

Question I (Bad Frog candy) (Bad Frog = BF; NYS FPSA = govt) (50 points)

BF arguments

Fully protected speech-Even though on product label, it is satire & social commentary--(3) _____

Regulated based on content-Strict Scrutiny-no compelling interest-unnecessary to protect kids - kept off shelves in most places people buy candy, access behind counter chills adult customer access, less restrictive alternatives-place on higher shelf out of reach of younger children--(4) _____

Symbolic sp-satisfies **Spence test**-intended to communicate message, likely to be understood by audience-extended middle finger is recognized symbol & slogans clarify message------(3) _____

Protected symbolic sp-O'Brien test (w/in power of govt, sub'l interest, narrowly tailored, govt int unrelated to suppression of speech) - BF argues no sub'l int since doesn't harm children, not narrowly tailored, also govt interest is related to suppression of speech - regulated because of Frog's message- because it fails this pt of test-govt must satisfy strict scrutiny (above)----(4) _____

Not Obscenity -no appeal to the prurient interest even though reference to a sexual act---(2) _____

Not Fighting words-while giving the finger could be fighting words in some situations, not here since there is no face to face exchange and finger is not directed at a particular individual(2) _____

Commercial speech-label is form of advertising-communicates source of product, and not false, misleading or illegal so is not deprived of protection if considered to be commercial sp---(2) _____

Doesn't satisfy Central Hudson test-doesn't suppress false or misleading info, doesn't directly advance sub'l int since no showing seeing logo is harmful to kids under 13, any interest could be protected by a more limited restriction that doesn't deny most adult and over 13 access--(4) _____

Prior restraint - unbridled administrative discretion to restrict product label and sale----(2) _____

Vagueness-vague criteria for limiting candy sale (adversely effect health, safety, welfare)(2) _____

Govt arguments

Unprotected speech - not commercial speech or political speech - BF logo contains no product information and also no political message------(3) _____

Central Hudson test (if viewed as commercial speech)-not false or misleading, sub'l interest in protecting kids under 13 from profane ads, ban on labels in places where children could buy candy directly advances that interest; restriction is narrowly tailored because only applies to younger children, only in places where they can be found and allows sales to adults------(4) _____

Symbolic sp-doesn't satisfy **Spence test**-no message communicated by BF logo that is likely to be understood, just an amusing drawing, but no political message------(3) _____

If protected symbolic sp-O'Brien-sub'l int to protect children, narrowly tailored since doesn't prevent sales except to under 13, govt int not to suppress message, just how expressed----(4) _____

If must satisfy strict scrutiny-compelling interest to protect younger children particularly when offensive frog appears on label of product designed to appeal to children, and necessary means - using least the restrictive means-BF can still sell its candy in stores to adults/over 13 kids(4) _____

Not a prior restraint - candy can still be sold; only change is in the manner of sale------(2) _____

Not void for vagueness-restrictions and reasons for them are clearly articulated by govt-(2) _____