

A city ordinance created a three-member zoning board, which is responsible for approving the location of all entertainment venues in the city. In an inseverable provision, the ordinance requires that one member of the board be a representative of the local council of churches.

A minister was appointed to the board to represent the local council of churches. During the minister's tenure, the board denied a company permission to open a nightclub in a particular location solely because it would be so close to an existing church that it might disturb the church's operations. The company has challenged the ordinance and its application in federal court on constitutional grounds.

Is the company likely to prevail?

- A. No, because the existing church has a right to have its vested property interests protected.
- B. No, because the minister was only one of three votes and, therefore, could not dictate the decision of the zoning board.
- C. Yes, because, as applied, the ordinance denied the company the equal protection of the laws by irrationally discriminating against its particular type of business.
- D. Yes, because the requirement that the zoning board include a representative of the local council of churches violates the First and Fourteenth Amendments.

Explanation:

A law that **benefits or burdens religion** can be challenged under the First Amendment **establishment clause**, as applied to states and municipalities through the Fourteenth Amendment. This clause places a wall of **separation between church and state**. But this wall contains gates that can be opened if the government passes the appropriate test. The busiest gate—the **historical test**—opens when a law has **historically been permitted** in accordance with the **original meaning of the Constitution**.

Here, an ordinance requires that one member of the zoning board be a representative of the local council of churches. However, guaranteeing religious institutions positions on government boards and committees has historically not been permitted under the original meaning of the Constitution. Since the ordinance requires membership by a church representative on the zoning board, the gates of the establishment-clause wall should remain closed. Therefore, the company will likely prevail.

(Choice A) Although the church has a vested interest in its property, this interest can only be protected by constitutional means—eg, religiously neutral zoning decisions.

(Choice B) The minister had only one of three votes and could not dictate the zoning board's decision. But the provision granting him a spot on the board is still unconstitutional as violative of the establishment clause.

(Choice C) The **equal protection clause** can be used to invalidate a law that is applied in a discriminatory manner. But since there is no evidence that similarly situated businesses were permitted to open near a church, there is no proof of discrimination against the company. As a result, it is unlikely to prevail on this basis.

Educational objective:

The historical test allows the government to pass through the First Amendment establishment-clause wall separating church and state when the government action has historically been permitted in accordance with the original meaning of the Constitution.

References

- Larkin v. Grendel's Den, 459 U.S. 116, 125–27 (1982) (holding that a law that delegates or shares important government powers with a religious institution violates the First Amendment establishment clause).
- 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 © 2013 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Wall separating church and state

