Content-neutral restrictions that likely satisfy intermediate scrutiny include those penalizing trespasses on private property and prohibiting protests on streets during rush-hour traffic.

**(Choice B)** A person's conduct is protected by the First Amendment if it is expressive—ie, (1) the person intends to communicate a message and (2) the audience is likely to understand that message. And since the ordinance unjustifiably restricts the expressive aspect of picketing, it is likely unconstitutional.

**(Choice C)** Had the ordinance regulated a **nonpublic forum**, rational basis scrutiny would require the group to show that the ordinance irrationally discriminates between different types of protesters. However, residential neighborhoods are *public* forums because they contain public streets and sidewalks.

## Educational objective:

Since content-based restrictions on speech are heavily disfavored, they are unconstitutional unless they survive strict scrutiny—ie, the government proves that the restriction is necessary and narrowly tailored to achieve a compelling government interest.

## References

- United States v. Playboy Entm't Group, 529 U.S. 803, 816–17 (2000) (explaining that content-based restrictions on speech require the government to satisfy strict scrutiny).

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