

GRADER'S GUIDE

*** QUESTION NO. 2 ***

SUBJECT: CONSTITUTIONAL LAW

1. Freedom of Speech (30 points)

Article I, § 5, of the Alaska Constitution protects the freedom of speech. This clause provides at least as much protection as the First Amendment of the United States Constitution. *Mickens v. State*, 640 P.2d 818, 820 (Alaska 1982).

The right to free speech is not absolute. *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1981). The court must weigh the conflicting rights and interests. *Id.* The Alaska courts do not appear to have addressed the right to engage in door to door solicitation or canvassing. However, the Alaska Supreme Court has adopted the public forum doctrine. *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 955 (Alaska 1978). According to the doctrine, the free speech clause circumscribes the state's ability to limit expressive activity in places, which by long tradition or by government fiat have been devoted to assembly and debate. *Fardig v. Municipality of Anchorage*, 803 P.2d 879, 883 (Alaska App. 1993). The state may not prohibit all expressive activity. *Id.* However, the state may enforce time, place, and manner regulations so long as they are content neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels of communication. *Id.* The state may only enforce content-based prohibition if the regulation serves a compelling state interest and the regulation is narrowly drawn to serve that interest. *Id.*

The statute impacts Peter's freedom of speech because it limits his ability to carry his message to the public. By limiting solicitation to the hours between 10:00 a.m. and 3:00 p.m., the statute reduces the time available to Peter to go door to door. Not only does the statute reduce the time for soliciting down to 35 hours per week, but it also makes it difficult for people like Peter who work during the day. Essentially, Peter is now limited to 10 hours of soliciting per week. Moreover, the statute limits the soliciting to a time period during which there are fewer people home to be contacted.

The statute prohibits door to door solicitation. This involves travelling on both public and private property. The solicitor must walk along the road to get from one house to another. The solicitor must then walk up the private drive or walkway to reach the front door. Public

streets and sidewalks are public forums. *Alaska Gay Coalition*, 578 P.2d at 957. The Supreme Court has long given special protection to door to door solicitors because there is a lengthy tradition of going door to door for expressive purposes. *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862 (1943). The Supreme Court also emphasized that door to door solicitation was necessary for “little people”, groups without extensive financing, to get their message across. *Id.*; See also *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248 (7th Cir. 1985) (cataloguing Supreme Court cases involving solicitation). The examinee should, therefore, conclude that the public forum doctrine applies.

The restriction on solicitation is content neutral on its face. It limits all solicitation to the specified hours regardless of the content of the solicitation.

The intent provisions of the statute indicate that the state’s purpose is to protect pedestrians from being run over. The Supreme Court has held that protecting the public from fraud and crime and the protection of a resident’s privacy are significant interests. *Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080, 2088 (2002). Protecting pedestrians is probably, therefore, a legitimate state interest. The restriction is not narrowly tailored, however. The stated reason for imposing the restriction is to limit accidents between pedestrians and vehicles in the dark. However, the time restriction only makes sense if it is limited to the winter season when daylight is limited and the road is narrowed by snow berms. For a significant portion of the year, the harm addressed by the statute is not an issue.

The statute arguably does not leave ample alternative channels of communication. The time restriction dramatically reduces the ability of organizations to contact individual households. The restriction limits the canvasser’s ability to contact people by limiting the time for solicitation to normal work hours. On the other hand, organizations may still engage in canvassing during the specified hours. They may also engage in other forms of contact, such as direct mail, broadcast, informational booths at public events, etc.

Peter could allege that the statute is not really content neutral based on Senator Sam’s speech; i.e., that the statute is really intended to affect Green Voters. Without more, however, a court is unlikely to accept this argument, for the statute has language expressing the legislature’s intent is content neutral and describes a legitimate state interest. However, if the court concluded that the statute was not content neutral, it would apply a more restrictive analysis. The state would have to

justify the statute with a compelling state interest and show that it is narrowly drawn to serve that purpose. Absent a showing that pedestrians getting injured at a prodigious rate, a court is unlikely to conclude that the state's interest is compelling. In any event, as noted above the statute is not narrowly drawn

2. Equal Protection (30 points)

To prevail on an equal protection claim, Peter must first demonstrate that the state is treating similarly situated people differently. *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 397 (Alaska 1997). If the court concludes that there is disparate treatment, then the court will apply Alaska's sliding scale approach to equal protection analysis. *Id.* Alaska's sliding scale requires the court to evaluate three variables: the weight to be afforded the interest impaired, the purposes served by the statute, and the state's interest in the particular means chosen to further its goals.

The first variable is the most important variable and involves determining the importance of the interests impaired by the challenged statutes. *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 396-97 (Alaska 1997)(quoting *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264 269 (Alaska 1984)). Depending upon the primacy of the interest impaired, the state will have a greater or lesser burden in justifying the legislation. *Id.*

The second variable involves examining the purposes served by the statutes and assessing their importance relative to the interests impaired by those statutes. *Id.* When the legislation impairs very important interests, the state must show a "compelling state interest" to justify the legislation. *Id.* When the legislation impairs relatively minor interests, the state must show that it has a "legitimate" state interest in treating the groups differently. *Id.*

In the third step, the court must evaluate the state's interest in the particular means chosen to further its goals. *Id.* The state's burden to justify its means depends upon the importance of the interests impaired. *Id.* At the low end of the sliding scale, the state needs to show a "substantial relationship" between the means and the ends. *Id.* When the legislation impairs very important interests, the state must show that that the fit between the means and the ends is much closer and that the ends could not be accomplished with less restrictive means.

Peter may have a claim that the statute violates equal protection. To make out the claim, he must first demonstrate that the statute treats

similarly situated people differently. Peter could argue that the statute treats solicitors differently from other nighttime pedestrians. Peter could also claim that the statute treats small, under-financed organizations that need to solicit door to door differently from other advocacy organizations. Peter's claim is not clear-cut, however, for the statute is neutral on its face. However, Senator Sam's speech to Develop Alaska provides a basis for a colorable claim. The statute will adversely affect "Grass roots" organizations like Green Voters because their ability to get out their messages and to raise money will be reduced by the restriction on solicitation. In contrast, groups like Develop Alaska that rely on other methods of fundraising will not be harmed. Senator Sam's speech raises the inference that the statute was actually intended to cripple Green Voters rather than protect pedestrians.

The first variable involves determining the importance of the interest impaired by the legislation. In this case, Peter would want to argue that the statute is impairing his ability to engage in political speech. This would be a very important interest and would arguably justify requiring the state to put forth a compelling state interest. The second variable in this case is the state's interest. Protecting pedestrians is certainly a legitimate state interest, but a court may not consider it a compelling interest that outweighs Peter's interest in engaging in political speech. The third variable involves the relationship between the statute's goals and the means chosen to effectuate those goals. In this case, the relationship is not very close because the restriction applies all year, but it is only needed during the winter months.

Peter could also argue that the statute has the effect of discriminating against his church. By restricting solicitation, the statute treats churches that proselytize by canvassing door to door differently than churches that do not. If the court concluded that the statute treated Peter's church differently, it would then analyze the variables. The court would likely consider the practice of religion a more important variable requiring a greater state interest and a tighter connection between the statute's goals and means. The court would likely analyze the last two variables as described above. The supreme court has stated that no value has a higher place in our constitutional form of government than religious freedom and that the freedom to believe is protected absolutely. *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979). As the cite to *Frank* indicates, the equal protection analysis will bleed over into the free exercise analysis.

3. Free Exercise of Religion (30 points)

The supreme court uses a balancing test to determine whether a generally applicable, neutral law violates the free exercise clause of the

state constitution. *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994). To invoke a religious exemption, Peter will have to show that (1) a religion is involved; (2) the conduct in question is religiously based; and (3) that the religious beliefs are sincere. *Swanner*, 874 P.2d at 281. The state can only deny a religious exemption if it would pose some threat to public safety, peace, or order or if there is a competing state interest of the highest order that is not otherwise served. *Id.*

Peter should be able to meet all three prongs. First, he belongs to a church and wishes to go door to door on behalf of that church. Second, Peter's conduct is religiously based. The church requires its members go out amongst the public to convert others. Third, the facts further indicate that his beliefs are sincere since he goes canvassing on Sunday evenings and has done so for the past three years.

Peter may be entitled to his exception. In *Frank v. State*, 604 P.2d 1068 (Alaska 1979), the supreme court upheld the taking of a moose out of season to provide for a funeral potlatch. In *Swanner*, the court concluded that Swanner's religious belief that cohabitation was wrong did not outweigh the city's interest in prohibiting discrimination based on marital status. The court rejected Swanner's claim in part because his religion did not require him to be in the rental business. Peter's conduct is closer to that of Frank's in that he is carrying out a specific tenet of his religion by going door to door. Moreover, as noted above, the state's interest in protecting pedestrian's is not particularly well served by the statute. Finally, although the state could argue that door to door soliciting poses a threat to public safety because pedestrians could be injured, Peter is a member of the class that the state seeks to protect. Arguably, he should be entitled to take his chances if his religion requires it.

4. Substantive Due Process (10 points)

Substantive due process requires that a statute have a reasonable relationship to a legitimate governmental purpose. *State v. Niedermeyer*, 14 P.3d 264, 267 (Alaska 2000). The court does not evaluate the statute to determine whether it is wise. *Id.* The court only ensures that the statute is not arbitrary. *Id.* The burden of demonstrating that there is no rational basis for the challenged legislation is on the plaintiff. *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 263 (Alaska 2000). The court begins with a presumption that the legislative action was proper. *Id.* If any conceivable legitimate public policy for the enactment is offered, the plaintiff must disprove the factual basis for the justification. *Id.*

In the present case, the legislature offered a plausible reason for the restriction: to protect pedestrians. Peter would, therefore, have the heavy burden to prove that the factual basis justifying the legislation was false. Peter might be able to do that. First, he could argue that the statute is arbitrary in establishing the permitted time for solicitation because the harm is only present during the winter months. Limiting a person's ability to solicit door to door during the extended daylight hours of summer in Alaska is not going to protect them from the dangers of snow berms and darkness. Moreover, the restriction does not protect other sorts of pedestrians. Second, Peter could argue that Senator Sam's comments indicate that the stated justification for the statute was not the legislature's real purpose. Peter would argue that the real purpose was to handicap Green Voters.