

**Part I**

[There are four questions to be answered in 2 hours. The questions are of equal weight.]

**Question #1**  
**(30 minutes)**

The following are the opening paragraphs of a recent federal district court opinion. Your task is to complete the opinion for the court.

The parties have stipulated to the following facts: The plaintiffs, Joseph Inturri, Stephen Miele, Matthew Rooney, Darren Besse and Mark Castagna, are police officers for the City of Hartford, and have tattoos on their arms depicting a spider web. Since at least 1985, the police department's General Order 6-15 has provided the standards and requirements for the uniforms and appearance of all officers. In 1999, Section III.C.5 was revised, providing: "Tattoos that are visible to the public and deemed offensive, immoral, or presenting an unprofessional appearance, as deemed by the Chief of Police, shall require the officer to cover said tattoo with a bandaging type material or a long sleeve shirt in accordance with the Uniform of the Day Standards."

On October 17, 2002, Detective Keith Knight, another officer in the department, wrote a letter to Michael Wood, president of the Hartford Police Union, raising several concerns. Knight provided copies of his letter to City of Hartford officials, including Chief Marquis, and the mayor, deputy mayor, city manager and council members. One concern raised by Knight in his letter was tattoos of certain officers in the department. Specifically, Knight's letter stated:

Lets debate the issue of a white supervisor along with two other white police officers wearing a racist tattoo of a white supremacy group called the Arian Nation [sic]. The tattoo which is a spider web tattoo, which I am informed by the Department of Corrections who monitors such groups that the tattoo symbolizes race hatred of non-whites and Jews. I know the U.S. Constitution gives everybody the right to free speech and expression, but this is unacceptable for a police officer to wear in plain view knowing that it offends and what it stands for.

After receiving a copy of Knight's letter, the Hartford city manager informed Chief Marquis that the issue of the spider web tattoos was a concern to the mayor and at least some of the members of the city council, and asked him to resolve the situation. Chief Marquis then consulted with the Office of the Corporation Council ("OCC") for the City of Hartford, as well as a contact at the Federal Bureau of Investigation's Legal Investigation Unit. The command staff of the department then discussed the matter and decided that, pursuant to General Order 6-15, spider web tattoos should be covered while the officers were on duty or in uniform. In reaching this conclusion, the command staff and Chief Marquis stated that they considered the following: an internet web-site maintained by the Anti-Defamation League; the racial composition of the City of Hartford (which is almost seventy percent non-Caucasian); a history of troubled race relations between the population of Hartford and members of the police department; the racial composition of the police department; a consent decree [in another lawsuit requiring attention to minority hiring and race-relations training]; Article XII of the department's Code of Conduct, which addresses discriminatory acts by police officers; and Chief Marquis' information from the FBI. In particular, the ADL website had a page entitled "Hate on Display: A Visual Database of Extremist Symbols, Logos and Tattoos," which included the spider web design in a display of such tattoos. A separate page providing details about the spider web tattoo described it as being favored by "racist convicts" and, in the "Background/History" section, stated the following:

The spider web tattoo is often found on the arm, or under the arm, of racists who have spent time in jail. In some places, one apparently “earns” this tattoo by killing a minority. However, non-extremists may sometimes sport this tattoo as well, unaware of its other symbology, simply because they like the design.

Chief Marquis, “acting as a final policy maker and pursuant to official policy,” issued a memorandum to all officers which stated: “It has been determined that a visible spider web tattoo is offensive, and therefore as Chief of Police and in consultation with Corporation Counsel, I am ordering everyone to cover this tattoo, in accordance with [General] Order 6-15, while you are in an on-duty capacity or wearing the Hartford Police Uniform.” The plaintiffs have complied with the order by covering their tattoos with either sweatband-type material or by wearing long sleeve shirts. Accordingly, they have not been disciplined or lost any pay as a result of the issuance of the April 14, 2003 memorandum. Other officers in the department, including one or more of the plaintiffs, also have arm tattoos other than the spider web design, some of which express support of minority racial and ethnic groups. They have not been directed to cover these other tattoos.

The plaintiffs have filed a complaint in this Court [alleging various federal constitutional violations]. Both parties have moved for summary judgment.

*See Inturri v. City of Hartford*, 2005 U.S. Dist. LEXIS 5087 (D. Conn. 3/30/05).

## **Question #2** **(30 minutes)**

The legislature of the Commonwealth of Puerto Rico became disgusted with the practice of publishers’ issuing new editions of textbooks when there were virtually no substantive changes. (Hard to believe, isn’t it?) The legislature passed a statute stating that private school students must be given the option by their school of using a prior edition of a book when there are no substantive changes in the current edition. In the words of the court,

The statute requires all private schools to provide parents with a list of textbooks which includes information about which textbooks have changed their editions, the specific nature of these changes, and whether the changes are substantive. If the new edition does not incorporate substantive changes, then the regulations require that parents be given the option of purchasing and using the prior edition. The statute defines substantive changes as “historical, technological, scientific and/or cultural changes in a new edition of a textbook that are so significant as to result in the total or partial revision of one or more chapters of the book, or the addition of one or more chapters to the same.” Substantive changes do not include deleted chapters or sections, cosmetic changes (i.e. cover changes, page numbers, chapter order, texture of textbooks), or the addition of a few sentences, illustrations, graphs, tables, or photographs. In order to ensure compliance the regulations require the publisher, distributor or bookstore to provide the requisite information about the textbooks or face penalties up to the amount of \$10,000.00.

An association representing both teachers and private schools, some of which are religious institutions, sued to have these regulations set aside as a violation of their first amendment rights and academic freedom. Puerto Rico is a territory of the U.S. in which the first amendment applies just as if it were a state.

- a. What result in this litigation and why?
- b. What would be the outcome if the statute provided that it would not apply to any textbooks that the Commonwealth Department of Education determined to be “primarily religious” in content?

*See Asociacion de Educacion Privada de Puerto Rico v. Echevarria Vargas*, 289 F. Supp. 2d 1 (D.P.R. 2003).

**Question #3**  
**(30 minutes)**

We have seen various examples during this semester of government subsidies for artistic displays, student publications, medical services, and scholarships for both college and K-12 education. It has been reported that the federal government has produced and provided news stories to be carried by television outlets and has subsidized the salaries of political commentators.

Justice Scalia asserted in *Nat'l Endowment for the Arts v. Finley*, that it “is perfectly constitutional” for government to “establish content- and viewpoint-based criteria upon which grant applications are to be evaluated.” Justice Souter countered that it is one thing for government to purchase a piece of artwork for display in a government building but quite another for government to employ a “subsidy scheme . . . based on viewpoint popularity.” Justice Scalia also remarked that

I suppose it would be unconstitutional for government to give money to an organization devoted to the promotion of candidates nominated by the Republican party – but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican party, and I do not think that that unconstitutionality has anything to do with the First Amendment.

Using these examples, and others as appropriate, construct a general statement of the constitutional considerations that apply to government provision of services which intersect with speech and religion.

**Question #4**  
**(30 minutes)**

Following are the opening paragraphs of the Sixth Circuit's opinion in a recent case. Your task is to finish the majority opinion. *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005).

The City of Fairfield appeals the district court's grant of a preliminary injunction prohibiting the City on First Amendment grounds from enforcing a municipal ordinance against Lynn Tucker, Jr. and other members of his union in their use of a rat balloon as part of demonstrations in a public right-of-way.

Lynn Tucker, Jr. is the General Vice President of the Eastern Regional Office of the International Association of Machinists and Aerospace Workers. Tucker and several of his fellow union members picketed Fairfield Ford, a car dealership in Fairfield, Ohio, on three primary occasions in 2003 (February 26, July 1, and July 31) for alleged unfair labor practices. The protests all took place in the public right-of-way between Fairfield Ford and Dixie Highway, with each involving somewhere between twenty-five and forty protesters and generally lasting between one and two hours. During these protests, Tucker and his colleagues held signs and displayed an inflatable rat balloon measuring approximately twelve feet high and eight feet in diameter. The rat has long been used as a symbol of efforts to protest unfair labor practices. The rat balloon in the instant case can be inflated or deflated within five to ten minutes, and is temporarily secured to the ground with stakes to ensure that it does not tip over.

The conflict in this case arises out of the application of the City's ordinance prohibiting structures in the public right-of-way to the Union's use of the rat balloon. Section 905.03(c) of the municipal code provides that “no person, firm or corporation shall construct or place or cause the construction or placement of any . . . structure or improvement . . . on any street, alley, public right-of-way, easement or public grounds without the written permission of the Public Works Director.” As originally enacted, the ordinance defined “structure” as “anything constructed, the use of which requires permanent location on the ground or attachment to something having permanent location on the ground, and also includes anything constructed which is not enclosed within another structure and is placed in a stationary location.” The City later amended the definition of “structure” on September 13, 2003, with the express intent of covering the use of the balloon in this case. The amendment defined a “structure” in relevant part as “any object, whether permanent or temporary, including, but not limited to, non-public signs, that is constructed, erected or placed in a stationary location on the ground or is attached to or placed upon an object constructed, erected, or placed in a stationary location on the ground.”