

Residents of a city complained that brightly colored signs detracted from the character of the city's historic district and distracted motorists trying to navigate its narrow streets. In response, the city council enacted an ordinance requiring any "sign or visual display" visible on the streets of the historic district to be black and white and to be no more than four feet long or wide.

A political party wanted to hang a six-foot-long red, white, and blue political banner in front of a building in the historic district. The party filed suit to challenge the constitutionality of the sign ordinance as applied to the display of its banner.

Which of the following would be the most useful argument for the political party?

- A. The ordinance effectively favors some categories of speech over others.
- B. The ordinance imposes a prior restraint on political expression.
- C. The ordinance is not narrowly tailored to further an important government interest, nor does it leave open alternative channels of communication.
- D. The ordinance is not the least restrictive means of promoting a compelling government interest.

Explanation:

Laws that restrict an individual's right to freely communicate information and ideas through speech or conduct can be challenged under the **First Amendment**. The **level of scrutiny** applied to such challenges depends on whether the law is either:

- **content-based** – in which case, **strict scrutiny** applies and the law is unconstitutional unless the government can show that it is **necessary and narrowly tailored** (ie, least restrictive means) to achieve a **compelling government interest** *or*
- **content-neutral** – in which case, **intermediate scrutiny** applies and the law is permissible so long as the government can show that it is **narrowly tailored** to achieve an **important government interest** *and* leaves open **alternative channels** of communication.

The ordinance here is content-neutral since it applies *equally* to all signs and visual displays irrespective of their message, so strict scrutiny does not apply (**Choices A & D**). As a result, the political party's most useful argument is that the ordinance cannot survive intermediate scrutiny.

(Choice B) A prior restraint is a highly disfavored government action that prohibits speech before it even occurs (eg, injunction, permitting process). The ordinance here is not a prior restraint because it does not require government approval before signs can be posted—they must merely comply with the ordinance.

Educational objective:

Content-*based* speech regulations must be necessary and narrowly tailored to achieve a compelling government interest (strict scrutiny). In contrast, content-*neutral* regulations need only be narrowly tailored to achieve an important government interest and leave open alternative channels of communication (intermediate scrutiny).

References

- 16A Am. Jur. 2d Constitutional Law § 480 (2019) (level of scrutiny applied to content-based and content-neutral restrictions).

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