

A large privately owned and operated shopping mall is open to the public and includes small shops, major department stores, and restaurants that are located around a pedestrian area. It also has several movie theaters, an ice-skating rink, a small amusement park, and a branch of the local public library. The mall is advertised as "a small town with a big-town feel."

During shopping hours, a group of 10 protesters gathered in the pedestrian area near the entrance to a department store to denounce the sale of animal-fur products in that store. The protesters were peaceful and did not interfere with traffic into or out of the store, but they carried signs and vocally communicated their message to people walking in the area. Mall management quickly broke up the protest and required the protesters to leave the mall. The protesters have sued the mall, claiming that their right to freedom of speech guaranteed by the First and Fourteenth Amendments was violated.

Should the protesters prevail?

- A. No, because the mall is private property, and there was no state action to which the freedom of speech guarantees of the First and Fourteenth Amendments apply.
- B. No, because the prohibition of protests adjacent to the entrance of a department store during shopping hours is a constitutionally proper limitation on the time, place, and manner of speech.
- C. Yes, because the mall is functionally equivalent to a town and, therefore, its actions are subject to the Constitution's guarantees of freedom of speech and assembly.
- D. Yes, because the mall's restriction on the protesters' speech was broader than necessary to ensure proper access to the department store.

## Explanation:

### State-action doctrine

<b>Traditional government function</b>	<ul style="list-style-type: none"><li>• Private actor performs traditional &amp; exclusive government function (eg, running elections)</li></ul>
<b>Significant government involvement</b>	<ul style="list-style-type: none"><li>• Government &amp; private actor have <i>mutually beneficial</i> relationship (eg, joint activity or venture)</li><li>• Government creates <i>nexus</i> by affirmatively facilitating or authorizing private action (eg, police officer acting under color of law)</li><li>• Government is <i>pervasively intertwined</i> in private entity's management or control</li></ul>

First Amendment free speech protections—applicable to the states through the Fourteenth Amendment due process clause—are triggered by government (not private) action. But under the **state-action doctrine**, **private action is treated as government action** when either:

- the private actor performs a traditional and exclusive **government function** *or*
- the government is **significantly involved** in the private actor's activities.

Here, the protesters can only sue the *privately* owned shopping mall for violating their freedom of speech if the state-action doctrine applies. But operating a shopping mall is not a traditional and exclusive government function. And though the mall houses a branch of the local public library, this does not amount to *significant* government involvement. Therefore, the mall cannot be treated as a government actor and the protesters' constitutional claim should fail.

**(Choices B & D)** The *government* can only limit the time, place, and manner of speech if it passes intermediate scrutiny—ie, the limitation (1) is narrowly tailored (ie, no greater than necessary) to achieve a substantial government interest and (2) leaves open ample alternative avenues of communication. But the *private* shopping mall need not comply with constitutional requirements when limiting access to its stores.

**(Choice C)** Although the mall is advertised as "a small town with a big-town feel," the Supreme Court held in *Hudgens v. NLRB* that a shopping mall is not functionally equivalent to a town.

### Educational objective:

Free speech protections are triggered by government—not private—action. But under the state-action doctrine, private action is treated as government action when (1) the private actor performs a traditional and exclusive government function or (2) the government is significantly involved in the private actor's activities.

**References**

- *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (holding that the First and Fourteenth Amendments do not apply to a shopping center since it is not functionally equivalent to a municipality).

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