

ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

For many years, the advocacy group Parents Outraged by Pedophiles (POP) has maintained a display in the lobby of the Alaska Department of Motor Vehicles (DMV) in Juneau. The display includes profiles of people who claim to be victims of child molestation and how this experience has affected them.

National Organization of People Exercising Rational Voluntariness (NOPERV) is a group whose members believe in inter-generational love. It is their position that any consensual sex is appropriate and that legislating the age of consent is a violation of "natural law." They have asked the state to provide them with space in the DMV lobby to put up a display profiling inter-generational relationships throughout history. Those historical figures featured include Plato and Pocahontas. Further, NOPERV asks to display a position paper advocating the abolishment of age-of-consent laws.

Citing lack of space, the political nature of the proposed display, and the fact that NOPERV is advocating criminal activity, the DMV denies NOPERV's request to put up its display.

1. What claims may NOPERV raise under Alaska's constitution challenging the DMV's denial?

GRADER'S GUIDE

*** QUESTION NO. 5 ***

SUBJECT: CONSTITUTIONAL LAW

This is primarily a Free Speech question. Intertwined in an analysis will be the use of the Free Speech Clause of the Alaska Constitution and a recognition that Alaska's Equal Protection Clause is also implicated in a free speech analysis.

1. Free Speech Overview (25 pts.)

The most significant issue before the applicants is whether the state's action in denying NOPERV access to the lobby denied the group its right of free speech. The right to free speech is found in Article I, section 5 of the Alaska Constitution that states: "Every person may speak freely, write, and publish on all subjects, being responsible for the abuse of that right."

It should be noted that when interpreting this section of Alaska's Constitution, the Alaska Supreme Court has historically adopted the analysis and language applied by the United States Supreme Court in interpreting the First Amendment of the federal constitution. See Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 955 (Alaska 1978). Therefore, as it stands now, a constitutional analysis of free speech would be the same regardless of whether the analysis was under the state or federal constitutions. But, it should also be understood that the Alaska Supreme Court has not limited the free speech protection found in Alaska's Constitution to the protections found in the First Amendment. Instead, the court has held: "the free speech clause of the Alaska Constitution . . . was meant to be at least as protective as the First Amendment." Mickens v. City of Kodiak, 640 P.2d 818, 820 (Alaska 1982) (footnote omitted).

2. Public Forum (25 pts.)

The first step in determining whether NOPERV's right to free speech has been violated is to determine whether or not the DMV lobby is a public forum. The Alaska Supreme Court has held:

Once there exists a government-controlled forum for the dissemination of information and the expression of ideas, the government cannot deny equal access to the forum based on content alone. This equality of access is compelled by both the First Amendment and the Equal Protection Clause [of both the Alaska and

Federal Constitutions]. Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 955 (Alaska 1978).

Utilizing this test, it is clear that the DMV lobby is a “government-controlled” forum. Since POP has a display in the lobby it is equally clear that information and expression of ideas are disseminated there. An argument could be made that the DMV lobby was not intended to be a public forum, rather a place for people to conduct motor vehicle-related business and therefore a public forum does not exist. However, governmental intent is not the correct focus. As the Alaska Supreme Court has held:

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. Id. (internal citations omitted).

So, it appears that by allowing POP to have its display in the DMV lobby that the state has created some form of public forum. This would be consistent with the Alaska Supreme Court’s finding that areas that could be considered public forums are : public streets, sidewalks, parks, municipal auditoriums, city owned airports, a state house rotunda, utility poles and a state owned bus terminal. Id., at 956.

The court has also noted that limited public forums can be created when the state sponsors a one-time event, such as the bicentennial, and provides the public with the opportunity for expression. Id.

Here, since POP has had its display for “many years”, the “one time event” limited public forum designation seems to be inapplicable and the DMV lobby in Juneau is likely a public forum.

3. Regulation of Speech in a Public Forum (25 pts.)

Since the DMV lobby is a public forum the state cannot restrict access to it by NOPERV based on content alone. So, the state’s denial of NOPERV’s display based on its “political nature” likely will fail.

But, the state may place reasonable restrictions on the “time, place and manner” of NOPERV’s speech. Id. Or as the Alaska Supreme Court has held: “the government may reasonably regulate expressive activity, it may not censor such activity.” Id. Here by example, DMV could limit the size of NOPERV’s proposed display and DMV could direct where in the lobby it was placed.

Some applicants might also argue NOPERV should be denied access to the DMV lobby because they are advocating illegal behavior. Strictly speaking this is not true. NOPERV is only seeking to educate the public about inter-generational relationships and is doing so by profiling “historical” relationships. NOPERV is also advocating an abolishment of the age-of-consent laws.

A similar fact pattern existed in Gay Coalition v. Sullivan where the defendant argued that since there were statutes against sodomy and incest that it was improper to allow access to a governmental publication by a homosexual organization. Id. at 955. The Alaska Supreme Court, citing federal precedent, rejected this argument and held that the defendant needed to make “a far greater showing of a likelihood of imminent lawless action than is presented here.” Id.

Some applicants might also argue that because of the inflammatory nature of NOPERV’s position that the display might interfere with the purpose and normal use (motor vehicle business) of the DMV lobby. The Alaska Supreme Court, citing significant public safety concerns, has noted that the state could prohibit peaceful demonstrations on jail grounds and could limit picketing near a courthouse. Id. at 957.

But, the court has repeatedly noted that “it is the fact that the government has opened a forum for speech activity in general that is determinative of rights of access rather than the use of the forum as a vehicle for the exchange of partisan viewpoints.” Id. at 958. Therefore, since DMV has opened up the lobby as a public forum, arguably the state cannot restrict access to that forum based upon the content of speech, objectionable or not, absent a showing of a significant public safety concern.

4. Equal Protection (25 pts.)

Arguing that a display may potentially interfere with the normal course of business in the DMV lobby might be meritorious if POP did not have a longstanding display in the DMV lobby. As noted *supra* equal protection is intertwined with virtually any free speech argument. Applicants should give an overview of Alaska’s version of equal protection which is found in Article I, Section 1 of the Alaska Constitution that states: “all persons are equal and entitled to equal rights, opportunities, and protection under the law.” This is often referred to as the “equal protection clause,” this clause actually guarantees not only equal “protection,” but also equal “rights” and “opportunities” under the law.” ACLU v. State, 122 P.3d 781, 785 (Alaska 2005). Further, the Alaska Supreme Court has held: “We have long recognized that the Alaska Constitution’s equal protection clause affords greater protection to individual rights than the United States Constitution’s Fourteenth

Amendment.” Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003).

Like its federal counterpart, Alaska’s equal protection clause mandates equal treatment of those similarly situated. ACLU v. State, 122 P.3d 781, 787 (Alaska 2005).

In applying Alaska’s more “stringent” equal protection standard the court uses a so-called “sliding-scale” approach. Specifically, “we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state depending upon the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake...” Id. (internal citation omitted).

Under this sliding scale denial of an explicit constitutional right, free speech, would trigger the highest level of scrutiny and the governmental interest here is merely minimal. Here, under equal protection, the state cannot allow the POP display without allowing the NOPERV display. Such was the holding in Sullivan where the court held:

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an ‘equality of status in the fields of ideas’ and government must afford all points of view an equal opportunity to be heard. Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 955 (Alaska 1978).

Here then, NOPERV’s view have the same right to be heard to be displayed in the DMV lobby as POPs, even though NOPERV’s views are controversial and repugnant to some.