

## Question MEE 2 – February 2025 – Selected Answer 1

### Essay 2

#### 1. Pedestrian median strip

The Supreme Court has held that there are different types of forums when free speech ordinances are relevant. Forums that have traditionally been open to speech and open to the public have been recognized public forums (e.g., public sidewalks and parks). In contrast, forums that are generally private but have been held open for speech are considered designated public forums (e.g., school classrooms) and places that have not been made open to public speech are considered private forums (e.g., prisons, military bases, airports, etc.)

Here, the pedestrian median strip is likely a public forum, because it is a paved portion of the medium strip that allows pedestrians to cross from one side of the street to the other, which is essentially the same as a sidewalk. Furthermore, the fact that individuals have been permitted to post approved signs on trees and utility poles, as well as post and carry signs on the sidewalks adjacent to the to to public roads tends to lend to the pedestrian median strip being a public forum.

Therefore, the pedestrian median strip is a public forum.

#### 2. Town ordinance

A restriction of speech is content-based if it seeks to limit the type of speech that is allowed.

Here, the town ordinance is not content-based, because its goal is not to limit the type of speech that is allowed or not allowed based on what is being said in the pedestrian median strip. Instead, it is a general prohibition of communication or solicitation to all occupants of vehicles who are passing by or stopping near the pedestrian median strip.

Thus, the town ordinance is not content-based.

#### 3. Whether applying the town ordinance to the man would violate his First Amendment rights, assuming it is content-based.

Any type of restriction on speech that occurs in a public forum and it is content-based must pass strict scrutiny in order to be constitutional. Strict scrutiny requires that

government prove that the law is necessary to achieve of a compelling government interest. In addition, the law must be narrowly tailored to achieve said interest.

Here, assuming the town ordinance were content-based, it would be violating the man's first amendment rights, because it would be limiting his ability to voice his opposition to the candidate of the town council in the pedestrian median strip, which is a public forum. The town has historically allowed the posting of approved signs on trees and utility poles, as well as allowed the carrying of signs on sidewalks adjacent to the public roadways. Although the town council will likely try to justify a "compelling interest" for the ordinance by pointing to the fact that it is trying to promote traffic safety, it is not narrowly tailored. If anything, the ordinance could have continued to allow the activity and just prohibited the man from soliciting or communicating with the drivers.

Thus, the town ordinance would violate the man's First Amendment rights if it were content-based.

#### 4. Whether applying the town ordinance to the man violate his First Amendment rights, assuming it is content-neutral.

A restriction of speech in a public place can occur if it is a reasonable restriction on the time, manner or place wherein the speech occurs. However, in order for it to be constitutional, it must pass intermediate scrutiny - which requires the government to prove that the law is substantially related to an important governmental interest. Additionally, the government must leave open alternative channels of communication for the speech.

Here, assuming the town ordinance is content-neutral, it would not violate the man's First Amendment rights, because the town has a substantially important reason for enacting the ordinance and there are alternative methods of communication available for his speech.

Prior to enacting the ordinance, the town council received numerous complaints from residents who were annoyed by the people who solicited at the traffic lights. Although the residents were "frustrated", there have been no official reports that solicitations have resulted in aggressive, threatening or distracting behaviors by the solicitors nor have there been any records of traffic accidents that were caused by said solicitations. But that isn't to say it could not occur, especially if the driver's frustrations continued to build by the annoying and unwelcome solicitations that were constantly subjected to while traveling through the center of Town to retail shops, restaurants and other businesses located in the area.

Furthermore, it leaves alternative methods of communication open. The ordinance does not say that individuals must stop their expressive speech from occurring, it simply prohibits them from communicating or attempting to communicate with the occupants of vehicles passing by or stopping near the pedestrian median strip and imposes a misdemeanor violation if it occurs. Additionally, there are still other public forums available for the speech to occur (e.g., parks, sidewalks, etc.).

Thus, the ordinance would not violate the man's First Amendment rights, assuming it is content-neutral.

### **Question MEE 2 – February 2025 – Selected Answer 2**

1. The pedestrian median strip is a traditional public forum. There are three types of public forums for First Amendment purposes. There is a traditional public forum, which includes sidewalks, streets, and parks. The second forum is a designated forum such as a school or civic auditorium. The third type of forum is a non-public forum, which includes airports and government facilities. The facts indicate that Main Street is a public road that runs through the center of the town and that a median strip separates the two lanes within Main Street. The median strip is covered with grass and streets except for paved 10-foot segments. These facts align more with a traditional public forum because the median strip is similar to that of a sidewalk or street and may loosely resemble a park. The paved portions of the median strip are even a part of the crosswalk, demonstrating this to be a traditional public forum. Sidewalks and park areas have always been associated as being public areas, therefore, the median strip is a traditional public forum.

2. The ordinance is a content-neutral regulation of speech because it does not specifically prohibit a certain type of speech and it leaves alternative channels for communication. The ordinance on its face does not single out a particular message, which is what is required for a content based regulation. The ordinance states that no person shall communicate or attempt to communicate with occupants of vehicles from one side of the street to the other, but it does not describe a specific content. Furthermore, existing town ordinances allowed for posting approved signs on trees and utility poles in median strips, which demonstrates alternative channels of communication. Since the ordinance does not regulate a specific conduct or prohibited message, then it is a content-neutral regulation.

3. In a traditional public forum, content based regulations are subject to strict scrutiny and are generally unconstitutional. The burden is on the government to show that the law is narrowly tailored to a compelling government interest. The government's interest in this case is to promote traffic safety by prohibiting those within pedestrian median strips from actively engaging with drivers in a distracting manner. However, law enforcement had no official reports that solicitations from the pedestrian median strips had been aggressive, threatening, or distracting to the drivers and there were no traffic accidents caused. Content based regulations are evaluated under strict scrutiny, and therefore, this ordinance is unconstitutional and a violation of the man's First Amendment rights.

4. The ordinance does not violate the man's First Amendment rights under a content-neutral regulation of speech. In a traditional public forum, content neutral regulations are subject to intermediate scrutiny and must have alternative channels for communication. Under the heightened/intermediate scrutiny as required for a content-neutral analysis, the government must demonstrate that the interest is narrowly tailored to a substantial government interest and leaves open alternative channels for communication. The ordinance does not violate the man's First Amendment rights because there is a substantial interest in regulating traffic safety and there are alternative channels for communication as evidenced by the posting and placing of signs elsewhere on sidewalks adjacent to public roadways. Additionally, other ordinances allow for solicitation while standing on a sidewalk along Main Street. Since the ordinance advances a substantial interest and leaves open alternative channels for communication, this ordinance does not violate the man's First Amendment rights.

### **Question MEE 2 – February 2025 – Selected Answer 3**

#### **1. The issue is whether sidewalks are a traditional public forum under the First Amendment.**

There are three types of forums recognized in constitutional law concerning the First Amendment: traditional public forums, designated public forums, and nonpublic forums.

Traditional public forms are those places where there is a historic expectation of the freedom of speech, including sidewalks, streets, and public parks. Designated public forums are places where the government designation has led to an expectation, like a civic auditorium that is being used for a town hall. Nonpublic forums are those in which there is no expectation of freedom of speech protections.

The pedestrian median strip at issue here is best understood as an extension of the sidewalk. It is a small 10 foot paved section of the median that is part of the crosswalk, and marked for use by pedestrians. Presumably, the paved median strip connects sidewalks on either side of Main Street. Sidewalks are a traditional public forum.

Because the paved median strip is best understood being part of the sidewalk, it is a traditional public forum.

## **2. The issue is content-based vs. content-neutral regulation of speech.**

Regulations concerning speech take two forms: content-based, and content-neutral.

Content-based restrictions regulate the content of speech itself, rather than its manner or medium. Content-based regulations are subject to strict scrutiny in either type of public forum and will only be upheld if the government can show that the regulation is necessary to achieve a compelling government interest and is narrowly tailored.

Content-neutral restrictions regulate the time, manner, or place of speech. The content of the speech is not regulated. In public forums, content-neutral restrictions are subject to an intermediate level of scrutiny. They will be upheld if the government can show that the regulation is narrowly tailored to meet an important government interest, and leaves open channels of alternative communication.

Here, the regulation generally bars communication between persons on the pedestrian median strip and occupants of vehicles that are passing through Main Street. No specific viewpoint or particular idea is mentioned; the restriction applies only to the specific place. Because the restriction only applies to a specific, small area, of the street, it will likely be considered a content-neutral regulation of speech.

## **3. At issue is the high level of scrutiny applied to content-based restrictions.**

Assuming that the ordinance is content-based, then it is subject to strict scrutiny and will likely be struck down. The town bears the burden of showing that the ordinance is necessary and narrowly tailored to achieve a compelling government interest.

Here, the stated purpose of the restriction is to promote traffic safety by prohibiting those within pedestrian median strips from actively engaging with drivers in a distracting manner. Although avoiding traffic accidents is an interest of the state, it is unlikely that it will rise to the level of "compelling" that is so rarely recognized by the

court. Furthermore, the regulation must be narrowly tailored to meet that interest. Here, banning all forms of communication with the occupants of passing vehicles is likely overbroad. The town allows signs to be posted, which presumably can be read while driving, but a person holding a sign would be banned by this ordinance. Alternatively, the town may choose to ban certain types of communication, such as shouting or attempting to provide leaflets to moving cars.

Because the interest is neither compelling nor narrowly tailored, the ordinance would likely be struck down as unconstitutional as applied to the man under strict scrutiny review.

#### **4. At issue is the intermediate level of scrutiny applied to content-neutral restrictions.**

Assuming the ordinance is content-neutral, then it is subject to intermediate scrutiny and will be upheld only if the town can show that the ordinance is substantially related to an important government interest, narrowly tailored, and leaves open alternative forms of communications.

As above, the same government interest applies. It is much more likely that a court would consider the state's interest in preventing distracted driving to be an important state interest rather than a compelling state interest. In addition, the ordinance itself only limits communication between pedestrians and drivers in a specific area. It does not prohibit communication between pedestrians and fellow pedestrians, and it does not prohibit any form of communication from the sidewalks that are on either side of Main Street.

Because the purpose of promoting safety traffic is an important state interest, and because the ordinance leaves open alternative forms of communication, the ordinance is more likely to be constitutional as applied to the man.