

Swimmers were unable to use a city-owned beach for several days because demonstrators protesting city policies had taken over the beach. Immediately after the demonstration ended, the city enacted an ordinance that banned "all First Amendment activities" on the beach.

What is the best argument AGAINST the constitutionality of the ordinance?

- A. The ordinance amounts to a prior restraint on speech.
- B. The ordinance is overly broad.
- C. The beach is a public forum.
- D. The city enacted the ordinance to prevent further protests of its policies.

Correct

Collecting Statistics

42 secsTime Spent

2023Version

Explanation:

Facial challenges

Type	Definition	Examples
Overbreadth	Law burdens substantial amount of First Amendment expression	Prohibiting nudity at drive-in theater overbroadly includes non-obscene content Requiring permit for all canvassers overbroadly includes nonfraudulent solicitation
Vagueness	Law fails to give person of ordinary intelligence fair notice of what is prohibited	Distinction between "prejudicing trial" & "of general nature to defense" unclear "Manner annoying to persons" vague

The **First Amendment free speech** clause—as applied to state and local governments through the Fourteenth Amendment—protects the free flow of ideas. A law that infringes upon this right can be challenged **on its face** and struck down in its entirety under the **overbreadth doctrine**. Under this doctrine, a law is **unconstitutionally overbroad** if it **restricts a substantial amount of protected speech**.

Here, the ordinance bans "all First Amendment activities" on the beach. Although the ordinance applies to **unprotected speech**, it also restricts a substantial amount of protected speech by prohibiting *all* speech. Therefore, the best argument against the constitutionality of the ordinance is that it is overly broad.

(Choice A) A prior restraint is a government action (eg, injunction) that prohibits speech *before* it occurs. But the ordinance here is not a prior restraint since it would impose penalties *after* speech occurs.

(Choice C) The beach is a **nonpublic forum** because beaches have not historically been associated with public expression like a sidewalk or park (ie, traditional public forum), and there is no indication that the beach has been opened for public expression (ie, designated public forum).

(Choice D) The facts are insufficient to prove that the city enacted the ordinance to prevent further protests of its policies at the beach. Instead, the facts indicate that the ordinance was enacted to allow swimmers to use the beach—ie, a **content-neutral regulation** of a nonpublic forum that need only satisfy rational basis scrutiny. Therefore, a better argument is that the ordinance is overly broad.

Educational objective:

A law that interferes with freedom of speech will be struck down on its face as unconstitutionally overbroad if it restricts a substantial amount of protected speech.

References

Houston v. Hill, 482 U.S. 451, 458–59 (1987) (explaining the overbreadth doctrine).

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