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Freedom of expression is protected under the First Amendment of the U.S. Constitution. Here, Clear City has enacted an ordinance limited freedom of expression by prohibiting the burning of candles in any church. This ordinance further authorizes the fire marshal to close down any church in which candle burning occurs. SC uses candles to signify spiritual light of the world. Thus, the ordinance operates as an improper prior restraint of free speech and should be invalid.

Any ordinance that restrains speech is preemptively invalid. Oliver Wendell Holmes has cautioned against such prior restraints since at least 1907 and stressed that the "main purpose" of the First Amendment is to allow freedom of expression. For example, in *Schenck v. United States*, Justice Holmes opined that unless there is a "clear and present danger" speech should not be regulated. Although *Schenck* was decided in the context of publication, other Supreme Court precedent has overruled equitable relief, such as injunctions, in other cases such as *Near v. Minnesota and New York Times Co. v. United States*. If prior restraint against publications was disallowed, prior restraint is surely disallowed against the symbolic religious expression of burning a candle to signify the light in the world. Thus, as discussed below SC should be able to obtain a temporary restraining order, preliminary injunction, and declaratory relief.

#### Prior Restraint

In order for Clear City ("CC") to prove the ordinance is a proper prior restraint, CC must show (1) a serious and irreparable harm to the public and (2) the ordinance uses a very narrow means to regulate the speech such that restraint is proper. Just because one church of 50 churches burned down earlier in the year due to a burning candle does not mean that you can go around shutting down churches with candles burning. Candle burning in churches is not causing serious irreparable harm to the public. Moreover, having the fire marshal shutdown churches is not a narrow means for preventing the burning of candles in churches. For example, churches could install fire sprinklers or have other means to monitor and prepare for fires caused by candles. Declaratory relief should be granted on this ground alone. However, to preserve the status quo, SC may have to use a temporary restraining order and a preliminary injunction to preserve the status quo until the Article III judge issues an Order providing SC the declaratory relief for this facially unconstitutional statute that is not only against the black letter of the law, Supreme Court precedent, and the First Amendment of the U.S. Constitution.

Alternative arguments regarding the type of speech, the equal protection clause, and the due process clause are made briefly below. Please recognize that arguing the ordinance is a prior

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restraint is the tact that should be taken by SC in this case.

State action is present here by CC. The 14th Amendment applies the constitutional laws.

### Content-based vs. Content-neutral

Content-based speech regulations require strict scrutiny analysis and content-neutral regulations require a lesser intermediate scrutiny. SC will argue that prior restraint is the proper measure for this ordinance but if it must argue between content-based and content-neutral, SC will argue churches were being singled out for candle burning and that CC needs to show a compelling government interest that is narrowly tailored and leaves open alternative channels of communication. CC will argue that the ordinance is for any candles and intermediate scrutiny should apply, so that the ordinance only needs to serve an important government interest that is narrowly tailored leaving open alternative channels. Under either standard, CC will have a difficult time arguing the risk of a candle burning down a building goes to a compelling or significant interest of CC.

### Equal Protection Clause

The Equal Protection Clause (EPC) as applied to the states via the 14th Amendment, provides for the equal protection of laws. Specifically, the EPC protects classes and fundamental rights. Since the First Amendment is a fundamental right, SC could challenge this ordinance on EPC grounds. Strict scrutiny would apply and CC would need to come up with reasons why the ordinance is necessary to further a compelling reasons why SC can not burn candles.

### Due Process Clause (Procedural & Substantive)

The Substantive Due Process Clause protects life, liberty and property. Liberty includes free expression. Here, burning candles is free expression that is being attacked by CC's ordinance.

The Procedural Due Process Clause requires adequate notice and hearing when depriving one of a liberty. Here, the ordinance was put into place without a hearing or notice. The facts simply state the ordinance was "enacted."

### Symbolic Speech

The First Amendment, via the 14th Amendment, protects symbolic speech such as the candle burning within SC.

### Overbreadth

Speech is overbroad when it prohibits more speech than necessary, including protected

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speech. Here, SC may argue that an ordinance against burning candles in a church is overbroad since it precludes burning candles in any church. However, the better argument is prior restraint.

### Justiciability

Article III of the U.S. Constitution allows courts to hear cases and controversies that are justiciable. In order to be justiciable, a party must have standing, the issues must be ripe, and not moot.

The church has standing because it can show it is injured by the ordinance because candles are such an integral part of the service to signify the spiritual light of the world, Clear City caused the ordinance, and the injury is redressible since the ordinance can be invalidated. The church also satisfies the requirements for organizational standing because the ordinance affects all of its members and the harm will be prevented via invalidation of the ordinance on constitutional grounds.

The issue is ripe because the ordinance is in full effect, and the marshal is already out and about inspecting churches. The fact that he issues warnings to two of the six churches and the random visits would not resume for at least eight weeks does not make the issue unripe. Although courts do not want to issue advisory opinions based on laws that are not in full effect, the facts plainly state that the ordinance was already been issued and further, the ordinance gives the fire marshal the power to close down churches. Thus, the issue is ripe.

In order for an issue to not be moot, there must be a controversy throughout the entire litigation. Although random visits are not to resume for eight weeks, SC and the ordinance have a controversy. Thus, the issue is not moot.

### **Likelihood of SC's success in obtaining a temporary restraining order ("TRO")**

SC will likely obtain a temporary restraining order unless declaratory relief is given first.

A TRO requires irreparable harm for the waiting time, likelihood of success on the merits, inadequate legal remedy, and a balance of hardships. Generally TRO still require notice to the other party, such as the Supreme Court's decision in *Carroll v. Princess Anne*, TRO's be issued *ex parte* if justice so requires. Further, defenses such as laches and unclean hands are available.

### irreparable harm for the waiting time

SC can show irreparable harm because the ordinance does not allow the burning of candles to signify the light of the world. Not only is this a protected right under the First Amendment's Free

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Exercise clause, the ordinance is arguably in violation of the Establishment clause. Under the Free Exercise Clause, an ordinance can not burden religion. Here, not allowing candle burning in churches does just that. Although CC will argue SC may practice its religion without candles, this argument will fail. Additionally, CC will argue that the Establishment Clause is not violated because the ordinance is for a secular purpose, does not advance or inhibit religion, and there is excessive entanglement. CC's argument will fail because disallowing candle burning when it signifies the spiritual light in the world inhibits religion. Moreover, if the court finds that the ordinance involves a sect preference, strict scrutiny will apply and CC will need to come up with a compelling reason why this ordinance is necessary. The risk that churches will burn down will not work. Although the Free Exercise and Establishment Clauses are important, SC may obtain a TRO on the prior restraint ground alone.

On balance, SC is irreparably harmed by not being able to light candles to signify the light of the world.

likelihood of success on the merits

See prior restraint analysis above. Further, the church is a private place, although open to the public for service, regulation of speech in a church is very unlikely.

SC will likely succeed.

inadequate legal remedy

Money damages or other legal remedies will not remedy the wrong caused by the ordinance. Thus, this element is met.

balance of hardships

The court will balance the hardships between the risk a church is burned down with SC's First Amendment rights.

SC clearly has the greater hardship.

notice

SC has not filed for a TRO yet but gave notice to CC's attorney. Although notice is generally required, the judge may issue the TRO for 10 or 14 days to keep the status quo before ruling on the declaratory judgment or preliminary injunction.

The likelihood for a TRO is high and it is very possible the judge issues the TRO *ex parte* given the strength of SC's position.

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**Likelihood of SC's success in obtaining a preliminary injunction ("PI")**

A preliminary injunction requires irreparable harm for the waiting time, likelihood of success on the merits, inadequate legal remedy, and a balance of hardships. Unlike a TRO, a preliminary injunction requires notice and will not be issued ex parte.

A preliminary injunction operates to preserve the status quo until a trial on the merits and a permanent injunction may be issued.

For the same reasons set forth above, the likelihood of a preliminary injunction is high, assuming the ordinance has not been invalidated already and the issue would be then moot.

**Likelihood of SC's success in obtaining declaratory relief or declaratory judgment ("DJ")**

Federal court's offer relief in the form of a declaratory judgment if there is an imminent threat of harm. Here, the ordinance is harming SC by preventing the burning of candles to signify spiritual light in the world. CC will argue that the harm is not imminent because no random visits will take place for eight weeks and only warnings were issued in the past. Given that the statute is already being used in Clear City since the Fire Marshal has visited churches, the court will likely grant a declaratory judgment.

In conclusion, the declaratory judgment will likely be granted against this ordinance from causing any more harm to SC and unconstitutionally acting as a prior restraint candle burning. However, to preserve the status quo until then, the court may issue a TRO and then a PI.

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**END OF EXAM**