

A city enacted an ordinance banning from its public sidewalks all machines dispensing publications consisting wholly of commercial advertisements. The ordinance was enacted because of a concern about the adverse aesthetic effects of litter from publications distributed on the public sidewalks and streets. However, the city continued to allow machines dispensing other types of publications on the public sidewalks. As a result of the ordinance, 30 of the 300 sidewalk machines that were dispensing publications in the city were removed.

Is this ordinance constitutional?

- A. No, because it does not constitute the least restrictive means with which to protect the aesthetics of the city's sidewalks and streets.
- B. No, because there is not a reasonable fit between the city's legitimate interest in preserving the aesthetics of its sidewalks and streets and the means it chose to advance that interest.
- C. Yes, because regulations of commercial speech are subject only to the requirement that they be rationally related to a legitimate state goal, and that requirement is satisfied here.
- D. Yes, because the city has a compelling interest in protecting the aesthetics of its sidewalks and streets, and such a ban is necessary to vindicate this interest.

## Explanation:

**Commercial speech** is protected by the First Amendment so long as it concerns lawful activity and is not false or misleading. As a result, the government can only regulate protected commercial speech if the government proves that its regulation (1) **directly advances a substantial government interest** and (2) is **not more extensive than necessary** to serve that interest. The second element is met if there is a **reasonable fit** between the means chosen and the interest served.

Here, a city ordinance banned all sidewalk machines dispensing solely commercial advertisements. The ordinance directly advances the city's legitimate (and likely substantial) interest in preserving the aesthetics of its sidewalks and streets. But there is no reasonable fit between that interest and the means chosen to advance it since only 30 of the 300 machines were removed and there is no indication that the advertisements generate more litter than other publications. Therefore, the ordinance is unconstitutional.

**(Choice A)** In the context of commercial speech, "no more extensive than necessary" does not mean the least restrictive means available. Instead, it means that there must be a reasonable fit between the relevant government interest and the means chosen to achieve it. And since there is no reasonable fit here, the ordinance is invalid.

**(Choice C)** Rational basis review—which merely requires that a government regulation be rationally related to a legitimate government interest—does not apply to commercial speech.

**(Choice D)** Strict scrutiny would require the city to prove that its ordinance is necessary to achieve a compelling government interest. But this stringent standard of review does not apply here. And if it did, the ordinance would fail since it cannot even meet the lower standard applicable to commercial speech.

## Educational objective:

Government regulations of protected commercial speech must (1) directly advance a substantial government interest and (2) not be more extensive than necessary to serve that interest. The second element is met if there is a reasonable fit between the government interest and the means chosen to achieve it.

## References

- *Bd. of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 480 (1989) (explaining that government restrictions on protected commercial speech must have a reasonable fit between means and end).
- *Cincinnati v. Discovery Network*, 507 U.S. 410, 424–25 (1993) (finding that there was no reasonable fit between city's ban only of commercial news racks and city's interest in sidewalk aesthetics).

## Regulation of commercial speech

