

A city operates a cemetery pursuant to a city ordinance. The ordinance requires the operation of the city cemetery to be supported primarily by revenues derived from the sale of cemetery lots to individuals. The ordinance further provides that the purchase of a cemetery lot entitles the owner to perpetual care of the lot, and entitles the owner to erect on the lot, at the owner's expense, a memorial monument or marker of the owner's choice, subject to certain size restrictions. The city ordinance requires the city to maintain the cemetery, including mowing the grass, watering flowers, and plowing snow, and provides for the expenditure of city tax funds for such maintenance if revenues from the sale of cemetery lots are insufficient.

Although cemetery lots are sold at full fair market value, which includes the current value of perpetual care, the revenue from the sale of such lots has been insufficient in recent years to maintain the cemetery. As a result, a small amount of city tax funds has also been used for that purpose.

A group of city taxpayers brings suit against the city challenging the constitutionality of the city ordinance insofar as it permits the owner of a cemetery lot to erect a religious memorial monument or marker on his or her lot.

Is this suit likely to be successful?

- A. No, because only a small amount of city tax funds has been used to maintain the cemetery.
- B. No, because the ordinance does not violate the establishment clause of the First Amendment.
- C. Yes, because city maintenance of any religious object is a violation of the establishment clause of the First Amendment.
- D. Yes, because no compelling governmental interest justifies authorizing private persons to erect religious monuments or markers in a city-operated cemetery.

### Explanation:

City taxpayers have challenged the constitutionality of a city ordinance that permits persons to erect religious monuments or markers on cemetery lots maintained by the city. This challenge triggers the First Amendment **establishment clause** since it alleges that the government **failed to remain neutral toward religion**. As a result, the government action will be reviewed under the **historical test** and upheld if the action has **historically been permitted** in accordance with the **original meaning of the Constitution**.

Historically, individuals have had the right to erect monuments or markers of their choice on individual cemetery lots, including religious monuments or markers on lots in city-operated cemeteries. And since the ordinance here adheres to this long-standing practice, it is in accord with the original meaning of the Constitution and does not violate the establishment clause (**Choice C**). As a result, the taxpayers' suit will likely be unsuccessful.

**(Choice A)** The small amount of city tax funds used to maintain the cemetery helps establish the lack of government entanglement with religion required to satisfy the *Lemon* test. But this test has been abandoned in establishment-clause challenges.

**(Choice D)** The city ordinance would have to be necessary to achieve a compelling government interest to survive strict scrutiny. But courts will only apply this heightened standard and forego the historical test when a law *expressly* favors or disfavors religion—which the ordinance here did not do. Therefore, no compelling interest is required.

### Educational objective:

Establishment clause challenges are reviewed under the historical test, which upholds government actions that have historically been permitted in accordance with the original meaning of the Constitution.

### References

- Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2428 (2022) (holding that challenges based on the establishment clause "must be interpreted by reference to historical practices and understandings").

Copyright © 1995 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

## Wall separating church and state



©UWorld