

CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験 過去問① 憲法

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

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<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
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QUESTION 2

Public School District (District) in State X is attempting to reduce gang violence in District's high schools. After consulting with local law enforcement, District has determined that most violence results from confrontations between two gangs, the Westsiders and the Eastsiders. As a result, District has adopted the following rule for all high school students: "No student shall wear any label, insignia, words, colors, signs or symbols that reflect gang-related activities. Students violating the policy will be immediately suspended or expelled from school."

For several years, Paloma, a high school senior, has had a small tattoo of a dove on one wrist, her "self-expression" as a peaceful person. Paloma has never been associated with any gang, including the Westsiders and Eastsiders. After learning of Paloma's tattoo, District officials described it to local law enforcement officials who said that it sounded like a Westsider gang symbol, which includes birds. Paloma was suspended for the last ten days of school after she refused District's request that she either wear long sleeves to cover her tattoo or have it removed.

Paloma, now graduated, and attending the college of her choice, has brought a declaratory relief action challenging the validity of District's policy under the First and Fourteenth Amendments to the United States Constitution. District has moved to dismiss Paloma's lawsuit as moot on two grounds: (A) because she is no longer a high school student, and (B) District has now redefined "gang-related activities" in its rule in a manner consistent with State X's criminal code.

1. What arguments can Paloma make in support of her First and Fourteenth Amendment claims? Discuss.
2. Will either or both of District's arguments in support of its motion to dismiss Paloma's lawsuit be successful? Discuss.

QUESTION 2: SELECTED ANSWER A

First & Fourteenth Amendment Claims

First & Fourteenth Amendments

Paloma (P) is suing District (D) on the grounds that it violated her constitutional rights under the 1st and 14th Amendments. The First Amendment provides that Congress shall make no law abridging the freedoms of speech, press, association, and religion. The First Amendment is applied to the states via the 14th Amendment Due Process Clause (in other words, the First amendment is "incorporated" to apply to the states under the 14th Amendment Due Process Clause). Thus, P must show that her 1st Amendment rights, which apply to D under the 14th Amendment, were violated.

Standing

To bring a constitutional action in federal court, the plaintiff must have standing under Article III (because Article III only grants jx to "cases or controversies"). To show standing, the plaintiff must show: 1) injury in fact; 2) causation; and 3) redressability.

Here, P has suffered injury in fact because she was suspended for the last ten days of school (in other words, she has suffered actual harm as a result of D's policy). Second, P can show causation; the reason that she was suspended was because of D's policy prohibiting gang-related speech. Third, P can show redressability because a favorable court decision would declare the policy invalid and could potentially remove the suspension from her academic record. Thus, P has sufficient standing to bring this action (assuming it is not moot, see arguments below).

Freedom of Speech

P will argue that D's policy violates her freedom of speech under the 1st and 14th Amendments of the US Constitution. As a preliminary matter, speech is broadly defined under the 1st Amendment, and it can include symbolic/expressive conduct that would not be traditionally thought of as speech. Here, P was punished for having a small tattoo as an act of self-expression; the fact that she wore this tattoo as an act of self-expression shows that this is a symbolic/expressive act that counts as speech. P's tattoo constitutes expressive/symbolic speech that implicates the 1st Amendment.

State Action

To show a First Amendment violation, P must first show that there was state action (the Constitution does not apply to private actors, other than the 13th Amendment, which is not at issue here). State action simply means government action (it need not be at the "state" level; it can be local, federal, etc.). Here, P is challenging the actions of D, a public high school district. As a public school district, D is a part of the government and is thus a state actor. This requirement is met.

Vagueness

Laws/policies infringing on the freedom of speech cannot be vague; this requires that the law give fair notice of the prohibited conduct such that a reasonable person would understand what is prohibited by the policy.

Here, P can challenge D's policy on the grounds that it is vague. It prohibits symbols that reflect "gang-related activities," however, it does not define what exactly "gang-related activities" means. D will argue that given the prevalence of the two gangs, W and E, in the community, it would be obvious to a reasonable person what constitutes gang-related activities. However, P can argue that "gang-related activities" is a broad

and unclear term with no set definition, and thus it does not put a reasonable person on notice of what conduct is prohibited--indeed, P had never had any association whatsoever with W or E, yet the symbol tattooed on her arm apparently was enough to get her suspended. P will argue that she was punished simply because her tattoo was a bird and birds are included in W's gang symbols--the phrase "gang-related activity" was insufficient to put her on notice that her own small dove tattoo may be punished. P has a good argument that this regulation was impermissibly vague.

Overbreadth

Similarly, a speech regulation will be struck down if it is overbroad, i.e., it regulates more speech than is necessary. P can also argue that D's regulation is impermissibly overbroad because it purports to broadly prohibit all symbolic speech reflecting "gang-related activities." This could include speech such as P's, which is not gang related in any way, simply because it looks similar to gang-related activity. This regulation could have been drawn more narrowly by clearly defining what constitutes gang-related activity; by allowing D officials to punish any speech that looks remotely gang-related, this regulation goes too far, and P can potentially challenge it as overbroad. D will argue that the rule was drawn as narrowly as possible to only impact gang-related activities but, given that that term is not defined and could be construed very broadly (as it was in P's case), D will have a difficult time proving this law is not overbroad.

Prior Restraint

A prior restraint is an order (such as an injunction or gag order) or a licensing scheme that seeks to prohibit speech before it has occurred. Here, although the regulation punishes speech, it does not appear to be a prior restraint in the way the court has

traditionally defined it (this policy punishes speech after it happens, like most speech related laws). Thus, P cannot challenge this policy on the grounds that it is a prior restraint.

Symbolic Speech

P will argue that D's policy impermissibly regulates expressive speech under the 1st and 14th Amendments. The test is as follows: a regulation will be upheld only if: 1) it serves an important, non-speech related interest; 2) it burdens no more speech than necessary; and 3) the primary aim is not the suppression of speech. The government, D, has the burden of proving this test. Also, as a threshold matter, the government must have the power to create the law--here, the school district has the power to create reasonable regulations on public high school students, so D has the authority to implement such regulations.

Here, D will argue that this regulation passes the symbolic speech test. First, D will argue that it serves an important interest unrelated to speech--here, the purpose of this regulation is to reduce gang violence in public high schools. D will argue that a consultation with law enforcement has revealed that two main gangs, W and E, are responsible for gang violence in the community, and the goal of this regulation is to identify those students who are associated with the gang and may lead to violence. D will argue that there is an important interest here in making sure that children are safe from gang violence while at school. Moreover, D will argue that the primary aim of this law was not the suppression of speech, but rather to ensure the safety of students while at school. D will argue that permitting students to flash gang signs and represent their gangs will disrupt school and lead to violence; the goal of this law is not to suppress

speech, but rather to facilitate public safety. Finally, D will argue that this policy does not burden any more speech than necessary--D will argue that this policy was narrowly drawn to only prohibit symbols/expression involving gang-related activities. D will argue that students can still express themselves in many other ways while at school and that this regulation only burdens gang-related speech; and is thus narrowly tailored and burdens no more speech than necessary. D will also point out that P could have simply worn long sleeve shirts for the final 10 days of her high school career and there would have been no issue (thus, the law is not overly burdensome on student speech because she was not required to remove the tattoo, she simply had to wear certain clothes to cover it up).

On the other hand, P will argue this regulation fails the test. P will argue that D's true aim is not to encourage safety in the school, but rather to suppress any speech it does not like by defining it as gang-related--she will point out that she is a peaceful person who has never been associated with any gang, and yet she was still punished and suspended from school for 10 days. P will argue that even if there is a valid interest in protecting student safety, this regulation burdens more speech than necessary by punishing students who engage in symbolic, expressive speech that is not gang-related, but arguably could be. She will argue that being suspended from school simply because she has a bird tattoo and one of the gangs (W) used bird symbols is a prime example of how this regulation is not narrowly drawn and burdens more speech than necessary---birds are an incredibly common symbol in numerous different contexts (religion, product logos, national symbols, etc.), and construing the ban on gang-related symbols to include all bird-related symbols is going much too far--this will result in the regulation of

far more speech than is necessary to serve the interest of reducing gang violence and protecting students from such gang violence. P will argue that D's policy clearly burdens more speech than necessary by applying to anything that is even remotely gang-related, even if it is simply a bird tattoo that is designed to show "peaceful" self-expression.

On balance, even though D can likely establish an important, non-speech related interest motivating this policy (the safety of students at school and reduction of gang violence), P will likely prevail here by showing that the law burdens more speech than is necessary to protect that interest. P can most likely demonstrate this policy is an unconstitutional regulation of symbolic/expressive speech, and thus the court should strike it down and grant her relief on that basis.

Content-Neutral vs. Content-Based

If the court did not apply the symbolic/expressive speech test set forth above, and instead took a more traditional freedom of speech approach, the court would examine whether the regulation was content-neutral, or content-based. Content-neutral regulations are subject to intermediate scrutiny-like analysis, while content-based regulations receive strict scrutiny.

Here, the regulation is content-based given that it specifically targets gang related expressive conduct/speech (it regulates a particular type of content, not the time/place/manner of the speech's occurrence). Because it is content-based, it must pass strict scrutiny. Strict scrutiny requires that the government show the regulation is the least restrictive means of achieving a compelling government interest. Here, D will argue that it has a compelling interest in the protection of high school students from

gang violence. A court may or may not find this to rise to the level of compelling.

However, even if it is compelling, the policy still fails strict scrutiny because P can show that it is not the least restrictive alternative. Broadly banning all symbols/labels/colors that reflect "gang-related activity" (which is not clearly defined) is not the least restrictive way of preventing gang violence--the school could establish clear guidelines showing what counts as gang-related activity and could establish some sort of review process rather than outright suspending/expelling students. Because the district policy is not the least restrictive means of achieving the goal of reducing gang violence, it would fail strict scrutiny. Thus, P could successfully challenge it as a content-based regulation of speech that fails strict scrutiny.

Unprotected Categories of Speech

There are certain categories of speech that are viewed as unprotected: incitement, fighting words, true threats, and obscenity. Here, D may try to argue this regulation is attempting to regulate speech that falls into one of these categories. However, the problem is that this regulation is broadly drawn to impact all expressive speech related to "gang-related activities." This does not explicitly regulate incitement (words that have a likelihood of inciting imminent lawless activity), fighting words (words that tend to cause an immediate breach of the peace), true threats of violence, or obscenity (sexually explicit material under the 3-part Miller test; not seen here). Although gang-related speech *may* tend to incite violent activity and *may* tend to cause a breach of the peace, a broad regulation prohibiting any gang-related expressive conduct does not qualify as a regulation of a category of unprotected speech, and D could not defend against P's claims on that ground.

Type of Forum: SCHOOL

Additionally, there is an issue raised by the fact that this is a public high school regulating speech within its walls. As SCOTUS held in *Tinker*, public students do not shed their First Amendment freedoms at the schoolhouse gate. Thus, the fact that this speech took place while at school does not give the school district plenary authority to regulate it; it can only regulate speech at school if there is a substantial and material likelihood that the speech will cause disruption to class. Although there is a likelihood that gang-related conduct/speech could cause disturbances at school, there are zero facts to suggest that P's small, peaceful dove tattoo caused a substantial/material disruption to the mission of the school. Thus, even though D was regulating her speech while at school, P can still challenge the constitutionality of that regulation under the 1st and 14th Amendments.

Conclusion

P can likely succeed on a First Amendment freedom of speech claim, either because this fails the test for regulating symbolic speech or because it fails the content-based strict scrutiny test.

Freedom of Association

The First Amendment also guarantees the freedom to associate with groups whom one chooses. Arguably, a regulation prohibiting gang-related speech would violate the freedom to be associated with that gang. P may potentially consider raising a challenge under this provision of the 1st Amendment as well, although she would likely be better served by challenging this on speech grounds since it would likely be difficult to convince a court that high school students should have the right to associate with

gangs, which are often a source of violence/criminal activity in local communities.

Fourteenth Amendment Claims

Additionally, P may be able to argue that this regulation violates her constitutional rights under the 14th Amendment only.

Procedural Due Process

Under the 14th Amendment procedural Due Process Clause, no person shall be deprived of life, liberty, or property without due process of the law. This requires a showing that 1) there was a deprivation of a protected interest, 2) without due process protections (namely, notice and a hearing). When deciding what process is due, the court looks at the nature of the interest affected, the probable value of additional safeguards, and the burden on the government.

The court has recognized that students have a protected interest in public high school education; they cannot be denied the opportunity to attend school without some level of due process protections. Here, the decision to suspend P took place immediately and it does not appear the speech regulation allows for any opportunity of notice and a hearing. Notice and a hearing are generally viewed as the bare minimum for PDP, and here P was provided with neither. P can argue that a hearing would have been helpful because she would have been able to present evidence that shows her tattoo was a peaceful non-gang-related symbol, and that the burden on the school district to have a pre-suspension hearing would be relatively minimal (it would not be too difficult for D to hold a quick hearing in connection with each suspension rather than implementing it immediately). Thus, given that P was not provided with any sort of due process protections and was suspended immediately, she likely can show a PDP violation here.

She may be able to challenge this law on PDP grounds because she was suspended without any sort of due process protections (i.e., notice and a hearing).

Substantive Due Process

Under the 14th Amendment substantive Due Process Clause, the government shall not infringe on individual rights in an arbitrary or irrational manner. If the right is fundamental, strict scrutiny applies; if the right is not fundamental, it is subject to rational basis review. Here, D will argue that there is no fundamental right to attend public school, and thus suspending her from school did not violate her fundamental rights and this action should be viewed under the rational basis test. If the rational basis test is applied, the law will be upheld as long as it is rationally related to a legitimate government interest (here, preventing gang related symbols is rationally related to the interest in preventing gang violence at school; the law will likely be upheld).

On the contrary, P will argue this law infringes on her rights of speech/self-expression while at school, and the First Amendment rights are regarded as fundamental. She will argue that strict scrutiny should apply here, and as set forth above, this policy will fail strict scrutiny because it is not narrowly tailored/least restrictive alternative.

The court could potentially go either way, depending on whether it views this regulation as infringing on the right to go to school (not fundamental) or the right to free speech (fundamental). P would be best served by pursuing the First Amendment claims set forth above, but she could also potentially raise this substantive due process argument.

Equal Protection Clause

The EP clause protects from unconstitutional discrimination. If the law discriminates

based on a suspect class or involves a fundamental right, strict scrutiny applies; if it's not a suspect class, rational basis review applies.

Here, P may argue this law violates EP because it discriminates against students wearing gang-related symbols and students who do not. However, people who belong to gangs are not a protected class, so the law will be subject to RBR (will be struck down; see above). The arguments re whether it involves a fundamental right will be the same as they were for SDP (see above).

The Equal Protection Clause is not the best argument for P to advance. She would be better served by focusing on the First Amendment and procedural due process issues.

D's Arguments in Support of Motion to Dismiss as Moot

D has moved to dismiss P's action as moot. An action is moot when a live controversy under Article III no longer exists. Here, D will argue that this case is moot and there is no more controversy because: 1) P is no longer a student being harmed by the regulation; and 2) the district has redefined "gang-related activities" to be consistent with the criminal code (implying that under this new definition, P would not have been punished).

1. P No Longer HS Student

D argues the case is moot because P is no longer a high school student and thus no longer subject to D's policy. However, P will argue that this falls under an exception to the mootness doctrine: cases capable of repetition yet evading review. The key example of this exception is pregnancy: claims involving pregnancy often evade review because the length of time is short, but because one can get pregnant again, they are

capable of review.

P will argue that such cases will keep arising as more and more students are subjected to this policy (i.e., her type of claim is capable of repetition), and yet because high school only lasts four years and the process of litigation a case often also takes years, it is often that these claims will evade review because students will graduate by the time the claim gets through the court system. D will argue this should not apply because the length of time (4 years) is far longer than something like a pregnancy (9 months), so it is not truly going to evade review (although it unfortunately does for this specific plaintiff, given that she sued so late into her career). Moreover, D will argue that it is not capable of repetition because P will not go to high school again.

On balance, the court will probably side with P and not dismiss it as moot because the claim is capable of repetition (more students will be subjected to the policy in the future and thus will have claims), but evading review (students will graduate before claim is finished because high school only lasts 4 years).

2. Redefined "Gang-Related" Activities

Another exception to the mootness doctrine arises when the defendant voluntarily ceases the offending activity--the case will not be deemed moot simply because the offender has ceased the activity, given that they could always do it again and that would render the case no longer moot.

Here, P will argue that D's voluntary redefining of the term in the policy does not render her action moot because D's voluntary choice to change the policy could always be overturned (it's not as though the state's legislature changed the law; a school district policy can be changed far easier). Here, P will argue that D's voluntary choice to change

the policy does not make her case moot because D could always choose to change the policy back, and thus everyone would be right back in the same situation. A declaratory relief action can help clarify the constitutionality of this policy and will prevent future cases if the district decides to simply change the policy back. Thus, on balance, a court will likely find that P's action is not moot on this ground, because D could always re-define the policy in a manner that is overly broad/unconstitutional.

QUESTION 2: SELECTED ANSWER B

I. ARGUMENTS THAT PALOMA CAN MAKE IN SUPPORT OF HER FIRST AND FOURTEENTH AMENDMENT CLAIMS

Sovereign immunity

Paloma is suing the public school district for declaratory relief challenging the validity of the district's gang-related clothing rule. Under the Eleventh Amendment, a state cannot be sued in state or federal court by a citizen unless certain circumstances exist. A citizen may sue for declarative relief or sue a local government or municipality.

Here, Paloma seems to be seeking a declaratory judgment holding that the District's rule is unconstitutional, thereby abolishing the rule. This type of declaratory judgment does not fall within sovereign immunity protection. Furthermore, Paloma is suing a school district, which likely qualifies as part of a local government or municipality, which can be sued under the Eleventh Amendment. Thus, there is no Eleventh Amendment bar to Paloma's suit.

State action

Only a unit or instrument of government can be sued for violating the Constitution, because private parties not subject to state action cannot violate the Constitution. Here, the District is an instrumentality of the state, seeing as it's a public school, and can be sued for unconstitutional actions. Thus, Paloma may sue the District for constitutional violations.

Standing

An individual only has standing to sue when there is an injury in fact, causation, and

redressability. Here, Paloma has suffered an injury by being suspended from school for violating the District's policy, the injury was caused by the District enacting and enforcing its policy, and the injury is redressable if a court awards declaratory relief to Paloma because she may be able to get damages based on the District's action or ensure that the rule is not enforced for future students. Thus, Paloma has standing to sue.

Ripeness and Mootness

As will be analyzed further below, the issue of the constitutionality of the District's policy is ripe because Paloma suffered an injury from it and the policy is still in effect. The issue is not moot because it will be a continuing harm that can be redressed for future students and for Paloma's incurred injury, even though Paloma is no longer a high school student. Thus, the requirements of ripeness and mootness are satisfied.

1. FIRST AMENDMENT CLAIMS

The First Amendment prohibits the government from limiting an individual's freedom of expression in most cases. There are a variety of First Amendment grounds upon which Paloma could challenge the District's policy. If a court finds that Paloma succeeds on any of these grounds, then the District's policy constitutes an unconstitutional violation of the First Amendment.

Symbolic Speech

Symbolic speech, such as freedom of expression when doing an action (i.e., flag burning) is protected by the First Amendment. The speech at issue in this case is Paloma's dove tattoo, which isn't written or spoken speech, but qualifies as symbolic

speech because it is her "self-expression" as a peaceful person. The government (here, the District as a public school) may only regulate symbolic speech if the regulation is narrowly tailored, related to a significant government interest, and not primarily concerned with the suppression of symbolic speech.

Narrowly tailored

A regulation is narrowly tailored when it is not too restrictive and targets the conduct at issue.

The District's policy prohibits all students from wearing any "label, insignia, words, colors, etc... that reflect gang-related activities." This is very broadly tailored to basically encompass all forms of bodily expression, including clothing and tattoos, that bear any relation to a gang. The District could have narrowly tailored this policy by providing specific restrictions, such as prohibiting an exact bird gang sign or finding the actual signs used by the Westsiders and Eastsiders and banning the use of those signs. Instead, the District enacted a broad rule that covers almost everything on a student's body, and which can be related to "gangs" in general, not even mentioning the Westsiders and Eastsiders. Additionally, the restriction provides a broad and harsh punishment that is not narrowly tailored to fit any violation of the restriction.

Thus, the restriction here is not narrowly tailored.

Related to a significant government interest

In addition to being narrowly tailored, the restriction on symbolic speech must be related to a significant government interest. Here, the District has a significant interest in reducing gang violence in schools. The District has consulted with local law

enforcement to determine that the most violence results from gang confrontations between the Westsiders and Eastsiders. The District, in overseeing public schools, has a significant interest in fostering a safe learning environment without violence so that students can learn peacefully and be shielded from the gangs and violence beyond the school. Thus, the District has a significant government interest in reducing gang violence and this interest is related to the District's policy prohibiting students from wearing labels that reflect gang-related activities.

Suppression of symbolic speech

To be valid, a restriction on symbolic speech must not be primarily enacted to suppress that speech or have that effect. Here, the District will argue that its purpose in enacting the policy is to suppress gang violence and reduce the violence in the District's high schools, not ban students from having dove tattoos and engaging in self-expression of their peacefulness. However, Paloma will argue that the District's failure to narrowly tailor its policy effectively results in the suppression of symbolic speech, as any symbolic speech that bears a relation to gang-activity in general will constitute a violation of the District's policy and open the student to a harsh punishment.

Thus, the lack of narrow tailoring in the District's policy leads to an unjustifiable suppression of symbolic speech, even though the policy is related to a significant government interest. Thus, the District's policy is unconstitutional as a suppression of symbolic speech.

Time, Place, or Manner Restriction

If the court does not accept Paloma's argument that the District's policy unconstitutionally suppresses symbolic speech, Paloma can argue that the policy is an

unconstitutional time, place, or manner restriction. These restrictions apply to the government's limitation of speech in traditional public forums or designated public forums and enable the government to place restrictions on the time, place, or manner of speech so long as the restriction is content-neutral.

A content-neutral restriction does not regulate the content of speech, and to be valid as a time, place, or manner restriction, it must be narrowly tailored to serve a significant governmental interest and leave alternative avenues of communication available. A content-based restriction is subject to strict scrutiny and must be necessary for a compelling governmental interest and narrowly tailored to that interest.

Paloma may try to argue that her high school is a traditional public forum whereby students can engage in free speech. A court may not accept this characterization, but if it does, then Paloma can argue that the District's policy is an invalid time, place, or manner restriction that regulates students' speech during the time they are at school.

Content-based

A content-based regulation prohibits some speech on the basis of its content and is subject to strict scrutiny. Here, Paloma will argue that the District's policy is a content-based one because it prohibits expression related to gang activities, so it regulates the content of gangs.

Under strict scrutiny, the regulation must be necessary for a compelling governmental interest and narrowly tailored to that interest. The burden is on the District (the governmental unit) to prove these elements. The District will argue that it has a compelling governmental interest in reducing gang violence in high schools, for reasons of student safety and school functioning outlined above. The District will argue that the

regulation is narrowly tailored because it only regulates expression related to gang activities, and only while the student is in school. The District will argue that gang signs are changing and numerous, and the District or law enforcement officers may not have all the information on what constitutes a gang sign, so it is necessary to restrict students from having anything that might be related to gang activities in order to discourage students from aligning with their gangs in school or breaking out in fights upon seeing the sign of a rival gang and disrupting school operations and student safety. The District will thus argue that its policy is necessary due to the problem of gang violence in its high schools and the difficulty of nailing down who exactly is a gang member and what constitutes a gang sign, and thus that its policy passes strict scrutiny.

However, as analyzed above, Paloma will argue that the policy is not narrowly tailored because it prohibits basically any expression related to a gang activity without defining these terms and comes with a harsh punishment. Even if the policy is necessary for a compelling governmental interest, Paloma has a good argument that it is not narrowly tailored, and thus the regulation will likely fail strict scrutiny.

Content-neutral

The elements of being narrowly tailored to a significant governmental interest have already been analyzed above under the symbolic speech analysis. The additional element here is that there are alternative avenues of communication available. The District will argue that its policy only applies in schools, and that students are free to wear gang insignia outside of school so there are alternative avenues of communication. However, Paloma will argue that the District is requiring students to remove things like tattoos, which are not temporary and cannot be banned in school

while existing outside of school. Even though the District gave Paloma the option of covering up her tattoo, it confines her to only being able to show the tattoo outside of school which may be impossible if she has strict family that will not let her show the tattoo. Additionally, students often spend much of their day in school and there are not many alternative avenues of communication outside of school for students who go to school and then return home.

Thus, even if classified as a content-neutral time, place, and manner restriction, the District's policy will likely fail, primarily because it is not narrowly tailored.

Nonpublic forum

The government has more freedom to restrict speech in nonpublic forums, such as prison. In these forums, a restriction on speech is valid so long as it is viewpoint neutral and related to a significant government interest. The District will argue that a school is a nonpublic forum and should be subject to this analysis, instead of being classified as a traditional or designated public forum and subject to strict scrutiny or the time, place, and manner analysis.

If a court accepts the District's classification of a school as a nonpublic forum, then the restriction is valid if viewpoint-neutral and related to a significant governmental interest. The significant governmental interest has been analyzed above in the suppression of symbolic speech point. The District may argue that the policy is viewpoint-neutral because even though it bans content-based speech on the subject of gangs, it does not take a viewpoint stance on gangs. Rather, the language of expression that reflects "gang-related activities" can cover viewpoints that are supportive of gangs, as well as viewpoints that are opposed to gangs, as long as the viewpoint is related to gangs.

Thus, the District likely has the best chance of convincing the court that its policy is constitutional if it argues that a public high school is a nonpublic forum and subject to that analysis.

Vagueness

A restriction on speech is unconstitutional if it is too vague. The District's policy that "no student shall wear any label, insignia, words, colors, signs... that reflect gang-related activities" is likely much too vague and unconstitutional for vagueness. This is because the policy basically prohibits any form of clothing, tattoo, paint, or anything that a student can wear, possibly extending even to backpacks and items that touch a student --essentially any item, so there is no limitation or definition on what constitutes a banned item. Furthermore, the term "gang-related activities" is much too broad and not defined at all. As analyzed above, this term encompasses both viewpoints supportive and dismissive of gangs, and can encompass any gang, not just the Westsiders or Eastsiders. It could conceivably encompass a fictional gang, a gang in another city that causes no harm in the District's schools, or symbols that have a non-gang meaning and possibly a gang meaning, such as Paloma's tattoo. The lack of definition makes the policy too vague and almost absurd because it has no limit, essentially.

Thus, the policy is very likely to be void for vagueness.

Overbreadth

A restriction on speech is unconstitutional if it is overbroad and encompasses too much protected speech. As analyzed above, the District's policy is not narrowly tailored, to the point of being overbroad because it encompasses too many items, and "gang-related activities" is not defined to the point where it can be broadly interpreted to encompass

symbolic speech such as Paloma's tattoo. Thus, the District's policy is likely to be void for overbreadth.

2. FOURTEENTH AMENDMENT CLAIMS

The Fourteenth Amendment applies to the states and contains the Equal Protection Clause as well as the Due Process Clause.

Equal Protection Clause

Under the Equal Protection Clause, all individuals must be treated equally without discrimination. A restriction is subject to strict scrutiny if it discriminates on the basis of a suspect class such as race or national origin, subject to intermediate scrutiny if it involves gender or legitimacy, and subject to rational basis review for everything else.

Here, Paloma will likely argue that the District's policy violates the Equal Protection Clause because it discriminates on the basis of gang members or those who may be gang members. Gang members are not a suspect class, so the policy would be subject to rational basis review under which the challenger must show that the policy is not rationally related to a legitimate governmental interest. As analyzed above, the District has a legitimate interest in reducing gang violence in its high schools.

Paloma will argue that there is no rational relationship between the District's policy prohibiting gang-related symbolic expression and the District's interest in reducing gang violence. However, this argument will likely fail because it is conceivable and likely that the District's prohibition on gang-related symbolic expression will make it harder for gang members to identify each other at school and get into disputes, so there is a rational relationship here. Thus, Paloma's Equal Protection Clause challenge will likely

fail because the policy satisfies rational basis review.

Due Process Clause

Under the Due Process Clause, a person may not be deprived of life, liberty, or property without due process. This clause comes from the Fifth Amendment but is applied to the states through the Fourteenth Amendment. Paloma will argue that her procedural due process and substantive due process rights have been violated by the District's policy.

Procedural due process

Procedural due process guarantees protective procedures such as notice and hearing when an individual is deprived of life, liberty, or property.

Life, liberty, property interest

Paloma will argue that she has a liberty interest in wearing what she wants at school, or a property interest in her body such that the school cannot make her cover up her tattoo or remove it. Paloma can further argue that she has a liberty interest in going to school and cannot be immediately suspended or expelled without an opportunity for notice and hearing. Here, Paloma was immediately suspended for ten days when she refused to cover up or remove her tattoo. A court will likely find that Paloma's liberty and/or property interest was implicated here.

Notice and hearing

A court weighs many factors in deciding what process is due. The main issue is Paloma's suspension, seemingly without notice or a hearing. It is unclear when the District enacted the policy or how much notice Paloma had, especially considering she had her dove tattoo for years without issue. More facts are needed here, but if the

District did not broadcast its policy and adequately inform students, then it is likely that Paloma did not have notice. Furthermore, due to the vagueness and overbreadth of the policy, it's likely that, even if Paloma knew about it, she did not know that it could apply to her dove tattoo due to the lack of definitions or examples in the policy.

Thus, Paloma likely lacked notice of the policy and was likely entitled to a hearing of whether she should have been suspended, especially considering she was not a gang member and she lost out on the last few days of her high school experience.

Substantive due process

Substantive due process applies when the government prohibition at issue impacts an individual's fundamental right, such as the right to travel, vote, or have privacy. Here, Paloma will argue that her right to privacy was intruded on when the District tried to make her cover up or remove her tattoo.

Right to privacy

An individual has a right to privacy, including a right to what they wear on their body.

This is a fundamental right that is subject to strict scrutiny. If the court finds that Paloma had a valid privacy right in her tattoo and her choice of how to display it, then the District has to pass the strict scrutiny standard. This standard is the same for purposes of due process and the Equal Protection Clause, so the strict scrutiny analysis above will apply to Paloma's right of privacy. Even if the court finds that Paloma doesn't have a right to privacy here, and that any right is only subject to rational basis review, that analysis has also been done above and will apply here.

Conclusion

Paloma can make all the above arguments in support of her First and Fourteenth Amendment claims, but her strongest argument is that the policy is unconstitutional due to vagueness and overbreadth.

II. WILL EITHER OR BOTH OF DISTRICT'S ARGUMENTS IN SUPPORT OF ITS MOTION TO DISMISS PALOMA'S LAWSUIT BE SUCCESSFUL

The District can dismiss Paloma's lawsuit in the first instance if it can show that Paloma does not have standing to bring the suit. A lack of standing will cause the court to dismiss the lawsuit. The District will argue that Paloma's lawsuit is moot, meaning that the injury has passed and there is no current or continuing harm to sue on.

1. Mootness--Paloma is no longer a high school student

A claim is moot if the injury has passed and is not capable of repetition. But, as in abortion standing cases, mootness will not bar a suit when the injury is one that eludes judicial review because it passes before a court has time to hear and decide the issue.

The District will argue that Paloma's injury has passed because it occurred when she was in high school and she is now in college, so the lawsuit is now moot because Paloma will never again be subject to the District's policy for high school students.

However, Paloma can argue that when the harm occurred in high school, she was not able to sue for some reason, or that the harm is one that will likely repeat itself for future high school students in the District. Paloma can likely successfully argue that the brevity of her high school experience (this injury occurred during the last days of senior year) is similar to the abortion-standing in that the harm eluded judicial review, but is capable of repetition. Paloma will likely prevail on this point given that the District's policy still exists.

2. Mootness--District has redefined "gang-related activities" in a manner consistent with State X's criminal code

A court may still hear a case even if the offending party has stopped its criminal conduct or reformed its conduct. This is because there is no guarantee that the criminal or otherwise prohibited conduct will not continue because the offending party may merely be pretending to conform to avoid judicial review or has the discretion to repeat the offensive conduct in the future in the absence of an injunction or a judicial determination that the conduct is unconstitutional.

Here, the District may not argue mootness merely because it has redefined "gang-related activities" to be consistent with State X's criminal code. First, there is no guarantee that the District will adhere to this definition or not change the definition in the future, thus repeating the harm that Paloma is suing upon. Second, it is unclear whether its redefinition is constitutional because it may not be enough to redefine the term in accordance with a criminal code that itself may be unconstitutional. Third, the redefinition of gang-related activities does not solve the other parts of the policy that may be unconstitutional, namely the vagueness and overbreadth in what items of clothing/tattoos/etc. are covered under the policy, and the harshness of the immediate suspension or expulsion without any procedural protections in place.

Thus, both of the District's mootness arguments will likely fail, and the case will proceed.



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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

QUESTION 5

Five years ago, State X bought Railroad (RR), which was in bankruptcy and about to be liquidated. RR has always been the largest rail carrier in State X, presently carrying 70% of its rail freight. RR's transport rates are generally lower than other rail carriers. In signing the Act authorizing the purchase of RR, the governor stated that it would ensure continued freight rail service for State X industry.

The Act authorizing the purchase of RR provides that manufacturers with factories in State X shall have first choice of space on RR.

Peter, a citizen of State Y, which borders State X, grows melons in State Y for sale to grocers there and in State X. Before its purchase by State X, Peter exclusively used RR for shipping melons to his many State X customers. Peter has lost nearly all of his State X customers over the last 5 years because he cannot guarantee timely delivery of ripe melons because shipping space on RR is so uncertain.

Corporation manufactures refrigerators in State Y and sells them there and in other states, including State X. Corporation has lost retail customers in State X because it can no longer guarantee dates of delivery when using RR.

Peter and Corporation have repeatedly been forced to give up reserved space on RR because it is being used by State X manufacturers. They have now filed suit in Federal Court in State X.

1. What claims can Peter make under the United States Constitution and how should the court rule? Discuss.
2. What claims can Corporation make under the United States Constitution and how should the court rule? Discuss.

QUESTION 5: SELECTED ANSWER A

1. PETER'S POTENTIAL CLAIMS

The issues are the claims Peter can make under the United States Constitution against State X.

Dormant Commerce Clause (Negative Implications of the Commerce Clause)

Whether State X's Act providing State X manufacturers priority choice of space on RR is a violation of the Dormant Commerce Clause (DCC).

Under the Commerce Clause in the US Constitution, Congress has the authority to regulate interstate commerce. This includes (i) the channels of interstate commerce (roads, railways, waterways), (ii) the instrumentalities of interstate commerce (trucks, boats, airplanes, the internet), and (iii) economic activities that, when aggregated, have a substantial effect on interstate commerce. However, this authority is not absolute. States are allowed to regulate commerce if such regulation is not preempted by federal law, and so long as the State regulation does not discriminate against out of staters. If the state regulation discriminates on its face against out of staters, it violates the DCC unless the regulation is necessary for a compelling state interest (strict scrutiny). If the regulation does not discriminate against out of staters, it usually will be upheld so long as it does not unduly burden interstate commerce. Citizens, including individuals and corporations, as well as aliens can sue on a cause of action arising under the DCC.

Here, State X purchased RR, which is the largest rail carrier in State X. The Act authorizing the purchase of RR, provides that manufacturers with factories in State X get first choice of space on RR. Peter grows melons in State Y for sale in both State Y and State X. Peter exclusively uses RR for shipping his melons to his many State X

customers. Since State X purchased RR, Peter has nearly all of his State X customers because he cannot guarantee delivery due to uncertain availability of space on RR. State X manufacturers are given priority all the time so if they fill up all freight space, there is none left for out of state users. Peter will argue the State X Act discriminates against out of states because it gives priority to manufacturers in State X to the disadvantage of out of state business. In contrast, State X will argue that even if the Act prioritizes State X manufacturers it has a compelling interest in doing so. Prior to State X's purchase of RR, the railroad was in bankruptcy. The State X Act allowed the State to purchase RR to ensure its continued service as State X's largest rail carrier. Peter, on the other hand, can argue that although State X has a interest in continuing rail service, the provision in the Act giving priority to in-state business is not necessary to achieve this interest. Continued rail service is not dependent on giving priority space to in-state users and could be accomplished just the same if all shippers received the same access regardless of whether they were in state or out of state. Thus, although State X's interest is compelling, the methods used are not necessary and thus violate the DCC.

Therefore, because the State X Act discriminates against out of staters and the method used is not necessary to achieve the Act's purpose, State X has violated the DCC.

Market Participant Exception to DCC

Whether State X is a market participant.

Congress has provided two exceptions to the DCC: (i) consent by Congress, and (ii) when the state acts as a market participant.

Here, State X owns RR and RR presently carries 70% of State X's rail freight. Because State X owns the railroad, it is acting as a market participant and would fall under the exception to the DCC so long as there is not an undue burden on interstate commerce. Presently, 70% of RR's freight comes from State X. Further, the Act does not prohibit out of state users. It simply gives priority to its existing State X users which comprise the

majority of its rail freight. Therefore, it is likely that the court would find that State X qualifies as a market participant.

Therefore, although State X's Act discriminates against out of staters in violation of the DCC, State X is a market participant and as such would be exempted. Peter would fail in a claim under the DCC and the court would rule in favor of State X.

Privileges and Immunities Clause of Article IV

Whether State X's Act violates the Privileges and Immunities Clause of Article IV (P&I Clause).

The P&I Clause guarantees that citizens of each state shall be given the privileges and immunities of citizens of all states. A state law which discriminates against out of staters as to a fundamental right or civil liberties, including the ability to earn a livelihood, violates P&I Clause unless a substantial justification exists.

Here, Peter will argue that the State X Act violates the P&I Clause because it discriminates against out of staters. Peter will specifically argue that the Act has impeded his ability to earn a livelihood as evidenced by five years of lost customers for lack of access to shipping on RR. Although Peter is able to earn his livelihood in State Y and sell his melons in State Y, the State X Act substantially interferes with his preexisting customer relationships in State X, hindering his ability to earn a living. Such discrimination will violate the P&I Clause unless a substantial justification exists. Here, State X will make the same arguments regarding RR as to its market participation and its need to continue the rail service in State X. Peter will again argue other means would be available to meet the state's purpose. Unlike under the DCC claim, Peter will likely succeed in his P&I claim. Although the need to save the bankrupt RR is a substantial justification for the Act, it is not a justification for discriminating against out of staters. Therefore, Peter will likely prevail in his P&I claim.

Equal Protection

Whether Peter has an equal protection claim.

The equal protection clause under the 14th Amendment to the US Constitution applies when the government is making a distinction between similarly situated people. If the classification is based on race or national origin, then the state must meet strict scrutiny. If the classification is based on gender, then intermediate scrutiny will be used. Any other classification will only need to meet a rational basis test.

Here, Peter will be unable to argue a fundamental right has been violated. The right to use a railroad for shipping is an economic right and Peter will need to prove State X has no rational basis for the Act. Because the Act rationally relates to the legitimate interest of preserving the State X railroad, State X will likely prevail, and the court will rule against Peter.

Therefore, Peter will not prevail in an EP claim and the court will rule for State X.

Due Process

Whether Peter has a due process claim.

The Due Process clause under the 14th Amendment prohibits the government from acting arbitrarily and unreasonably.

Here, Peter will argue his due process rights were violated when State X arbitrarily and unreasonably gave priority to State X manufacturers over out of state users of RR. Because Peter used RR exclusively, he will argue he was deprived of right without due process of law. However, Peter's right to use RR relates to an economic liberty and not a fundamental right. Thus, State X's Act must only meet a rational basis test. The Act must be rationally related to the achievement of a legitimate government interest. As the

challenger, Peter will have the burden to prove the Act does not meet the rational basis test. Because State X can argue that preservation of the 70% of in-state users is a legitimate interest and the Act's provisions rationally relate to this, Peter will likely lose this challenge.

Therefore, Peter will likely not prevail and the court will rule for State X on this claim.

2. **CORPORATION'S CLAIMS**

The issues are the claims Corporation can make under the United States Constitution against State X.

Dormant Commerce Clause (Negative Implications of the Commerce Clause)

Whether Corporation has a DCC claim against State X.

See rule above.

Here, Corporation will make very similar arguments as those by Peter above. However, Corporation will further argue that because he is an out of state manufacturer he is more directly impacted by the State X Act. The State X Act specifically discriminates against out of state manufacturers by giving priority to in state manufacturers. Additionally, because Corporation does not have any factories in State X, he is further impacted because he needs RR in order to get his refrigerators into State X to sell. Nonetheless, State X will again argue for a market participant exception and will likely prevail.

Thus, Corporation will lose on a DCC claim and the court will rule in favor of State X.

P&I Clause of Article IV

Whether Corporation has a claim under the P&I clause of Article IV.

See above. The P&I clause does not apply to corporations and aliens. Therefore, they cannot sue under it.

Here, Corporation is a state Y corporation. Thus it cannot sue under the P&I clause and would not prevail in such a claim.

Due Process (DP)

Whether Corporation has a claim under the DP clause of the 14th Amendment.

The due process clause provides that states may not act unreasonably or arbitrarily. Here, Corporation will argue that State X's Act unreasonably denies him due process because it deprives him of existing rights. Further, Corporation will argue that repeatedly being forced to give up on RR just because it is an out of state manufacturer is an arbitrary and unreasonable denial of his rights. However, Corporation's right to use RR relates to an economic liberty and not a fundamental right. Thus, State X's Act must only meet a rational basis test. The Act must be rationally related to the achievement of a legitimate government interest. As the challenger, Corporation will have the burden to prove the Act does not meet the rational basis test. Because State X can argue that preservation of the 70% of instate users is a legitimate interest and the Act's provisions rationally relate to this, Corporation will likely lose this challenge.

Therefore, Corporation will likely not prevail and the court will rule for State X on this claim.

Contracts Clause

Whether Corporation has a claim under the Contracts Clause of the US Constitution.

Under the Contracts Clause of the US Constitution, a state may not impair rights under pre-existing contracts. If the interference is with a private contract, intermediate scrutiny applies. If the interference is with a government contract, strict scrutiny applies.

Here, Corporation may argue that he has lost all retail customers in State X due to the fact that it can no longer guarantee delivery dates. If Corporation is engaged in existing contracts with these customers, then the State X Act giving priority to in-staters over out-of-staters would cause an impairment to Corporations' existing contracts. Corporation has shown that it has repeatedly had to give up space on RR for in state manufacturers. However, the facts do not indicate that Corporation has existing contracts in place. The facts only state Corporation has lost retail customers; there is no indication whether they are new or existing. Thus, if Corporation can prove the State X Act has impaired his rights under existing contracts, State X will have to prove its Act meets intermediate scrutiny--the provision in the Act is substantially related to an important government interest. If State X cannot do so, then Corporation may prevail on a contracts clause claim. Therefore, if Corporation can prove impairment of existing contracts under the contracts clause, it may prevail in this claim over State X.

QUESTION 5: SELECTED ANSWER B

1. Peter's Claims

Standing

Injury in fact; causation/redressability; ripe; not moot

A plaintiff in federal court must have standing in order for the court to hear the case. In order to have standing the plaintiff must show (1) injury-in-fact; (2) causation: the P's harms were caused by the defendant's conduct; (3) redressability: a decision in the P's favor will redress the injury caused by D (e.g. a favorable decision will remedy the harm); (4) ripeness: the case must be ripe for judgment (e.g. a case is not ripe if the law has yet to be enacted and there is insufficient details in the legislative discussion on its enforcement or the law is unlikely to be enforced); and (5) not moot: a case is moot if the harm has already occurred and is not capable of repetition, but evading review (e.g. it is not a live case and controversy).

Injury: P's injury is the loss of nearly all of his State X customers over the last 5 years. Economic damages need not be proven to show an injury in fact, but economic harms are sufficient if a P can prove them. P could easily demonstrate that the loss of this many customers led to a downfall in profits for his melon business.

Causation: P's injury was caused by the state law at issue (the Act that authorizes State X to purchase RR and giving manufacturers with State X factories first choice of space on the RR). P has been forced on many occasions to give up his space on the RR for his melons because a State X manufacturer needed the space. This priority given to State X manufacturer has caused P much uncertainty regarding whether or not he can ship his melons to customers in State X. Additionally, P exclusively used the RR for shipping melons to his many State X customers. Because of the uncertainty of

shipping space on the RR, P cannot guarantee his customers timely delivery of ripe melons, which has caused him to lose nearly all of his State X customers. Thus, there is but-for cause (but for the Act, P would not have lost its customers) and proximate causation (foreseeability and fairness). Thus, causation is satisfied.

Redressability: Because the state X Act caused the P's injuries, a decision by the court in favor of P will redress P's injuries. By striking down the Act, a court would allow P to get space on the RR without being kicked out unexpectedly by an in-state manufacturer and, thus, he would be able to deliver melons to his customers in a timely manner while the melons are still ripe.

Ripeness: Here, the Act has been enacted. It was enacted 5 years ago. It has clearly been enforced by the State because it purchased the RR and it repeatedly kicked out P and Corporation (out-of-staters) to make room for in-state manufacturers. Since it is an enacted law that is fully enforced, the case is ripe for adjudication.

Not Moot: The state may argue that this case is moot because the harm has already been done to P, he has lost nearly all his customers. Thus, a favorable decision will not be able to get those customers back. There is no live case or controversy since the law has caused all the harm it can to P. However, P will rebut that he has not lost all of his State X customers. Thus, the court striking down the law would help him to not be further harmed by losing the rest of his State X customers. Also, this is a harm (like *Roe v. Wade*) that is capable of repetition but evading review. Although the harm has already been caused by D's acts, it is possible that P could get more state X customers and then lose them again because of the impact of the Act on P's timely delivery of melons.

Thus, the court will likely find that P has standing to challenge State X's Act.

Dormant Commerce Clause

The Commerce Clause grants Congress the power to make laws regarding interstate

commerce (between states). This power includes the right to regulate (1) instrumentalities of interstate commerce (cars, trains, planes, buses); (2) channels of interstate commerce (roads, highways, etc.); and (3) intrastate (solely in one state) economic activity that has a substantial effect (in the aggregate) on interstate commerce. Where an intrastate non-economic activity is involved, the activity's effect on interstate commerce cannot be aggregated and courts generally require that Congress submit a finding that the activity has a substantial effect on interstate commerce.

The Commerce Clause also grants certain powers to the state. As part of the negative implications of the Commerce Clause (e.g. the dormant commerce clause), states are prohibited from unduly burdening interstate commerce and particular states may not discriminate between in-staters and out-of-staters without satisfying a level of scrutiny (discussed below). If a state's actions (law, regulation, act, etc.) violate the Dormant Commerce Clause (DCC), that state's actions will be deemed unconstitutional and the relevant law/regulation will be struck down. Both corporations and aliens can sue under the DCC.

Where a state both discriminates against in-staters and out-of-staters (treats in state citizens or corporations differently from those out of state) and burdens interstate commerce, the law will be deemed unconstitutional unless the state can demonstrate that the regulation is necessary to achieve an important government interest. Necessary means that there must be no less restrictive (e.g. no less burdensome or less discriminatory) means to achieve the stated ends. It is the state's burden to satisfy this level of scrutiny.

Where a state is not discriminating between in-staters and out-of-staters, but its regulation/law burdens interstate commerce, courts perform a balancing test to determine if the state's law unduly burdens interstate commerce. The court weighs the benefits to the state and the burdens placed on interstate commerce. If the benefits outweigh the burdens, then the state law does not unduly burden interstate commerce and is constitutional (e.g. does not violate the DCC). If the burdens outweigh the

benefits, then the law does unduly burden interstate commerce and it is unconstitutional (e.g. violates the DCC) and will be struck down.

Burdens and Discriminates

Here, P will argue that the Act both unduly burdens interstate commerce and discriminates between in-staters and out-of-staters. The Act unduly burdens interstate commerce because it prevents companies and businesses from being able to have reserved space on railroad transportation. Businesses require shipment of their goods between states in a timely manner. If goods are kicked off a train because of a need for priority space for in-state manufacturers, it will lead to the goods to spoil (as in the case of melons) or it will cause the business to pay extra money to secure some emergency shipment of the goods. It also causes the loss of customers for the businesses and slows down and frustrates transportation of goods between states. All of this was shown with P's situation because the priority space has led P's melons to be taken off the train and he lost customers since he failed to timely deliver these perishable goods to the customer when he contracted/promised to do so. P will also argue that it discriminates between in-staters and out-of-staters because it gives in-state manufacturers priority space on the train and does not give priority space to out-of-state companies or citizens. The law treats similarly situated companies and people differently based on their state of citizenship.

State X may rebut that it is not discriminating against out-of-staters, as the manufacturers it is favoring are not necessarily solely State X corporation, rather it is favoring those manufacturers that have factories in State X. This argument will likely be unsuccessful, as they are still favoring entities that operate within the state and disfavoring entities that operate out of state.

P's argument will likely be successful. State X will have the burden of providing that the Act is necessary to achieve an important government interest. X will argue that the important government interest is ensuring that State X industries are guaranteed freight

rail service. However, courts have found it to be not an important government interest to protect in-state companies and businesses at the expense of out-of-state ones. X will next argue that providing in-state manufacturers with first choice of space on the RR is necessary to ensure that these manufacturers with in-state factories are ensured and guaranteed railroad transportation for their goods. If RR had gone bankrupt and was not bought by State X, the in state manufacturers would have lost 70% of their source of freight services, which would have been disastrous for State X's economy and its in-state corporation. Also, this RR was less expensive than other rail carriers, so its bankruptcy would have led to less profits and revenues for in-state manufacturers since they would have to pay more for shipment costs and that would harm the job market and economy of State X. X would reason that stabilizing and ensuring the continuing profits of in-state manufacturers was an important interest.

P will rebut that necessary means least restrictive means and this law could be much more narrowly tailored. For example, the law could merely guarantee that a small percentage of all rail cars on a given RR train would be kept open only for State X manufacturers and if they are not filled, those spots can be used for out of state entities as well. This would be less discriminatory and less burdensome on interstate commerce because it would never kick out an out of state company's goods that had originally planned on being shipped to customers on that particular train. Thus, the Act is not necessary because there are feasible alternatives that cause less burden and are less discriminatory.

Thus, a court will likely find that the Act both discriminates and burdens and that the state will not be able to satisfy their burden of showing the Act is necessary to serve an important government interest. Thus, the law will be found to violate the DCC unless an exception applies.

DCC Exceptions

There are a few exceptions to the dormant Commerce Clause. Where there is

Congressional approval for the law/regulation/act in question, the DCC does not apply. Where a state is acting as a market participant, the state's regulation/law is allowed under the DCC. A state acts as a market participant when it assumes the role of an entity in the market place, such as a corporation, and participates in the market itself.

This would include a state-owned company. Another exception to the DCC is the traditional public function exception. This is where a state is performing a function traditionally given to the states under their powers. Examples of this include public universities that charge lower tuition to in-state citizens as opposed to out-of-state citizens.

Here, there is no Congressional approval and the state isn't performing a traditional public function. However, State X is acting as a market participant. X bought a public company (RR) after it went bankrupt and was about to be liquidated. X bought it so that the State's manufacturers did not lose 70% of their freight services. The Act authorized the State to buy the RR and take its place as a market participant. Since X was performing the services of a private company in the marketplace of freight shipping, a court will likely find that an exception to the DCC applies.

Thus, a court will likely dismiss P's DCC claim against State X because the market participant exception applies.

Privileges and Immunities Clause under Article IV

Under the Privileges and Immunities Clause under Article IV, states are prohibited from discriminating between in-state citizens and out-of-state citizens as to fundamental rights (important rights) or important commercial activities. This clause prevents states from denying out of state citizens the privileges and immunities it provides to its own state citizens. If a state law both discriminates and burdens interstate commerce, the level of scrutiny discussed above under the DCC applies.

If the state law discriminates but does not burden interstate commerce, then the court will first ask whether a fundamental right or important commercial interest/activity is involved. Courts have found the right to earn a living to be an important commercial interest. Laws have been struck down under the privileges and immunities clause (PIC) where they only allow in-state citizens to get licenses to practice law. Laws have been struck down for charging in-state shrimp fishermen a small fee for a shrimping license (like \$100), but then charged out of state fishermen an extremely large fee (\$20,000-30,000). However, courts have found no important commercial interest where mere hobbies are involved. Thus, state laws charging in-state golfers lower greens fees on golf courses than out-of-state golfers were deemed constitutional and did not violate the PIC. Also, a law making hunting licenses relatively cheap for in-staters, but very expensive for out-of-staters was also found constitutional.

If a court finds a fundamental right or important commercial interest is involved, then the burden is on the state to show that the law is necessary to achieve an important government interest.

If the state law does not discriminate between in-staters and out-of-staters (and does not unduly burden interstate commerce (DCC)), the law is presumptively valid.

Unlike the DCC, corporations and aliens cannot sue under the PIC.

Here, State X is discriminating between in-state manufacturers/entities and out-of-state ones. P is an out of state citizen from State Y. State X provides first choice of freight space benefits to manufacturers with State X factories, but not those, such as P, who are out of state. The same scrutiny analysis will apply (state's burden to show Act is necessary to achieve an important government interest). P has standing to file this suit because he is an individual and a US citizen presumably, not an alien or a corporation. See DCC analysis from above. Because PIC does not have any exceptions, a court will likely find that the state cannot show the law is necessary to achieve an important government interest since less restrictive means are available. Thus, the court will find

the law invalid under the PIC under Article IV and strike the law down as unconstitutional.

Equal Protection Clause

Under the EPC, applied to the states through the 14 Amendment, states may not treat similarly situated persons differently. The level of scrutiny that applies depends on what classifications is used by the government to differentiate persons/entities. Corporations and individuals can sue under the EPC.

If the state is using a suspect classification, then strict scrutiny will be used to determine the constitutionality of the law. Thus, the state has the burden to show the law is necessary to achieving a compelling government interest (it must be the least restrictive means available). Suspect classifications include race, national origin, and alienage (for the states where it does not involve a job dealing with the democratic process, such as an elementary school teacher, police officer, etc.; this does not apply to the federal government, which has plenary power over immigration).

If the state uses a quasi-suspect classification, intermediate scrutiny applies. The state has the burden to show that the law is substantially related to an important government interest. This requires narrow tailoring, which does not require the least restrictive means, but requires there is a substantial relationship between the means and the ends). Quasi-suspect classifications include gender (where the state must show an exceeding persuasive justification) or illegitimacy.

If the state uses a non-suspect classification, rational basis review applies. The plaintiff (challenger of the law) has the burden to show that the law is arbitrary, e.g. that it is not rationally related to a legitimate purpose. The purpose need not be the actual one used, but rather need only be a hypothetical one that the court could come up with. Laws generally pass RBR. RBR applies to all classifications that are not those stated for SS and IS, which includes age, mental disability, wealth, education level, etc.

Here, the classification at issue under this law is whether the entity has an in-state factory or not. This is not a suspect or quasi-suspect classification. Thus, RBR would apply. P would not be able to show that this law is arbitrary and that it is not rationally related to a legitimate purpose. The legitimate purpose could be to protect the economy of State X and X's in-state factories and stabilize employment levels. The law achieves these ends by providing access to freight shipping to these in-state entities, so it is rationally related to those ends.

Thus, under the EPC the court would likely find the law is valid and constitutional.

Due Process

The Due Process clause of the 5th amendment applies to the federal government and applies to the states through the 14th amendment. Under the DP clause, states must not act unreasonably or arbitrarily. The government cannot deprive individuals of certain rights without a counter-balancing justification for doing so. Individuals and corporations can sue under the DP clause.

If the government is depriving individuals of a fundamental right, then SS applies (stated above). Fundamental rights include the right to contraception, marriage, guiding the upbringing of one's family, sex, privacy, right to vote, right to travel.

If the government is depriving other rights, such as the right to abortion (undue burden test for pre-viability), something below SS applies. For sex between members of the same gender, it is unclear what level of scrutiny applies.

IS applies when the government is depriving a member of the public's right to commercial speech.

Law depriving individuals of other rights need only satisfy RBR.

Here, the right to have goods shipped on a freight train is not a fundamental right. Thus, P has the burden to show the Act does not satisfy RBR. Since the law does satisfy RBR, the court will likely find the law is valid under the DP clause.

Conclusion: Thus, P's DCC claim will likely be successful and a court would likely strike down the State X act as unconstitutional on DCC grounds. However, none of P's other claims would likely be successful.

2. Corporation's Claims

Standing

Similar analysis as P. C manufactures refrigerators outside of State X (in State Y). C sells those fridges to customers in State X. C has injury because it lost retail customers in State X because it could not guarantee dates of delivery. This was caused by the Act since C was repeatedly forced to give up reserved space on RR to an in-state manufacturer. Redressability is also satisfied. The claim is ripe and not moot.

Privileges and Immunities

Because corporations and aliens cannot sue under the PIC, C will not be able to bring this claim because C is a corporation.

Dormant Commerce Clause

Same analysis as above. DCC can be used by corporations and aliens, so this would be available to C. C is an out-of-state manufacturer and the Act is discriminating between out-of-state and in-state manufacturers in providing the reserved freight space.

As above, the market participant exception likely applies and thus a DCC claim would be

unsuccessful.

Equal Protection

This claim can be used by individuals and corporations, so would be available to C. Same analysis as above. Same conclusion as above (the analysis for P).

Due Process

Can be used by individuals and corporations. Same analysis as above. Same conclusion as above.

Conclusion: Thus, C will likely not have any successful claims against State X's Act and, thus, a suit by C would not lead a court to strike down the State X act as unconstitutional under any grounds (unlike P's DCC claim which would be successful).



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 2

County Jail has prominently posted in the inmate dining hall quotations from three of the Ten Commandments as follow: “You shall not kill.” “You shall not steal.” “You shall not give false testimony against your neighbor.” County officials thought these were “good moral principles” that would assist prisoners when they were released.

The Jail makes available to inmates copies of the Bible and the Quran (Koran), but no other religious books. Inmate Ivan requested a copy of a religious book central to his recognized, but relatively small, sect. This book urges the religious use of a hallucinogenic sacramental tea. Ivan has requested permission to have the hallucinogenic sacramental tea on a weekly basis as part of his religious observances.

Ivan’s request for the book was denied on the basis that it encourages illegal drug usage. His request for permission to have the hallucinogenic sacramental tea was denied for the same reason.

1. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the dining hall quotations, and what is the likely outcome? Discuss.
2. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the denial of his requests for the book and the tea, and what is the likely outcome? Discuss.

QUESTION 2: SELECTED ANSWER A

Constitutional Law

In general, there must be a separation of Church and State.

Dining Hall Quotations

Establishment Clause

The issue is whether Ivan could assert a violation of the Establishment Clause with regards to the dining hall quotations.

First, to bring a claim under the U.S. Constitution and the Establishment Clause, there must be a government action. Here, the action of posting three of the Ten Commandments was done by the county jail. A county is considered a government actor. Thus, there has been a government action in this case.

Under the Establishment Clause, the government cannot take action or promulgate a rule that has the effect of establishing or inhibiting religion. In order to determine whether government action violates the Establishment clause, the court will apply the *Lemon* test. The *Lemon* test has three factors. To meet these three factors, the government must show that (i) the action has a secular purpose, (ii) that the action's primary effect is not to advance or inhibit religion, and (iii) there is not excessive entanglement between the government action and religion.

Secular Purpose

First, the government must show that its action has a secular purpose. Here, the county officials stated that the three commandments it posted were "good moral principles" that would assist prisoners when released. It appears that the county officials meant for the purpose of posting the commandments to be secular. Their goal was to assist prisoners when they are released from prison. Likely to ensure that they do not commit further crimes such as killing or stealing, and also telling them not to lie. If this was the sole purpose in posting those three commandments, that is likely considered a secular

purpose.

Primary Effect

The primary effect of the action must not be to advance or inhibit religion. Ivan will likely argue that anytime someone posts all or part of the Ten Commandments, the primary effect is to advance religion. More specifically, that the Ten Commandments are inherently religious because they are from the bible. Thus, the primary effect is to advance the religions that believe in the Ten Commandments, while inhibiting the religions that do not believe in the Ten Commandments.

Conversely, the county officials will likely argue that they only posted three of the Ten Commandments. That, coupled with the purpose in posting the three commandments, indicates that the primary effect is not to advance or inhibit religion. Rather, it was intended as a way to help morally guide the prisoners. That the primary effect is to advance good morals.

This will be a close factor and something for the fact finder to decide. It is possible the fact finder could go either way on this particular issue.

Excessive Entanglement

Even if the county is successful on the first two factors of the *Lemon* test, it will likely fail on this factor. Under this prong, the government action cannot be excessively entangled with religion. Ivan will argue (successfully) that the Ten Commandments are inherently religious. And it does not matter that the county posted only three of the commandments, or that their purpose was not religious. Posting the Ten Commandments would likely be the same as hanging a cross or a prayer on the wall. The government's action of posting the ten commandments entangles itself with religion. Even if they do not intend to promote religion, the association of the ten commandments with the government action results in that entanglement. The county officials will have a hard time arguing that their action was separate from religion.

In sum, although a court could find that the county official's purpose in posting the three commandments was secular, and that the primary effect did not advance or inhibit religion, it is likely a court would conclude that posting those commandments resulted in

an excessive entanglement between the government and religion. Therefore, Ivan will be successful in his claim that the county jail has violated the Establishment Clause.

Denial of Ivan's Book

Free Exercise of Religion Clause

The issue is whether the jail's denial of Ivan's request for his book violates the Free Exercise Clause of the U.S. Constitution.

Under the 1st Amendment of the Constitution, every person has the right to the free exercise of his or her religion.

Sincerely Held Religious Belief

The first issue here is whether Ivan's religious belief is protected.

Whether a religion is protected under the Constitution is not based on whether the particular religion is well known or well established. Rather, the court will look at whether the individual has a sincerely held religious belief. Put another way, the question is whether the individual's belief and whether that belief has a similar role in the individual's life as a typical religion would.

In this case, the facts state that Ivan was requesting a religious book related to his recognized, but relatively small sect of his religion. The fact that Ivan's sect is small does not mean that his belief is not protected. Based on the limited facts, it indicates that his sect is recognized, and that he holds a sincere belief in it. His sincerity is evidenced in his request for a book, as well as his request for the religious use of tea (analyzed below). This indicates that Ivan's religious belief, although based on a small sect, is sincerely held and thus subject to constitutional protections.

Free Exercise

The issue is whether the county jail's action of denying Ivan's book violates the Free Exercise Clause of the 1st Amendment of the Constitution.

When a government action or regulation is based on or discriminates against religion, it must pass strict scrutiny. Strict Scrutiny requires that the government action is

necessary to achieve a compelling government interest.

Here, the government's stated interest is that the book encourages illegal drug usage. The reduction or elimination of illegal drug is likely considered a compelling government interest so they will have met this prong of the test. However, the actions necessary to achieve that is to outlaw or prohibit the actual use of drugs. In this case, the county jail is denying Ivan a religious book. The act of denying that book is likely not necessary to achieve the stated purpose of preventing illegal drug use. The action of not allowing illegal drug use is the action necessary to prevent illegal drug use (analyzed below).

As such, a court will likely consider the county jail's action of not providing Ivan his book to not pass strict scrutiny. Specifically because it is not necessary to achieve their purpose. As discussed below, they have other means to achieve their purpose.

Ivan will likely be successful in his challenge that the county jail has violated his 1st Amendment right to Free Exercise of his religion based on their denial of his religious book.

Equal Protection

The issue is whether the jail's failure to provide Ivan his religious book violates the Equal Protection Clause of the Constitution.

Citizens are entitled to equal protection of the laws of the United States. This applies to the federal government under the 5th Amendment, and is applicable to the states under the 14th Amendment.

Here, the jail provides copies of the Bible and the Quran (Koran) to prisoners, but it does not provide any other religious books. Providing religious books for some religions and not others is not equal. Under the Equal Protection Clause, an action or law that discriminates against a suspect class must pass strict scrutiny. Actions based on religion, as mentioned, must pass strict scrutiny. Thus, because the government action is not equal and it is based on religion, it must pass strict scrutiny.

Similar to the above analysis, failing to provide Ivan his book does not pass strict scrutiny. There is no stated basis for why the Jail provides inmates with copies of the

Bible and the Quran, but not other books. The jail offers no reasons why it should be allowed to provide books based on some religions, while denying books for other religions. Although the jail's interest of preventing illegal drug use is compelling, denying the book is not necessary to achieve that purpose.

The jail is required to either provide all of the requested religious books (assuming they are sincerely held religious beliefs) or they can offer none. That is the only way that they can ensure equal protection of the laws to the various religions.

The county jail's offering of certain religious books and not others violates equal protection. The jail's action does not pass strict scrutiny, and thus Ivan would be successful on this claim.

Denial of Ivan's Tea

Free Exercise

The issue is whether the denial of Ivan's request for hallucinogenic sacramental tea violated his 1st Amendment right to free exercise of his religion.

As stated above, a government action that discriminated against religion must pass strict scrutiny. Unlike the book request, the jail's denial of Ivan's request for hallucinogenic tea will pass strict scrutiny.

As mentioned previously, the government's interest is to eliminate or outlaw the use of illegal drugs - a compelling government interest. That interest is no more compelling than in a jail setting. Illegal drug use is not allowed by the general public, and absolutely should not be allowed by prisoners in a jail. Here, Ivan is specifically asking to use hallucinogenic tea, which is assumed to be an illegal drug. As such, not providing that tea is necessary to accomplish its stated goal. The fact that the tea is sacramental does not matter. The Supreme Court previously upheld a similar government action that outlawed the use of drugs (i.e. peyote) by Native Americans. Although Native Americans are still allowed to practice their stated religions, use of sacramental drugs was not allowed. The same analysis applies here. Although Ivan is allowed to practice his religion, including use of a religious book,

the county jail is not required to provide him with illegal hallucinogenic tea.

Denying Ivan his hallucinogenic sacramental tea is necessary to achieve the jail's compelling interest of outlawing and eliminating illegal drug use in its prison.

Ivan will not be successful in his challenge of the government's denial of his hallucinogenic tea.

Equal Protection

The issue here is whether the jail's denial of Ivan's tea violates equal protection. See above for the rules regarding equal protection.

Unlike the book situation, where the jail offers some religious books but not others, there is not the same issue here. There is no indication that the jail has offered the use of teas or other drinks for other religious. Thus, without more, the Equal Protection Clause is not invoked here. Even if it were, for the same reasons as the analysis under the Free Exercise Clause, the government's action passes strict scrutiny.

Ivan will not be successful in his claim that the jail's denial of his sacramental hallucinogenic tea violates equal protection of the laws.

QUESTION 2: SELECTED ANSWER B

Ivan's Constitutional Challenges to the Dining Hall Quotations

Ivan can challenge the quotations on the dining hall as a violation of the Establishment Clause.

A. Establishment Clause

The Establishment Clause prohibits the government from engaging in actions that constitute an establishment of a religion. The clause is applicable to state (and county) officials through the Fourteenth Amendment. When government conduct potentially implicates the establishment clause, courts apply the *Lemon* test to determine if there has been a constitutional violation. The *Lemon* test is a three-step approach whereby government conduct will be found to violate the establishment clause unless it has a secular purpose, the primary effect neither advances nor prohibits religion, and there is no excessive entanglement with religion.

1. Secular Purpose

First, County will need to show that the quotations on the dining hall have a secular purpose. The dining hall quotations contain three quotes from the Ten Commandments: "You shall not kill"; "You shall not steal"; and "You shall not give false testimony to your neighbor." The Ten Commandments is a religious document, and thus appears to have a religious, not a secular purpose. The County will argue that the officials chose this quotes, however, because they emphasized "good moral principles." Ivan may argue that this reason is not a meaningful distinction because the moral principles it purports to support are Christian, and religious, not secular. However, because emphasizing good moral principles is arguably a secular purpose, the County may be able to succeed in showing that the first prong of the *Lemon* test is satisfied.

2. Advances or Prohibits Religion

For the second prong of the *Lemon* test, the primary issue is whether the quotes could

be said to advance religion. There does not appear to be any real issue with the quotes prohibiting a religion. It's unclear from the facts if the dining hall quotations even make clear that the source of the material is the Ten Commandments. If the quotes are clearly attributable to the Ten Commandments, which as noted above is well-known religious text, then the quotations would clearly appear to advance a particular religion. If they do not, then arguably the quotes do not advance or prohibit a particular religion. The County may further argue that the quotes that were chosen do not reference a religion, nor do they expressly support a higher being. The first two quotes relate to common principles that are codified in the state law--all states prohibit killing and stealing. The last quote is arguably more specific to Christianity. While the law prohibits giving false testimony under oath, the actual quote relates to a more specific concept of not giving false testimony about your neighbor that appears to be more amorphous and arguably is readily identifiable as tied to a particular religion. Additionally, the quotes are prominently posted in the inmate dining hall, which suggests that the County is supporting these religious beliefs. While this issue is a closer call, Ivan may still prevail in showing that the primary effect of these quotes is to advance religion.

3. Excessive Entanglement

Finally, Ivan can argue that the quotes constitute excessive entanglement with religion. Many of the arguments discussed above with regard to prong two of the *Lemon* test would also be relevant as to whether the chosen quotes constitute excessive entanglement. However, if the County succeeds in arguing that the quotes relate to core principles of society that are not inherently tied to a religion, the County may succeed in arguing that there is no excessive entanglement.

In summary, for the reasons explained above, Ivan is likely to prevail on his Establishment Clause claim because it appears that the three prongs of the *Lemon* test have not been satisfied.

B. Government Speech

The County may respond to Ivan's Establishment Clause claim by arguing that the quotations constitute government speech. The Establishment Clause claim is part of

the First Amendment, and the First Amendment does not generally apply to government speech. However, when the speech at issue involves religious issues, the Supreme Court has held that the government may not engage in conduct that appears to disproportionately favor one religion. For example, the Supreme Court has held that governments may place a display in a city hall that depicts a menorah and a Christmas tree, two well-known religious symbols, because there are multiple religions recognized, not just one. Similarly, the government may include a religious text in a display that includes other types of texts as well. This exception, therefore, would not appear to help the County here because the dining hall only contains quotations from the Ten Commandments. Because the County has chosen only to display quotations from a religious text, it will not be able to claim that this is acceptable government speech.

(2) Ivan's Constitutional Challenges to the Denial of Requests for Book and Tea

Ivan can challenge the denial of his requests for the book and tea under the First Amendment's Free Exercise Clause (incorporated against the states (and counties) via the Fourteenth Amendment), Equal Protection Clause of the Fourteenth Amendment, and Due Process Clause. For the reasons explained below, Ivan is likely to succeed in challenging the denial of his book, but not the denial of the hallucinogenic tea.

A. Free Exercise Clause

There are three potential issues that arise with Ivan's claim under the Free Exercise Clause: (1) whether Ivan's beliefs are religious, (2) whether Ivan's beliefs are sincere, and (3) whether the County's conduct is discriminatory. Each is discussed below.

1. Whether Ivan's Beliefs Are Religious

The Free Exercise Clause protects religious beliefs. An individual does not give up this right merely because he is in jail. The Supreme Court has never clearly defined what constitutes a "religious" belief protected by the Free Exercise Clause, but it has made clear that it extends beyond the traditional religions. The general test is whether the belief holds a place in the individual's life parallel to that of traditional religious beliefs.

We have very little information about Ivan's religion. We know that it is a relatively small sect with a religious book and that it has weekly religious observances, including use of a hallucinogenic sacramental tea. The Supreme Court has made clear that courts have very little power to question the validity of a religion. Here, it is likely that a court will find that Ivan's beliefs are religious, and thus he may bring a claim under the Free Exercise Clause.

2. Whether Ivan's Beliefs Are Sincere

Assuming Ivan's beliefs are "religious," the court may assess whether Ivan sincerely holds these beliefs. We again have very little information to determine whether Ivan's beliefs are sincere. But there are no facts indicating that Ivan's requests are some kind of ruse or that he does not sincerely believe in this religion. A court, therefore, would likely find that Ivan's beliefs are sincere.

3. Whether County's Conduct is Discriminatory

Because Ivan will likely be able to show that his requests were based on sincere, religious beliefs, the next issue is whether the County's conduct is discriminatory. The Free Exercise Clause affords strong protections for religious beliefs. Any government action that discriminates against religion is subject to strict scrutiny, meaning the government will have the burden of showing it is necessary to achieve a compelling interest. However, government action that is facially neutral may not be subject to strict scrutiny in the otherwise absence of an intent to discriminate. The Supreme Court has recognized as well that the government need not provide religious exceptions if a facially neutral policy incidentally burdens the exercise of a religion. For example, the Supreme Court upheld as constitutional a ban on illegal drugs that prohibited a Native American from using peyote as part of a religious ceremony.

Here, the stated reason for the denial of the book and the tea is that they promote illegal drug usage. We don't have any information as to whether this is an official policy, but since this is a County jail it seems safe to assume that the County would have a policy against illegal drug usage in the jail. The policy on its face appears to be neutral and there is no evidence that it was passed intentionally to interfere with Ivan's religion. While the policy does incidentally burden Ivan's ability to practice his religion, this

seems to be a similar situation to the peyote case discussed above.

4. FEC Conclusion

In summary, as to the tea, a court almost certainly would find that the County does not have to make an exception for Ivan's religion, and would likely not find that the denial of the tea constitutes a violation of the Free Exercise Clause. As to the book, this is a closer call because the book itself is not a hallucinogenic. Ivan's stronger arguments, however, are probably based on the First Amendment and the Equal Protection Clause, for the reasons explained below.

B. Due Process Clause

Ivan may reasonably challenge the denial of his requests as a violation of the Due Process Clause, which prohibits the government from engaging in arbitrary and capricious conduct. Under the DPC, government action that infringes on a fundamental right must satisfy strict scrutiny, meaning the government must show that it is necessary to achieve a compelling purpose. If a fundamental right is not implicated, then the government action is subject only to rational basis review, meaning the burden is on the challenger (in this case Ivan) to show that the government action is not rationally related to a legitimate government purpose. As a practical matter, most government action will satisfy rational basis review.

Here, Ivan can argue that the County's conduct infringes on his fundamental rights of religious freedom. The County, therefore, would have the burden to show that its actions are necessary to achieve a compelling interest. The County has a strong argument that denial of the tea is constitutional. The tea is a hallucinogenic, and assuming hallucinogens are considered illegal drugs, then the County's denial seems to be necessary to uphold the policy against illegal drug usage (which a court would likely find is a compelling purpose).

However, the County would likely not prevail on the book. As noted above, preventing illegal drug usage in jail is likely to be deemed a compelling purpose. But denial of the book is not necessary to achieve this purpose. While the book may urge the use of the tea, there are less restrictive means to prevent illegal drug usage (including denial of the illegal drugs). Reading the book in and of itself will not lead to illegal drug usage. The

County, therefore, will likely not prevail in showing that denial of the book satisfies strict scrutiny.

Accordingly, Ivan is likely to prevail on his challenge that the denial of the book violates the Due Process Clause.

C. Equal Protection Clause

Ivan may also argue that the County's denial of the book violates the Equal Protection Clause because the County allows other inmates to have copies of the Bible and the Quran but will not make available Ivan's religious sect. The EPC analysis depends on whether a suspect, quasi-suspect, or fundamental right is implicated. Government conduct that discriminates on the basis of a suspect class (such as race or national origin), as well as government conduct that implicates a fundamental right, is subject to strict scrutiny, which means the government must show it is necessary to achieve a compelling purpose. Government conduct that implicates a quasi-suspect class (such as gender) is subject to intermediate scrutiny, meaning the government must show it is substantially related to an important purpose (and in the case of gender must also show an exceedingly persuasive justification). All other government conduct is subject to rational basis review, meaning the challenger must show that it is not rationally related to a legitimate government purpose.

Here, Ivan can argue that the County discriminates against his religion because the County allows inmates to have access to the Bible and Quran but not his religious text. Because freedom of religion is a fundamental right, the court is likely to apply strict scrutiny. In that case, the analysis would be the same as described above for the DPC, and County is unlikely to be able to show that the denial of the book was constitutional.

Finally, there does not appear to be an EPC argument based on the tea because we have no facts indicating that the County allows other inmates religious tea or the equivalent. Even if there was, as explained above, because the tea is a hallucinogenic, the County would have a strong argument that strict scrutiny is satisfied because denial is necessary to prevent illegal drug usage.

D. Establishment Clause

Because the County allows inmates access to the Bible and Quran, but denied Ivan access to his religious text, Ivan may also argue that the County's conduct violates the Establishment Clause. The test is discussed above. It is unclear whether the County has a policy of only allowing these two religious texts. If it does, we do not have sufficient facts to analyze whether there is a secular purpose for this policy (such as budgetary constraints). Thus, it is difficult to tell whether Ivan can prevail on this claim, and it is not as strong an argument as the ones discussed above challenging the denial of his book.



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JULY 2016

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<u>Question Number</u>	<u>Subject</u>
1.	Civil Procedure
2.	Real Property
3.	Contracts
4.	Constitutional Law
5.	Community Property
6.	Professional Responsibility

QUESTION 4

State X has a valid contract with public school teachers providing a fixed salary schedule. State X recently passed legislation to address its failing public schools. Now, when a school falls below established standards, each teacher at that school has 10% of his or her salary withheld each pay period for a maximum of two years. The withholding ends, and the money is returned with interest, upon the completion of a ten-hour certification program or termination of employment.

City High is a public school in State X where salary withholding has begun.

Bob has been a teacher at City High for the past three years. Paige is a highly-regarded probationary teacher at City High. A probationary teacher may be terminated for any reason upon written notice within the first year of employment.

Bob and Paige have been outspoken opponents of the State X law and its application to City High, appearing at various community and school board meetings throughout the school year.

Shortly before the end of Paige's first year of employment, City High served her with written notice terminating employment, and refunded the money withheld with interest.

Bob and Paige have sued State X, the Attorney General of State X, and City High in federal court seeking damages and injunctive relief. State X and the Attorney General have moved to dismiss the suit based on standing and the Eleventh Amendment.

1. Did City High's termination of Paige without a hearing violate the procedural due process guaranty of the Fourteenth Amendment to the United States Constitution? Discuss.
2. How should the court rule on the State and the Attorney General's motion? Discuss.

QUESTION 4: SELECTED ANSWER A

1. WHETHER PAIGE'S TERMINATION VIOLATED HER FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty or property without due process of law. Due process generally requires a fair procedure, usually notice and a hearing. Under procedural due process analysis, the first inquiry is whether the plaintiff had a constitutionally protected liberty or property interest. If the plaintiff has a protected interest, the court will then balance that interest against the state's interests under *Mathews*. The court will also look to the risk of erroneous deprivation and whether additional procedural safeguards would reduce such risk. The issue for Paige (P) is therefore (1) whether she has a protected liberty or property interest, and (2) whether she was entitled to a fairer process.

WHETHER PAIGE HAS A CONSTITUTIONALLY PROTECTED LIBERTY OR PROPERTY INTEREST

Property Interest

The issue is whether P's probationary employment at City High is a protected property interest. Traditionally, the Supreme Court differentiated between "rights" and "privileges" and provided that only "rights" are protected under the Due Process Clause. The Court since *Goldberg*, however, has held that a property interest is protected by the Due Process Clause if the plaintiff has a "legitimate claim of entitlement."

Under Supreme Court precedent, a tenured public school teacher has a protected property interest in their employment; however, a teacher does not have a protected interest if she is terminable at will during an initial probationary period. *Kelly*. P is a probationary teacher and may be terminated for any reason upon written notice within the first year of employment. There is also no indication that City High made her any

assurances that she would not be fired during the probationary period. P, therefore, does not have a legitimate claim of entitlement to her job and thus has no protected property interest.

Liberty Interest

The Court has also recognized that when a person's freedom of movement is restrained (e.g., detention) or when a person's constitutional rights are denied, the person has a liberty interest that is protected by the Due Process Clause. P may argue that she was terminated during her first year, not because of poor performance, but rather in retaliation for her exercising her First Amendment rights in speaking out against the State's law that withholds teachers' salaries based on the school's performance. If P can make a showing that her First Amendment rights were violated, she could trigger due process protections and seek additional termination procedures beyond the written notice provided to her before she was fired.

Some speech is not protected under the First Amendment. Generally, the speech of a public employee made in the course of their employment can be regulated by the government employer. Employees' speech outside the scope of their work and regarding public issues, however, is protected by the First Amendment. P will argue that her outspoken criticism of the State law at community and school board meetings was not related to her job duties and therefore is protected. City High may argue that it was related to the job and therefore not protected. A court will likely find her speech protected.

Content-based regulations of speech must meet strict scrutiny; the restriction must be necessary to achieve a compelling government purpose. Content-neutral restrictions must meet intermediate scrutiny; they must be substantially related to and narrowly tailor to achieve an important government purpose. P would need to show that her termination was in relation for her speech, which would constitute a content-based regulation because it is based on her viewpoint. If P can make this showing, the state would have to meet strict scrutiny, and would likely fail. Regardless, P may be able to

show that she had a protected liberty interest in her Free Speech rights under the First Amendment.

MATTHEWS BALANCING TEST

If the court recognizes P's liberty interest, it must apply the *Matthew* balancing test to determine whether she should have been entitled to any additional procedures beyond her pre-termination notice. The court will balance: (1) the private interest affected by the government action, (2) the government's interest including administrative and fiscal burdens, and (3) the risk of erroneous deprivation and the value of additional procedural safeguards.

First, P has a relatively strong private interest in her job. Employment is the way individuals earn money to support themselves. Generally courts have viewed employment interests as quite weighty. Second, the state has an interest in not having to provide a full hearing on this type of probationary termination. The state likely saves a lot of money by not having to develop elaborate procedures to ensure that all of its termination decisions are fair. This interest is therefore quite strong. Finally, P will argue that the risk that she was fired because of her First Amendment rights is high, and that a few additional procedures such as allowing her to present countervailing evidence, or a hearing in front of the school board or committee would allow her to challenge the basis of the decision and force City High to justify their actions, or at least show that the basis of the decision was not to silence her.

The outcome of the *Matthews* test is difficult to predict. However, a court may require City High to provide at least minimal additional protections such as a post-termination hearing.

2. WHETHER THE COURT SHOULD GRANT THE STATE AND ATTORNEY GENERAL'S MOTION TO DISMISS

STANDING

The State and the Attorney General (AG) filed a motion to dismiss for lack of standing and under the Eleventh Amendment. First, standing is the issue of whether the plaintiff is the proper party to bring the claim before a federal court. The plaintiff must have a concrete stake in the outcome of the litigation. The Court has interpreted Article III's conferral of the judicial power over "cases" and "controversies" to require the plaintiff to show (i) that he has suffered an injury in fact (injury in fact), and (ii) that the defendant's conduct was the cause of that injury such that a favorable court decision will remedy the injury (causation and redressability). The issue for Bob (B) and P is therefore whether they can demonstrate injury in fact, causation and redressability.

First, the requirement that the plaintiff prove an injury in fact is generally satisfied if the plaintiff shows that they suffered an injury that was actionable at common law, such as pecuniary loss. However, the Court has also recognized an injury in fact where the plaintiff's constitutional or statutory rights have been violated. Environmental, aesthetic, and stigmatic injuries are also judicially cognizable. However, when a plaintiff is seeking injunctive relief, he must show that there is a concrete, imminent threat of future injury that is neither conjectural nor speculative. *Lyons*.

Here, B and P are challenging the State law seeking damages and injunctive relief. They would argue that they have suffered a pecuniary injury because a portion of their salaries was withheld. This is likely sufficient. City High may argue that because their salaries are refunded with interest if they are terminated or complete a certificate program, that there is no real financial loss. B and P, however, will probably succeed in arguing that even a temporary pay cut is a sufficient financial injury. The extent of the injury is generally de minimus. With regard to the injunction, B and P will likely succeed in arguing that they are presently suffering from the financial injury and that will continue in the future; therefore it is sufficiently imminent and concrete. In conclusion, the court should likely find that B and P have shown an injury in fact based on the loss of income, even if temporary. P may have an additional basis for standing by arguing that she was

terminated based on protected First Amendment activities. Either would likely be sufficient.

Second, causation and redressability are easily met here. B and P can clearly show that lost earnings are directly caused by the pay withholding required by the statute, and that a court order reimbursing them or enjoining enforcement of the statute would remedy this injury. In conclusion, B and P will likely succeed in showing that they have Article III standing, and therefore the court should deny the State and the AG's motion to dismiss.

ELEVENTH AMENDMENT

The State and the AG also seek dismissal of the suit based on the Eleventh Amendment, which provides that a state is immune from suit in federal court. The Eleventh Amendment is similar, if not identical, to the doctrine of state sovereign immunity, which also applies to suits against states in state court. *Alden v. Maine*. A state may waive sovereign immunity under certain conditions, and Congress can override state sovereign immunity by statute using its enforcement powers under Section 5 of the Fourteenth Amendment. In addition, state officers may be sued in their official capacities to enjoin the enforcement of a state law under *Ex Parte Young*. A state officer may also be sued in his or her individual capacity for retroactive damages, and may be indemnified by the state. So the question depends on the party being sued and the basis of the claim.

The State may not be sued in federal court under the Eleventh Amendment. The court will therefore dismiss B and P's claims against the state. The AG, however, may be sued in his individual capacity to enjoin him from enforcing the state law being challenged. If B and P's claims allege that the AG is liable for their financial losses, he may also be sued in his individual capacity for money damages. However, B and P do not appear to have alleged that the AG is personally liable, or liable under a theory of respondeat superior; therefore he is likely not a proper party for the individual damages

action.

In conclusion, the court should grant the motion in part. The claims against the State should be dismissed. The claim for injunctive relief should be upheld against the AG, and potentially also the claim for damages if B and P allege that the AG is liable for damages.

QUESTION 4: SELECTED ANSWER B

1. City High's Termination of Paige

14th Amendment--Due Process

The Due Process clause of the 14th Amendment prevents the government from taking a person's life, liberty, or property without first giving them due process of law. The due process clause has been interpreted to have two sets of rights: substantive due process and procedural due process. Substantive due process prevents the government from arbitrarily denying rights. Procedural due process requires notice and a hearing before (or sometimes after) the government takes a person's life, liberty, or property. Here, Paige is claiming that she was deprived of her right to liberty in her freedom of speech and her right to government employment without procedural due process.

In analyzing a procedural due process claim, the court first determines whether a person's life, liberty, or property has been taken from her. Then, the court determines what process, if any, was due before or after the taking of this right. The Supreme Court laid out this analysis in Matthews v. Eldridge. The court balances three factors: (i) the individual's interest in the right at issue, (ii) the government's interest in efficiency, and (iii) the likely added value of additional protective procedures.

Paige's life has not been taken; thus her claim must be that she was deprived of a liberty interest or a property interest.

A person has a liberty interest in being free from being restricted in movement and in being free to engage in constitutional rights. Paige was not restricted in movement, but she may argue that she was restricted from engaging in a 1st Amendment right, the right to free speech. Sometimes the right to free speech intersects with government employment and the right of the government to control its employees. This is the case here because Paige is a government employee, but she also has been engaging in free speech as an outspoken opponent at various community and school board meetings of

a State X law that affects teacher pay. Generally, a government employee has a right to free speech on matters not connected with her employment, and any government restriction of this right is subject to strict scrutiny; it will only be upheld if the government action is necessary to achieve a compelling government purpose. This is a very high burden to satisfy and the government will usually lose. Here, Paige was engaged in speech not associated with her employment because she spoke out against a State X law in her individual capacity as a citizen, not as an employee. Thus, a court could find that if her firing was based on her speech (as she was a "highly regarded" probationary teacher) then she was denied her right to liberty without due process. To determine the amount of process that was due, the court will balance the Matthews factors and likely find that she was entitled to a hearing before termination. The right to speech is great and highly regarded in society and a hearing would be likely to remedy the wrongful termination to great process is added. Moreover, the government interest in efficiency would not overcome these other two factors.

Alternatively, Paige will argue that she has a property interest in her employment. For a person to have a property interest, the Supreme Court has explained that the person must have an entitlement to the property. This entitlement must come from something concrete such as a state law. Generally, employment is at will. In other words, either an employee or an employer can terminate a contract at any time without notice and for any reason (except an illegal reason). Such an employee does not have an entitlement to property because there is no promise of future employment. A tenured employee who can only be fired for cause, on the other hand, has an entitlement to continued employment and is entitled to notice and a hearing before her employment is terminated by the government.

Here, Paige was a probationary teacher at City High, a public school. As a probationary teacher, she could be terminated for any reason upon written notice within the first year of employment. While still in this probationary period, City High notified Paige of her termination. City High is a government actor because it is a public school. Thus the only issue is whether Paige had a property interest that could give rise to a right to due process before her termination. A court will likely find that because Paige's employment

was essentially at will during the probationary period, she had no right to continued employment. She was not entitled to future employment because as a probationary employee her contract clearly stated that she could be terminated for any reason. Thus, when City High terminated her employment, it did not deny Paige any property interest and no process was due.

If a court were to find that Paige had a property interest in continued employment at City High, then the next step the court would engage in is determining what process is due before the government can lawfully take the person's property.

Here, the individual's interest is great. Employment is an important aspect of a person's life because it is generally a person's greatest (if not their only) source of income. Being deprived of an income can have serious consequences on a person's life as they may be unable to pay their bills, put food on the table, etc. Thus, a person has a strong interest in continued employment. The government too has a strong interest here, though. The government would incur a significant cost by having to hold a hearing every time that it discharges a government employee. This could have a number of negative consequences. For one thing, it may result in ossification in government hiring because the government would be weary of entering into employment contracts if terminating such contracts would require a hearing. It would also place a financial burden on the state as it would have to pay for the procedures necessary for the hearing, which would be due every time the government seeks to fire an employee. Finally, as to the last factor--the value of the added protections to the individual's rights--a court would likely find this to be relatively little. There are many reasons for which the government may choose to discharge an employee, particularly a probationary employee, and most of these would be legal because employment is presumed at will. Thus, the hearing would probably provide little use, as the government would only need to show that it sought to discontinue the employment relationship.

In conclusion, a court may find that termination of Paige without a hearing violated the procedural due process guarantee of her liberty. However a court is unlikely to find that City High's termination of Paige without a hearing violated the procedural due process

guarantee of the 14th Amendment on the grounds of denial of a right to property.

2. State's and Attorney General's motion

The State and the Attorney General have moved to dismiss on standing grounds and the 11th Amendment. Each will be handled in turn.

Standing

A plaintiff must have standing to assert a claim in federal court. Standing is a judicial doctrine developed from interpretation of Article III of the United States Constitution, which requires that courts can only hear "cases and controversies." The Supreme Court has interpreted this to mean that courts cannot give advisory opinions. For a case or controversy to exist, the plaintiff must have an injury in fact, caused by the action which the plaintiff is challenging, and the injury must be capable of being remedied by a judgment in his favor. An injury in fact occurs when a plaintiff has a concrete stake in the litigation that is not generally held by all other people. The injury is typically an economic injury, but need not necessarily be.

Here, Bob has standing because he can show injury in fact, causation and redressability. He is a teacher at a school that withholds 10% of his salary each period. This injury was caused by the State X legislation which Bob is challenging and it will be redressed by a judgment in his favor because such a judgment would rescind the legislation resulting in Bob receiving his full salary.

Paige too has standing. She can show injury in fact because she lost her job so she lost the income stream associated with that job. This job loss was caused by the fact that City High terminated her employment. And this injury can be redressed by an injunction requiring City High to rehire her and damages for her lost wages.

11th Amendment

The 11th Amendment to the United States Constitution has been interpreted by the U.S. Supreme Court to provide state governments with immunity from suit by private citizens

or foreign countries suing in federal court. There are a number of exceptions to the 11th Amendment's bar on private individual suits against the State, including when the State waives its sovereign immunity, and when Congress authorizes suit within its 14th Amendment powers. Moreover, even though the 11th Amendment bars federal courts from hearing suits brought by individuals against States, it does not prevent courts from hearing cases brought by individuals against State officers in their individual capacity or in their official capacity. However, the Amendment does bar suits brought against State officers in their official capacity if the suit seeks damages to be paid out of the State's treasury.

Suit Against the State

Here, the suit against State X will be prohibited by the 11th Amendment. This is a suit by private individuals, Bob and Paige, against a State, State X, brought in federal court. As such, it falls within the 11th Amendment's immunity. Moreover, there is no evidence that the State has waived its sovereign immunity. Nor is there any evidence that Congress has abrogated sovereign immunity in accordance with its 14th Amendment powers for cases brought by teachers against the State for termination or withholding of wages. Thus, the case against State X should be dismissed.

Suit Against the Attorney General

Bob and Paige have also named the Attorney General of State X in their suit. Whether this claim will be barred by 11th Amendment sovereign immunity will depend on whether Bob and Paige are suing the Attorney General in his individual capacity or his official capacity. If they are suing him as an individual, the suit, both for injunctive relief and damages, will not be barred and the Attorney General's motion to dismiss will be denied. The reason is that the 11th Amendment does not protect officials from suit in their individual capacity.

If Bob and Paige have sued the Attorney General in his official capacity, the 11th Amendment will have different effects on the suit for an injunction than on the suit for damages. The suit for an injunction will not be dismissed under the 11th Amendment because it does not prevent individuals from suing officials for injunctive relief. The 11th

Amendment will, however, bar the suit if the suit is for damages to be taken out of the State's coffers. Such a suit is barred by the 11th Amendment and the Attorney General's motion to dismiss should therefore be granted.



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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015

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<u>Question Number</u>	<u>Subject</u>
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

QUESTION 6

City Council (City) amended its zoning ordinance to rezone a single block from “commercial” to “residential.” City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Several property owners on the block brought an action to challenge the amended ordinance.

In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.
2. Property Owner B, who had spent \$1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.
3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Was each ruling correct? Discuss.

QUESTION 6: SELECTED ANSWER A

Constitutional Protection

The Constitution prohibits wrongful government/state action, not private action. State action allows constitutional protections to arise.

State Action

The state action here is the City Council amending its zoning ordinance.

Takings Clause

The power of the government to take private property for public use is known as eminent domain. The takings clause of the 5th Amendment to the US Constitution provides "no property shall be taken for public use without just compensation." The government must provide just compensation for any property taken for a public use. Since the *Kelo* decision the US Supreme Court has interpreted a public use broadly and deemed a public use to even include "economic development" as well as the classic highway, military base, etc. The Takings Clause applies to states and local entities through the 14th Amendment. Regulations are not usually considered takings but can be in certain circumstances.

Here there was no physical taking of any land by the government for a 'public use'. The City Council amended the zoning ordinance to change a block from commercial to residential. The property of the block was not actually seized, but rather the activity on the property was regulated. The property owners will argue this regulation constitutes a regulatory taking.

Regulatory Taking

A regulatory taking is that which deprives the owner of the economic use of his property. A regulatory taking is often found when a regulation deprives the owner completely of any substantial economic use. A regulatory taking analysis can be applied to the states and local entities through the 14th Amendment. (See Florida Water District.)

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

1. Property Owner A

Property Owner A will argue the City Council's amended zoning ordinance constituted a regulatory taking violated the right to a Non-conforming use.

Regulatory Taking of the Restaurant

See Rule above

To determine if a regulatory taking occurred Property Owner A will demonstrate the economic impact of the regulatory taking on the property. Here the Owner operated a popular restaurant on the premises. The impact of the regulation on the land is severe as location is vital for [a] popular restaurant. The actual economic impact of the ordinance on the property value itself would need to be determined if there is value in land that has a restaurant on it and must be remodeled or rebuilt to conform with the residential requirement.

Property Owner's reasonable expectation on the return on investment for the property. If the owner has a popular restaurant and has been there for a long period of time then the economic return expected out of the property to be achieved can be argued to have occurred then the court decision is supported. However if the restaurant is newly open and popular for this reason, the owner has likely not achieved the expected return on investment for the restaurant. Restaurants are capital intensive and it takes time to recoup the capital costs.

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street. The government will argue it only had to show a rational basis for the decision.

Non-Conforming Use

A non-conforming use occurs when a business or residence is in existence and within the proper use of a city ordinance, at which point the ordinance subsequently changes and the current use of the property becomes in violation of the current code. The non-conforming use must be permitted to continue unless substantial threat to public safety/health is at stake. The non-conforming use may continue as long as the business or use does not cease or a change in ownership of the property occurs.

In this case the restaurant business can only operate as a non-conforming use. Owner A should have been permitted to continue using the property as a popular restaurant. There was no significant threat to public safety or health. In fact the restaurant was likely feeding many residents due to its popularity. Traffic hazards are not necessarily related to the commercial uses on the property.

Conclusion: The Court was incorrect in ruling that the property owner had no right to continue that use. There was no emergency or threat to public safety to not permit a non-conforming use.

2. Property Owner B

Property Interest

A party that makes substantial investment and obtains the necessary permits for a development based on the current zoning ordinance is entitled to complete the project within a reasonable amount of time even if the zoning ordinance changed in the meantime. Once the government has granted the permission, and the party has then relied on that permission it may not be taken away arbitrary by new ordinances. If such action occurs the party may rely on the governing zoning and ordinances at the time the project was permitted and began.

In this case Property B substantially relied on commercial zoning ordinance based on his investment of \$1 million on engineering and marketing studies. This investment was for the undeveloped land based on the commercial zoning ordinance. This is a significant sum, and the Owner may even claim he detrimentally relied on the previous ordinance, but such an argument would not be upheld.

The courts often require there be some permission granted or approval of a project by a review board before a developer can be found to substantially rely on the zoning ordinance. It is not enough to have a good faith belief that your use will be permitted in [the] future, some certainty must be acquired by permit or council approval. Unfortunately for Property Owner B the facts do not indicate he submitted his plan for the undeveloped property to local official for review. No applications submitted, and unfortunately the owner will be unable to mitigate losses if all the studies were based on commercial use.

Conclusion: The court's ruling was likely correct based on the Property Owner B's failure to obtain government permission for future investment. Owner B is not entitled to any protection as he would have been if permits were granted before the City Council amended the zoning ordinance.

3. Property Owner C

Regulatory Taking

See Rule Above

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

Economic Impact

The economic impact of the residential zoning ordinance on Owner C's property is significant. There was 65% drop in value because of the new ordinance. This is over

half of the value. However, even with a severe economic drop in value the property maintains some viable economic use if it retains 35% of its value. The courts when granting a regulatory taking prefer to see no economic benefit from the property because of the regulation. Based on these facts the economic impact to the ordinance favors the City Council.

Expectation on Investment Return

This analysis depends on Property Owner C's reasonable expectation on the return on investment for the property. This is a fact specific analysis. Given the fact that the property value decreased by 65%, this was not likely an expectation of the Owner. Even in a severe economic recession property losing over half of its value is substantial and not reasonably expected.

This factor supports the lot owner's claim.

Burdens Distributed

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street.

Conclusion: The court should have ruled that the lot owner suffered a regulatory taking if the reduced expectation on investment and distributed burdens were severe enough.

QUESTION 6: SELECTED ANSWER B

Zoning Powers

The Supreme Court has historically granted great deference to municipalities engaged in creating zoning ordinances. (See *Euclid v Ambler Realty*). Generally, local government has the police power to enact zoning ordinances so long as they are reasonably related to a legitimate government purpose, namely, that they relate to protecting the general welfare, safety, or health of the community.

Here, the city enacted the zoning amendment to change a commercial to residential area in response to traffic that may have endangered children. Clearly, the zoning ordinance is related to a legitimate government interest in protecting children pedestrians. On these grounds, it would most likely be upheld.

However, the facts indicate that the ordinance only applies to "a single block." This raises the specter of spot zoning, which may be impermissible if used to single out landowners or make a handful of landowners bear a disproportionate burden that the public at large should have to bear. In contesting zoning that appears to unlawfully inhibit a landowner's use of his property, a landowner may bring a takings claim challenging the constitutionality of the zoning ordinance on its face or as applied. As demonstrated in *Euclid*, a facial challenge is bound to fail--zoning has been upheld for decades. But an "as-applied" challenge can be viable, and is discussed below.

Takings

Under the 5th amendment and applied to the states via the 14th amendment, the government may not take private property without just compensation. Typically, a government taking is through eminent domain, where the government must show a valid public purpose for the taking and compensate the landowner for the land the government takes for the public purpose.

Here, the ordinance does not employ eminent domain, and as such is analyzed under takings jurisprudence.

Physical Takings

Any government statute that incurs a physical occupation of a landowner's land or real property (including airspace) must be compensated (*Lorretto Teleprompter*). Here, however, the ordinance does not install or require imposition of any government presence within any property owner's physical space, so this strict rule is unavailable to the plaintiffs.

Regulatory Takings

Courts have held that an ordinance that is so burdensome, or that unduly burdens a single landowner in order to benefit the public at large, may be a regulatory taking, and must be compensated. Under *Lucas*, a regulation that incurs a "total economic wipeout", meaning that it deprives a landowner of any economically beneficial use of his land, is a regulatory taking and must be compensated. The one exception to the total wipeout rule is if the ordinance is based on preexisting common law in the state (*Lucas*).

Here, the ordinance rezones the use of land from commercial to residential, and is thus most likely not based on common law principles. In *Lucas*, the court recognized an argument that an ordinance restricting beach development could be based on common law principles, if it sought to mitigate nuisance. But the facts here are not analogous. Nonetheless, the ordinance has also not incurred a total economic wipeout. Property owners A, B, and C all may still make use of their property in economically beneficial ways, even though those uses are not the ones they anticipated.

Because *Lucas* is unavailing, a takings analysis would go to the *Penn Central* multi-factor balancing test, in which the government determines if an ordinance incurs a taking based upon: the government interest to be advanced, the nature of the government regulation, and the degree of interference with the landowner's "investment back expectations."

Variances and Amortization

Lastly, landowners may also seek relief through variances and amortizations if they do not wish to bring a constitutional claim under *Penn Central*. A variance can be Area or Use. An area variance allows a nonconforming use to vary by the area used; a Use variance allows a nonconforming use in an area that is not zoned for that purpose. Use variances are typically harder to secure, and the landowner must show an undue burden if the use variance is not granted.

An amortization allows a nonconforming use to persist until ownership of the property changes, and prohibits the owner from expanding or changing his permitted nonconforming use. Amortization works to mitigate the impact of a sudden zoning change, which could deprive the landowner of economic use of their property and also reduce the likelihood of a takings lawsuit.

Application to Property Owners A, B, and C

Property Owner A

Here, the court has granted the property owner a mere 3 month period to move out of the premises or change it. Under *Lucas*, the property owner most likely does not have a claim. He has not experienced a total economic wipeout because he can still sell the land for residential development.

Under *Penn Central*, he has a stronger claim. The government interest in protecting children is strong, but it zones a single block, thus making property owner A largely bear this burden rather than the community as a whole. Further, the restaurant is popular, viable, and most likely has significant investment backed expectations--namely, its physical assets and cooking equipment. Although the government does not need to ensure that the new restaurant location is equally as profitable, the strict and narrow application of the zoning amendment gives the restaurant a factual advantage if it chooses to bring a takings claim.

To avoid a takings challenge under *Penn Central*, the court would have been wise to issue a use variance just for the property or an amortization, allowing the owners to continue operating until they finally closed by their own accord. As is, only allowing 3 months to move and in light of an ordinance that appears to single out the owners, the court risks a viable takings claim.

Conclusion: the court can uphold the ordinance and three-month grace period because the zoning appears to be a valid government action. But these are draconian measures and a three month grace period is very short. It might consider permitting an amortization or use variance to avoid a takings claim under *Penn Central*. An amortization would reduce the economic impact while allowing the area to gradually conform to the zoning the city enacted.

Property B

Here, the property owner has an undeveloped lot, so his loss is minimal. Under *Lucas*, he can probably sell the lot and earn a profit, and based on the jurisprudence in *Euclid*, a zoning ordinance is still viable even if it changes the permissible uses and devalues a property significantly.

But the owner has also invested \$1 million in assessing his lot in "good faith" prior to the amendment. *Euclid* makes it clear that the zoning ordinance can still be upheld. However under *Penn Central*, this huge investment backed expectation gives serious weight to a takings claim. As mentioned above, the government objective is valid--public safety--but the nature of the government action is targeted and intrusive because it only applies to a single block. By contrast, in *Penn Central*, the court upheld a development restriction on a historical building because it found that the owner could build elsewhere, and moreover, everyone else in New York was equally burdened by the restriction. Here, only the block is burdened; a handful of landowners are bearing a burden for the whole city, but they are not being compensated. Because *Penn Central* is a fact-based inquiry, and the investment backed expectations here are so high, the landowner has a fairly strong case.

Nonetheless, the court's decision is valid--the owner is not entitled to relief, despite his investments because he can still sell his land. But in the interest of precluding a subsequent takings claim, the court might permit the owner to submit an area variance to the zoning board. Depending on what he had planned to use the lot for, the traffic impacts of that use, and how that lot would conform with surrounding uses and traffic, an area variance may still achieve the city's goals while avoiding a costly takings lawsuit and providing relief.

Property C

Here, the court properly ruled that the landowner did not suffer a regulatory taking. There has been no total wipeout, so the land is still valuable for residential uses. Further, the facts indicate that there are not investment-backed expectations. As such, the Penn Central analysis merely considers the impact--65% reduction in value--as well as the valid government interest in protecting children. Overall, there is no valid regulatory claim.

Lastly, *Euclid* is directly on point and confirms the court's holding. A city may enact zoning using its police powers and to further the general safety, welfare, or health of the community, even when the ordinances greatly reduce the value of property owner's land. In *Euclid*, the owner's land was greatly devalued because he could not use it for industrial purposes, but the supreme court nonetheless upheld the zoning ordinance. Here, there was no regulatory taking. It is also unclear if a variance of any kind would provide relief, as the facts do not indicate the type of harm the property owner has experienced or his current use of the land.



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<u>Question Number</u>	<u>Subject</u>
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

QUESTION 2

Clear City is home to 50 churches, one of which burned down earlier this year. Fire investigators suspected that the cause was a burning candle.

Clear City has enacted an ordinance that prohibits burning candles in any church and authorizes the fire marshal to close down any church in which candle burning occurs. The Mayor told the press that Clear City would vigorously enforce the ordinance and that the fire marshal would randomly visit churches during their Sunday services to close down violators.

The fire marshal visited six churches last Sunday, but did not visit the Clear City Spiritual Church ("SC"). Two of the six churches visited were burning candles, but were only issued warnings, not shut down. Immediately after visiting the last of the six churches, the fire marshal publicly announced that it was likely no further warnings would be issued to churches caught violating the ordinance. The fire marshal also announced that, due to a lack of personnel, these random visits would not resume for "at least eight weeks."

The members of SC burn candles during Sunday services to signify spiritual light in the world. The day after the fire marshal's announcements, SC gave notice to Clear City's attorney that it would immediately sue Clear City in federal court seeking: (1) a temporary restraining order and a preliminary injunction to enjoin Clear City from enforcing the ordinance during the pendency of the lawsuit; and (2) a declaration that the ordinance violates the First Amendment.

Clear City's defense is that it has not taken any action and there is no controversy.

1. What is the likelihood of SC's success in obtaining a temporary restraining order? Discuss.
2. What is the likelihood of SC's success in obtaining a preliminary injunction? Discuss.
3. What is the likelihood of SC's success in obtaining declaratory relief in its favor?

QUESTION 2: SELECTED ANSWER A

This question triggers issues of Freedom of Religion under the First Amendment, associational standing, mootness, ripeness, and potentially conduct as speech under the First Amendment.

Preliminary Issues

A necessary prerequisite to SC's ability to obtain any form of relief is that standing exists and that ripeness and mootness can be cleared. Article 3 courts (federal courts) are courts of limited jurisdiction. Under the Constitution, they are not permitted to issue advisory opinions and may only issue opinions where cases or controversies exist. The defense of Clear City ("CC") is essentially that standing does not exist here--that there is no live action or controversy that may be appropriately assessed and provided a remedy. Each of the three questions below will require that there is standing before the remedy may be addressed. Thus, we must tackle the issues of standing, ripeness, and mootness before proceeding to the three questions below, as each of these has the ability to remove the "case/controversy" requirement and thus preclude Art. 3 jurisdiction over the case.

Standing

The issue here is whether there is either individual or associational standing. In order to have standing, one must have suffered a concrete and particularized injury in fact, there must be causation between the defendant's conduct and the plaintiff's injury, and redressability by a favorable decision of the Art. 3 court must exist. In addition, we should note that the association bringing the lawsuit here is exactly that--an association

and not an individual. There are additional rules in order to find associational standing. First, the individual members who make up the organization must have standing. Second, the lawsuit at issue must accord with the organization's purposes. Third, the association must be able to sue in its own right without requiring the active participation of its individual members.

Here, we should find that both individual standing and associational standing are satisfied. The requirement of injury in fact is probably the most tenuous link. SC has not been visited, issued a warning, or shut down. However, they engage in activity that is now prohibited under the ordinance and did so previous to the ordinance's creation. As such, the possibility that they will be reprimanded for their use of burning candles should constitute an injury in fact, as it interferes with the free exercise of their religion. (This finding is bolstered by the lurking First Amendment issues. It might not be so convincing in a non-religious context. See below.) We should note that the fire marshal's statement that they probably wouldn't keep issuing warnings is ambiguous. This could either indicate that the ordinance will not be enforced going forward, or that it will be enforced strictly and to the full extent of its reach. It is more likely that the latter is the correct response because it accords with the Mayor's press announcement that the ordinance would be vigorously enforced. This also increases the likelihood of an actual injury in fact occurring to SC directly.

Additionally, the causation between the defendant's conduct and plaintiff's injury is clear. Here, the defendant's action was to pass an ordinance that prohibits the burning of candles in churches, a religious activity. Without the passing and enforcement of that ordinance, SC would have been permitted to continue burning candles in their church at

their leisure.

Additionally, redressability is within the power of the court. Here, if the court finds the ordinance to be unconstitutional (as requested in the prayer for declaratory relief), the injury in fact imposed on churches in CC will cease.

Thus, we can conclude that an individual member of the church would likely have standing. We should then consider associational standing. In addition to the requirement that the individual members who make up the organization would have standing (satisfied directly above), the lawsuit in question must accord with the association's purpose. Here, the purpose of the association is not directly stated, but one could conclude that it is "to signify spiritual light in the world," the reasoning given for the burning of candles during Sunday services. Realistically, it is probably broader than this. The church's purpose is to provide spiritual guidance and so on, and one part of that is to signify spiritual light in the world to others who might consider joining and so on. Regardless, the nexus between the association's purpose and the lawsuit should be sufficient to satisfy this requirement.

The final requirement is that the association must be able to represent itself in the lawsuit without requiring the individual input of any of the particular members. There are no facts in the pattern that indicate otherwise. Thus, I assume this element is satisfied.

As such, there is both associational and individual standing here. Because SC is bringing the lawsuit, associational standing is most pertinent to our purposes. It is satisfied.

Ripeness

The issue here is whether the case or controversy here is actually ripe. The conclusion should be yes, but CC will argue that it is not. In order to be ripe, a lawsuit must be capable of actually being determined. Issues of ripeness arise with respect to proposed legislation, ordinances that have not yet been enacted, laws that have not yet been violated, and so on. In short, the injury is essentially to come, and the plaintiff is seeking a declaration that the ordinance (or otherwise) is invalid before harm can occur.

Generally, ripeness questions can also arise when there is a dearth of appropriate facts such that the court cannot appropriately answer the question. A case is less likely to be unripe when the question is essentially one of law. Here, the question is essentially one of law--is the ordinance compatible with the First Amendment? Thus, there is no need for a slew of facts before judicial review can be appropriately had.

SC will also point out that the ordinance has actually been enforced (at least in part), because the fire marshal has begun to make random visits and has begun to issue warnings. The ambiguity of the fire marshal's statement is again in issue here, because it is not entirely clear whether he means to ramp up or down enforcement after the eight weeks have passed. Because of the threat of interference with religion, and because the question here is mostly one of law, the court should find the issue to be ripe and to take up the case.

Mootness

The issue here is whether the case or controversy in question has been mooted. CC could claim that there is no controversy, because the fire marshal publicly announced that they would not seek any further warnings to issues caught violating the ordinance.

Additionally, he announced that the random visits would not occur for the next 8 weeks because of a lack of personnel. Thus, CC might claim that there is no longer any live issue in the case as there is no risk that SC will be caught burning a candle during a Sunday service and being closed down. If there is no live controversy, then a federal court cannot act on the issue.

However, there are two exceptions to the mootness doctrine. One exists where the problem in the lawsuit is capable of repetition, yet evading review. The best example of this is abortion. By the time a decision is made in federal court, typically 9 months have passed and the live issue has been resolved. However, if this standard were strictly followed, there would never be an opportunity to adjudicate on the issue. Here, SC could raise this exception, perhaps arguing that the fire marshal might just cease enforcement activity whenever a lawsuit is threatened. However, this doesn't exactly accord with the facts, as SC informed CC of its intent to sue the day after the fire marshal's announcements.

The better argument for SC is that this is an example of the voluntary cessation mootness exception. Where the conduct complained of by defendant pauses or is halted, such that the live controversy disappeared as a result of defendant's own free will, the case cannot be said to have been resolved. Rather, it is wholly possible that upon dismissal of the case the defendant will begin to once again engage in the conduct complained of. As such, voluntary cessation is an exception to the mootness doctrine. Here, voluntary cessation neatly fits the facts. The fire marshal indicated that there was a lack of personnel, so the random visits would stop for at least eight weeks. However, if many new personnel signed up the very next day, random visits could start again

immediately. Additionally, the fire marshal's decision to "likely" not issue any further warnings is voluntary. The ordinance giving him the authority to do so has not been repealed; this is simply a policy decision on his behalf. As such, this is a good case of voluntary cessation that should prevent the mootness doctrine from disposing of this case.

Potential Remedies

Above we have ensured that the case is an appropriate case or controversy under Article 3 such that it is permissible for a federal court to hear it. Now we must assess the remedies issues assigned.

One preliminary issue with respect to remedies is that the suit is being filed against Clear City, a municipality. Municipalities are not entitled to state sovereign immunity under the 11th amendment, and at any rate it appears that CC has not attempted to fight the suit on an immunity basis, so I will not consider that potential defense further.

(1) Temporary Restraining Order

The issue here is whether a temporary restraining order is appropriate. Temporary restraining orders are devices that are intended to be available only when there is a serious threat of immediate, irreparable injury to the plaintiff. Temporary restraining orders require the showing of two elements (1) likelihood of success on the merits for plaintiff, and (2) likelihood of irreparable injury to the plaintiff if not granted. Temporary restraining orders ("TROs") are also allowed to be issued before a hearing occurs--thus

ex parte--and in some cases without notice to the other party. Notice is not required if the plaintiff can show that provision of notice would potentially lead to the destruction of the item in question in a goods case or some other good reason why it might be inappropriate to furnish the defendant with a warning. Another good reason can also include simply documented unavailability of the defendant. Temporary restraining orders in federal court are good for 14 days. They can be extended for another 14 days with a showing of good cause, but all reasonable efforts must be made to secure a preliminary hearing before that point. When a preliminary hearing occurs, the court will determine whether or not to issue a preliminary injunction. If the court does not hold a hearing before both 14 day periods have passed, the TRO effectively morphs into a preliminary injunction.

Here, there is probably not a compelling case for a TRO. First, there is probably a likelihood that plaintiff can establish a likelihood of success on the merits (see section 3 below). However, it is unlikely that irreparable injury would occur without a TRO. The fire marshal's statement indicated that there would not be any random visits for eight weeks. Eight weeks consisting of 7 days is 56 days. A TRO would be good for, at maximum, 28 days. As such, there is no pressing need that requires a TRO be granted in order to prevent the SC church from being shut down.

SC's likelihood of success in obtaining a temporary restraining order is low, unless they can demonstrate some increased likelihood of irreparable injury (i.e., if the fire marshal suddenly hired 50 new employees and could carry out the ordinance in full).

(2) Obtaining a Preliminary Injunction

The issue here is whether SC will be able to obtain a preliminary injunction. The test for a preliminary injunction is much the same as that of a TRO. The plaintiff must establish a likelihood of success on the merits; a likelihood of irreparable injury if a preliminary injunction is not granted; and a balancing of the hardships of plaintiff and defendant/the public in plaintiff's favor in order to succeed. We should also note that in the case of a preliminary injunction it is appropriate to provide a bond, such that if a preliminary injunction is inappropriately awarded, the defendant can be compensated for the time in which he was precluded from acting in a particular way/possessing a particular good. We will assess each element below in turn.

Likelihood of success on the merits. See section (3) on declaratory relief.

Likelihood of irreparable injury if preliminary injunction not granted. Here, there is an increased chance of irreparable injury if the injunction is not granted, because the reality of litigation/trial is that the process is lengthy. The likelihood is that litigation will exceed 8 weeks of preparation and trial. Again, the ambiguity of the fire marshal's statement is pertinent. If they intend to ramp up ordinance enforcement when the 8 weeks end, then the likelihood of irreparable injury via the closing down of the church is significant. We should also note that the manner of enforcement of the ordinance is rather extreme. Rather than fining a church, they will be shut down. Shutting down surely gives rise to an inference of irreparable injury--even if the ordinance is later declared unconstitutional and the church is permitted to reopen, there is a likelihood that congregation members

will have gone elsewhere and the ability of the church to attract new members will have been greatly diminished. Because of the widened time scope of the preliminary injunction, likelihood of irreparable injury is probably satisfied here.

Balance of hardships between plaintiff/defendant and public. Here we must assess how the ordinance and its enforcement affect parties on either side of the case. If the ordinance is not enforced, the hardship imposed on the defendant and public is that occasionally a church (potentially) burns down. (Note that fire investigators weren't even sure if this was the cause of the church burning down.) While the loss of a church to a community is likely impactful, the fact remains that CC is home to 50 churches, so the public and the city are unlikely to be devastated by the loss of one. By contrast, to the plaintiff--an actual church--the potential for them to be shut down as a result of burning a candle imposes a significant hardship. This is so because of the likelihood of irreparable injury as discussed above (loss of congregation members, inability to attract new members). The balance of hardships thus comes out strongly in favor of plaintiff. Because we aren't given facts about SC's financial situation, I will presume that they could afford to post the appropriate bond.

The likelihood of SC's success in obtaining a preliminary injunction is thus high.

(3) Obtaining Declaratory Relief

The issue here is whether declaratory relief is appropriate. Declaratory relief is that relief provided by a court that does not change the rights of a party but merely delineates those rights. Declaratory relief is an appropriate way to handle the question of whether

or not an ordinance is constitutional, and is especially appropriate in the context of a municipality because it does not run into any 11th amendment state sovereign immunity issues that might be implicated by a damages analysis.

To determine whether declaratory relief is appropriate, we must assess the merits of the constitutional challenge to the ordinance. Here, the challenge is that the ordinance violates the First Amendment. There are at least two ways in which this could violate the First Amendment under freedom of religion and potentially one under freedom of speech--regulation of symbolic conduct.

It should be noted that here the municipality is a government actor whose actions might be violating the First Amendment.

Freedom of Religion - Free Exercise Clause

The issue here is whether the ordinance inappropriately restricts SC's ability to freely exercise their religion. Under free exercise jurisprudence, a general statute of neutral applicability is valid even if it incidentally burdens religion. However, where it appears to regulate only religion, then the governmental conduct in question must pass strict scrutiny. Strict scrutiny requires the government to show that the law in question was necessary to achieve a compelling governmental purpose, and that there was no less restrictive alternative available.

Here, the law in question does not appear to be neutral and general. Rather, it is directed toward religious entities (churches) alone. As such, it must pass strict scrutiny. One could argue that there is a compelling purpose here in ensuring that churches are not burnt down. (This may not be an appropriate governmental purpose, as it could be argued under the Establishment Clause/*Lemon* test that this constitutes inappropriate

excessive entanglement of government and religion.) Another potential purpose the government could put forward is fire suppression/prevention for the health, safety, and welfare of their residents. Assuming *arguendo* that this is considered an appropriate government compelling purpose, then we must ask whether it was *necessary*--that is, whether it was the least restrictive means for accomplishing that purpose. CC is very unlikely to be able to fulfill this burden, because there are a variety of other ways a church could undertake to ensure its candles didn't lead to its burning down. Increased fire safety measures, the installation of sprinklers, the placement of fire extinguishers within the church, repositioning of candles in un-flammable areas, etc.--there are a variety of less restrictive alternatives as compared to shutting a church down entirely.

The ordinance probably violates the free exercise clause.

Freedom of Religion - Establishment Clause

The issue here is whether the ordinance inappropriately establishes or interferes with a religion. Generally, the Establishment Clause analysis proceeds by consideration of the Lemon test, which asks: (1) Was there a secular, non-religious purpose in enacting the law? (2) Was the primary effect of the law to advance or inhibit religion? (3) Was there excessive entanglement between the government and religion? Here, there was clearly a secular purpose in enacting the law--prevention of loss of churches through accidental burning down from unattended candles. This is not religious in nature merely because the place in which the government seeks to stop burning buildings is candles. There is probably a general compelling governmental interest in fire suppression/prevention for the health, safety, and welfare of its constituents.

The primary effect of the law, however, probably inhibits religion. Because a common

religious practice, burning candles, is here being prohibited by the government upon pain of being shut down entirely, the law seems to be overbroad in attempting to achieve its legitimate non-secular purpose. Because if the law were fully enforced many churches would be shut down, there is probably a failure on prong 2.

Third asks whether there is excessive entanglement between government and religion. This is a close call. It is possible that there is excessive entanglement here because the fire marshal seems to have an inordinate amount of discretion in deciding whether he is going to issue a warning or shut the church down entirely. For example, if the churches issued warnings were Catholic, but future Lutheran churches were immediately shut down, this would appear to be excessive entanglement of government and religion because it seems to send a message about the content of church services. This makes exercise of discretion very dangerous. Presuming that the fire marshal is going to strictly enforce the law going forward and decline to exercise discretion, this prong is probably not problematic, but from the fact pattern, the conclusion is unclear.

Because the second prong of the Lemon test is failed, the ordinance is probably improper under the Establishment Clause as well.

Freedom of Speech Issue - Symbolic Conduct

The issue here is whether the ordinance is permissible governmental regulation of conduct speech. This is probably permissible governmental regulation of conduct speech. The test for permissible conduct speech is a hybrid test closest in nature to intermediate scrutiny. It requires that the regulation of speech not be overbroad; that the purpose for regulating the speech not be purely to regulate the speech content, but for another unrelated governmental purpose; that the government have an important

purpose in regulating the speech; and that the regulation be narrowly tailored; and that it directly advance the government purpose.

Here, the regulation of symbolic speech--prohibiting candle burning--is not merely to regulate the content the speech communicates (signifying spiritual light in the world), but to prevent buildings within a municipality from burning down. The interest in fire suppression/prevention is probably an important government purpose because it affects the health, safety, and welfare of its residents. The question of whether the regulation is narrowly tailored is arguable--again, the enforcement mechanism seems somewhat strict--but it seems appropriate as it merely prevents open flame within the church while the point of the regulation is to prevent fires. Because of this, the regulation is probably not overbroad, though its enforcement mechanisms may be. The government purpose of fire suppression is probably directly advanced by eliminating the most likely source of flame/fire within the buildings in question.

The ordinance probably does not constitute a violation of the freedom of speech with regard to regulation of speech by conduct.

It is likely that SC will be successful in obtaining declaratory relief in its favor under a first amendment freedom of religion theory. The best theory for SC is probably a violation of the free exercise clause as strict scrutiny is extremely unlikely to be satisfied here. An establishment clause argument would probably also succeed. A first amendment freedom of speech argument would probably not succeed, so one of the other two should be used.

QUESTION 2: SELECTED ANSWER B

Whether Clear City Spiritual Church ("SC") is Entitled to a TRO to enjoin Clear City ("CC") from enforcing ordinance

Standing

The first issue is whether SC has standing to bring an action against CC. A party meets the elements of constitutional standing by showing (a) injury in fact (b) causation, and (c) redressability.

Injury in fact

Injury in fact means that the injury is concrete, not abstract, and is particularized. In other words, the plaintiff must show that *they* were actually harmed.

Here, SC can likely argue that it has suffered injury in fact. SC's practice is to burn candles during Sunday services to signify spiritual light in the world. CC is effectively trying to put that light out by prohibiting burning candles in any church. This has a concrete effect on SC in particular. This element is met.

Causation

But for CC's ordinance, SC would not be in a position where they are afraid to engage in one of their regular religious practices. This element is met.

Redressability

If the court prevents SC from enforcing the ordinance and eventually overturns the ordinance, it will provide SC with exactly the relief it seeks, allowing SC's members to continue lighting candles. Redressability is met.

Organizational Standing

CC might argue that SC's members are required to bring the action rather than SC. Indeed, it is SC's members who burn the candles. However, even if it were true that SC's members are the ones that suffer harm, SC likely has organizational standing here.

An organization has standing to bring a suit on behalf of its members where the members can be adequately defined and the organization can show that it adequately represents the members' interests. Here, the members are SC's churchgoers, and, as SC is the organization that leads the congregational worship and oversees Sunday services where candle burning takes place, it can represent the interests of its churchgoers effectively. SC has organizational standing.

Ripeness

A court may only hear a live case or controversy. That is, there must be an actual dispute over the rights and obligations of parties, such that resolution will clarify those rights and obligations. A court may not issue advisory opinions. Ripeness may exist even if one party voluntarily curtails their conduct where there is the ongoing possibility of a violation.

Here, CC argues that there is no controversy, likely because it is not currently enforcing the ordinance. The facts show that due to a lack of personnel, random visits to enforce the ordinance are delayed "at least eight weeks." Nonetheless, the ordinance is still in effect, and it is highly likely that at some point in the near future, SC will be paid a "visit" by the fire marshal. SC's argument holds considerable weight in light of the public statements made by the Mayor and fire marshal. The Mayor told the press that CC

would "vigorously enforce the ordinance," and the fire marshal announced that churches will likely no longer get the benefit of a warning if caught violating the ordinances. Accordingly, while SC may not have to worry about a fire marshal "visit" for at least eight weeks, the concern is still very much live. Furthermore, there is nothing to say that the fire marshal is true to his word. The Mayor's announcement to the press suggests that the CC has almost an inquisition-like desire to shut down churches burning candles. There's nothing to suggest that the fire marshal may gain personnel to start the sweeps earlier.

Accordingly, there is a live case or controversy such that ripeness exists.

Entitlement to a TRO

A temporary restraining order ("TRO") is a form of injunctive relief that a party may obtain with or without notice, which, if granted, immediately enjoins a party from taking a contested action until the parties can be heard on a preliminary injunction motion. In essence, TROs and PIs are designed to preserve the status quo during the pendency of an action. When a court grants a TRO, it will generally set the preliminary injunction hearing shortly thereafter (usually within 10 days). TROs are obtained ex parte upon a showing that giving notice to a party is likely to frustrate enforcement. Here, the TRO appears to be with notice as SC gave notice to CC's attorney that it would seek a TRO.

A TRO is only granted upon a showing of immediate harm. In determining whether to grant a TRO, the court looks at (i) whether the party will suffer irreparable or immeasurable harm if injunctive relief is not granted, (ii) the likelihood of success on the merits, (iii) the balance of the harm to the movant if the TRO is not granted against the burden to the nonmoving party in complying with the injunction, (iv) the public interest in

granting a TRO.

i. Irreparable harm

SC can meet this element because it is not seeking monetary relief, but rather declaratory relief declaring that the ordinance violates their First Amendment rights. A monetary value cannot be placed on the harm SC will suffer if its members are prohibited from practicing their religious beliefs. This element is met.

ii. Likelihood of success on the merits

This factor is explained below in the discussion of declaratory relief. The short answer is that this element will be met because CC would be considered a state actor, and has passed a law that facially discriminates against religion, and does not meet strict scrutiny.

iii. The balance of harms

This factor also favors SC. The harm SC will suffer due to a violation of the free exercise clause is profound, as its members would have to give up one of their regular religious practices, or otherwise practice secretly, in fear of government intervention, which evokes Soviet Union-type concerns. On the other hand, CC would be prohibited from enforcing an ordinance that may be unconstitutional, and even if it is not, the harm is small. Indeed, SC can point to the fact that the fire marshal has already explained that they will have to postpone random visits due to lack of personnel. If enforcement of the ordinance was that important to the city, then CC would find another way to continue enforcement, such as moving over personnel from other departments.

iv. Public interest

The public interest in allowing persons in the United States to exercise their First Amendment rights is paramount. On the other hand, there is no interest in allowing a government actor to enforce a questionable ordinance.

Immediacy of harm

While SC will easily satisfy the four-factor test for injunctions, the court may still refuse to grant the TRO because SC may not be able to show a risk of immediate harm. The fire marshal's announcement that random visits will not resume for at least eight weeks means that there is plenty of time to seek a preliminary injunction prior to any harm befalling SC. If the court accepts CC's statement that they will not enforce the ordinance for at least eight weeks, then it will likely not grant a TRO.

Accordingly, while the factors for a TRO all favor SC, SC still may lose its TRO application based on a lack of immediacy of harm.

2. Whether SC is Entitled to PI to enjoin CC from enforcing ordinance

On the other hand, SC is likely entitled to a PI.

Courts use the same four-factor analysis in determining whether to grant a PI. Additionally, a PI does not require a showing of immediate harm; only a showing that the harm is likely to occur if an injunction is not granted during the pendency of the action.

For the reasons stated above, SC can meet the four-factor test. Furthermore, if CC begins its sweeps in the next eight weeks, then the risk of harm is likely to occur during the pendency of the action, such that the PI is necessary to preserve the status quo.

3. Whether SC is likely to obtain declaratory relief

Government Action

The First Amendment applies only to government action. The First Amendment is couched on *Congress* not making any law that violates a person's rights. It is extended to state and local government through the Fourteenth Amendment due process clause. Here, CC appears to be a state actor because it is a city. It has a Mayor, a fire marshal, and enacts ordinances that it seeks to enforce. The alleged First Amendment violation directly relates to one of those ordinances. Accordingly, government action has occurred raising First Amendment issues.

Free Exercise

A person has the absolute right to their religious beliefs, but religious conduct may be limited in some circumstances. The government may pass laws that limit religious conduct, but they are more likely to be upheld where the laws only incidentally limit religious conduct. Where a law is facially neutral, such that the prohibited conduct applies equally to religious and secular conduct, absent a showing of discriminatory motive, the law must merely meet rational basis scrutiny. This requires the proponent to prove that the law is not rationally related to a legitimate government interest. On the other hand, where a law is facially discriminatory, such that it is aimed at tailoring religious conduct, it is subject to strict scrutiny. This requires the government to show that the law is narrowly tailored to meet a compelling government interest.

The ordinance is facially discriminatory

Here, the ordinance applies only to burning candles in *any church*. On its face, it appears to target religious conduct because it only affects churchgoers.

The city could argue that the ordinance is not aimed at religious conduct, but is instead aimed solely at regulating burning or candles. But if that's the case, then CC could have drafted the ordinance to say that. The ordinance could have applied to burning candles in any building, or any place where members of the public meet, or similar. It does not say that; rather, it applies only to burning candles in churches.

Because it is facially discriminatory, strict scrutiny applies. The government must show the law is narrowly tailored to meet a compelling government interest.

Compelling government interest

The government can likely meet this because CC is home to many churches, and one of those churches burned down earlier this year, with the suspected cause being a burning candle. It can be presumed that people go to these churches, and CC has a compelling interest in protecting the safety of its citizens. Accordingly, CC meets this element.

Narrowly tailored

CC will lose on this element because the ordinance is not narrowly tailored. To be narrowly tailored, the government generally must use the least restrictive means. Here, CC completely prohibits the use of candles, and has invoked draconian enforcement measures and sanctions to enforce the ordinance. CC could have regulated in a less restrictive way, such as by regulating where candles are placed in churches, or the type

of candle used, or required other safety measures, such as burning candles over a non-flammable service. CC instead issued a blanket prohibition. CC fails this element.

Accordingly, the law does not meet strict scrutiny.

Rational basis

On the chance that the law is considered facially neutral, it is more likely to be upheld. SC would have to show that the law is not rationally related to the legitimate government interest. Courts generally give the state wide discretion under rational basis scrutiny. Accordingly, the ordinance would likely survive on the unlikely chance that the ordinance is found to be facially neutral.

Establishment Clause

The First Amendment also prohibits the government from favoring one religion over others or favoring religion over non-religion. The government must show (1) the law has a secular purpose, (2) its primary aim is not to advance or inhibit religion, and (3) the law does not excessively entangle government with religion.

Here, even if the law has a secular purpose, and even if the primary aim is to not to advance or inhibit religion, the government would fail on the third factor because it excessively entangles government with religion. As mentioned above, these draconian sweeps are Soviet-Union like. Because the ordinance applies only to churches, the practical effect is that the government is engaging in random, chilling sweeps of churches and churchgoers. The government's willingness to crash Sunday services is strong evidence that the government is excessively entangled in religion.

Conclusion

For the foregoing reasons, SC is likely to succeed on its declaratory relief action because CC likely violated the First Amendment by passing and enforcing the ordinance.

Constitution

**ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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QUESTION 4

To prepare herself for a spiritual calling to serve as a pastor at City's jail, Ada enrolled in a nondenominational bible school. After graduating, Ada advised the pastor of her own church that she was ready to commence a ministry and asked that her church ordain her. While sympathetic to her ambition, Ada's pastor accurately advised her that their church did not ordain women.

Ada began going to City's jail during visiting hours and developed an effective ministry with prisoners, particularly women inmates who increasingly sought her counsel. Ada noticed that ordained ministers who visited the jail received special privileges denied to her.

Dan, the jail supervisor, told Ada that ministers who were ordained and endorsed by a recognized religious group were designated "jail chaplains" and, as such, were permitted access to the jail during nonvisiting hours. He told Ada that she too could be designated a jail chaplain if she obtained a letter from a recognized religious group stating that it had ordained her as a minister and had endorsed her for such work.

Ada replied that her church was not part of any recognized religious group and would not ordain her anyway because she was a woman. She asked Dan nonetheless to designate her a jail chaplain because of the effectiveness of her work.

Dan refused to designate Ada a jail chaplain or to allow her the access enjoyed by jail chaplains. He acted pursuant to jail regulations adopted to avoid security risks and staff involvement in making determinations as to who was really a "minister."

Ada has brought suit in federal court to obtain an injunction requiring that she be designated a jail chaplain or be granted access to City's jail equivalent to those who have been designated jail chaplains. Ada's complaint is based on the grounds that the refusal to designate her a jail chaplain violates rights guaranteed to her and the prisoners by the First Amendment to the U.S. Constitution and also violates rights guaranteed to her by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

How should Ada's suit be decided? Discuss.

ANSWER A TO ESSAY QUESTION 4

Standing -- Federal courts are only empowered to hear cases involving real controversies, and a plaintiff has standing to bring a case only if he or she suffers, or will imminently suffer, an injury in fact that may be remedied by the court's action.

Here, Ada (A) alleges that she is being denied privileges that are afforded to others because of her particular religion, which is not "recognized," and because she is not ordained by her religion. Both, she argues, violate her constitutional rights under the first and fourteenth amendments to the U.S. Constitution. Thus, she has alleged an injury in fact sufficient to give the federal court the power to hear the case. Further, an injunction, if granted, directing the jail to grant her the additional privileges would remedy the injury. Thus, A has standing to bring the case.

Ada also appears to be raising the rights of prisoners in her action. A plaintiff may only raise her own constitutional rights, unless the persons she is seeking to represent are unable to vindicate their own rights, the proposed plaintiff has the same motivation to pursue the litigation as the rightholder, and the proposed plaintiff is capable of doing so. Prisoners are capable of raising their own rights, and A's motivations are not necessarily the same as the prisoners. Therefore, she will be precluded from raising the prisoners' rights in her lawsuit.

Eleventh Amendment -- In general, the eleventh amendment prevents a private individual from bringing suit in federal court against a state government. However, this prohibition does not apply to local governments, nor to individual state officers. A is bringing her suit both against "City" jail and, apparently, against Dan, the jail supervisor. She is also seeking injunctive relief. For these reasons, the eleventh amendment is not a bar to this suit.

State Action -- Generally where a plaintiff alleges violation of personal rights under the constitution, the violation must have been committed by a state or federal actor in order to be actionable. Here, A is primarily arguing that City Jail's actions violate her rights. City Jail is a political subdivision of state, and is therefore a state actor. However, Jail may argue that it is only implementing a classification (ordained vs. unordained) that is established by a private church, and therefore A's real injury is caused by a private, not state actor. However, the fact that Jail adopts the private entity's classification is enough to establish state action.

The fourteenth amendment clearly applies to the state. The first amendment only applies to the federal government, but the rights under the first amendment have been incorporated into the fourteenth amendment and are therefore applicable to the state as well.

First Amendment

A may argue that the jail's policy of granting special privileges only to ordained pastors of established religions violates both the free exercise of religion clause and the establishment clause of the first amendment.

Free Exercise Clause -- The state may not impose restrictions on the free exercise of religion unless the restriction serves a compelling state interest and is narrowly tailored to serve that interest. A law of general applicability, however, which merely incidentally burdens religious practices will not be subject to invalidation. A will argue that the jail regulation is not generally applicable, since it focuses directly on "established" religions, and singles out these religions for special privileges. She will also argue that the regulation inhibits her ability to preach to inmates who are interested in receiving her ministry, and therefore impairs her free exercise of religion. Therefore, the burden will be on the state to demonstrate the necessity of the regulation to serve a compelling interest.

The jail will argue that the regulation serves important security interests, and that if all self-proclaimed ministers were given security clearances, it would raise the risk that some ministers are falsely representing themselves. However, the jail has alternative means of determining the security risk of a person claiming to be a minister other than classifying them as "ordained" and from "established" religions. Since the regulation is not narrowly tailored, the regulation does not pass the strict scrutiny test.

No Inquiry into Legitimacy -- Further, the regulation differentiates between established and non-established religions. This in effect amounts to an inquiry into the legitimacy of [sic]. The supreme court has held that the government may not inquire into the legitimacy of a religious belief. The regulation is invalid for this additional reason.

Establishment Clause -- The first amendment also prohibits the government from establishing a religion. A will argue that by giving preference to established religions, the Jail is giving support to those religions, and in effect establishing them. The establishment clause is not violated, however, if the regulation or statute at issue serves a secular purpose, has primarily a secular effect and does not entangle the government in religious matters.

Here, the jail will argue the regulation has the secular purpose of increasing security at the jail by limiting the number and types of outside visitors allowed in. However, the regulation clearly does not have a secular effect -- it impacts religious practice directly, by limiting the right of non-established religions to send their ministers, and it prevents unordained ministers from receiving privileges. Therefore, the second prong is not met.

The third prong is also not met. A will argue successfully that by allowing only established religions to send ministers to the jail, the state must get involved in determining what is an established religion. Although the jail has argued that it is limiting its entanglement with religious affairs by allowing the particular religion to determine who can be ordained, the mere acceptance of these decisions necessarily entangles the public entity in the religious organization's decisions.

The regulation will be found to be a violation of the establishment clause because, although it may serve a secular purpose, it has a non-secular effect and entangles the state in religious

affairs.

In addition, as discussed above, the regulation is a violation of the free exercise clause.

Equal Protection -- State and local governments may not discriminate against individuals on the basis of a suspect class unless the discrimination serves a compelling state interest and is necessary and narrowly tailored to serve that purpose. A classification based on a quasi-suspect class is subject to intermediate scrutiny -- the state must show an important interest being served, and the regulation must be necessary for the purpose. Further, if the disparate treatment is in relation to the exercise of a fundamental right, the state must also meet the stricter scrutiny standard of review.

A will argue that the disparate treatment is based on her affiliation with a non-established [sic] religion, her status as a non-ordained [sic] minister, and, indirectly, on her status as a woman (since her church won't ordain her because she is female). Further she will argue that the disparate treatment relates to the exercise of a fundamental right (the free exercise of religion).

Non-ordained [sic] and Non-Established [sic] -- Classifications based on religious titles or on membership in a particular religion are not suspect classes for purposes of the equal protection clause. Therefore, A must prove that the regulation serves no legitimate purpose and is not rationally related to this purpose.

The stated purpose is to increase security at the jail. This is a legitimate purpose. Further, limiting the ministers who are allowed to serve as chaplains to those who are endorsed by established religions tends rationally to limit these outside influences in a jail to those who are legitimately there for religious, and not ulterior, motives. Therefore, the regulation passes this low level of scrutiny.

Gender-Based Class -- Gender discrimination is a quasi-suspect class (see above for standard of review). The jail's regulation itself does not on its face differentiate between male and female chaplains, but A will argue that since some religious organizations, such as her own church, refuse to ordain females, the regulation has a discriminatory effect on women. However, A will have to show that the discrimination by the state was intentional, and there is no indication of this here, unless the jail knew when it passed the regulation that no, or almost no, religions ordain female ministers. The regulation also allows "endorsed" ministers to be considered chaplains, and arguably even those religions that don't ordain women may at least "endorse" them.

A will also argue that the private church's discrimination, though not directly actionable under the equal protection clause, has been endorsed by the jail through the use of the religion's classification system. This argument will succeed, and the jail will therefore have to meet the midlevel scrutiny.

Although security is an important issue, as discussed above, the regulation limiting chaplains to those who are ordained or endorsed does not appear to be necessary to ensure security. Therefore, if the church's discrimination against women will be applied to the jail, the regulation will be struck down for this additional reason.

Exercise of a Fundamental Right -- Because the classification involves the exercise of a fundamental right, the regulation is subject to strict scrutiny under the equal protection clause. However, the standard of review is identical to that provided under the first amendment, and therefore the discussion above is applicable here as well.

Thus, the regulation should be found invalid, and A should be given access to the jail as a chaplain (access during non-visiting hours) as requested in her injunction.

ANSWER B TO ESSAY QUESTION 4

Justiciable

For Ada's (S) suit to be heard in federal court, it must involve a case or controversy. The justiciable requirements ensure that the case or controversy requirement of Article III are met.

Ripeness

A plaintiff's suit must represent a case ripe for review by federal courts. A suit for a declaratory judgment or a pre-enforcement injunction against a regulation or law may present an issue as to whether a case is ripe for review.

Here, A has already sought to be named a jail chaplain or receive jail chaplain privileges. Thus, her suit is ripe for review, because A is not seeking either a declaratory judgment or pre-enforcement review. A's injury by being denied the privileges as a jail chaplain is ongoing and occurring now.

Mootness

Mootness doctrine prevents a federal court from continuing to hear a case when the case is no longer a live controversy, because the real world injury to the plaintiff has already ended. Here, A's case is not moot -- she is still being denied the rights of a jail minister.

Political Question

Federal courts may not hear non-justiciable political questions. This case does not involve a political question.

Abstention

Federal courts will in general abstain from enjoining an ongoing state criminal prosecution. There is no criminal prosecution in this case -- abstention does not apply.

Standing

To be able to sue in federal court, a plaintiff must have standing, which includes injury in fact, causation and redressability.

Injury in fact

A plaintiff must have suffered (or be about to suffer with a significant likelihood) an injury in fact. The injury may be the denial of constitutional or statutory rights, economic injury, or even environmental or aesthetic harm.

Here, A is suffering an alleged denial of her first and fourteenth amendment rights. Her first amendment rights to freely exercise her religion and to not have state action force an established religion on her have been allegedly denied -- her fourteenth amendment right to equal protection has also been denied. Moreover, A's desire to serve as a jail chaplain, and the denial of that by the jail, would alone probably qualify as enough of an injury in fact.

Causation

The plaintiff's injury must have been caused by the defendant's action. Here, the denial of A's rights was caused by the City's refusal to allow her to be a jail chaplain. Thus, City's action caused A's injury.

Redressability

The plaintiff's injury must be redressable by a court order. Here, an injunction from the court to require City to admit A as a jail chaplain would redress A's injury. Thus, there is redressability.

Third Party Standing

Generally, plaintiffs may not assert the rights of third parties in filing suit. However, there is an exception when either the relationship between the plaintiff and third party is close (e.g.) doctor -- patient; buyer -- seller) or where the third party would be unlikely to assert their rights on their own.

Here, A is attempting to also assert a violation of the prisoner's first amendment rights. A court might hold that this is not appropriate because it is third party standing.

However, a court might also hold that the exceptions apply. Here, A does have a close relationship with the prisoners, as she is effectively serving as a minister to them. Also, the prisoners might be unlikely to assert their rights to have A serve as a jail chaplain, since they may not even know this is an issue. Thus, a court might allow A to assert the prisoners' rights in this case.

State Action

The first amendment applies to states because it has been incorporated through the fourteenth amendment. The fourteenth amendment only applies to state action -- action by state governments.

This includes branches of state governments. Here, City is the party allegedly denying A's rights by not allowing her to be a jail chaplain. City is a municipality, and so is a branch of state government. Thus, there is state action.

First Amendment

Free exercise clause: Ada

The first amendment prohibits state action that interferes with the free exercise of religion. However, neutral laws of general applicability with no intent to infringe on free exercise, but which happen to prohibit religious activity, are allowed under the first amendment.

Here, A would argue that the City rule prohibiting her from being a jail chaplain violates her free exercise of religion, because it keeps her from expressing her religion by ministering to inmates after visiting hours.

The City might respond that the law is of general applicability because it restricts access to visiting hours to everyone who is not a jail chaplain.

However, A would respond that the law is not a neutral law, because only members of "recognized religions" can become jail chaplains. Thus, the law explicitly distinguishes among religions and is not neutral.

Strict Scrutiny

Since the law is not a neutral law of general applicability, and infringes on A's free exercise rights, it will be only upheld if it meets strict scrutiny. This requires the government to show that the law is necessary to fulfill a compelling state interest, and is narrowly drawn to meet that interest.

Here, the state has two possible interests: avoiding security risks and not having staff determinations as to who is really a minister. Avoiding security interests in a jail is clearly a compelling interest. However, avoiding staff determinations as to who is a minister does not appear to be compelling, because there is no clear reason why it matters if someone is a minister -- a non-religious psychiatrist, for example, might be just as helpful to the inmates. Thus, the security risk interest is the only compelling interest.

It also does not appear that the rule is narrowly drawn (and thus necessary) to serve the compelling interest of jail security. It is unclear that ministers from recognized religious groups would pose any less of a security threat than other ministers. Instead, background checks or the monitoring of visits would seem to serve the security interest much better.

Thus, the City policy would not meet strict security and should be struck down as violating free exercise.

Free Exercise Rights of Prisoners

The prisoners have a free exercise right to receive A's ministry services, and to participate in those services after visiting hours.

On the other hand, prisoners' rights in jail may be curtailed more than other individuals' rights for valid penological reasons -- such as security.

However, again, the City policy is not neutral on its face, and thus strict scrutiny would apply. This is because inmates who share A's faith are denied A's help outside visiting hours, while others can receive chaplains at that time. The same analysis would be undertaken as above -- security would be a compelling interest, but the policy is not necessary to that interest, and so it would also violate the prisoners' free exercise rights.

Establishment Clause

The first amendment also prohibits states from establishing any form of religion. The test as

to whether a state action establishes a religion is whether it (1) has a valid secular purpose, (2) has a primary effect that neither inhibits nor advances religion, and (3) does not result in excessive entanglement of the state with religion.

Secular Purpose

Here, City's policy has a secular purpose of reducing security risks and of avoiding staff determinations as to who is a minister. Thus, there is a valid secular purpose for the "recognized religion" requirement.

Primary Effect

However, City's policy does have the primary effect of advancing some religions, and inhibiting others. Here, "recognized religion" chaplains may enter the jail after visiting hours, while non-recognized chaplains may not. Thus, some religions have considerably greater access to prisoners, which they might use to proselytize, etc. Thus, the state action advances some religions and inhibits others.

City might argue that City's effect is not "primary" because non-recognized chaplains may still visit during visiting hours, so the impact is minimal. This would depend on how large a difference in time there is between visiting and non-visiting hours -- unless the difference is minimal (e.g., visiting hours last 20 hours/day), then this argument would probably fail and the effect would be primary.

Excessive Entanglement

The jail officers must determine what religions are "recognized." This is an excessive entanglement of the City with religion.

Thus, the City policy also is an unconstitutional establishment of religion.

Fourteenth Amendment

Equal Protection

Religion

A might argue that the City policy classifies and discriminates based on religion, and this either involves a suspect class or fundamental right. If the court argues with this, the analysis would be the same as for the free exercise clause of the first amendment, above.

Gender

The equal protection clause requires states to grant equal protection of the laws to all citizens. If one state denies a fundamental right to some citizens, or distinguishes based on a suspect classification, then the state action will undergo a heightened level of scrutiny. Otherwise, the rational basis test applies.

If a state law improperly classifies on the basis of gender, then intermediate scrutiny applies. The state must show that the classification is substantially related to an important government

interest (and also must provide an exceedingly persuasive justification).

Gender is only a classification for equal protection analysis if the law facially discriminates based on gender, or there is a discriminatory impact and a discriminatory intent to the law.

Here, the City policy does not facially discriminate against women, but only based on the type of religion.

A might argue that the city policy has a discriminatory impact -- most organized religions (including A's) do not ordain women. Thus, it is much more difficult, if not impossible, for women to qualify as jail ministers. Thus, there is a discriminatory impact.

However, there does not appear to be any discriminatory intent to City's action -- City's policy is instead based on staff and security concerns.

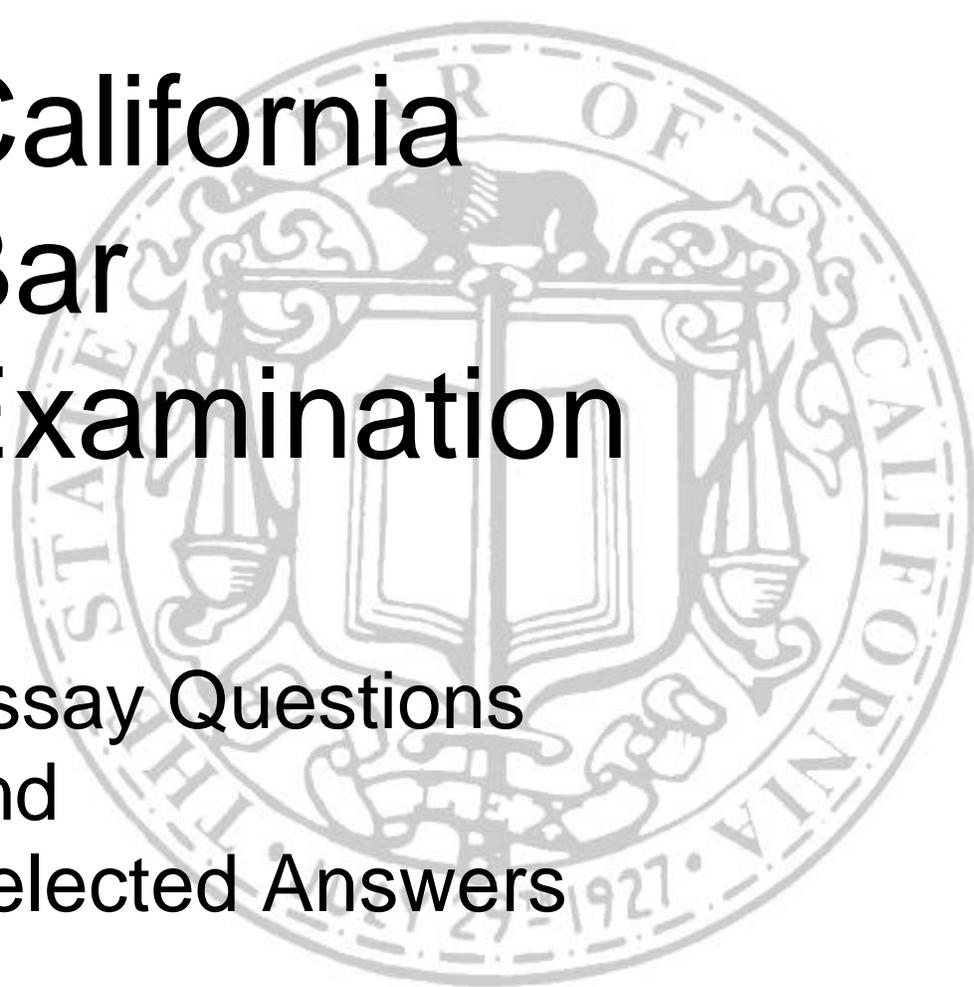
Rational Basis

Thus, no suspect class is involved, and only a rational basis test would apply. The burden is on the plaintiff to show that there is no conceivable legitimate state interest that could rationally be served by the policy.

Here, the City clearly has a legitimate interest in security. While City's policy may not be narrowly tailored to that policy (see above), it is certainly rationally related. Thus, any gender discrimination claims by it would fail.

Fundamental Rights

Strict security applies to any discriminatory denial of a fundamental right under the equal protection clause. Here, A's freedom of religion is allegedly denied because she is not part of an organized religion. Thus, strict scrutiny would apply under this claim -- the same analysis as for free exercise (above) would apply and the policy would be struck down.

The seal of the State Bar of California is a circular emblem. It features a central shield with a scale of justice and a book. Above the shield is a grizzly bear. The shield is flanked by two scales of justice. The entire emblem is surrounded by a circular border containing the text "THE STATE BAR OF CALIFORNIA" and the year "1927".

California Bar Examination

Essay Questions
and
Selected Answers

February 2002

Question 5

The growth of City has recently accelerated, putting stress on municipal infrastructure. City's water supply, roads, sewers, and schools are all operating in excess of designed capacity.

The Assembly of Future Life was organized in City not long ago. Its members adhere to certain unpopular religious beliefs. City gave the Assembly preliminary zoning approval for plans to build a worship center on a one-acre parcel of real property the Assembly owned within City's borders. The Assembly's plans incorporated a dwelling for its minister. Soon after the preliminary zoning approval, newspapers in City featured articles about the Assembly and its members' beliefs.

After these newspaper articles appeared, City adopted a "slow growth" ordinance providing for an annual lottery to allocate up to 50 building permits, with applicants for certain "priority status" dwellings entitled to participate first. Priority status dwellings were defined as: (1) affordable housing; (2) housing on five-acre lots with available sewer and water connections; or (3) housing with final zoning approval as of the date the ordinance was adopted. Only after all applicants for priority status dwellings had received permits in the lottery could other applicants participate.

Over 500 applicants for priority status dwellings participated in the first annual lottery. Realizing that its opportunity to participate in a lottery could be years away, the Assembly submitted an application for retroactive final zoning approval and a building permit. City denied the application.

The Assembly brought suit in federal district court against City, alleging that: (1) City's ordinance was invalid under the due process, equal protection, and takings clauses of the U.S. Constitution; and (2) City's denial of the Assembly's application was invalid under the due process clause of the U.S. Constitution.

What arguments can the Assembly reasonably make in support of its allegations and is each argument likely to succeed? Discuss.

ANSWER A TO QUESTION 5

1. Assembly of Life's (AAsembly@) Challenge of the City Ordinance

The Assembly, an unpopular religious organization in the City, is attempting to obtain building approval for its worship center on a one acre parcel of land. However, in response to the growth of the City and the strain on the City's infrastructure, the City enacted an ordinance that strictly limits growth, and affords priority largely on the basis of increasing affordable housing with preexisting facilities. Assembly challenges the ordinance based on (1) Due Process, (2) Equal Protection, and (3) the Takings Clause of the United States Constitution.

Standing

Because Assembly is suing in Federal Court for violation of its constitutional rights, it must first demonstrate that it has proper standing to bring its claim. A plaintiff has standing to sue (1) where it has suffered an actual injury, (2) where that injury has been caused by the defendant's actions, and (3) where the harm or injury is redressable by a court order.

In the present case, Assembly has standing to challenge the ordinance. Assembly has suffered an actual injury because it cannot build its worship center because of the change in the law, preventing it and its members from more fully exercising their religious beliefs. This injury was caused by the change in the law when the city enacted the ordinance, and it could be redressed if the court struck down the ordinance.

However, the city could argue that even if the court struck down the ordinance, Assembly's injury would not be redressed because [it] may not receive final zoning approval regardless. In light of the fact that Assembly received preliminary approval without difficulty, this argument would likely fail.

It is also important to note that the assembly has organizational standing, because its members are injured by the city's action, and it relates to the purpose of the organization (exercise of religious beliefs).

Ripeness

In a related matter, Assembly's claim must also be ripe in order for the court to hear its claim. A suit is not ripe where the injury has not yet occurred or where the harm is speculative in nature or where the issues for the record are not fully developed or fit for adjudication.

The City may argue that Assembly has not yet been turned down for its permit, and that it could conceivably receive its permit after the lottery takes place. However, this argument would likely fail, given the limited nature of available permits, and given the fact that the available permits will be given on a basis of priority which excludes Assembly. Additionally, the issues in the case are fit for adjudication, and there is no further factual development necessary before the court can properly decide the merits.

State Action

The protections of the Constitution prevent the government from infringing the Constitutional rights of its citizens, and therefore, for Assembly to succeed it must prove state action. However, because the City's ordinance is at issue, and the City is a government actor, there is sufficient basis for state action.

Substantive Due Process

Assembly will argue that the city enacted the ordinance in order to prevent it from exercising its unpopular religious beliefs, violating its fundamental right to exercise its religion, as well as its members' right to free assembly.

In cases where a statute denies a plaintiff the exercise of a fundamental right, the statute should receive strict scrutiny. However, if the law does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

This law would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. The members are still free to assemble where they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

Under rational basis review, the law will be upheld if it is rationally related to achieve a legitimate governmental interest. In the present case, the city has a legitimate interest in preserving the city infrastructure for necessary housing purposes, and delaying approval for development that may otherwise tax the city's resources until they can be improved. This ordinance is rationally related to achieve this purpose because it gives a priority to housing development and development with pre-existing infrastructure, thereby limiting growth to necessary housing, and housing that will not sufficiently burden the resources of the city. Thus, under rational basis review the ordinance will be valid.

However, if the law is analyzed under strict scrutiny, the law will only be upheld if the City can show that (1) it is narrowly tailored to (2) achieve a compelling governmental interest. Additionally, there must be no less restrictive means available to achieve the city's goal. Under this analysis, the City would assert that it has a compelling interest in

increasing housing and limiting development. However, the Assembly will likely argue that it is not narrowly tailored to achieve this goal because it includes housing that had final zoning approval at the time the ordinance was passed, which could potentially include land that did not include housing. Additionally, because the religious center was only going to have one person (the minister) live on the property, they could argue that the law could have been less restrictive by allowing development of property which would not tax the water supply, sewers or schools by the mere addition of one person. Therefore, in the unlikely event that the court applies strict scrutiny, the ordinance would be struck down.

Equal Protection

The Assembly would argue that the ordinance is discriminating against it because of its unpopular religious beliefs, and that the law is therefore invalid under the Equal Protection clause because it discriminates against them based on their exercise of their fundamental right to exercise their religion.

Classification

If the statute does not discriminate on its face or expressly in its terms, the plaintiff must prove (1) discriminatory effect, and (2) discriminatory intent.

The ordinance in this case does not discriminate on its face between religious or nonreligious development. The classification in the ordinance is between affordable

housing and nonaffordable housing. Because this classification does not implicate a fundamental interest, the statute would receive rational basis review.

However, the Assembly would argue that the ordinance has a discriminatory effect, because other development would be permitted under the new law, but the religious development is now prevented. Additionally, it would argue that the timing of the ordinance leads to a conclusion that the law was passed because of discriminatory intent. Assembly would argue that it received preliminary approval of its zoning, but that immediately after the unfavorable newspaper articles were printed, the city enacted the ordinance that prevented their development. The city would argue that there is no discriminatory intent because it was not acting to prevent the Assembly from its religious beliefs, but was instead motivated by the dire crisis for city resources.

This is a close call, but the city would likely prevail. Absent additional evidence, the City's ordinance appears to be related primarily to its concern regarding limited resources, rather than an aversion to Assembly's religion.

Level of Review

If the court believes that the ordinance was not motivated by discriminatory intent, it should apply rational basis review. As discussed above, the statute would pass this level of review.

However, if the court believes that this law was motivated by religious animosity to Assembly and discriminated against it for issuing permits based on its unpopular religious beliefs, then it should apply strict scrutiny. As discussed above for due process, the law would likely fail strict scrutiny.

Takings Clause

The Assembly would argue that the retroactive change in the permit approval process after it has already received preliminary approval constitutes a taking of its property right in violation of the Takings Clause.

Under the Takings Clause of the Fifth Amendment, where the government takes or condemns private property, due process requires that it provide just compensation. Any permanent physical occupation of private property by the government is a per se taking of the property. However, a statute which limits the productive uses of the property is considered a regulatory taking. In order for a regulatory taking to occur, the government's action must take away all reasonable use or value of the property. Otherwise, the government's action that impacts, but does not take away, the value or use of the property need not be compensated.

The assembly wants to use its parcel of land in the city to develop a worship center and give its minister a place to live. It will argue that because it is a religious organization, its only purpose in owning the property is to conduct religious

activities. Because the ordinance prevents them from building a worship center to conduct their activities, it prevents them from beneficial use of the property and should be compensated.

However, the city would argue that the ordinance may have prevented (or more likely, merely delayed) the building of the center, but did not deprive the Assembly of every beneficial use or value of the property itself. The assembly is free to use it for other purposes that do not require the building permit, and are still free to use it for religious worship. Because the Assembly is still free to use the property for other purposes than building the center, the ordinance likely does not constitute a taking, and need not be compensated.

2. Assembly's Challenge of the Denial of its Retroactive Zoning Approval and Building Permit

The Assembly will argue that the city's denial of its retroactive zoning application violated its right to procedural due process and substantive due process.

Procedural Due Process

The Assembly will argue that it did not receive procedural due process when its application was denied. Under procedural due process, before a plaintiff is deprived

property or liberty right, it must receive reasonable due process (including a hear, right to present its side and argue its case). For property, a taking of property without due process only occurs if there was a property right, i.e., an entitlement to the benefit or property interest.

In the present case, although Assembly will argue that it was already approved for preliminary zoning and that it would have been approved for final building if not for the newspaper, it will likely lose because it cannot demonstrate that it was deprived of a property right. Zoning approval was not yet complete, and preliminary approval did not create an entitlement to final approval. Therefore, because Assembly was not deprived of a property right or interest entitlement, no procedural due process is required, and the City's denial of the application was likely valid.

Substantive Due Process

As discussed above, in cases where a statute denies a plaintiff the exercise of a fundamental right, the state action should receive strict scrutiny. However, if the state action does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

The city's denial of Assembly's permit application would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. As discussed above, the members are still free to assemble where

they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

The denial of Assembly's retroactive application survives rational basis review because it is rationally related to the legitimate city interest of preserving development and city resources for necessary housing.

ANSWER B TO QUESTION 5

1. Validity of Ordinance?

Standing

First, Assembly will have constitutional standing whether as [an] organization or by individual members to sue in federal district court. In order to have standing, a party must have (1) an injury in fact; (2) caused by alleged unconstitutional conduct; (3) capable of redressibility. Here, the Assembly and its members have injury in fact, as they have been denied a permit to build, caused by the new ordinance;; and if the court rules in favor of Assembly, their grievance will be capable of redressibility. The ordinance caused them not to get their permit, and if the ordinance is invalidated, they will be able to participate in the lottery.

(a) Due Process argument. (Procedural and Substantive)

Procedural Due Process

The Assembly could first argue that the ordinance is invalid under procedural due process. The Fifth Amendment due process clause, as applied to the states via the Fourteenth Amendment, is applicable in this case to City (a State Actor). The due process clause guarantees that no person shall be denied life, liberty, or property without due process of law. Assembly will argue it was denied procedural due process in the denial of its permit under the ordinance. It will argue it had a right to be heard on the issue, particularly after it had already been granted a preliminary

zoning permit. It will argue the ordinance does not leave open any procedures to be heard.

In determining the need for procedural due process, courts look at (1) whether a fundamental life or liberty interest or property entitlement has been denied, (2) the importance of that interest; (3) whether the procedures claimed by Assembly would make the hearing more fair and accurate; and (4) balance those interests against the interests of governmental efficiency.

Assembly could argue that (1) their land and zoning permit is a property entitlement. Although they did not have a final permit, the preliminary permit gave them reason to claim an entitlement and believe they would receive a final permit. Also, they will argue they have a right to build on their land and the ordinance is denying them this.

(2) the Assembly will argue that their interest is important. They have invested money in the land, and they are a church that needs a place to worship.

(3) The assembly will argue that to have a hearing or at least a chance to repetition will greatly increase the fairness and accuracy of the permit procedure. As of now, City determines on its own, without hearing, who fits Affordable housing,[@] and sets an arbitrary 5-acre minimum land size, and doesn't leave open for hearings for those with preliminary permits. The hearings, rather than an arbitrary lottery, will better determine who needs the permits more, who should be entitled to them, etc.

(4) The City will counter that its interests in efficiency outweigh the interests in procedure, particularly because no one truly has an entitlement to a building permit. The City will argue that it is facing a crisis in its municipal infrastructure, and that the only way to relieve it is to substantially slow down growth. If it were to have a hearing on every permit, this would drastically slow down the process with so many parties competing for limited spots. Plus, a lottery is fair and objective.

City, could, however, have a lottery for some, and leave open a few spots/permits to be reviewed by application.

Given City's interests, they could keep the lottery, but they should have allowed reasonable procedures and hearings in place for others who want to develop their land. Assembly could win here.

Substantive Due Process

In order to succeed on a claim of substantive due process, Assembly must show (1) that the ordinance denies applicants a fundamental liberty interest and did so deny them; and (2) is not necessary to achieve a compelling government interest.

Assembly will argue that the ordinance denies individuals the right to build on their property, [and] to decide how to develop their land. Assembly, unfortunately, will not be able to show this is a fundamental right. The Supreme Court has not recognized a fundamental economic right (but see below as applied to them).

Therefore, the Rational Basis test will apply. Assembly must prove that the ordinance is not reasonably related to a legitimate government interest. Assembly will fail here. Government will be able to assert that the extreme stress on the City's infrastructure is a legitimate government interest in the welfare of its people. City will also show that the ordinance was a rational way of solving the City's growth and infrastructure problem. By limiting building, it can stabilize and improve infrastructure to keep up with the growth.

Assembly will not succeed here.

Equal Protection

Assembly can argue that the ordinance, on its face, denies equal protection of the laws based on an applicant's housing to be built, those with final zoning approval, and the infrastructure of the land. In order to sustain an equal protection claim, Assembly must show that people are treated differently with regard to fundamental rights, or that Assembly is part of a suspect (or quasi) class.

Assembly will again try to argue that people are treated differently depending on the nature of their land, what they choose to build, etc. Again, this is not a fundamental right recognized by the supreme court, and rational basis will apply. (See before.)

Also, Assembly won't be able to make a reasonable argument as to suspect classification. The law in its intent, effect, or in its face, does not discriminate based on

race, national origin, alienage, gender, or illegitimacy (recognized protected classes by the supreme court). Therefore, rational basis applies and City again will succeed (see before).

(c) Takings Clause.

Assembly will argue that the ordinance acts as a taking of their real property for public use without just compensation. Under the Takings Clause, when a government entity (State Actor B as City is here) (1) takes property of another for (2) public use, it must provide just compensation.

Taking?

Assembly will argue that the regulation, in effect, is a taking because by denying building permits, the regulation leaves no viable use for the property (other than farming). Assembly will argue that those who want to build something other than housing and who do not meet the other requirements are left with no viable use for their property. The City is essentially taking their property because City is leaving them without use.

City will counter that there are other viable uses like parking, or farming, that there are some viable uses left, although severely limited. And that the limitations are outweighed by the benefits to the City in reducing the stress on its infrastructure and slowing growth.

Assembly may succeed on this issue if they can show that where their property is situated, it can not be made useful in any other way **B** that will stay a vacant property without earning potential.

If Assembly meets this prong it will also be able to show it was taken for public use as the City admits that it's being used for the City's purposes in slowing growth.

Assembly will receive just compensation if it succeeds.

2. City's denial of Assembly's Application

Assembly will argue again that it should have had a hearing, etc. (see above) and may succeed there.

However, Assembly may have an argument that it was denied substantive due process because the City used the ordinance to violate Assembly's right to worship/free exercise of religion.

Assembly will try to show that although the ordinance seems to be a law of general applicability on its face, it is really an attempt to interfere with its practice of religion under the First Amendment as applied to the states under the Fourteenth Amendment.

Assembly will argue that (1) City's intent in passing the ordinance was to prevent them from building a place of worship; and (2) the law had the effect of preventing them from building.

Obviously, they were denied the building permit, so they will be able to show prong #2.

In order to meet Prong #1, however, they will have to show that they were granted the preliminary permit and that only after the newspaper article, the lottery came into effect. They will have to prove that the City never had this ordinance in mind before learning of Assembly, the City passed the ordinance with the intent to prohibit Assembly's plans. Assembly could try to find witnesses or City council members, or minutes of meetings to help them.

If they succeed here, City will have to show that their discrimination vs. religion was necessary to achieve a compelling government interest. This will be nearly impossible to show, and Assembly will succeed. City would have to show Assembly was a cult, or illegal institution.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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Question 5

The National Highway Transportation and Safety Administration (NHTSA), a federal agency, after appropriate hearings and investigation, made the following finding of fact: “The NHTSA finds that, while motor vehicle radar detectors have some beneficial purpose in keeping drivers alert to the speed of their vehicles, most are used to avoid highway speed-control traps and lawful apprehension by law enforcement officials for violations of speed-control laws.” On the basis of this finding, the NHTSA promulgated regulations banning the use of radar detectors in trucks with a gross weight of five tons or more on all roads and highways within the United States.

State X subsequently enacted a statute prohibiting the use of radar detectors in any motor vehicle on any road or highway within State X. The State X Highway Department (Department) enforces the statute.

The American Car Association (ACA) is an association comprised of automobile motorists residing throughout the United States. One of ACA’s purposes is to promote free and unimpeded automobile travel. ACA has received numerous complaints about the State X statute from its members who drive vehicles there.

In response to such complaints, ACA has filed suit against the Department in federal district court in State X, seeking a declaration that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution. The Department has moved to dismiss ACA’s complaint on the ground that ACA lacks standing.

1. How should the court rule on the Department’s motion to dismiss on the ground of ACA’s lack of standing? Discuss.
2. On the assumption that ACA has standing, how should the court decide ACA’s claim that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution? Discuss.

Answer A to Question 5

5)

1. ACA's Standing

Organizational Standing

An organization may bring suit on behalf of its members if it can establish the following:

1. It's [sic] members have suffered an injury in fact;
2. The injury is related to the organization's purposes; and
3. The court can grant relief without the presence of the individual members who have suffered the injury.

Injury in Fact

The requirement that the members have suffered an injury in fact ensures that the federal courts are only hearing real and live claims and controversies. In order to establish an injury where a statute is challenged based on its unconstitutionality, either the statute must have been enforced against someone or the failure to rule the statute invalid before enforcement must work an extreme hardship to the complaining individual.

Here, there is no evidence that the statute has been enforced against any of the ACA members. Though the State X Highway Department enforces the statute, the facts do not indicate that the department has enforced the statute against any of the ACA members. The facts do state that ACA has received numerous complaints about the statute from State X members who drive in State X where the statute is being enacted. Because there has been no actual enforcement of the statute, in order to obtain pre-enforcement review, the ACA must show that its members are going to be put to an extreme hardship if they are not granted a judgment on the constitutionality of the statute.

The hardship faced by the members if they are forced to continue acting under this statute until it is enforced is relatively light.

It is likely that the court will find that this case is not ripe for review because there is no evidence that the statute has been enforced against the ACA members. Furthermore, the hardship the members will suffer if they are not given pre-enforcement review does not rise to the level of extreme hardship to justify a premature ruling by the federal court.

Injury Related to Organization's Purposes

If the court does find the members of ACA have suffered an injury, ACA must next establish that this injury is related to the purpose of the organization. Here, the injury would be that the drivers are forced to drive without radar detectors. The stated purpose of the ACA is to promote free and unimpeded automobile travel. ACA will have no problem showing that the statute prohibiting drivers from utilizing radar detectors is related to free and unimpeded automobile travel. Not having a radar detector can rationally be viewed as being an impediment to free driving. Thus, the injury is related to the association's purpose.

Presence of Individuals is Unnecessary to Grant Effective Relief

ACA must show that it can bring suit challenging the statute and that the court can grant relief to remedy the injury suffered by its members without the individual presence of the members in the lawsuit. Here, the relief ACA is seeking is a declaration that the statute is invalid. If they are seeking injunctive relief, to keep the Department from enforcing the statute, then the presence of the members would not be necessary to fashion this relief. If the ACA is seeking an injunction this relief would be an effective means to remedy the injury suffered by the drivers. If, however, the association is seeking money damages because of the infringement of some free driving right, then they would need the presence of the drivers in the suit to grant this relief.

11th Amendment

State may also challenge the suit brought by ACA on grounds of the 11th Amendment. The 11th Amendment prohibits cases in federal courts against the states. Here, ACA is bringing an action against State X Department in the federal court. The ACA's suit might not be barred because they are seeking to have the statute ruled unconstitutional and are most likely seeking an injunction prohibiting further enforcement of it. It is unlikely that the 11th Amendment will bar this suit against the Department for a declaration of unconstitutionality.

Conclusion

The court will most likely find that ACA lacks organizational standing because its members have not suffered an injury in fact. There is no evidence the statute has been enforced against the members and the "hardship" suffered by the members is not sufficient to warrant pre-enforcement review. The case should be dismissed for lack of standing.

2.

Validity of State X Statute under Commerce Clause

Preemption

Where the federal government preempts a field, the state may not regulate it. Preemption can take place either expressly by the Legislature stating so in a statute, by the pervasive presence of the federal government in the certain field, or by a federal statute conflicts [sic] with a state statute directly or indirectly.

There is no evidence that the NHTSA intended to preempt the field of radar detector legislation. In the statute, they stated that its purpose was to allow apprehension of speeders by law enforcement officials and assumedly, for the protection of drivers. There is no express preemption of the field. The regulation by the federal government in this area does not seem to be so pervasive so as to imply that the federal government has preempted the field (as is the case with the FCC). This statute appears from the facts to be the only statute related to speed control devices.

The federal statute is limited to large trucks. It prohibits radar control devices in trucks over a certain weight. The state statute is more regulatory than the federal statute- it prohibits such devices in all vehicles. More extensive regulation granting more protection serves the purpose of the federal statute, it does not conflict with it.

Dormant Commerce Clause/Negative Implications of the Commerce Clause

A state may not regulate interstate commerce in a way that is discriminatory against interstate commerce or in a way that unduly burdens interstate commerce. Here, the statute does not discriminate against interstate commerce. The statute prohibits all drivers from using these radar control devices- it does not just prohibit out-of-state drivers from using these devices. Because the law does not discriminate against interstate commerce, to be invalid, ACA must show that the regulation places an undue burden on interstate commerce.

In order for state law that regulates either the channels, instrumentalities or those things that, in their aggregate, have a substantial affect [sic] on interstate commerce, the state must show that the non-economic state interest outweighs any burden on interstate commerce. Here, the interest is not economic. The interest of the state is presumably for the safety of drivers on the State X roads and highways. Speed devices like radar detectors arguably aid drivers in evading the laws that the state will argue were designed to protect drivers.

The safety of drivers on State X roads and highways is a legitimate, important state interest. This interest must outweigh the burden on interstate commerce by the prohibition

on speed control devices. The only burden suffered by interstate commerce is that interstate drivers will be subject to different rules. In other states, they might be permitted to use radar detectors, but in State X, they will not be able to. This might potentially create a substantial likelihood that drivers traveling on interstate highways, traveling between states, will be more likely to unknowingly violate this rule. In order to remedy this problem, the State could post signs at or near its borders that radar detectors are prohibited in State X. Once a driver knows of this prohibition, the driver can put the radar detector away or turn it off. The statute does not prohibit the possession of one within the state, but only the use of one.

Conclusion.

The prohibition of radar detectors in State X in any vehicle traveling on a road or highway within the state serves an important, non-economic state interest. This interest outweighs any burden placed on interstate commerce. The statute will not violate the Dormant Commerce Clause.

Supremacy Clause

The statutes, treaties, and Constitution of the United States are supreme. Where a state law conflicts with either federal statutes, regulations, or the federal Constitution, the state law is invalid.

In order for ACA to prove that the state law violates the Supremacy clause, it must show that the State X law either directly conflicts with the federal law, or frustrates or impedes the objectives and purposes of the federal law. Here, the State X law only regulates more vehicles than does the federal statute which is limited to trucks over a certain weight.

A state may regulate more extensively than a federal statute so long as this does not frustrate the objective of the federal statute. A state may not, however, pass a law that excludes conduct that is included in a federal law. Thus, for example, the State X statute could not read that trucks with a gross weight of five tons or more are exempt from the radar detector ban. This would expressly contradict the federal statute. Here, the State X law does not expressly conflict with the federal statute nor does it impede or frustrate the objective of the federal statute. The federal statute objective and the state statute objective are the same- both statutes aim to prevent drivers from evading law enforcement officials for violations of speed-control laws. The State X statute only prohibits more vehicles from using such devices--- it extends the protections the federal statute desired even further.

Conclusion

This law will not be invalid under the Supremacy Clause. It neither expressly contradicts nor frustrates or impedes the purposes of the federal statute.

Answer B to Question 5

5)

I. The Court should Deny the Department's Motion to Dismiss for ACA's lack of standing

A. Preliminary Jurisdictional and Venue Issues

Personal jurisdiction in State X is appropriate here, given that the subject action is to challenge the validity of a statute of State X. The Federal District Court for State X has jurisdiction because the ACA is raising a federal question: namely, whether or not the State X statute violates the United States Constitution as to either or both of [sic] the Commerce Clause and the Supremacy Clause. Venue in the Federal District Court for State X presumes that State X is a single-district state, and thus there is not a multiplicity of federal district courts from which to choose.

B. ACA has standing

The Federal courts have jurisdiction to hear cases and controversies. This means that there must be an actual dispute, not a hypothetical or moot question, and that the parties to the action are, respectively, the injured party and the party liable for the injuries.

Although the ACA itself has not suffered an actual injury, the Courts have, since the Sierra Club case, set forth a clear standard by which unincorporated associations can sue on behalf of their members and be found to have standing. There are three components that must be met: first, the purpose of the lawsuit must be directly related to the purpose of the association; second, individual members of the association would have the standing to bring the action on their own individuals[] behalves; third, the participation of individual members of the association is not required to prosecute the action. Each of these will be explored in turn.

i. The Purpose of the ACA

As noted in the facts, the ACA is an association comprised of automobile motorists residing throughout the United States. Among ACA's organizational purposes is the promotion of free and unimpeded automobile travel. Such an organization is clearly one that is concerned with a State that has adopted and enforced a statute that imposes different rules on drivers as they cross from state to state.

ii. The Standing of Individual Members

Also, as noted, members of the ACA have complained to the ACA about the relevant statute. We cannot determine, from the facts provided, whether any member of

the ACA has actually been cited for use of a radar detector in violation of the statute, nor can we determine whether ACA members have been cited for speeding based on being “clocked” by police-operated radar that would have been detected with the lawful use of radar detectors. However, a person with a reasonable basis for challenging a criminal statute is not required to first commit the crime and be convicted thereof before challenging the validity of the statute. On this basis, individual members of the ACA who own radar detectors and would use them when driving in State X would clearly have standing to sue; assuming that such persons exist, the next element of the standing analysis is satisfied.

iii. The participation of individual members

The final element of associational standing analysis is whether the individual members themselves are required to participate in the action. Here, the ACA is mounting a broad-based challenge to the statute; their claim is not tied to the enforceability of the statute against a particular person or in a particular set of circumstances. In these conditions, the ACA is fully capable of proceeding with its case absent the active involvement of any particular person or representative plaintiff.

Thus, the requirements of associational standing have been met, and the Court should deny the Department’s motion to dismiss for lack of standing.

II. The Court should Uphold the validity of the Statute.

The ACA has identified two bases for its challenge of the constitutionality of the relevant State X statute: the Commerce Clause and the Supremacy Clause. Each will be discussed in turn.

A. The Commerce Clause.

Under the United States Constitution, Congress has the power to regulate interstate commerce. However, individual states, as separate sovereigns, have their own individual police powers to regulate conduct within the boundary of the state. The interplay between these two provisions - often conflicting provisions - requires in part of a fact-based analysis.

The ACA would argue that the subject statute clearly imposes significant restrictions on interstate commerce. They would argue that motorists driving through State X on their way from one state to another should not be expected to know the requirements of State X law, and thus face risk of [a] ticket or possible arrest.

State X will counter by noting that any impact on interstate commerce is, at best, minimal and tangential, and does not constitute an undue burden. The State will note that they do not ban the ownership or possession of radar detectors, only the use of radar detectors.

Additionally, State X will argue that its regulation is required to enable State X to use its

police power to provide for safe roads and highways. State X will cite to laws in other states, such as Virginia, prohibiting the use of radar detectors. State X will similarly note that other states validly impose regulations that are far more burdensome, such as laws regarding child safety seats.

State X will also note that no discriminatory impact exists against out-of-state residents. All motorists - both from outside State X and residents of State X - are subject to the ban. Presumably, State X will post appropriate signage at or near public roads that cross into State X advising motorists of the existence of the ban on radar detectors. This will further minimize the impact on out-of-state motorists.

On these bases, the Court is likely to agree with State X's contention that State X's regulation does not violate the Commerce Clause.

B. The Supremacy Clause.

In arguing that the relevant statute is in violation of the Supremacy Clause, the ACA is really arguing that by reason of the applicable NHTSA regulations on radar detectors, the Federal government has preempted any state legislation impacting this area. For the reasons noted below, this argument too will fail.

Federal laws and regulations can preempt state laws either expressly or through implication. Express preemption is readily apparent when it occurs; here, no evidence exists to indicate that the NHTSA's regulations promulgated on this topic state that they are exclusive, and thus no express preemption exists.

The federal government can also preempt by implication. If the scope of the federal action is such that it leaves no room for any additional state regulation, then state action is prohibited. Here, the NHTSA regulations only apply to trucks with a gross weight of five tons or more. The ACA will argue that by defining certain classes of vehicles which are not allowed to use radar detectors, the NHTSA also implicitly ruled that other motor vehicles are not prohibited from doing so.

This argument is likely to fail, however. Nothing implicit in the text of the regulation, as provided, implies any intent at reserving the arena for the federal regulatory action. Rather, the NHTSA's findings of fact are in no way limited to certain classes of vehicles, certain sizes, weights, etc. This would suggest, the State will argue, that NHTSA simply was not willing or able to extend its regulations further, but not that the individual states were prohibited from doing so.

Again, as noted above, many other states have similar or comparable statutes, regulating radar detectors or other areas. As such, the requisite intent to preempt is not likely to be found, and the Court will agree with State X that the regulation is not in violation of the Supremacy Clause.

* * *

Since the regulation is not invalid on any basis challenged by the plaintiff, assuming no facts inconsistent with those given, the statute will be upheld.

ESSAY QUESTION AND SELECTED ANSWERS
JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

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Question 2

State X amended its anti-loitering statute by adding a new section 4, which reads as follows:

A person is guilty of loitering when the person loiters, remains, or wanders about in a public place, or on that part of private property that is open to the public, for the purpose of begging.

Alice, Bob, and Mac were separately convicted in a State X court of violating section 4.

Alice was convicted of loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts in violation of section 4.

Bob was convicted of loitering for the purpose of begging on a waiting platform at a stop on City's subway system in violation of section 4.

Mac was convicted of loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers Building located in the business district of City in violation of section 4.

Alice, Bob, and Mac have each appealed their convictions, and their appeals have been consolidated in the State X appellate court. It has been stipulated that Alice, Bob, and Mac are indigent, that section 4 is not void for vagueness, and that the only issue on appeal concerns the validity of section 4 under the First Amendment to the United States Constitution.

How should the appellate court decide the three appeals, and why? Discuss.

Answer A to Question 2

2)

STANDING

Since the question states that the only issue on appeal concerns the validity of section 4 under the First Amendment, it is assumed that all standing requirements are met.

STATE ACTION

The constitutional provisions of the first amendment are only applicable to state action which deprives a citizen of his/her right to free speech. Here, State X passed a loitering law affecting speech (expression), and later enforced that law by their police. Therefore there is state action and Alice, Bob and Mac can allege their first amendment rights.

SPEECH

The first amendment is raised with respect to a citizen's rights for free speech or religion. Here, State X passed a law concerning loitering. This law concerns the right to free speech, however, because speech is not limited to words spoken or written, but can also apply to free expression or demonstrative speech. Since this law affects where a person can legally go (in public space) and what they can do in that public space, it does affect speech.

CONTENT-BASED

Speech regulations can be either content-based or content-neutral. Content neutral regulations on speech are viewed more favorably than content-based regulations, because there is no discriminatory purpose on the face of the regulation. Here, however, the regulation affecting Alice, Bob and Mac concerns only those on the property "for the purpose of begging." Since the statute concerns only those who have particular purpose, a particular message (i.e. "please give me money if you can spare it"), the statute is content-based and will have to survive stricter scrutiny.

OVERBREADTH

While the statute is not void for vagueness, it could be challenged by all three for being over broad. That is, it may not be narrowly tailored to serve the interest they are seeking to regulate. The statute seems aimed at prohibiting begging. However, it does not merely prohibit begging but "remain[ing] or wander[ing] about in a public place for the purpose of begging." This statute is arguably overbroad. Here, an officer can arrest someone, not for committing the actual act of begging, but for having that purpose. How can an officer, or judge, or a jury possibly know whether a person has the purpose of begging? This statute

invites abuse of indigent or undesirable people. Furthermore, the statute regulates “remaining” or “wandering about” in a public place. Again, this is overboard because it punishes not only the act of begging but the right of a person to remain in a public place or wander about there. Under this statute, an indigent could arguably be arrested for taking a walk on the sidewalk or sitting in a public park -- if the officer believes that he has the “purpose of begging.”

INDIGENCE

It is unconstitutional to pass a statute that places an unreasonable burden on indigents with the respect to compliance (for example, unreasonable fines). Here, the statute & question do not say anything about fines or fees, so it is presumed that there is no undue financial burden on indigent people.

Alice should win her Appeal

SIDEWALK = PUBLIC FORUM

Alice should win her appeal because she was “loitering...for the purpose of begging” on the sidewalk outside the Public Center for the Performing Arts. First, a sidewalk is generally a public forum. In a public forum, a person is given greater leeway to exercise their rights of free speech. The city would have to have a strong justification for repressing Alice’s right of self-expression on a sidewalk, such as public safety.

NO DANGER TO THE COMMUNITY

While Alice might not be able to loiter on the sidewalk begging in front of a Fire Station (for example) for public safety reasons, she should be able to do so in front of the public center. There is no indication that there is any danger to the community in letting her exercise her free speech rights. Rather, her speech rights are being suppressed likely because the well-to-do do not want to suffer a beggar when they go out to the theater. This is not sufficient justification to violate Alice’s right of free expression.

Bob should lose his appeal:

SUBWAY PLATFORM = QUASI-PUBLIC FORUM

A subway is not a public forum, like a park or a sidewalk. To access a subway platform one has to pay money. Therefore, it is more like a private forum, to which the rider has a license to be on the property. However, the grantor of the license is still a public entity (the city). So the subway platform is like a quasi-public forum. It has elements of being both a public and a private forum.

POTENTIAL DANGER

A quasi-public forum faces a standard of scrutiny similar to the public forum. Here, there is arguably a potential for danger to both Bob and the public. Subway platforms can be crowded places, and the subway trains typically approach at dangerous speeds in close proximity to the waiting passengers. Furthermore, even the rails of the train are often electrified. Finally, the crowds of people on subway trains are often hot, sweaty, in a hurry, tired, and thus more likely to have short tempers. For all these reasons, regulating begging has more value in this forum than on the sidewalk. It is possible that the crowds might push or shove one another (or Bob) to get away from the beggar. Furthermore, allowing begging on the platform would further congest an already dangerously congested area as other beggars moved in to beg in a beggar-friendly zone. Therefore, the state and city have reasonable justification to regulate begging on the subway platform (provided, of course, the statute is not overbroad).

Mac should lose his appeal:

STATE ACTION

Even though Mac was arrested in a private building, he was arrested subject to state action, and state action is what is at issue in his case. The state passed the anti-loitering statute, and the state enforced that statute with its police powers.

PRIVATE FORUM -- OPEN TO THE PUBLIC

The Downtown Lawyers Building is a private building. The state could not regulate what kind of speech could occur in a completely private building, in a completely private setting. But in a setting where the private owner(s) invite the public to their private space (e.g. bringing in employees, or, as here, a lobby open to the public) the state has the right to regulate speech.

PUBLIC CONCERN

Mac should lose his appeal because there is a public concern at stake when a beggar begs in a private, customer-driven establishment. There is not the danger that inheres in the subway platform, but there is a strong potential for a loss of revenue due to the begging. Customers will tire of the begging and may stop frequenting the lawyers building. If beggars could beg in every establishment open to customers, the aggregated effect may be that people will go out less and business, the economy, tax revenues and social programs will suffer. Therefore, the state has sufficient reason to regulate Mac's type of begging (again, assuming that the statute is not overbroad).

Answer B to Question 2

2)

Validity of Section 4 Under the First Amendment

Alice, Bob and Mac have challenged their convictions under State X's loitering statute under the First Amendment of the Constitution. Although Alice, Bob, and Mac are indigent, the only issue on appeal is whether their rights under the First Amendment have been violated. Thus, there is no issue on appeal of whether the statute violates their rights under the Equal Protection Clause because they are indigent. There is also no issue of whether the statute is void for vagueness under the First Amendment because the parties have stipulated that is not void for vagueness.

Incorporation of the First Amendment Against State Governments

To challenge a statute on the basis that it violates their First Amendment rights, Alice, Bob, and Mac must demonstrate that there is some type of government action that has violated their rights. Under the due process clause of the Fourteenth Amendment, the limitations that the First Amendment places on federal government action have also been incorporated against the states.

Constitutional Standing

To bring a constitutional claim, a plaintiff must have adequate standing. This requires a showing of a personal injury; causation of that injury by state action; and redressability, which means that a favorable outcome in the case will result in the injury being redressed. Third party standing, which is the bringing of a suit by one person when another has suffered an injury, is prohibited in most circumstances. Similarly, generalized grievances are prohibited in most circumstances. A plaintiff must also show if she is seeking to prevent government action, that the controversy is ripe to be heard by the court, meaning that there is adequate factual development and it is an appropriate controversy for the court to hear. Finally, a case can be dismissed for mootness if the court will not be able to change the outcome, as a result of the Article III prohibition on courts issuing advisory opinions.

State X Government Action

Alice, Bob, and Mac must demonstrate that an arm of the State X government has taken some type of action which has violated their First amendment rights. Here, the state has convicted them of violating the anti-loitering statute. Thus, although it is unclear exactly what the penalty for conviction is, it is clear that Alice, Bob, and Mac have been penalized in some way by State X. Thus, the conviction constituted state action sufficient to allow Alice, Bob, and Mac to challenge the statute.

Implication of the First Amendment

The First Amendment prevents the government from limiting the rights of citizens to free speech. Although there are some circumstances in which this right can be limited, the government action must have sufficient justification. Here, the anti-loitering statute appears to be directed primarily at conduct, because it prohibits loitering, remaining, or wandering about in certain types of places. However, conduct, under certain circumstances[,] can also constitute speech. The statute also prohibits loitering for the purpose of begging, which may mean that people are penalized under the statute for what they are doing in specific areas. Thus, a person's right to both conduct as speech and to begging, which is a type of speech, may be limited under the statute. Therefore, the statute must satisfy the requirements of the First Amendment.

The Statute's Regulation as a Discrimination on Content and the Requirement of Strict Scrutiny.

If a state undertakes to regulate the speech of citizens in a way that discriminates on the basis of certain content, the statute must satisfy strict scrutiny to be upheld when the statute is enforced in certain areas. Similarly, if a statute regulates speech on the basis of the viewpoint it expresses, it also must satisfy strict scrutiny. A discrimination based on content means that certain types of speech are regulated or prohibited on the basis of what they say. Such an exercise of government power in choosing the types of speech that are appropriate is particularly disfavored under the First Amendment.

Here, Section 4 prohibits the activities of loitering, remaining, or wandering on certain property for the purpose of begging. Thus, the statute specifically prohibits activities associated with begging, which is a type of speech. If the statute only prohibited the activities of loitering or wandering, it might be argued that it was content neutral. Then, the statute could be upheld if it was demonstrated to be a reasonable time, place, or manner restriction enacted by the state to regulate the places or times at which speech might occur, rather than the actual content of the speech. But instead, this statute forbids speech related to begging. As a result, it can be argued that it is not content-neutral. The statute thus must withstand strict scrutiny to be upheld.

The Standard for Strict Scrutiny

To demonstrate that a restriction withstands strict scrutiny, the state has the burden of proving that the regulation is narrowly tailored to achieve a compelling government purpose. The regulation must be the least restrictive means of the state achieving its purpose.

Alice's Case

Alice's Standing

Alice has standing to challenge her conviction under the anti-loitering statute. She has been personally injured by being convicted of the statute, which probably carries with it imprisonment, a fine, or some other type of punishment. The injury was caused directly by State X promulgating and enforcing a statute which violates her constitutional rights. Her injury is redressable, because if the appeals court decides on her behalf the conviction will be reversed. There are no ripeness or mootness concerns.

State Action

As discussed previously, the conviction in State X is adequate state action.

Alice Violated Section 4 on a Sidewalk, which is a Public Forum

Alice was convicted for loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts. The location in which Alice was convicted of violating Section 4 is important, because a state has different abilities to restriction[sic] First Amendment rights depending upon where those rights are being exercised. Here, Alice's activities took place in what is called a public forum. A public forum is an area which is traditionally available to the public as a place in which they may exercise their First Amendment rights to free speech. Sidewalks and parks are classic public forums. In addition, the sidewalk on which Alice's activities took place was adjacent to the City's Public Center for the Performing Arts. This appears to be a municipal building. Sidewalks near public buildings are particularly important public forums because those are areas in which people may express their views in an effort to influence the way the city is governed.

Applicable Standard for Content Specific Restriction of First Amendment Rights in a Public Forum is Strict Scrutiny

The fact that Alice's activities took place in a public forum is important for determining the standard the city must satisfy to demonstrate that its restriction of her activities did not violate the First Amendment. As discussed previously, the city has the burden of showing that its regulation is narrowly tailored to achieve a compelling government interest.

The Compelling Government Purpose

Here, the purpose the government is attempting to achieve is unclear. It may be to deter what is seen as nuisance when people ask others for money on the sidewalk. It also might have something to do with the state's interest in preserving its aesthetic environment. These are unlikely to be found to be compelling government purposes that outweigh the exercise of others' First Amendment rights.

If there is crime affiliated with these activities related to begging, that might serve as a government purpose for the statute. Although reducing crime can be a compelling government purpose, the statute will also have to be narrowly tailored.

The Narrow Tailoring Requirement

Because it is unclear what exactly the government's purpose is, it is difficult to tell how narrowly tailored the statute is. However, if the statute was enacted to reduce crime, there are certainly ways that the government could address that crime more specifically by prohibiting the actual criminal activity rather than the begging that creates an environment in which such criminal activity may take place.

Validity of Alice's Conviction

Alice's conviction under the statute is thus invalid, because her activities took place in a public forum. The city may not curtail such activities in a public forum on the basis of content without a compelling government purpose that the statute is narrowly tailored to effectuate. Alice was penalized for exercising her First Amendment rights in an unconstitutional manner, and thus her conviction should be reversed.

Bob's Case

Bob's Standing

Like Alice, Bob has a personal injury in his conviction. That injury was caused by application of the statute to his activities, and may be redressed through the reversal of his conviction. Thus, he has standing to challenge the statute.

Bob's Activities Took Place in a Semi-Public Forum

Bob was convicted of violating the statute on a waiting platform at a stop on the city's subway system. This is likely to be found to be a semi-public forum. Such forums are not always open for speech activities like a public forum. Instead, the standard applied to regulation of speech in a semi-public forum depends on the type of speech the City permits there. If the City permits other First Amendment activities in the semi-public forum, it may not discriminate against other First Amendment activities on the basis of content or viewpoint.

Applicable Standard is Also Strict Scrutiny

If a semi-public forum is open for speech, content or viewpoint neutral restrictions on speech must also satisfy strict scrutiny. However, the type of forum may make this standard easier to fulfill. Here, the government has a compelling interest in making the subway stop a place in which traffic may smoothly operate so that the subway station may

fulfill its duties in transporting people through the city. Thus, activities which may [sic] it difficult for traffic to operate smoothly may be restricted. However, because this statute targets only particular types of speech, it may not be the appropriate method of ensuring that traffic operates smoothly. Such a regulation would likely target particularly problematic conduct, and not types of speech. Therefore, this statute is not narrowly tailored to uphold the state's interest in making sure the subway stop operates effectively.

Validity of Bob's Conviction

Because Bob's conviction for speech at the waiting platform took place under a content-discriminatory statute that was not narrowly tailored to effectuate the government's compelling interest, it should be reversed.

Mac's Case

Mac's Standing

Mac's conviction was a personal injury that was caused by State X's enforcement of its statute and is redressable through the overturning of the conviction. Thus, Mac has standing to challenge his conviction.

Mac was Loitering in a Non-Public Forum, on Private Property

Mac's conviction was for loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers' building in the business district of city. Thus, Mac's conviction took place as a result of his activities on private property.

Mac's Conviction is not Subject to Strict Scrutiny unless the Building is Serving a Public Function

Mac does not have the same right to speak on private property that Alice and Bob had in public of[sic] semi-public forums. The sole exception to this is if the private forum is serving a public function, which means that the private forum is serving a role typically served by public buildings or areas. However, there are very few examples of private property which serve a public function, other than private company towns that replace a public municipal government. This appears to be a private office building which is not implicated in any function of governing. Thus, the building is not a public forum. Therefore, his conviction is not subject to strict scrutiny.

Validity of Mac's Conviction

Mac cannot challenge his conviction under the First Amendment because he was conducting his activities on private property on which he had no First Amendment right to speak. Therefore, his challenge to the statute will be unsuccessful and his conviction will

be upheld.

Validity of the Conviction

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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Question 1

A State X statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as “gasohol.” The statute is based on the following legislative findings: (1) the use of gasohol will conserve domestic supplies of petroleum; (2) gasohol burns more cleanly than pure gasoline, thereby reducing atmospheric pollution; and (3) the use of gasohol will expand the market for grains from which ethanol is produced.

State X is the nation’s largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

Oilco is an international petroleum company doing business in State X as a major retailer of gasoline. Oilco does not dispute the legislative findings underlying the statute or the facts concerning State X’s grain production and lack of oil wells and refineries. Oilco, however, has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.

Can Oilco successfully assert that the statute violates any of the following provisions of the United States Constitution: (1) the Commerce Clause, (2) the Equal Protection Clause, (3) the Due Process Clause, and (4) the Privileges and Immunities Clause? Discuss.

Answer A to Question 1

1)

Oilco is asserting that the State X statute violates the 1) Commerce Clause, 2) the Equal Protection Clause, 3) the Due Process Clause, and 4) the Privileges and Immunities Clause of Article IV.

Justiciability

Standing

In order to successfully bring an action, Oilco must demonstrate that they have standing. A party has standing where there is injury, the injury is caused by the defendant, and the court can provide relief. Here, Oilco will be injured by the legislation because they do business in State X and do not currently meet the State's gasoline regulations. Oilco could lose profits from loss of business. The loss of profits is directly caused by the statute's ban on non-ethanol based gasoline. The court can provide relief for Oilco by invalidating the statute. Thus, Oilco has standing.

Eleventh Amendment

The Eleventh Amendment prohibits a party from suing a state without the state's permission. It appears from the facts that Oilco is suing State X and thus would be barred by the Eleventh Amendment. If Oilco sues the appropriate official, the suit will not be barred by the Eleventh Amendment.

Ripeness

The courts will not hear a case unless there is some threat of immediate injury caused by the defendant. Here, the statute could result in a significant loss of profits for Oilco, so the State's argument for dismissal based on ripeness will fail.

Commerce Clause

The Commerce Clause grants the federal government power to regulate the channels and instrumentalities of commerce, and other activities that affect interstate commerce. If a valid federal law under the commerce clause conflicts with state law, the federal law invalidates the state law because of the Supremacy Clause. Even if the federal law and state law do not conflict, the federal law may preempt the state law by occupying the field. Where Congress is silent on a matter, a state has the power to regulate the local aspects of commerce as long as the regulation is not discriminatory and does not unduly burden interstate commerce.

Here, there are no facts suggesting that there is a federal law that either conflicts with the State X statute or preempts the field. Thus, State X's statute will be valid as long as it does not discriminate against out-of-state interests and does not unduly burden interstate commerce.

Discrimination against out-of-state interests

The Dormant Commerce Clause prohibits a state from discriminating against out-of-state interests. Discrimination can appear on the face of a regulation, or it can be discriminatory in its impact on interstate commerce. Here, the statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as gasohol. State X will argue that [t]he statute on its face does not discriminate against any out-of-state interests, as any other state meeting these requirements would not be prohibited from selling gasoline inside State X.

However, Oilco's strongest argument will be that the Statute has a discriminatory impact. Here, Oilco will argue that State X is the nation's largest producer of grain used for making ethanol. Oilco will also point out that State X has no oil wells or refineries inside State X. Putting these two facts together, Oilco will argue that by passing the statute, State X is promoting its own interests by encouraging the consumption of ethanol while harming out-of-state oil refineries and wells. Since State X has no oil refineries or wells, they will not be harmed by the statute at all. This, Oilco will argue, is discrimination against out-of-state interests and[,] thus, is violative of the Dormant Commerce Clause. Oilco will also point to the legislative finding that State X's statute will "expand the market for grains from which ethanol is produced", strengthening its argument that this regulation is merely economic protectionism, and violative of the Dormant Commerce Clause.

State X will counter by arguing the important interest exception: a state may discriminate against out-of-state interests where there is an important state interest in the regulation and there are no non-discriminatory options. State X will point to the legislative findings regarding the conservation of petroleum, and the reduction in pollution. These, State X will argue, are important state interests. State X will also argue that achieving these goals cannot be achieved by non-discriminatory means. State X will argue that in order to conserve petroleum and reduce pollution, State X must ban the sale of non-ethanol based gasoline inside the state.

Oilco will argue that there are available non-discriminatory means of meeting the state interests. Oilco can argue that a phaseout of non-ethanol based gasoline is a less discriminatory means of achieving their goals, and would provide time for out-of-state sellers of non-ethanol based gasoline to meet State X's stringent requirements.

State X may attempt to argue the market participant exception which allows a state to discriminate against out-of-state interests where it is a market participant. However, the

facts do not indicate that the regulation only applies when State X is purchasing gasoline. The effect of the regulation is to prohibit sale of all non-ethanol based gasoline to residents, and the State. Thus, the state will not successfully argue the market participant exception.

Because the statute discriminates against out[-]of[-]state interests, the court should find that the statute violates the Dormant Commerce Clause.

Undue burden on interstate commerce

Even if the court finds that the statute does not discriminate against out[-]of[-]state interests, the statute will be invalidated if it unduly burdens interstate commerce. Here, Oilco will argue that it is a major retailer of gasoline inside State X. The effect of the statute is to prohibit all sales of non-ethanol based gasoline inside the state. Oilco will introduce their evidence showing the reduction in sales and profits, and will argue that if every state enacted similar statutes, the effect would greatly burden interstate commerce.

State X will argue that the statute does not significantly burden interstate commerce, as Oilco is still free to sell their gasoline in other states or comply with State X's regulations. However, since the impact of the statute will burden interstate commerce, a court would likely find that the statute is violative of the Dormant Commerce Clause.

Equal Protection Clause

In order to assert an equal protection claim, Oilco will need to show some state action. State action exists where the act is an exclusive public function or there is significant state involvement. Here, the State X legislature passed a law. Thus, Oilco will easily be able to show state action.

The Equal Protection Clause of the 14th Amendment provides that the state must provide all citizens and organizations in their jurisdiction the equal protection of the laws. Where the regulation does not affect a suspect or quasi-suspect class, and where the regulation does not affect a fundamental right, the regulation must pass the rational basis test – that is, the regulation must be rationally related to a legitimate government interest.

Here, Oilco is an international corporation. The statute does not involve a suspect class – race or alienage – and it does not affect a quasi-suspect class – gender or legitimacy. The statute also does not affect a fundamental right such as 1st Amendment protections or the right to privacy. Thus, the rational basis test will be used in scrutinizing the statute. Under the rational basis test, a regulation will generally be upheld as long as it is not arbitrary.

State X will argue that there is a legitimate government interest involved – the conservation of domestic supplies of petroleum, and the reduction in atmospheric pollution. State X will

also argue that the prohibition of non-ethanol based gasoline is rationally related to the government interest, since the prohibition will reduce the amount of petroleum used in producing gasoline, and will also reduce the pollution because ethanol is cleaner than pure gasoline. Thus, the statute will pass rational basis, and the court will find no equal protection violation.

Due Process Clause

Substantive Due Process Clause

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The [S]ubstantive Due Process Clause prohibits states from infringing on a fundamental right. If the state infringes on a fundamental right, the action must pass strict scrutiny. Under strict scrutiny, the regulation must be necessary to achieve a compelling government interest. Where no fundamental right is involved, the regulation must pass rational basis – that is, the regulation must be rationally related to a legitimate government interest.

Here, the right to sell gasoline is not a fundamental right. Thus, the statute must pass the rational basis test. As explained above, State X will successfully argue that there is a legitimate interest in conserving petroleum and reducing pollution, and that the regulation passed is rationally related to achieve those goals. Thus, Oilco's claim under the Due Process Clause will also fail.

Procedural Due Process

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The procedural Due Process prohibits the taking of life, liberty or property without due process of law. Oilco may assert that the statute takes away their right to sell gasoline inside the state without an appropriate hearing. However, the Court will not find a procedural due process violation because the statute was validly passed by the state legislature.

Privileges and Immunities Clause of Article IV

The Privileges and Immunities Clause of Article IV prohibits states from discriminating against non-residents. The Clause does not protect against aliens or corporations. Here, Oilco is a corporation, and is not afforded protection under the Clause. Thus, any claim under the Privileges and Immunities Clause of Article IV will fail.

Answer B to Question 1

1)

Standing and ability to bring suit

The first issue is whether Oilco (“O”) can bring a suit against State X asserting that the statute violates the US Constitution. To bring a lawsuit, O must meet the following requirements: (1) standing, (2) ripeness, and (3) mootness. O has standing because it has suffered present injury that can be redressed by a favorable court decision. In addition, the lawsuit is ripe because O has suffered injury and thus the court would not be rendering an advisory opinion. And finally, the lawsuit is not moot because O is suffering from a live controversy.

Protection of US citizens only?

While the facts do not clearly indicate whether O is a foreign corporation, assuming that it is a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, it should be allowed to challenge the constitutionality of the statute. The fact that O may not be a US corporation may preclude it from raising certain arguments, but it will not prevent it from bringing a lawsuit.

The following analysis in turn addresses each of the potential arguments.

1. The Commerce Clause

The issue is whether O can assert that State X’s statute violates the Commerce Clause. The Commerce Clause provides Congress the power to regulate interstate commerce. The Dormant Commerce Clause or the negative implications of the Commerce Clause provides that even if Congress has not acted in a certain area, states may not be able to regulate those activities if they place an undue burden on interstate commerce. Under the Dormant Commerce Clause, O can make two separate arguments: (1) that the statute discriminates against out[-]of[-]stater, or (2) that even if the statute doesn’t discriminate against out[-]of[-]stater, it places an undue burden on interstate commerce and is[,] thus, unconstitutional.

Statute discriminates out[-]of[-]stater

The first argument O can make is that the statute discriminates out[-]of[-]stater. Where a state statute discriminates against out[-]of[-]stater, the Dormant Commerce Clause requires that the state statute must be necessary to an important state interest. Here, although the state statute does not discriminate out[-]of[-]stater on its face, O can argue that because state X is the nation’s largest producer of grain that is used in making ethanol

and because the use of gasohol will expand the market for grains, the statute in effect favors its in-state companies. Here, it's unlikely that a court will find that the statute discriminates against out-of-staters because it's neutral on its face - it regulates in-state companies the same way it regulates out-of-state companies.

If, however, the court does find that the statute discriminates out-of-staters, State X must meet the intermediate scrutiny test for regulations that discriminate out-of-staters. State X must show that the statute is necessary to meet an important interest. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Moreover, as indicated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of the country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

Market participant

State X may also try to argue that it is a market participant, thus has not violated the Dormant Commerce Clause. One of the exceptions of where a state can discriminate against out-of-staters is if it is a market participant. Here, the facts indicate that State X is the largest producer of grain used for making ethanol, but it's not clear on whether the state itself is actually a participant or simply that the companies within the state are the makers of grain. If it's only the companies within State X and State X itself does not produce any grain, it will not prevail in making the argument that it is a market participant.

Statute doesn't discriminate out-of-staters - balancing test

Where a state statute doesn't discriminate out-of-staters, in order to meet the constitutional requirements of the Dormant Commerce Clause, it must not place an undue burden on interstate commerce. In determining whether a statute places an undue burden on interstate commerce, courts will look at the state's interest and the cost of compliance. As discussed above, state X can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Moreover, it will argue that since it doesn't discriminate out-of-staters, the cost to all companies to comply will be the same. O can argue that the cost of compliance is great because as indicated in the facts, its sales and profits has [sic] decreased substantially because of the limited capacity to produce gasohol. It's not clear from the facts whether other companies are also affected and to what extent they are affected. But assuming that other producers are able to produce gasohol without a great deal of problems - - that the

cost of compliance is not great - - then the statute will likely meet the requirements under the Dormant Commerce Clause.

2. The Equal Protection Clause

The Equal Protection Clause of the 5th amendment applies to the states through the 14th amendment. It provides that all citizens must be offered the equal protection of the laws.

As stated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

State action

The first is whether there is state action. In order to bring a challenge under the Equal Protection Clause, there must be state action. Here, State X has enacted a statute[;] this requirement has been met.

Classification

The Equal Protection Clause protects against different treatments of classes of persons or corporations. The first issue, therefore, is whether the statute classifies people differently. Here, O can argue that because the statute favors grain producers in State X, the largest producers in grain, it is treating the state companies differently than out[-]of[-]staters. State X, on the other hand, will argue that the statute is neutral on its face, it does not classify different companies[,], and thus the Equal Protection Clause does not apply. Here, because the statute does not treat any company based on a particular classification, a court will likely find for state X.

At best, O can argue that the classification is companies that produce grain vs. companies that, like itself, cannot produce grain for the ethanol. Even if O succeeds on this argument, it will be a rational basis scrutiny because this classification doesn't involve any fundamental right or suspect or quasi-suspect classification. O may argue that because its sales and profits in State X have decreased dramatically, it is impinging on a fundamental right to make a living. O will fail in this argument, however.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

In sum, O will not be able to assert that State X has violated the Equal Protection Clause.

3. The Due Process Clause

The Due Process Clause also applies to the states through the 14th amendment and it also requires state action. As discussed above, State X has enacted a statute[;] this requirement has been met.

State X can advance several arguments under the due process clause - - under the takings clause, the substantive due process clause[,] and the procedural due process clause.

Takings Clause

The Takings Clause provides that a state may not take the property of anyone without just compensation. In order to invoke the protection of the takings clause, O must show that the statute impacted its profits and in substance amounted to a takings [sic]. Here, O can show with reliable evidence that since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol. This fact, along [sic], however, is not likely sufficient to show that there has been a taking. It appears that O is still making money. Simply because the profits have decreased, O hasn't satisfied the burden of showing that it amounts to a taking.

Where a state legislation doesn't amount to a taking, the state will not need to provide just compensation so long as it is substantially related to an important interest. As discussed above, State X will likely meet this burden. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Substantive due process

The substantive due process clause, which also applies to states through the 14th amendment, provides that the government may not take away life, liberty or property without the due process of law. To meet this requirement, it depends on whether the right infringed upon is a fundamental right. If it is not, then the rational basis test applied and so long as the statute is rationally related to a legitimate interest, it will be upheld.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

Thus, O will not prevail under this argument.

4. The Privilege and Immunities Clause

The Privilege and Immunities Clause of Art IV offers protections to individuals against state's discrimination of out[-]of[-]stater. It provides that if a state action discriminates out[-]of[-]stater [sic] residents, the statute must be necessary to achieve an important interest. The P&I clause, unlike the Dormant Commerce Clause, however, does not offer protection to corporations. Because O is a corporation and not an individual, it will not be able to prevail under the P& I Clause.



California
Bar
Examination

Essay Questions
and
Selected Answers

July 2006

Question 2

In an effort to “clean up Columbia County,” the County Board of Supervisors recently passed an ordinance, providing as follows:

“(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.

(2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.

(3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.

(4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a \$5,000 fine, or by both.”

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

Answer A to Question 2

The First Amendment protects the freedom of speech. It is imputed to the states through the Fourteenth Amendment.

Facial Attacks

Prior Restraint

Under the 1st Amendment, speech cannot be enjoined before it occurs. With regard to licenses & review panels, which determine whether speech should be allowed before it occurs, they may be valid under certain circumstances. They do not violate the 1st Amendment when they: 1) are based on definite criteria and are not left up to the discretion of certain persons; and (2) are appealable.

Here, the statute mandates that sexual material may only be sold if it is first submitted to the panel and the panel, in its sole discretion, determines the item is not pornographic. As indicated above, submission to a panel itself is not unconstitutional.

However, the “sole discretion” of the panel is problematic. Sole discretion allows the panel to prohibit speech it does not like. It may even prohibit speech that it finds acceptable, but due to the person or business attempting to disseminate the material, deny it on those grounds. This discretionary review is inequitable and risks the danger of chilling speech. Because there is no set criteria for the review & it is left to the discretion of the panel, the section is unconstitutional as a prior restraint[.]

In addition, the statute does not mention any procedural safeguard. A person who is denied permission to sell must be able to appeal the decision. Because of the statute’s lack of appellate review procedure, it is unconstitutional as a prior restraint.

Overbroad

A law is overbroad under the 1st Amendment when it prohibits more speech than is constitutionally allowed. Here, the statute prohibits “sexually graphic material.” This would prohibit not only obscene material (which is unprotected & can constitutionally be prohibited – see below), but also the majority of R[-]rated movies which are released. Such R[-]rated movies may be sexually explicit at times, but they are protected under free speech. Therefore, the statute regulates too much & is unconstitutionally overbroad.

Vagueness

A law is vague under the 1st Amendment when one cannot tell which speech is prohibited & which is allowed. The speech prohibited under the statute – “sexually graphic material” – is unclear because you cannot tell what is allowed & what is not. For example, are nude

scenes in art films allowed? Nude scenes in pornographic films? A passage in a classic novel where the protagonist kisses his wife before going off to battle? Due to the vagueness of the statutory standard, it is impossible to discern which speech is allowed & what is prohibited. Therefore, the statute is likely to be found unconstitutionally vague.

Regulation of Speech

Content[-]Based Regulations

Again, the 1st Amendment protects the freedom of speech. Regulations based on the content of the speech – either its subject matter or its viewpoint – are subject to the highest standard of review, strict scrutiny. The content-based regulation must be necessary to achieve a compelling state interest, and must use the least restrictive means.

However, some content-based regulations concern unprotected speech and need not meet strict scrutiny.

Obscenity

Obscenity is a form of unprotected speech. It can be regulated, based on content, without meeting strict scrutiny.

There is a three-part test to determine whether material is obscene: 1) it appeals to the prurient interests of people in the community; 2) it is patently offensive to people in the community; and 3) based on a national standard, it lacks any redeeming artistic, literary, or scientific value.

Here, the statute may regulate obscenity without meeting the strict scrutiny test. The provision prohibiting the sale of “sexually graphic material” may be valid if “sexually graphic material” is defined as limited to obscene material as set forth above.

Profane & Indecent Speech

However, if the statute extends to all sexually graphic material, not merely the “obscene”, the statute may be unconstitutional.

Under the 1st Amendment, profane & indecent speech is fully protected (with the exception of such speech disseminated on free broadcast media [like radio] & schools). Therefore, any content-based regulation is subject to strict scrutiny.

Here, the statute is regulating “sexually graphic material”. This is a content-based regulation because it deals with the content[,] or subject matter, of the speech. Therefore, it must be necessary to achieve a compelling statute interest & use the least restrictive means.

Compelling State Interest

Generally, when indecent speech is involved, the interest is in protecting children from sexual material. This is of the utmost importance in providing a safe & moral environment in which to grow up. Therefor[e] it most likely qualifies as a compelling state interest. Note: merely regulating the morals of the community is not compelling.

Necessary & Least Restrictive Means

A law is necessary when it provides the only way to achieve the compelling state interest. Here, ther[e] are other ways to prevent the dissemination of indecent sexual material to children. For instance, the statute can limit the sale of sexual material to those over the age of 18. Or, a regulation can validly control the zoning & location of shops which sell sexual material so they are not near schools.

Therefor[e], because there are other options to achieve the compelling interest, least restrictive means have not been used. The law fails strict scrutiny and is therefore an unconstitutional violation of the 1st Amendment.

Punishment

The final issue is whether the provision of the statute which authorizes imprisonment and/or fines for the violation of the statute is valid.

First, for this provision to be valid, the substantive portions of the statute must be valid. Because the statute is unconstitutional as a prior restraint, overbroad & vague & does not meet strict scrutiny (unless the statute is limited to "obscene" material), the punishment clause is invalid.

However, the punishment clause raises the issue of compliance.

Collateral Bar Rule

The collateral bar rule applies when a person violates a statute. The rule states that if a person does not comply with a statute, the person cannot use the unconstitutionality of the statute as a defense in a criminal contempt proceeding. Therefor[e], even though the statute at issue is likely unconstitutional, a violation of the statute could result in punishment for contempt.

Thus, the best option is to comply with the statute for the time being, while appealing the decision of the panel and/or challenging the constitutional validity of the statute in court.

Answer B to Question 2

Videorama v. Columbia County

State Action

To bring a First Amendment claim, the plaintiff must assert state action, because the First Amendment only applies to the government, not private action. State action is present here because the ordinance was passed by the Columbia County Board of Supervisors, an instrument of the local government.

First Amendment Freedom of Speech

The First Amendment, applicable to the states through the 14th Amendment, provides that no government shall interfere with the right to free speech.

The Columbia County ordinance interferes with the right to free speech because it restricts the ability of video stores and individuals to sell, and correspondingly to buy, sexually graphic material. The ordinance imposes monetary fines and imprisonment for violation. Thus, the ordinance must be scrutinized under the First Amendment.

Overbroad

A statute may violate the First Amendment if it is overbroad. A statute is overbroad if it restricts protected speech as well as unprotected speech. Even if some of the speech restricted is not protected by the First Amendment, the statute will fail if it also draws unprotected speech.

In this case, the ordinance restricts both protected and unprotected speech. Obscene speech is a category of unprotected speech, and enjoys no protection at all under the First

Amendment. Obscenity is speech that (1) appeals to the prurient interest, as defined by a local standard, (2) is patently offensive, as defined by local law, and (3) lacks serious scientific literary, artistic, or political value, as defined by a national standard.

Some of the speech restricted by the Columbia County ordinance may be obscene speech. The ordinance targets sexually graphic material, and obscene speech is probably included in that category. The obscene material restricted by this statute presents a First Amendment problem.

However, the problem is that the ordinance restricts a broader category of speech, including some speech that is protected speech. Sexually graphic material that has serious scientific, literary, artistic, or political value is not obscenity and therefore is protected speech. The ordinance does not adopt the three part obscenity test, or make an exception for material that has serious value. Therefore, the statute is overbroad.

Unfettered Discretion

The First Amendment is also violated where an official is given complete discretion on whether to allow or prohibit speech. Requiring an individual or entity to obtain a license or authorization to engage in certain speech, before engaging in the speech, is a prior restraint. Prior restraints are disfavored because they quell speech before it is even uttered. However, a licensing scheme, even though a prior restraint, can be constitutional if (i) no official has complete discretion over whether to grant a license, (2) specific, articulated standards are used to grant the licenses, and (3) judicial review or some other appellate process is available as a check.

The ordinance fails this test because it gives “sole discretion” to the Review Panel. The statute does not provide any standards whatsoever that the Panel should use to evaluate requests. The only standard given is that “sexually graphic material” may be prohibited by

the Panel. That is not a standard at all, because it does not articulate the factors the Panel will use to decide requests to sell such material.

Moreover, the ordinance requires potential vendors to get authorization from the Panel before selling any sexually graphic material. Thus, the ordinance is a suspect prior restraint. Without the procedural safeguards listed above – no sole discretion, articulated standards, and appellate review – the ordinance’s authorization scheme is an invalid prior restraint.

The statute gives no indication of any type of appellate review of the Panel’s decisions. The Panel has “sole” and apparently final discretion. This kind of unchecked power over free speech violates the First Amendment.

Vague

The First Amendment also requires that laws restricting speech not be overly vague. A vague law is one that does not give fair notice of what speech it prohibits and what it allows. As such, it will deter protected speech, speech that is not meant to be restricted by the law, because people will fear that such speech is in fact prohibited.

The ordinance here is vague because it gives vendors no fair warning about what kind of material is “sexually graphic” and what is “not pornographic.” As stated above, the ordinance provides no standards or factors or definitions that enable anyone to determine what exactly is prohibited. Instead, only the Panel knows what is prohibited, and only after they have reviewed the material and decided that it is or is not sexually graphic.

Since material is not clearly “sexually graphic” until the Panel decides that it is, the ordinance does not enable individuals to predict their own liability. They cannot predict ahead of time whether selling certain material will violate the ordinance or not. Since

violation could lead to both a hefty fine and imprisonment, people will err on the side of restricting their own speech to make sure they are not in violation.

As a result, video stores, magazine stores, and often individuals and entities that sell graphic material will all have to censor themselves until they obtain Panel approval. Moreover, Panel approval is required for each individual item, not for each vendor, so the self [-] censorship will be ongoing.

Because the ordinance will end up restricting protected speech, since it does not give fair warning of what is prohibited, it is unconstitutionally vague.

Content-based Restriction

A content [-] based restriction on speech is one that restricts speech according to what is being said or depicted or expressed, instead of according to the manner of the speech, or its time or place. Content-neutral time, place, and manner restrictions need only pass intermediate scrutiny to be constitutional. However, content-based restrictions must pass strict scrutiny.

The ordinance here is content [-] based because it restricts speech according to what it depicts – sexually graphic material. Although it does regulate the manner in which this speech can be sold, that does not make it a time/place/manner restriction. Because the restriction or the manner of sale only applies to sexually graphic material, the ordinance is targeting certain content. Therefore, it must pass strict scrutiny.

Strict Scrutiny

For a content-based law to pass under the First Amendment, it must be necessary to achieve a compelling state interest. The government has the

burden of proving that it passes this test.

Compelling State Interest

Columbia County's purpose in enacting this ordinance is to "clean up Columbia County." Presumably this means to regulate the distribution of sexually explicit material in order to have a more civil, professional, family-friendly atmosphere. The County may have had problems with children being exposed to sexually graphic material in stores or on the streets. The County may be concerned that an excess of such material may deter new residents, cause businesses to leave, harm young children, and even hurt Columbia's tourist industry. All of these concerns are valid state interests, and probably rise to the level of compelling. Assuming Columbia can prove that it has a compelling interest, it will next have to show that the ordinance is necessary to achieving those interests.

Necessary to Achieve That Interest

This requirement is more than just narrow tailoring. It actually requires that the law be the least restrictive means available for achieving the state's interests. If less restrictive alternatives are available, the state must pursue those alternatives first.

Columbia County will not be able to show that its ordinance is the least restrictive means for protecting children, cleaning up the town's image, and preserving its business and tourist industries. These interests could be accomplished by the use of content-neutral time [,] place and manner restrictions, such as requiring people to keep the material they are selling off of the streets, indoors, during normal business hours. Then children walking on the sidewalk would not necessarily run into sexually graphic material. The County could also require stores that sell such material to post warnings at the front door or window, to announce to customers that such material is sold inside. This would be a less restrictive

ban, although still content [-] based, because it would allow stores to sell such material without pre-approval from a Panel. It would also accomplish the County's goals by enabling residents to avoid that material if they want.

The County could also use zoning laws to regulate where adult-themed book and movie stores can operate. The Supreme Court has upheld the use of zoning in this way to control the secondary effects of such businesses. Zoning would be less restrictive than Columbia's current ordinance because it would not ban all sales or require pre-approval by a Panel. It would still allow Columbia to "clean-up" by regulating where such businesses can operate, and keeping other areas of the County free of them.

Because less restrictive alternatives are available, the ordinance will fail strict scrutiny, and Videorama will win its suit against Columbia.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 5

City has adopted an ordinance banning tobacco advertising on billboards, store windows, any site within 1,000 feet of a school, and “any other location where minors under the age of 18 years traditionally gather.”

The purpose of the ordinance is to discourage school-age children from smoking. The likely result of the ordinance will be to cause the removal of tobacco advertising from the vicinity of schools, day care centers, playgrounds, and amusement arcades.

The Association of Retailers (AOR) was formed to protect the economic interests of its member retailers. AOR had unsuccessfully opposed the adoption of the ordinance, arguing that it would cause hardship to store owners by depriving them of needed advertising revenue. AOR believes that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising.

AOR is considering filing a complaint for injunctive relief against City in federal district court claiming that the ordinance deprives its members of rights under the Free Speech Clause of the First Amendment.

What arguments could AOR reasonably make to show that it has standing, and that its First Amendment free speech claim has merit, and would it be likely to succeed? Discuss.

Answer A to Question 5

5)

I. Standing

The Association of Retailers (AOR) is an organization seeking to enforce the putative rights of its members. Normally, courts do not allow plaintiffs to represent the rights of third parties. Organizations, however, fall under an exception to this general rule (as do doctors suing on behalf of patients, or accused criminals suing to enforce potential jurors' right not to be peremptorily struck due to their race). An organization will have standing to sue on behalf of its members if: (1) the organization's suit is related to an issue that is germane to the organization's purpose; (2) the organization has members that would themselves have standing to sue; and (3) it is not necessary that the organization's members themselves be party to the case.

Applying this test, it appears likely that the AOR could reasonably show that it has standing. As to the first requirement, the AOR "was formed to protect the economic interest of its member retailers." The AOR hopes to enjoin the application of the ordinance because it will lead to a diminution of retailers (shopkeepers) advertising revenue. The amount of advertising revenue lost due to tobacco advertising prohibition directly affects AOR members' economic interest, and thus the subject of the suit is sufficiently related to the organization's purpose.

As to the second requirement, it appears that at least certain of AOR's members would have the standing required to bring suit themselves. Standing generally requires (1) an injury, (2) causation, and (3) redressability. Courts will not find standing when plaintiff has not suffered a harm (or is not in imminent danger of suffering a harm), the matter at issue cannot be considered to have caused the harm to plaintiff, or, if judicial action occurred, the harm could not be prevented/cured. Here, AOR members who run shops with windows that once featured tobacco advertisements have clearly suffered a harm—the City has passed the ordinance requiring them to remove the ads, and they have (presumably) lost the revenue they once earned from displaying said ads. It is beyond dispute that the City ordinance caused the harm, as but for the ordinance, the advertisements would remain in the storefront windows. Finally, injunctive relief granted by the Court would redress the harm—if it prevented the City from enforcing the ordinance, then AOR members could display the advertisements and resume collecting advertising revenue.

As to the third requirement, there does not appear to be any particular reason why any specific AOR member would have to be party to the litigation. The harm complained of is not particular to any one member, but rather to all members who had tobacco advertisements displayed. The organization itself could represent the aggregate harm to its various members. This is not a situation, such as fraud, where particular facts as to a particular member would play such an important role that the Court should not proceed without that member.

With these arguments, it is likely that the Court would find that AOR has sufficient standing.

II. First Amendment Free Speech Claims

At the start, AOR can predicate its Free Speech claims on the fact that the First Amendment applies to the states (and thus to municipalities) because of incorporation through the Fourteenth Amendment. To have a First Amendment Free Speech claim, AOR must show that there has been state action limiting its members' right to free speech. Again, that is not an issue here because the City (which is certainly a state actor) passed the ordinance at issue.

AOR has three options open to it in challenging the City's ordinance—it can claim (1) that it violates the intermediate scrutiny that Courts apply when the state regulates commercial speech; (2) that the ordinance is void for vagueness; and (3) that the ordinance is void for overbreadth. As we address these three options, we will determine why other avenues, though alluring, are unlikely reasonable.

A. Commercial Speech

The ordinance clearly regulates commercial speech, in that it only bans tobacco advertising (as opposed, say, to tobacco-related art) and cites store windows and billboards as primary locations of regulation.

While the state can outright ban false advertising, or advertisement for illegal purposes, neither is applicable here. There is no evidence that the tobacco advertising is in any way false or misleading, nor is there any evidence that tobacco is illegal in City. As such, the commercial speech at issue is subject to constitutional protection. Unlike non-commercial speech, the state can enact subject-matter based regulations for commercial speech (such as banning tobacco advertising) without triggering strict scrutiny (a showing of a compelling government interest and means necessary to achieve said interest).

Instead, the City must show: (1) that there is an important government purpose unrelated to the suppression of speech; (2) that the regulation directly advances that government purpose; and (3) that the regulation is narrowly tailored to achieve the purpose. If the City meets all three requirements, it can regulate commercial speech even by subject matter.

The City will argue that the health of children, and preventing the detrimental effects of smoking, is an important government purpose. That is essentially inarguable, and AOR should not contest it.

The City will further argue that the regulation directly advances that interest by decreasing children's media exposure to tobacco—that what children do not see, they will not be tempted to buy. AOR can challenge this by arguing that, in fact, the regulation only indirectly advances the government's purpose and that restricting actual access, rather than commercial references, to tobacco would directly advance the government's interest.

However, it cannot credibly be gainsaid that limiting the advertisements would diminish children's exposure to tobacco and directly advance the City's interest. Thus, the AOR will likely not be successful contesting this prong.

AOR's best argument is that the ordinance is not narrowly tailored, and that the ordinance prohibits more advertising than substantially required to achieve its purpose. AOR, however, cannot argue that the City can only regulate so far as necessary to achieve the purpose—that would be applying strict scrutiny rather than intermediate scrutiny. The City will respond that it has "narrowly tailored" the ordinance by limiting it to billboards, store windows, proximity to schools, and "locations" where minors "traditionally gather." That is not the most restrictive means of accomplishing its purpose, but it is more narrow than a blanket prohibition against tobacco advertising. This is a closer call, mainly because of the latter clause, but at least as to the billboards, store windows, and ads near schools, the ordinance is likely narrowly tailored enough. These places are either out in the open or particularly susceptible to children's presence, and thus a Court will likely apply the ordinance as to the specifically identified locations.

AOR is unlikely to prevent the application of at least parts of the ordinance on the grounds of commercial speech.

B. Void for Vagueness and/or Overbreadth

What AOR will be able to do, however, is have the ordinance enjoined in regards to the clause concerning "any other location where minors...traditionally gather." This is unconstitutional both because it is unduly vague (other than bars, offices and funeral homes, where don't minors traditionally gather?) and overbroad (even to the extent that there are more identifiable traditional gathering places, this language included far more than just playgrounds and fairs). This clause will be unconstitutional as applied to at least some of AOR's retailers, and thus the Court will likely consider enjoining enforcement of the non-specified places for advertisements.

Answer B to Question 5

5)

I. Does AOR have organization standing?

Standing requires that the claimant have an actual stake in the controversy. To assert standing, the claimant must have an injury in fact, the injury must be caused by the activity complained of, and the court must be able to redress the injury.

An organization may have standing if certain criteria are met. The organization must show that 1) its individual members have standing to assert a claim; 2) the claim is germane, or, related to the purpose of the organization, and 3) the individual members are not necessary to adjudicate the claim.

1. Do Members have standing in their own right?

Here, the members have standing in their own right because they have an injury in fact, can show causation, and the court can redress their problem. The members have standing in their own right because the ordinance prevents them from engaging in advertising, depriving them of revenue. Therefore, they have an injury in fact. Moreover, the loss of revenue is a direct cause of the City's ordinance. Finally, if the court finds that the ordinance is invalid, it will redress the injury.

2. The claim is germane to the purpose of the organization.

The AOR was formed to protect the economic interests of its member retailers. Here, the ordinance arguably is causing economic hardship to AOR members depriving them of needed advertising revenue. Therefore, the effect of the ordinance is to create the type of harm AOR was formed to protect against - harm to the economic interests of the member retailers. Therefore, it is germane to the purpose of the AOR to fight the ordinance as a violation of free speech that harms economic interest of its members.

3. The individual members are not needed for the court to decide the claim.

AOR is challenging a city ordinance on First Amendment free speech grounds. The court can decide whether the ordinance is a violation of the First Amendment and related issues of vagueness and overbreadth without need for the participation of the individual members of AOR.

Because AOR can show that its members have standing in their own right, that the complaint seeking injunctive relief against the City for enforcement of the ordinance is

related to AOR's purpose of protecting the economic interests of its members, and the members are not necessary to decide the matter, AOR can assert organizational standing.

II. First Amendment Speech Arguments

The protections of the First Amendment apply to the states and local governments through the 14th Amendment. Therefore, as a state actor, City may not violate free speech rights. Generally, a state must have a compelling interest in regulating the content of speech. However, commercial speech is afforded less protection by the First Amendment.

a. Commercial Speech

AOR may first argue that the ordinance does not meet the requirements for restraints on commercial speech. The City may regulate commercial speech if it is false or misleading. Here, there are no facts suggesting that the advertisements are false or misleading.

However, the City will likely argue that the very purpose of the ordinance was to protect minors because the advertisements for cigarettes were inherently misleading [sic] youth into believing that smoking is bad. AOR, however, will note that there is nothing misleading at all about advertisements for a certain product that say nothing aimed at minors, and that the State has offered no evidence showing that there is some attempt by the retailers to mislead youth into buying cigarettes.

Therefore, AOR has a strong argument that the City cannot regulate the advertisements as false or misleading.

i. Regulation of commercial speech generally

Where commercial speech is not false or misleading, the City may regulate the speech only if it meets the three part test set forth by the Supreme Court for calibrating the City's interest and the Retailers' commercial interests. The Supreme Court has applied an intermediate level of scrutiny to commercial speech regulation:

Any regulation of commercial speech must be 1) substantially related to an important government interest; 2) it must directly advance the interest, and 3) there must be no less restrictive means.

Is the ordinance substantially related to an important government interest?

The City will persuasively argue that there is an important government interest in discouraging school-age children from smoking. The state will note the fiscal costs of dealing with health related problems and the addictive nature of nicotine in relation to the maturity and intelligence of school-age children. Moreover, the City may try and analogize

the broad discretion given to the states under the Constitution to regulate the sale and distribution of alcohol.

AOR will argue that the state has an important government interest in regulating school-age smoking, but that the ordinance is not substantially related to that interest. However, AOR will not likely be able to show that an ordinance that is aimed at advertisements within 1,000 feet of a school is not substantially related to the interest of protecting minors from the dangers of smoking because there is a high concentration of youth near schools, particularly youth of young ages.

AOR may argue, however, that the provision in the ordinance prohibiting advertising at any location where youth under the age of 18 gather is not substantially related to an important government interest. AOR will argue that the City's interest is strong in protecting areas around schools where there is a definite and concentrated population of youth who are sent to that location for education. But, AOR will note that this interest decreases when the government is trying to protect gatherings of youth who are free to move about in public.

Does the Ordinance directly advance the government's interest in protecting youth?

By prohibiting the advertisement of tobacco near schools and other public places where minors gather, the ordinance directly advances the interests of the government's interest in discouraging school-age children from smoking. Assuming that the State can draw connections between the advertising and its effect on children, the ordinance directly advances the state's interest.

Is the ordinance the least restrictive means?

AOR has a strong argument that the ordinance is not the least restrictive means for promoting the state's interest in discouraging school-aged children from smoking. Specifically, AOR has already argued that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising. Moreover, AOR will argue that there could be regulations of the types of advertisements or size that would not prevent all advertising in windows or other locations where minors gather. Specifically, AOR will argue that the provision banning advertisement at "any other location where minors under the age of 18 years of age" is not the least restrictive means and that the portion should be struck from the ordinance.

b. Any regulation of speech, even if a valid regulation of commercial speech, still must not be overbroad, vague, or give unfettered discretion to enforcement agencies to be constitutionally valid.

Is the Ordinance overbroad?

A restriction on speech cannot prohibit substantially more protected speech than it may legitimately restrict. If the ordinance is found to prohibit substantially more speech than the City may constitutionally prohibit, then the ordinance will be found invalid and will not apply to any speech.

AOR will argue that the restriction on advertising at “any other location where minors under the age of 18 years traditionally gather” will prohibit substantially more speech than the City may constitutionally prohibit under the commercial speech clause. Specifically, AOR will argue that the City does not have an important interest in preventing advertising of tobacco at all places where minors gather. AOR will argue, as noted above, that while the City may have a strong argument that its interest in [sic] important in regards to advertising near school zones, the City’s interest substantially decreases as the concentration of children goes down. However, this argument will bleed into AOR’s stronger argument that the restriction banning advertising in areas where minors gather is vague, and, therefore, unconstitutional.

Is the Ordinance Vague?

A regulation is vague if it does not put the public on reasonable notice as to what is prohibited. Here, AOR has a strong argument that the ordinance is vague because it prohibits advertisements at any location where minors under the age of 18 traditionally gather. While the provision limiting advertisements within 1,000 feet of a school on billboards or store windows is specific, places where minors gather is not defined.

There is nothing in the ordinance that either specifies places where children traditionally gather or defines how to determine what in fact is a “gathering.” How many children constitute a gathering? Therefore, AOR will likely be able to assert that the ordinance is unenforceable because of a vague provision.

Does the ordinance give unfettered discretion to enforcement?

A regulation restricting speech must be defined and clear. And, if it gives unfettered discretion to whoever enforces it, it will be found invalid.

Because the ordinance offers no guidance as to what constitutes a place where minors traditionally gather, it gives unfettered discretion to enforcement agencies to make their own definition. Therefore, AOR can make a strong argument that the ordinance gives unfettered discretion to City officials in determine [sic] who is in violation, and therefore, the ordinance should be invalidated.

Conclusion

Because AOR can show that the ordinance is vague in part, gives unfettered

discretion, and is not the least restrictive means of promoting the state's interest, it is likely to prevail in its claim to enjoin enforcement of the ordinance.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

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Question 4

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: “Listen citizens. Prayer in the schools means government-endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution.”

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.
2. How should the court rule on each ground of Dan’s motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Answer A to Question 4

1. Murder or Any Lesser-Included Offense

Elements of a Crime

The four elements of a crime consist of (i) a guilty act, (ii) a guilty mind, (iii) concurrence, and (iv) causation.

For a person to be found guilty of a crime, the guilty act must be voluntary. Here, Dan appeared to only want to burn the document, not let it go and have it drift away. On the facts, it seems like he only let the document go involuntarily when the heat of the fire burned his hand. So it appears that Dan may not have committed the requisite guilty act. However, if we frame Dan's actions on a broader level, Dan did voluntarily burn the document and set into motion the chain of events leading to the ultimate killing of the pedestrian. The element of a guilty act is satisfied.

As to concurrence and causation, Dan's intentional act of igniting the parchment document set into motion a chain of events: he let go of the burning document, it settled in an open drum of flammable material, and it caused the drum to explode and kill a nearby pedestrian. On the one hand, it appears that there is no proximate causation because it is arguably unforeseeable for someone to die from an explosion as a result of burning a document. On the other hand, courts are generally flexible when it comes to foreseeability, and there is a viable argument that the result was foreseeable because playing with fire is a dangerous activity. A court will probably find causation.

However, what we need to establish is whether Dan possessed the requisite guilty mind. The discussion below addresses this element.

Murder

At common law, murder is the unlawful killing of a human being with malice aforethought, which is established by any one of the following states of mind: (i) intent to kill, (ii) intent to do serious bodily harm, (iii) reckless indifference to an unjustifiably high risk to human life (i.e., depraved heart murder), and (iv) intent to commit a felony underlying the felony-murder rule.

Intent to Kill

From the facts, it does not appear that Dan knew any of the following facts: the nearby presence of the open drum with flammable material, the pedestrian's presence near the drum, or the pedestrian's identity. Therefore, he could not have formed a specific intent to kill the pedestrian. Dan cannot be found guilty of intent to kill murder.

Intent to Do Serious Bodily Harm

On the facts, Dan did not intend to do any harm, let alone serious bodily harm. He was merely burning the document as a form of symbolic speech and probably did not even want to let go of the document.

Reckless Indifference to an Unjustifiably High Risk to Human Life

Dan's act of igniting the document and letting it go did not reflect reckless indifference to an unjustifiably high risk to human life. No reasonable person would think that a burning document could ultimately kill someone. For example, Dan did not carry a dangerous weapon such as a gun and fire it into a crowded room.

Felony Murder

Under the felony-murder rule, a person can be found guilty of a killing that occurs during the commission of an underlying felony that is inherently dangerous, usually burglary, arson, rape, robbery, or kidnapping. Dan did not have the intent to commit any of these felonies.

Lesser Included Offenses

Voluntary Manslaughter

Voluntary manslaughter is an intentional killing committed with adequate provocation causing one to lose self-control. We have already established above that Dan cannot be found guilty of an intentional killing, so we need not determine whether it can be reduced to voluntary manslaughter. In any event, Dan was not even provoked to begin with.

Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing that results either from (i) criminal negligence or (ii) misdemeanor-murder, which is a killing that occurs during the commission of a misdemeanor that is malum in se or inherently dangerous.

Criminal negligence exceeds tort negligence but is less than the reckless indifference of depraved heart murder. Significantly, for a person to be criminally negligent, he must have been aware of the risk. Here, Dan could have been aware of a general risk that results from a fire, which is an accidental burning of another object that occurs from a strong wind carrying the flame. On the other hand, Dan was not aware of the particular risk that an open drum of flammable material was nearby, which could kill someone. Dan cannot be found guilty of criminal negligence.

On the other hand, Dan may be found guilty of misdemeanor-murder, because he committed the misdemeanor of burning or mutilating a copy of the U.S. Constitution, and the commission of the misdemeanor caused the ultimate death of the pedestrian. On the other hand, the misdemeanor was not malum in se and not inherently dangerous. Dan should not be found guilty of involuntary manslaughter.

Conclusion: Dan cannot be found guilty of the crime of murder or any lesser-included offense.

(2) Dan's Motion to Dismiss the Charge of Attempting to Burn a Copy of the U.S. Constitution

(i) What he burned was actually a copy of the Declaration of Independence

Dan is being charged with attempting to burn a copy of the U.S. Constitution, but what he actually burned was the Declaration of Independence. At common law, factual impossibility is not a defense for attempting a crime. For example, if a person intends to shoot another with a gun and the gun happened to be out of bullets, the man is still guilty. However, legal impossibility is a defense to attempt. That is, if what the person was attempting to do was actually not a crime even though he thought it was, then he could not be found guilty of attempt.

Here, Dan's assertion that he actually burned the Declaration of Independence is a claim of factual impossibility. From the facts, we know that he had the specific intent to destroy a copy of the U.S. Constitution, so even though it was factually impossible for him to do it because he was holding the Declaration of Independence, he can still be found guilty of attempting to burn a copy of the U.S. Constitution.

Conclusion: The Court should deny Dan's motion to dismiss based on this ground.

(ii) The state statute on which the charge is based violates his rights under the First Amendment of the Constitution

The First Amendment protects free speech, and it is applicable to the states through the Fourteenth Amendment. The state action requirement is easily met here because it is a state statute making the act of burning or mutilating a copy of the U.S. Constitution a misdemeanor.

Symbolic Speech

Dan's act was a form of symbolic speech. For a regulation of symbolic speech to be valid and not violative of the First Amendment, the law must have a purpose independent of and incidental to the suppression of speech and the restriction on speech must not be greater than necessary to achieve that purpose.

Here, the state statute does not appear to have a purpose independent of and incidental to the suppression of speech. For example, the burning of draft cards was upheld, because it was found that the government has a valid interest in facilitating the draft, and that the suppression of the speech was incidental and no greater than necessary. Here, preventing the burning of the Constitution does not appear to serve any significant government interest other than to prevent people from showing their anger toward the government, which is within their rights under the First Amendment.

Unprotected Speech

The government may attempt to frame Dan's acts as unprotected speech that presents a clear and present danger. Such speech is intended to incite imminent unlawful action and is likely to result in imminent unlawful action, so that the state can regulate it. On the facts, Dan stood on the steps of the state capitol and yelled to a half dozen people entering the front doors while destroying what he thought was a copy of the U.S. Constitution, so arguably, he was trying to incite those people and get them enraged. On the other hand, there was no indication of encouraging harmful acts in his statement and burning a document in and of itself does not promote violence.

Moreover, even if the government can show that what Dan was specifically doing was inciting imminent unlawful speech, the government still cannot show that the state statute at issue is designed to restrain this kind of unprotected speech. The state statute merely bans burning the Constitution, but does not, for example, limit such acts to the steps of the state capitol, where the state might have an argument that doing such acts so close to government activity is dangerous and disruptive. The statute is overbroad and does not strive to only limit unprotected speech that is likely to incite imminent unlawful action.

Conclusion: The Court should grant Dan's motion to dismiss based on this ground.

Answer B to Question 4

Murder Charges Against Dan (“D”)

The first issue is whether Dan may properly be found guilty of murder or any other lesser included offense.

Murder

Murder is defined as the killing of another human being with malice aforethought. In order to be found guilty of murder a Defendant must have committed a voluntary act and must have possessed the requisite mental state at the time of the act. A defendant will be guilty of murder if he committed the act (1) with the intent to kill, (2) with the intent to inflict great bodily injury, (3) if he acted in such a way as to demonstrate a reckless disregard for human life (often termed as having an “abandoned and malignant heart”), (4) or if the murder resulted during the commission of a highly dangerous felony.

Here, D’s act of igniting the document constituted a voluntary act. The fact that the heat of the fire had burned his hand, and caused him to involuntarily let it go does not negate the fact that his act of burning the document in the first place was voluntary. However, an act, in and of itself, is not sufficient to convict D of a crime. The State must also prove that, at the time D committed the act of burning the document, he had the intent to commit murder.

On these facts, it is clear that Dan did not set the document on fire with an intent to kill. While an intent to kill may be inferred in cases where the D uses a deadly, dangerous weapon against a victim (a gun, knife, etc.), that is not the case here. Additionally, D did not act with an intent to inflict great bodily injury on anyone. Instead, his act of burning the paper was done to make a political point to those that were present nearby.

The State may try and argue that Dan’s acts were done with an abandoned and malignant heart because, by igniting the document around individuals, he acted in a way that demonstrated reckless and unjustifiable disregard for human life. The State will not be able to meet their burden of proof under this theory either. Here, D’s act of burning the paper is not the type of act that an individual could expect would lead to someone’s death. The law demands more in order to show a reckless disregard for human life.

Felony Murder Rule

The state may try and argue that D should be convicted of murder based on the Felony Murder Rule (“FMR”). Under this rule, a D is liable for all deaths that occur during the commission of a highly dangerous felony, whether he intended to cause them or not. Instead, the intent is inferred from his intent to commit the underlying felony. In addition, the deaths caused during the commission of the felony must be foreseeable and must result before D has reached a point of temporary safety. Generally, the FMR has been reserved for deaths that occur during highly dangerous felonies, such as rape, arson,

kidnapping, robbery, and burglary.

Here, the issue is whether D can be found guilty of one of these underlying felonies so that the FMR applies. The only one that would be applicable would be the crime of arson. In order to show that D is guilty of arson, the State must prove that D (1) acted with the intent, or was at least reckless, (2) in burning, (3) the dwelling, (4) of another. Here it is clear that D did not intend to burn the nearby construction yard. Instead, the fire resulted because a wind blew the lit paper into an open drum of flammable material. However, the State may try and argue that the act of igniting a document on fire and allowing the wind to carry it away constituted a reckless act. However, the State will also have to prove that D burned a dwelling. Here, the paper did not cause a dwelling to burn, but rather flew into a construction site.

Thus, D could not be convicted of the murder of the Pedestrian based on the Felony Murder Rule because he did not commit a highly dangerous felony.

Voluntary Manslaughter

Voluntary Manslaughter is a killing of another human being while acting under the heat of passion. Voluntary Manslaughter is generally reserved for cases in which the D kills another because of an “adequate provocation”. Here, Voluntary Manslaughter does not apply because there was no provocation which would have caused D to act the way that he did.

Involuntary Manslaughter / Misdemeanor Manslaughter

The remaining consideration is whether the State could properly convict D of involuntary manslaughter. Involuntary manslaughter is appropriate where the D is criminally negligent. Criminal negligence is a higher standard than is used in the tort context for negligence cases. In the criminal context, while D may not have been acting with an intent to kill, he nonetheless acted in a way that was so extremely unreasonable that a reasonable person in his shoes would have recognized that such actions are performed with a reckless disregard for the life of others. Here, the State will have to prove that not only was D’s act criminally negligent, but also that the Death was caused by D’s actions.

The State will likely fail on these facts because D’s act of burning a document does not rise to the level of a criminally negligent act. D’s conduct was not reckless in the sense that a reasonable person could have contemplated that burning a document could eventually lead to another person’s death. Moreover, the State will have a tough time meeting the causation requirement because, while D was the but-for cause in P’s death, the death was not foreseeable. Here, the death was caused by the explosion when the paper settled into an open drum of flammable material at the construction site. Thus, D could not, nor could a reasonable person foresee that such an act would result in a death due to such an explosion.

The State may also try and argue for misdemeanor manslaughter, which is appropriate

when a death is caused during the commission of a lesser-included felony or by those specified by state statute. Here, it is highly doubtful that the burning of the Constitution is the type of misdemeanor that would be included under such a rule. As a result, the State will not succeed on these grounds.

2. Dan's Motions to Dismiss

Attempt Charges vs. Dan

In order to prove attempt, the State must show that (1) D intended to commit the crime, and (2) he took a substantial step towards completing the crime. Regardless of the underlying crime, attempt is always a specific intent crime.

Here, the State will be able to show that D's burning of a document that he believed to be the U.S. Constitution demonstrates his intent to commit the crime. Additionally, because he actually ignited the document, the second element is also satisfied. The issue thus is whether D has any valid defenses to the charge.

Mistake of Fact

D's motion to dismiss is based on a mistake of fact defense. Namely, he is arguing that, because he actually burned a copy of the Declaration of Independence, not the U.S. Constitution as he thought, he should not be found guilty for attempt.

D will fail in this defense because mistake of fact is not a good defense to attempt. That is because, here, if the circumstances had been as D believed (to burn the Constitution), he would have been guilty of the misdemeanor. By way of analogy, a thief who attempts to receive stolen goods may not later argue that, because the police had secured the drugs and transferred them to him undercover, he cannot be guilty because the goods were no longer "stolen". The fact remains that, had the circumstances been the way he believed them to be, he would have been guilty of the crime of receipt of stolen goods. Here, D's mistake of fact may be a defense to the actual misdemeanor itself, but will not provide a defense to attempt.

First Amendment

The First Amendment protects an individual's freedom of speech. However, included in the First Amendment is a protection of expressive activities that constitute speech. Here, it is clear that D's act of burning the Constitution was an act of expression as it was intended to convey his political views regarding the problems inherent with government-endorsed religion and the commingling of church and state.

Statutes may limit expressive activity if they are unrelated to the expression that constitutes speech and are narrowly tailored to serve such goals. Here, the State may have a difficult time proving that this act is unrelated to expression because it seems to want to prevent individuals from burning or mutilating the Constitution as a way of

expressing their political views.

The State would likely try and analogize to the U.S. Supreme Court case of O'Brien. There, a statute made it a crime to burn draft cards. When the defendant burned his draft card as a way of protesting against the war, he was prosecuted under the statute. The Court held that the statute was constitutional because it was not aimed solely at curtailing individuals' ability to express their viewpoints. Instead, the County had an interest in the administrative matters of the draft and that draft cards were essential to the country keeping track of its draft members, soldiers, etc. Thus, because this statute was content-neutral, the Court applied intermediate scrutiny and found that the statute was narrowly tailored to a compelling state interest.

However, as noted above, no such interest appears to exist for the state's statute in this case.

D will likely point to the flag burning cases, such as Johnson, where the Court has held that statutes making it a crime to burn the U.S. flag are unconstitutional because they restrict speech under the First Amendment. In the flag burning cases, the Court has noted that these statutes are aimed at curbing an individual's right to express his views and thus warrant strict scrutiny. Because they are not necessary to advance a compelling interest, they are violative of the First Amendment.

The present case seems much closer to Johnson than O'Brien because the statute is aimed at expression rather than activities unrelated to expression. As such, it is unconstitutional because it impermissibly burdens the freedom of speech under the First Amendment. The State will have to meet a very high burden because strict scrutiny would be applied and thus it would have to show that the statute is necessary to advance a compelling state interest. Because no compelling interest appears to exist, the statute will be struck down.

**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 3

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.
2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

Answer A to Question 3

1. Dan's Motion to Exclude his Statement to Sid

5th Amendment

The 5th Amendment protection demands that Miranda warnings be provided to persons that are in the custody of government officials prior to any interrogation. The Miranda rights to remain silent and to counsel must be waived before any statement used against the person in court is obtained. Miranda is not offense-specific.

A person is in custody if they reasonably believe they are not free to leave. Interrogation is defined as conduct or statements likely to elicit an incriminating response.

In this case, Dan was in jail. He had been arraigned for murder and was being held, so he was clearly not free to leave. Thus, custody is satisfied.

As to interrogation, Dan was approached by Sid, and Sid informed Dan that he was a member of the Blues, a rival gang to the gang of Vic, and that the Blues had hired an attorney to assist Dan. He said that the lawyer needed Dan to inform Sid of what happened so that he could represent him. In fact, Sid was a police informant, who had been instructed by the police to try to get information from Dan.

Clearly, Sid was talking to Dan in such a way that was likely to elicit an incriminating response; he was asking him to give the details so that Dan would have better representation. He had lied to Dan and was tricking him into confessing.

However, the problem here is that Dan did not know that Sid was a police informant who was seeking a confession. The court has upheld the admissibility of statements obtained by police informants when the suspect did not know that the informant was working for the government. The rationale is that the coercion

factor is not so high, because the suspect does not know the police are involved. In other words, the suspect is free to not speak to the informant.

In this case, the court will have to weigh the fact that Dan did not know that Sid was a police informant against the devious nature of Sid's behavior in lying to Dan in determining whether the interrogation factor is met. Based on the prior cases admitting police informant confessions, interrogation is probably not satisfied and the confession will probably not be barred by the 5th Amendment.

6th Amendment

The 6th Amendment guarantees every person the right to counsel at all critical post-charge proceedings and events, including questioning. This right is offense-specific and must be waived prior to questioning.

In this case, the time frame for the 6th Amendment protection had been triggered, because Dan had been arrested, put in jail, and arraigned for murder, all before Sid approached Dan. In fact, Dan had been appointed an attorney by the court.

When Sid, a government informant posing to be a member of a rival gang interested in helping Dan, approached Dan and elicited the incriminating response, he violated Dan's 6th Amendment Right to Counsel. Sid initiated the conversation, and lied to Dan, tricking him into giving up the information. All the time, Sid was working as an informant. This equates to questioning by the government.

Because it was post-arraignment and the government sought to initiate questioning of Dan, Dan would have to first waive his right to have counsel present, or have his attorney present. Dan did not waive this right, because he did not even know Sid was a government informant, and his attorney was not present.

Because Dan's 6th Amendment right to counsel was violated, he can successfully move to exclude his statement to Sid from trial.

When he makes this motion, the government will have to prove by a preponderance of the evidence that the statement is admissible, a burden they will not be able to meet on the existing facts. Thus, the statement will be excluded.

2. Can Dan be Convicted of Murder or any Lesser-Included Offense

Murder is the unlawful killing of another human being with malice aforethought.

It requires actus reus, which in this case was Dan's act of shooting Vic.

It also requires causation, both actual and proximate. Actual cause is easily satisfied because "but for" Dan's act of shooting Vic, Vic would not have died. Proximate cause is the philosophical connection which limits liability to persons and consequences who [sic] bear some reasonable relationship to the actor's conduct, so as to not offend notions of common sense, justice, and logic. Proximate cause is also easily satisfied, because Dan shot and killed Vic without any intervening cause or unforeseeable event. If one shoots a human being, death is a logical and foreseeable result.

Malice is satisfied under one of four theories:

1. Intent to kill;
2. Intent to commit great bodily injury;
3. Wanton and Willful disregard of human life ("Depraved Heart Killing"); or
4. Felony Murder Rule.

Intent to Kill

Intent to kill can be satisfied by the deadly weapon doctrine: where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied.

In this case, Dan used a gun, pointed it at Vic, shot Vic, and killed Vic. A gun is a deadly weapon, so intent to kill is satisfied.

Intent to Commit Great Bodily Injury

Even if intent to kill were not satisfied, intent to commit great bodily injury would be apparent because the least that can be expected to occur when one points a gun at a human being and pulls the trigger is great bodily injury.

Wanton and Willful Disregard

In addition, wanton and willful disregard for human life is satisfied because the use of a gun against another human being shows a conscious disregard for human life. Guns can, and frequently do, kill people. In fact, killing things is one of their main purposes. The use of a gun against another human being shows disregard for the human being's life.

Felony Murder Rule

The felony murder rule requires an underlying felony, that is not "bootstrapped" to the murder. In this case, Dan does not appear to have

committed any crime except for killing Vic, so the malice could not be implied under the felony murder rule.

Murder in the First Degree

Murder in the first degree at common law was the intentional and deliberate killing of another human being. It required deliberation, but deliberation can happen in a very short period of time.

In this case, Vic had “terrified” Dan, and Dan began carrying a gun for protection. Dan carried this gun for an entire week before he saw Vic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Dan acted intentionally and deliberately. When he saw Vic, he then pulled out the gun and shot and killed Vic.

These facts, especially the elapse of an entire week, are probably sufficient to show that Dan was intentional and deliberate in his use of the gun. It did not arrive there by chance, and once Dan saw Vic, he acted without pause.

Murder in the Second Degree

All murder that is not murder in the first degree is murder in the second degree.

If the prosecution was not able to establish Dan intentionally and deliberately shot Vic, because perhaps the jury believed that Dan did not deliberate before he shot Vic, then he could be convicted of second-degree murder.

Self-Defense

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force.

Dan will argue that he was engaged in self-defense when he shot Vic. Dan will point out that his neighborhood was run by two gangs, and as such it was very dangerous. He will testify that Vic was a Red, one of the gangs, and that he had tried to recruit Dan to the gang. When Dan refused, Vic said he “couldn’t be responsible for Dan’s safety,” implying that Dan might be injured.

Vic then threatened Dan for several weeks, and finally backed him into an alley, showed him a knife, and told him that “Your deadline is coming fast.” Dan will argue that the statement regarding Dan’s safety, the threats, the knife and the deadline statement cumulate to show that Vic intended to kill Dan if he wouldn’t join the gang, or at least that Dan reasonably believed Vic would do it.

Dan will argue that when he then saw Vic on the street, with his hand under his jacket, he was terrified and afraid that Vic might stab him with the knife he had threatened him with, and therefore he defended himself by shooting Vic.

The primary problem with Dan's defense is that he carried around a gun for a week before seeing Vic, and then when he saw Vic with his hand under his jacket he pulled out the gun and shot Vic, without Vic producing any weapon or making any threat at that time. The state will argue that Dan is not entitled to a self-defense defense because he was under no threat when he shot Vic.

Unreasonable Self-Defense

Unreasonable self-defense is a defense available to one who engages in good faith but unreasonable self-defense. It is a mitigating defense which takes a murder charge down to voluntary manslaughter.

Dan will argue that if self-defense was not appropriate because of the timing of the threats and the shooting, then he is at least entitled to an unreasonable self-defense defense. Dan will argue that he acted in good faith and really believed Vic would stab him.

This is a very colorable defense for Dan, because although the timing of self-defense was inappropriate, Vic had been threatening Dan for several weeks, and had recently shown him a knife and said "Your deadline is coming fast," so Dan's fear was likely reasonable.

Heat of Passion

Heat of passion is a defense when circumstances evoke a sudden and intense heat of passion in a person, as they would affect a reasonable person, without a cooling off period, and the person does not cool off. Heat of passion is a possible defense during a fight.

In this case, however, it is likely not viable because Dan had not seen Vic for an entire week before the shooting, which is sufficient time for a reasonable person to cool off from the last incident with the knife in the alley. For that entire week, Dan carried around a gun, and then when he saw Vic he shot and killed him, without any prior interaction on that occasion. It appears unlikely that Dan's response was "sudden" or "intense".

Involuntary Manslaughter

Involuntary manslaughter is established by a killing with recklessness not so egregious as to satisfy wanton and reckless disregard for human life, but more serious than common negligence.

Involuntary manslaughter could be established by the reckless use of a gun, but because Dan intended to kill Vic, Dan will be convicted of a greater crime, or, if his self-defense defense is effective, of no crime at all.

Conclusion

Dan will likely be tried for first-degree murder under the intent to kill theory, and will allege the defenses of self-defense and imperfect self-defense. Dan is likely to be found guilty of voluntary manslaughter, by use of an imperfect self-defense defense.

Answer B to Question 3

Dan's Motion to Exclude

Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of defendant's 4th, 5th, and 6th Amendment rights, and under the "fruits of the poisonous tree" doctrine, also prohibits any evidence found as a result of violating defendant's 4th, 5th, and 6th Amendment rights, with limited exceptions. Thus, if Dan's confession violated his 5th or 6th Amendment rights, the statement cannot be admitted.

5th Amendment Right

The 5th Amendment provides that a defendant should be free from self-incrimination. The right applies to testimonial evidence coercively obtained by the police. Under the 5th Amendment, before the police conduct custodial interrogation, the police must give the defendant his Miranda warnings. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney. The 5th Amendment right is non-offense specific, meaning that even if the defendant exercises his rights, the police can question him about an unrelated offense. If the defendant asserts his right to remain silent, the police must abide by defendant's right, although they can later question him after a reasonable amount of time has passed. If the defendant unambiguously asserts his right to an attorney, the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

The 5th Amendment right to remain silent and to counsel only applies in custodial interrogation. A person is in custody if he or she is not objectively free to terminate an encounter with the government. A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Dan will argue that he was subject to custodial interrogation because (1) he was in prison and not free to leave, and (2) the informant was planted in order to elicit statements from Dan. Clearly, Dan was in custody, as he was in jail. Dan may have a harder time proving he was subject to interrogation. Typically,

interrogation only occurs when the person is aware that he is in contact with a government informant. The prosecution will argue that Dan was not aware that Sid was a government informant, and believed that Sid was a gang member who was trying to help him. Thus, the prosecution will argue, the police were not required to give Dan his Miranda rights before commencing the questioning. The prosecution will argue that if Dan trusted Sid and willingly spoke to him, he cannot now claim that the statement constituted interrogation or was coercively obtained.

As Dan did not know that Sid was a government informant, he will likely fail in arguing that he should have received his Miranda rights before Sid questioned him. Thus, he will not be able to exclude his statement on 5th Amendment rounds.

Impeachment Purposes

Even if Dan's statement violated his 5th Amendment right, the statement may still be used to impeach Dan's testimony if he testifies at trial.

Fruits of Miranda

If the police obtained any evidence as a result of Dan's statement to the informant, these "fruits of Miranda" may be admissible. The Supreme Court has not conclusively determined whether such fruits are admissible, but they likely are.

6th Amendment Right

The 6th Amendment provides the right to counsel at all criminal proceedings. It applies once the defendant has been formally charged with a crime, and prevents the police from obtaining an incriminating statement after formal charges have been filed without first obtaining the defendant's waiver of counsel. The right is offense-specific, meaning it only attaches for the crime(s) for which the defendant has been formally charged. It does not prevent the police from questioning the defendant about unrelated offenses.

Here, Dan had been [under] arraignment on a charge for murder, so formal charges had been filed by the government. Thus, Dan was entitled to counsel at any post-charge police interrogation. Dan will argue that by subjecting him to interrogation by a police informant after formal charges had been filed without obtaining a waiver of his right to counsel, the police violated his 6th Amendment right.

The police will argue that Dan was not aware that Sid was a government informant, but this awareness is not necessary for a 6th Amendment violation. Once Dan's rights to counsel attached at his arraignment, Dan had a right to counsel during police interrogation to prevent the police from deliberately eliciting

an incriminating statement. The police used a government informant who lied to Dan about his identity, made a promise of a better attorney, and asked him about his involvement with the crime, in order to obtain a confession from Dan. The police did all of this without waiving Dan's right to have his attorney present during the interrogation. Dan's right to counsel under the 6th Amendment has been violated, and Dan is entitled to exclusion of the statement at his trial.

Like a violation of Dan's 5th Amendment right, the prosecution may use a coercively obtained confession to impeach Dan's testimony at trial.

Conclusion

Dan's statement to Sid likely violated his 6th Amendment right to counsel at any post-charge interrogation, because he had already been arraigned. The police should have obtained a waiver of Dan's right to counsel before sending Sid in, and it should not matter that Dan did not know that Sid was a police informant. However, because Dan did not know that Sid was working for the government, the questioning and subsequent statement did not likely violate Dan's 5th Amendment rights to Miranda warnings.

Thus, Dan will likely be successful in his motion to exclude his statement under the exclusionary rule as a violation of his 6th Amendment right.

Dan's Conviction for Murder or any Lesser-Included Offense

Murder

Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists if there is no excuse justifying the killing and no adequate provocation can be found, and if the killing is committed with one of the following states of mind: intent to kill, intent to inflict great bodily injury, reckless indifference to an unjustifiably high risk to human life, or intent to commit a felony.

The prosecution will argue that Dan is guilty of murder because no excuse existed (duress is not an excuse to homicide), no adequate provocation exists, and he had any one of the three following states of mind: intent to kill, intent to inflict great bodily injury, or a reckless indifference to an unjustifiably high risk to human life.

The prosecution will argue that no excuse existed for Dan to kill Vic. The prosecution will argue that even though Dan may have felt he was under duress imposed by Vic, this does not justify the killing of Vic, for two reasons: (1) the duress was to join the Reds, not to kill Vic, and (2) duress cannot be used as an excuse for homicide. The prosecution will also argue that no excuse existed from Vic's actions toward Dan during the incident where he was killed that would

give Dan the reasonable belief that he was about to be killed or seriously injured. The prosecution will note that there is no evidence that Vic was even aware of Dan's presence, that Vic did not confront Dan with unlawful force, and that it was unreasonable that Dan thought he was about to be stabbed.

The prosecution will be required to show that adequate provocation did not exist for Dan's killing of Vic, and that Dan had one of the required states of mind here. Adequate provocation is discussed in detail below, but the prosecution will argue that even if Dan was subjected to a serious battery, he had a week to cool off from the provocation of that battery, and thus was not still under the direct stress imposed by that battery when he killed Vic.

The prosecution will also argue that Dan had any of the states of mind listed above. By pulling out his gun and pulling the trigger, Dan intended to kill Vic. This intent was evidenced by an awareness that the killing would occur if he pulled the trigger, and a conscious desire for that result to occur. The prosecution can also argue that if he did not intend to kill Vic, he knew or acted recklessly as to whether Vic would suffer great bodily injury as a result of the shooting. Finally, the prosecution can argue that by pulling the trigger, Dan was acting with a reckless disregard to the unjustifiably high risk to Vic's life that would occur from his actions. Dan, the prosecution will argue, clearly did not care whether Vic lived or died as a result of the shooting, and thus Dan had the requisite intent to be convicted of murder.

Because the prosecution can show that no excuse or adequate provocation existed, and that Dan acted with one of the states of mind required for murder, Dan can likely be convicted of murder unless he has a valid defense. In addition, if the prosecution can show that the killing was deliberate and premeditated, Dan may be guilty of first-degree murder. The prosecution will show that the killing was deliberate and premeditated because Dan was carrying a gun and shot Vic almost immediately after seeing him in the street.

Self-Defense

Self-defense is a complete defense to murder. Self-defense is justified when the defendant reasonably believes that the victim is about to kill him or inflict great bodily injury upon him. Deadly force may be used in self-defense if the defendant is not at fault, is confronted with unlawful force, and is subject to the imminent threat of death or great bodily harm.

Dan will argue that the defense of self-defense should completely bar his conviction for murder. Dan will point to the history between the parties as well as Vic's actions at the scene of the crime to establish that he was justified in using deadly force against Vic. Dan will argue that Vic had subjected him to a serious battery when he pushed him into the alley, showed him a knife, and threatened him. Dan will argue that this battery made Dan aware that Vic was a serious

criminal (and that Dan already had knowledge of Vic's criminality because he was involved in a gang), and that Vic would stop at nothing to injure Dan if Dan refused to join his gang.

With this history, Dan will argue that it was reasonable for him to believe that Vic was about to shoot him, because Vic was walking with his hand under his jacket, Dan will argue that the history between the parties and Vic's suspicious behavior made it reasonably likely that he was about to be stabbed, and thus he was justified in using deadly force in self-defense.

The prosecution will argue that even if the history between the parties made Dan afraid of Vic, that Vic had not confronted Dan with any unlawful force before Dan shot him. There is no evidence that Vic even saw Dan walking down the street. In addition, the prosecution will argue that even if Vic had plans to harm Dan, he wanted Dan to join his gang and would have only injured him if Dan refused to join the gang once again. While Dan was obviously not required to join the gang, this evidence will support the prosecution's defense that Dan's belief that he was about to be subject to immediate harm was unreasonable. At the very least, Vic probably wanted to talk to Dan one more time before inflicting harm upon him, so Dan was not subject to an immediate threat of death or bodily harm. The prosecution will argue that Dan should have waited until Vic produced the knife before shooting, or, at the very least, approached Dan in a threatening manner. Because Vic did not do these things, Dan cannot use the defense of self-defense.

Duress

Dan may argue that he was under duress, and this resulted in his killing of Vic. Duress is a good defense when the defendant is coercively forced under threats from another to commit a criminal act. Duress may have been a good defense if Dan was forced to join the gang and commit criminal acts. However, duress cannot be used to defend against homicide. Thus, this defense will fail.

Voluntary Manslaughter

Dan may try to get his charge lessened to voluntary manslaughter. Voluntary manslaughter is a killing that would be murder but for the existence of adequate provocation. Adequate provocation will be found where: the provocation is such that it would provoke a reasonable person, the defendant was in fact provoked, the facts suggest that the defendant did not have adequate time to cool off, and the defendant did not in fact cool off.

Dan will argue that Vic's repeated threats to him constituted adequate provocation. He will argue that being shoved into an alley, being shown a knife, and given basically a death threat is enough to provoke anger in the mind of a reasonable, ordinary person. Courts typically use an aggravated battery, as Vic

has committed here, as existence of adequate provocation. Dan will also argue that he was provoked, evidenced by carrying a gun for protection and living in fear of Vic.

However, Dan will have a harder time showing that a reasonable time to cool off could not be found, and that he did not in fact cool off. A week existed between Vic's aggravated battery of Dan and Dan's killing of Vic. While Dan may have still been frightened of Vic, a week is likely too long to find that Dan was still acting under the provocation supplied by Vic during the aggravated battery. Rather, Dan likely had cooled off, but was still upset by the incident and repeated threats.

It is likely that the prosecution can successfully argue that adequate provocation did not exist here because Dan was not acting under the direct stress imposed by the serious battery committed by Vic when he shot and killed Vic. However, if Dan can show such adequate provocation, his charge should be reduced to voluntary manslaughter.

Manslaughter

Dan may try to get his charge lessened to a manslaughter charge under the "imperfect self-defense" doctrine. Dan will argue that even though he may be ineligible to use the self-defense as a valid defense because Vic had not confronted him with unlawful force, he reasonably believed that it was necessary to shoot Vic to avoid being killed or subject to serious bodily harm. It is more likely that a court will accept Dan's argument for a lesser charge of manslaughter under the imperfect self-defense doctrine, rather than accepting Dan's total defense of self-defense, because Vic did not do anything during the incident where he was shot to suggest that he was about to kill Dan or subject Dan to great bodily harm.

Thus, Dan may likely be convicted of murder, voluntary manslaughter, or manslaughter.

THURSDAY MORNING
FEBRUARY 28, 2008



California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

**ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 2

To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security (“the Secretary”) to issue “National Security Requests,” which would require businesses to produce the personal and financial records of their customers to the Federal Bureau of Investigation (“the FBI”) without a warrant. Congress rejected the proposal.

Thereafter, in response, the President issued Executive Order 999 (“the Order”). The Order authorizes the Secretary to issue “National Security Requests,” which require businesses to produce the personal and financial records of their customers to the FBI without a warrant. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the “Terrorism Prevention Act” (“the Act”), requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to the State X Department of Justice.

1. Is the Order within the President’s authority under the United States Constitution? Discuss.
2. Assuming the Order is within the President’s authority, does the Order preempt the Act? Discuss.
3. Assuming the Order is within the President’s authority and does not preempt the Act, do the Order and the Act violate the Fourth Amendment to the United States Constitution on their face? Discuss.

Answer A to Question 2

1. Is the order within the President's authority under the United States Constitution?

Order 999

Order 999 was issued by the President after an identical piece of legislation proposed by him was rejected by Congress. The Order requires business[es] to produce the personal and financial records of their customers to the FBI without a warrant upon issuance of a "National Security Request" by the Secretary of Homeland Security. It is unclear what the use of such information so produced would be, other than the President's stated goal of protecting the nation from terrorism.

As an initial matter, assuming that the Order is valid (see below), it would not be a violation of the nondelegation doctrine. The President may delegate executive power as he sees fit to other members of the executive [branch].

Congressional Authorization

The President's power is at its apex when he acts pursuant to power given him by Congress. The U.S. Supreme Court has said that when he acts in the face of Congressional disapproval, he may only do so if the power he exercises is vested in him alone by the Constitution and denied to Congress. Where he acts in the face of Congressional silence on a matter, he acts in a "gray area". The case law is split as to whether Congressional rejection of a proposed power (but not the enactment of some act disallowing the President's use of that power) is silenced or disapproval, but the cases tend toward disapproval.

In this case, the President has issued Order 999 in the face of Congressional rejection of an apparently identical piece of legislation. The courts would likely treat such an action as occurring in the face of Congressional disapproval. Therefore, the court will only allow the Order if it is within the powers that only the President may exercise. If the court treats Congress' disapproval of the proposed legislation as silence, then the court will treat the Order as in the "gray area" of executive power and probably approve it if it is within the President's power. In this gray area, the court will likely look to the legislative history surrounding the defeat of the President's proposed legislation to divine some intent from the defeat.

Congress, on the other hand, could have authorized the act (assuming it is not unconstitutional under the 4th Amendment, see below). Congress has the power under the Commerce Clause to regulate the people, channels and instrumentalities of interstate commerce, as well as those things having a substantial effect on interstate commerce. The personal and financial information of individuals in America are most likely instrumentalities of commerce, and almost certainly have an effect on interstate commerce. So Congress does not have the ability to regulate in the field.

Congress is not bound by the Contracts Clause, so it does not pose a problem.

Given the fact that the power to make an Order such as this is not exclusively vested in the President, and the fact that he acted in the face of Congressional denial of his proposal to do so, the court will likely treat his act as outside his authority.

The President's Domestic Affairs Powers

The President has some domestic affairs powers reserved to himself. These include the appointment and removal powers, the pardon power, the commander in chief power, and the duty to execute the law. The President may make an argument that the latter two powers support the Order.

As an exercise of the commander in chief power, the President has the exclusive power to control the deployment of troops and their day-to-day control. There is a very weak argument that turning over financial records supports this role.

There is a better argument that the duty to execute the law supports the Order. In order to keep the nation safe, the President will argue, he must allow the FBI access to personal and financial records of all Americans. This is still a weak argument and there is no law to support it.

The President's Foreign Affairs Powers

The President shares foreign affairs powers with Congress, but has some reserved to himself, including the power to conduct foreign negotiations, to deploy troops overseas, and to make executive agreements.

The Order is not even arguably within his foreign affairs powers, as it concerns Americans' financial records at home, and gives them to the FBI, the government's domestic law enforcement agency.

Commandeering

Finally the Order poses a problem with commandeering; that is, the federal government's forcing the states to act. The Constitution as interpreted by the Supreme Court prohibits the federal government from requiring the states to enforce its laws. The Order forces law enforcement officials to "assist" the FBI. While the Congress could, for instance, condition spending to the states on such help, the President cannot force the states to do so. The Order violates the Constitution to that extent as well.

2. Does the Order Preempt the Act?

State X has passed an Act requiring business[es] in the state to provide the information they provide to the FBI under the Order to the state's DOJ as well. This section assumes that the Order is valid and treats it as federal law.

Preemption

Federal law can preempt state law in two ways, express and implied. In either case, where there is preemption, the state law is invalid under the Supremacy Clause of the Constitution. Express preemption occurs when the federal law by words states that it is the only regulation allowed and state regulation is prohibited. The Order does not contain an express preemption.

Implied preemption can occur in one of three ways, by direct conflict with state law, by so-called field preemption, and where the state law interferes substantially with the federal objective. Here, there is no direct conflict between the Order and the Act. The Act does not call for state business[es] to do anything they are prohibited from doing under the Order and vice versa. The Act merely requires businesses to provide a separate copy of their response to the Request to the state DOJ. This is not direct conflict.

Field preemption occurs when it appears from the legislative history of a federal law or from the law itself that it intends to be the only regulation in the area (for instance, environmental regulations typically provide that they are intended to fully occupy their fields). There is no legislative history for this Order other than the President's statement that it is to protect the nation from terrorism, and there is no language that a court might read as field preemption.

When a state law substantially interferes with the objectives of federal law, the state law will give way. Here, it does not seem like the Act interferes at all with the objectives of the Order. The Order provides that financial records go to the FBI (federal law enforcement) and the Act provides that a copy will go to state law enforcement. The Act is therefore not preempted.

Congressional vs. Executive Action

The above analysis assumes that an Executive Order can preempt a state law. The case law is unclear as to this point but it might be instructive to look to the President's authority to preempt state law under his power to make executive agreements with foreign governments. Because an executive agreement preempts state law, it is reasonable to assume that a court would declare an executive order to do so as well.

Contracts Clause

The Contracts Clause prohibits the states from substantially interfering with the obligation of existing contracts unless they have a substantial and legitimate reason for doing so and the means are reasonable and narrowly tailored to do so. Here, in the absence of the Order, the Act might have interfered with private contracts requiring businesses [to] keep their customers' records confidential. However, because the Order already breaks those contracts, and the Act goes no further, if the Order is valid, so is the Act.

3. Does The Order and Act Violate the 4th Amendment On Their Face?

The 4th Amendment applies to the federal government directly and to the states via incorporation by the 14th Amendment. The Order and Act call for the same information to be passed to equivalent agencies upon the same request. Therefore, the Order and the Act are essentially the same for the purposes of the 4th Amendment and will be analyzed together in this section.

The 4th Amendment

Purpose

The 4th Amendment prohibits unreasonable searches and seizures. The purposes [is] to prevent police and law enforcement misconduct. The Order and Act involve law enforcement collection of data without a warrant and therefore are generally within the scope of the 4th Amendment.

Use

The 4th Amendment generally provides that all evidence unreasonably seized be excluded (subject to some exceptions, for instance, for impeachment) from criminal prosecutions. The 4th Amendment is satisfied where a warrant has been issued and does not apply where there is an exception to the warrant requirement. The exceptions to the warrant requirement include searches incident to a lawful arrest, automobile searches, plain view, consent, stop and frisks, hot pursuit and evanesce. None of those exceptions apply here. There are also reduced requirements for so-called administrative warrants issued in highly regulated industries. However, that likewise does not apply here, as there is no warrant issued in a Request setting.

Government Action

The 4th Amendment only applies to government action. Here, the Order and Act require that private businesses turn over their records to law enforcement. In and of itself, this might not be considered government action, but the fact that the Order and Act [are] triggered by the Secretary's issuance of a Request (clearly government action) brings them within the scope of the 4th Amendment.

Reasonable Expectation of Privacy – Standing

The 4th Amendment prohibits unreasonable searches and seizures. The court has interpreted this to mean that it prohibits intrusions in areas where a person has a reasonable expectation of privacy. The facts do not state exactly what information is subject to the Requests. The case law is mixed on what sort of information is subject to a reasonable expectation of privacy. Pen registers (which record phone numbers dialed but not conversations) and bank account balances are not subject to the reasonable expectation of privacy, but it appears that the Requests go beyond those and will most likely be struck down if such information is used against an individual in a criminal prosecution.

Use of Information Discovered

In and of themselves, the Order and Act do not violate the 4th Amendment. However, any use of information in a criminal prosecution found thereby would violate the 4th Amendment, so, while the Order and Act are constitutional, they are essentially useless for criminal prosecution. For other purposes where the 4th Amendment does not apply (for instance, grand jury proceedings, parole revocation proceedings, immigration proceedings), the use of information discovered pursuant to the Order and Act is likely constitutional.

Answer B to Question 2

1) Is the Order Within the President's Authority Under the United States Constitution?

There are several potential sources of authority for the order in question. Unlike Article I, which vests specifically enumerated legislative powers to Congress, Article II, Section 1 vests "all" executive authority with the President. The President could claim that orders of this nature are inherently part of the "executive" power imbued in his office by the so-called "vesting" clause. This does not amount to an executive "police power," but it does allow the executive to take actions traditionally taken by heads of state. There is little case law on this clause, so it is uncertain whether it would provide sufficient justification for the President's actions.

The President could also seek to justify the order under his foreign affairs power. The President's powers in this area are plenary and expansive. The President would argue that the Order is designed to prevent and deter acts of international terrorism. Given the plenary and complete nature of the President's authority in this arena, this is a potentially solid grounding for the President's ability to enact the order.

Relatedly, the President could seek grounds for his order in his war powers. This claim would be based on the assertion that the United States is engaged in a "war" on terror. The Order would be seen as part of the President's efforts to defend the country from potential terrorist attacks. This grounding, however, probably goes too far. While the President's war powers are expansive, even in the case of a non-declared war, they are unlikely to justify an order of this nature. In dealing with the deployment and movement of troops, the President's powers are plenary. However, when dealing with civilian matters unrelated to the armed forces, his authority is greatly diminished.

Finally, the President could attempt to find a basis for his actions here in the "Take Care" Clause. The President is charged to ensure to "take care" that the laws be faithfully executed. Here, he would argue that terrorism, by its very nature, precludes and disrupts the execution of the laws of the land. His Order would be seen as a necessary step to ensuring that the laws are indeed faithfully executed.

The President's actions here would be unaffected by the test for executive authority set forth in the Steel Seizure case. Under that tripartite formula, the President's powers are at their highest when acting pursuant to congressional legislation; they are lessened if there is no congressional legislation on the matter, and they are at their lowest when he is acting in the face of congressional legislation. In this case, the President's proposal was indeed rejected by Congress. However, if that rejection did not come in the form of legislation barring the President from taking such action, it is unlikely that the rejection would have much impact on his authority to enact the Order. The mere refusal to enact a bill does not put the President's actions in the third Steel Seizure category. Thus, it appears that the President's actions fall in the middle ground-with no congressional legislation on the matter.

Thus, in this case, the President appears to be operating in an area where he is not bound or backed by congressional authority. In such an arena, the President's actions are bolstered by past acts of the executive. Here, the "National Security Requests" operate in much the same way that national security letters operate in the current system – FBI or DOJ can issue such letters and demand documents in return, without a warrant. It is likely therefore that the bulk of the Order would appear authorized under some combination of the vesting clause, the foreign affairs power, or the Take Care Clause.

A contrary argument would be that executive Orders are only binding on officials within the executive branch. As such, since this order attempts to control the actions of those outside the executive branch (the businesses), it is unconstitutional.

In either scenario, the portion of the Order that allows the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records is probably unconstitutional. The Supreme Court has held that the 10th Amendment prohibits Congress from "commandeering" either state legislatures or state executive officials (Printz). In other words, Congress cannot compel state governments to take action. It may incentivize [sic] action, and it may make grants of funds contingent, but it cannot demand. While the cases themselves referred to congressional action, it is likely that executive action would fall under the same rubric. In this case, the Order authorizes the Secretary to "require" state and local law enforcement to assist in the collection of records. That requirement effectively commandeers state officials and is therefore unconstitutional (there is an exception for requiring state governments to produce records already in their possession, but that is inapplicable here, as the records are not in state government possession).

2) Assuming the Order is within the President's Authority, does the Order Preempt the Act?

By action of the Supremacy Clause, federal law may "preempt" state law. Federal law is the supreme law of the land and renders any contrary state legislation void. This preemption can take several forms. Preemption can be express – in other words, the legislation may specifically indicate that it is preempting state law (express preemption does not rule out implied preemption). In this case, however, there is no indication that the Order by its express terms preempts state law.

Preemption can also be implied. In other words, federal law can preempt state law if it is clear that the federal legislation was meant to occupy the entire field of regulation, if the state law poses an obstacle to carrying out the federal law, or if the legislation conflicts with the relevant state law. These principles are generally applied to congressional action. If they only applied to congressional action, then, by definition, an executive order like the one in this case could never preempt state law. Assuming, however, that executive orders can indeed preempt state law, there is no implied preemption in this case. There is no indication that the order was intended to occupy the entire field of regulation in this area. It is plausible that states would be allowed to

assist (indeed, the Order attempted to mandate that they would assist) and in any case, there are alternative means of obtaining business records, etc. (warrants). The law does not pose an obstacle to the enforcement of the federal act, nor does it conflict with it. Again, the Act appears to be an attempt to aid the federal government in carrying out its order.

Thus, under either theory, the Act is not preempted by the Order.

3) Assuming the Order is within the President's authority and does not Preempt the Act, do the Order and the Act violate the Fourth Amendment?

Order

The Fourth Amendment applies directly to the federal government and prohibits unreasonable searches and seizures. Unreasonable searches and seizures have been deemed to be those involving state action which intrude upon an individual's reasonable expectation of privacy.

In this case, the state action element is clear. The federal government is ordering businesses to produce the records of their clients.

The next question is whether there was a reasonable expectation of privacy in the customer records. Individuals have a reasonable expectation of privacy, for example, in their homes. However, there are other things in which an individual has no reasonable expectation of privacy. Generally, items passed on to third party businesses cannot reasonably be expected to be considered private. For example, there is no reasonable expectation of privacy in bank records. By analogy, therefore, it is unlikely that there is a reasonable expectation of privacy in business records. Generally speaking, an individual has no standing to sue for the seizure of his property that is in the possession of another. On occasion, the owner of property does have standing to sue, but given the fact there is no expectation of privacy in bank records, it is unlikely applicable here.

Assuming, however, that there was indeed a reasonable expectation of privacy, the search is only permissible if there was a warrant or if the search fell into one of the exceptions to the warrant requirement. Here, it is clear that there was no warrant. A warrant must issue on the basis of probable cause, specifically describe the place to be searched or the person or things to be seized and be issued by an unbiased magistrate. In this case, while there is arguably a description of the things to be seized, there is no indication of probable cause, and the issuing authority (the Secretary) is not an unbiased magistrate (in many senses, he is akin to a prosecutor who has an interest in the outcome of the investigation).

A search may still be reasonable, however, if it falls into one of the exceptions to the warrant requirement. However, none of the main exceptions appear to be applicable. This is not a search incident to a lawful arrest, it is not a Terry stop, it is not under the automobile exception, there is no consent, there is no hot pursuit, the items are not in

plain view, and this is not an inventory search. The government could attempt to argue that this falls under the “special needs” exception to the warrant requirement, but that does not appear to be applicable. The special needs exception is justified only in extreme situations where law enforcement could not carry out its duties in any other fashion (i.e., drunk driving checkpoints, airport security searches). In this case, while the threat of terrorism may pose an extreme danger, it is unlikely that this is the only way of protecting the public.

Act

The Fourth Amendment has been incorporated against the states through the due process clause of the 14th Amendment. Thus it applies against the states in the same manner as it does against the federal government, so the analysis is the same as above.



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Question 4

In a recent statute, Congress authorized the United States Secretary of Transportation “to do everything necessary and appropriate to ensure safe streets and highways.” Subsequently, the Secretary issued the following regulations:

Regulation A, which requires all instructors of persons seeking commercial driving licenses to be certified by federal examiners. The regulation details the criteria for certification, which require a minimum number of years of experience as a commercial driver and a minimum score on a test of basic communication skills.

Regulation B, which requires that every bus in commercial service be equipped with seatbelts for every seat.

Regulation C, which provides that states failing to implement adequate measures to ensure that bus seatbelts are actually used will forfeit 10 percent of previously-appropriated federal funds that assist states with highway construction.

The State Driving Academy, which is a state agency that offers driving instruction to persons seeking commercial driving licenses, is considering challenging the validity of Regulation A under the United States Constitution. The Capitol City Transit Company, which is a private corporation that operates buses within the city limits of Capitol City, is considering challenging the validity of Regulation B under the United States Constitution. The State Highway Department, another state agency, is considering challenging the validity of Regulation C under the United States Constitution.

1. What constitutional challenge may the State Driving Academy bring against Regulation A, and is it likely to succeed? Discuss.
2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed? Discuss.
3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed? Discuss.

Answer A to Question 4

State Driving Academy Challenges

Standing

In order to bring a claim in federal court challenging this regulation each of the parties must have standing. In order to have standing the plaintiff must show (1) injury in fact, (2) that the defendant caused the harm, and (3) that a favorable opinion will remedy his harm. In this case, the state agency is likely to have standing because the regulation will require their instructors to obtain the federal certification and therefore they will incur greater expense because of the regulation. Moreover, a challenge brought against the US Secretary is proper because he is the one who issued the regulations. Finally, a favorable opinion invalidating the regulation would remedy the injury because they would no longer have to incur the expense to comply with the regulation.

Constitutional Challenges

State Action

In order for the constitution to apply there must be state action. State action exists whenever the government or a government official is acting or a private party with sufficient entanglement with the state is acting. In this case, the US Congress and the US Secretary of Transportation issued these regulations and therefore there is state action and the constitution will apply to such regulations.

Not Within Enumerated Powers

The State agency would argue that such regulation is not within Congress' enumerated powers and therefore would violate the constitution. Congress would argue that it has the power to regulate interstate commerce and therefore has the ability to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce including those things within interstate commerce, (3) those activities that

have a substantial effect on interstate commerce. When Congress is using its commerce power to regulate an activity the activity must have a substantial effect on interstate commerce. If the activity is an economic activity then the court will uphold the regulation so long as in the aggregate all substantially similar activity is likely to have a substantial effect on interstate commerce.

In this case, the activity is commercial driving instruction. Congress is requiring that all instructors of persons seeking commercial driving licenses be certified by federal examiners. The regulation requires [a] certain minimum number of years of experience and a minimum score on a test of basic communication skills. In this case, Congress is not regulating an instrumentality of interstate commerce or a channel of interstate commerce but rather an activity. This activity is a commercial activity because it involves the provision of driving instruction for a fee. This commercial activity, although entirely intrastate, may be regulated by Congress so long as there is a reasonable belief that such economic activity would, in the aggregate, have a substantial effect on interstate commerce. In this case, since this [is] an economic activity, it is likely that such activity would have a substantial effect on interstate commerce because driving instruction provided to commercial truckers is likely to have an effect on the way that truck drivers drive on the road. If the truckers are taught more effectively then it is likely that they are going to [drive] safer when on the roads and therefore cause less accidents. Moreover, the safety of the highways has a substantial effect on interstate commerce. Moreover, in the aggregate if the instruction is not sufficient then our highways are likely to be unsafe and therefore will increase the cost of interstate commerce or reduce the amount of interstate commerce.

Since the activity is likely to have a substantial effect on interstate commerce the court will likely uphold regulation.

Delegation of Legislative Powers

This State may also challenge the regulation as an invalid delegation of legislative power. As a general rule Congress may delegate its legislative authority so

long as it provides reasonably intelligible standards. In this case, Congress has delegated its authority to the US Secretary of Transportation. This delegation will be valid so long as Congress has provided reasonably intelligible standards. In this case, Congress has said that the Secretary should do everything “necessary and appropriate to ensure safe streets and highways.” While this guidance is broad the court is not likely to invalidate this as unintelligible because such broad delegations of authority have been upheld in the past. Therefore it is likely a valid delegation of legislative power.

10th Amendment: Commandeering

The State may challenge this regulation on the ground that it is commandeering state officials by forcing them to comply with a federal regulation. In this case, the State Driving Academy is a state agency; therefore their employees are state officials. The state would argue that by forcing them to comply with the regulation Congress is infringing on the state’s inherent powers protected by the 10th Amendment. In this case, while the regulation does require the state officials to comply with the regulation, the regulation is not likely to violate the 10th Amendment because it is regulating both private as well as state actors. In prior cases, the court has upheld generally applicable regulations that require state agencies to comply so long as they were applicable to both private and public actors. In this case, the regulation applies to all commercial driving instructors, public and private, and therefore will likely not violate the 10th Amendment.

Capitol City Transport’s Challenges

State Action

As mentioned above, there is state action in this case, so the construction applies.

Not Within Enumerated Powers

Transport would likely argue that this regulation is not within Congress' enumerated powers and therefore is unconstitutional. As mentioned above, under the Commerce Clause Congress has the power to regulate the instrumentalities of interstate commerce as well as those things within interstate commerce. Instrumentalities of interstate commerce include cars, planes, buses, etc. Moreover, Congress has the power to regulate an activity [that] has a substantial effect on interstate commerce.

In this case, the Regulation requires that every bus in commercial service be equipped with seatbelts for every seat. A bus is an instrumentality of interstate commerce because it is generally used to move people both within the state and between states. Even though Transport does not operate buses within interstate commerce (since it only operates within the City limits) the bus, itself, is an instrumentality of interstate commerce and therefore can be regulated by Congress under the Commerce Power. Moreover, commercial busing is an activity that has a substantial effect on interstate commerce because it is an economic activity that in the aggregate moves thousands of people and goods between states. So even though City itself does not move people in interstate commerce, the commercial activity of busing people within the city, in the aggregate, has a substantial effect on interstate commerce. If buses that operate in the country are safer than the roads and highways are likely safer and therefore there is going to be beneficial effect on interstate commerce.

Therefore the regulation is within Congress' enumerated powers.

Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

Equal Protection

Under the 5th Amendment Due Process Clause, the federal government is prohibited from making unjustifiable distinctions between its people. In this case, the plaintiff may challenge the regulation as a violation of equal protection because it distinguishes commercial buses from other buses. As a general rule, any classifications among economic actors is subject to minimum rationality review. In that case, the regulation is valid so long as it is rationally related to a legitimate government interest. In this case, the regulation is likely to be upheld because the regulation is rationally related to the legitimate interest of ensuring the safety of those instrumentalities of interstate commerce. Secretary may have concluded that commercial buses are more of [a] threat to safety and therefore needed to be regulated before other buses were regulated. Moreover, putting safety belts on buses makes them safer by ensuring less injuries when and if there is an accident. Therefore this challenge is likely to fail.

State Highway Department's Challenges

State Action

As recommended above, there is state action in this case, so the construction applies.

Not Within Enumerated Powers

The State Highway Department may challenge this regulation by claiming that the regulation is not within Congress' enumerated powers. Congress has the power to tax and spend for the general welfare. In addition, Congress has the power to condition federal funds so long as the condition is related to the purpose for which the funds were granted.

In this case, the regulation requires states to implement adequate measures to ensure that bus seatbelts are actually used by conditioning 10% of the previously appropriated federal funds that assist states with highway construction on the implementation of such measures. Under Congress' conditional spending power this

condition placed on the funds is appropriate so long as the condition is related to the purpose for which the funds are used. The funds are being used to assist with highway construction. Such funds are likely to be used to build better, safer and more highways. The condition on the funds is that the states must implement measures ensuring that buses have seatbelts. The purpose of the condition is to improve the safety of an important instrumentality of interstate commerce. In this case, the condition is clearly related to at least one of the likely goals of the federal funds. Therefore the regulation is not outside of Congress' enumerated powers.

Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

10th Amendment: Commandeering

The State Highway Department may challenge the regulation as invalid because it compels the state to legislate. As a general rule Congress cannot compel the state to implement legislation. Such regulations would be invalid and a violation of the 10th Amendment. However, Congress does have the power to condition its provision of federal funds on the states enacting certain regulation so long as the condition is not compelling the states to implement the regulation. In this case, Congress has conditioned only 10% of the federal highway funds on the implementation of such measures. 10% is only a slight percentage of the total and therefore it is unlikely that such an amount would constitute coercion of the states into implementing measures. If the state decides not to implement the measures it still will get 90% of the funds that were previously appropriated. Therefore the court is likely to find that such regulation is only inducing the states to act, not compelling them to act.

Therefore the regulation is not likely a violation of the 10th Amendment.

Answer B to Question 4

1. What constitutional challenges may the State Driving Academy bring against Regulation A, and is it likely to succeed?

Standing

It first must be determined whether the State Driving Academy (SDA) has standing to challenge Regulation A. Because of the requirement in Article III that federal courts only hear actual cases and controversies, the United States Supreme Court has imposed various requirements to determine whether a case is justiciable. Importantly, a litigant must have standing to bring a claim in federal court. This requires the litigant demonstrate injury in fact, causation, and redressability.

The SDA can demonstrate injury in fact based on Regulation A. The SDA offers its own driving instructions for persons seeking commercial driving licenses. However, the current federal regulation requires that the instructors at the SDA be certified by federal examiners, and meet specific criteria for eligibility. Thus, the SDA is injured because it cannot continue to offer driving instruction until it has complied with the federal regulations. Causation is also met, since the fact that the SDA cannot continue to offer instruction was caused by Regulation A. Finally, the SDA can also demonstrate redressability. If it succeeds in challenging Regulation A under the U.S. Constitution, it will be overturned, and the SDA will no longer have to comply.

As such, the SDA has standing to challenge Regulation A.

Improper delegation of legislative power

The SDA will first argue that the entire regulatory scheme is an improper delegation of legislative power. Congress may delegate its power to other branches, so long as intelligible standards are given and the power assigned is not uniquely confined to Congress (e.g., the power to declare war). It should be noted that although some

intelligible standard is required, the United States Supreme Court has not struck down a delegation of legislative power in nearly 30 years.

In this case, Congress authorized the United States Secretary of Transportation, an executive officer, to “do everything necessary and appropriate to ensure safe streets and highways.” This does seem possibly overbroad. However, the facts indicate that, as regards Regulation A, specific details were given for the licensing scheme. The facts say that the criteria for certification were detailed, and lists the types of things required for certification. Based on the fact that the United States Supreme Court is hesitant to overturn delegations of legislative power, these criteria are likely sufficient.

As such, a challenge based on improper delegation of legislative power will likely fail.

Interstate Commerce Clause

In order for Congress to take action, it must exercise an express power granted to it in the Constitution or it must exercise an implied power, typically those necessary and proper to achieve those powers expressly granted. Article I of the Constitution grants Congress the power to regulate interstate commerce. The United States Supreme Court has interpreted this power broadly, and Congress may regulate interstate commerce in three different areas: (1) it may regulate the channels of interstate commerce, such as highways and rivers; (2) it may regulate the instrumentalities used in interstate commerce, as well as regulate to protect the persons and things engaged in interstate commerce; and (3) it may regulate activities which have a substantial effect on interstate commerce.

In this case, Regulation A requires that all instructors of persons for commercial driving licenses be certified by federal examiners. Regulation A is part of the overall scheme “to ensure safe streets and highways.” The SDA will argue that this regulation is too broad, because it is not limited to those engaged in interstate commercial driving. Specifically, they will argue that the regulation also requires instructors to be certified

even when they're only instructing commercial drivers engaged in wholly intrastate commerce, and thus, the Interstate Commerce Clause cannot justify Congress' action here.

First, Congress will argue that Regulation A is a method of regulating the instrumentalities used in interstate commerce. Specifically, Congress will point out that those engaged in commercial driving are instrumentalities of interstate commerce, and thus regulating those who grant licenses to these drivers is entirely proper under the second prong mentioned above. However, Congress will also argue that the activity regulated has a substantial effect on interstate commerce.

Importantly, when Congress regulates an activity which may be entirely intrastate, it has to demonstrate that the activity has a substantial effect on interstate commerce. However, where the activity regulated is commercial or economic in nature, the regulation will be upheld if there is a rational basis to conclude that the activity regulated, in the aggregate, does have a substantial effect on interstate commerce. That test would easily be met in this case. It can rationally be assumed that commercial drivers within a state would impact commercial activities in interstate commerce – intrastate drivers could convey goods to interstate drivers, goods in interstate commerce could be moved by commercial drivers through the state, etc.

As such, Regulation A is constitutional under the Interstate Commerce Clause.

Intergovernmental immunity/principles of federalism

The SDA will next argue that Regulation A violates principles of intergovernmental immunity. Specifically, it will state that the federal government is targeting the states and forcing them to comply with federal regulations. The SDA will argue that Regulation A commandeers state officials to enforce the regulatory scheme, since all state driving instructors must now comply with federal certification rules. However, state governments are not immune to federal regulation, and it should be noted that principles

of federalism are not violated where a federal law regulates both states and private individuals equally, without directly targeting states.

This argument will likely fail. First, Regulation A is not targeted only to states. The facts indicate that Regulation A is applicable to all instructors of persons seeking commercial driving licenses. Thus, Congress is not requiring states to regulate in a certain way, but merely requiring those engaged in a specific activity [to] meet certain requirements.

Next, Regulation A does not commandeer state officials. Although state officials must meet certain requirements before being permitted to instruct, the Regulation does not mandate that state executive officials enforce a federal law. It merely requires all persons engaged in commercial driving instruction, both private and governmental, follow the federal rules.

As such, Regulation A does not violate principles of intergovernmental immunity.

Preemption

Because of the Supremacy Clause of Article IV, a lawfully passed act of Congress may preempt or supersede state laws. Congress may expressly preempt state law, or impliedly do so. It does so impliedly where the state law prohibits obtaining a federal objective or interferes with a federal scheme.

In this case, the SDA will argue that Congress is intruding on areas left to the States under the 10th Amendment. However, this argument will fail. As demonstrated above, Regulation A is lawful under the Interstate Commerce Clause. If the SDA has conflicting licensing requirements for commercial driving instructors, its scheme will be struck down and Regulation A upheld under the Supremacy Clause.

Conclusion

As such, the SDA's challenge to Regulation A will fail.

2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed?

Standing

As indicated above, a litigant must have standing to bring suit in federal court, meaning it must demonstrate injury in fact, causation, and redressability. The Capitol City Transport Company (CCTC) can demonstrate injury from Regulation B because it requires CCTC to put seat belts in all of its buses. This is an economic detriment that CCTC will have to incur. Because this economic detriment is due entirely to Regulation B, causation is met. Additionally, redressability is also met, because if the regulation is declared unconstitutional CCTC will no longer have to comply.

As such, CCTC has standing to litigate the constitutionality of Regulation B.

Interstate Commerce Clause

CCTC will also likely argue that Regulation B exceeds Congress' power under the commerce clause. However, this argument will likely fail. Again, as indicated above, Congress may regulate interstate commerce in three different ways (see above).

Regulation B requires that every bus in commercial service be equipped with seat belts. This indicates that Congress is regulating instrumentalities of interstate commerce, since buses engaged in commercial service are being regulated and are an instrumentality. Additionally, Congress is protecting persons involved in interstate commerce, since the regulation require seat belts. However, CCTC will argue that the regulation is again overbroad, because it does not regulate only buses engaged in

interstate commercial activity. Once again, as indicated above, since this activity is economic, Regulation B will be upheld if there is a rational basis to conclude the activity, in the aggregate, has a substantial effect on interstate commerce. Such a rational basis is easy to see here. Buses engaged in commercial service, even if only within the state, will likely impact commercial activity coming into the state and leaving it.

As such, a challenge under the interstate commerce clause will fail.

Government action

The CCTC may also argue that the law infringes its substantive due process rights under the 5th Amendment, as well as its rights to equal protection (which is implied in the 5th Amendment). However, to properly allege a violation of due process or equal protection, some government action must be shown. This is easy here, since the act complained of is a federal regulation, which would count as government action.

Equal protection

Again, implied into the 5th Amendment is a clause providing that no one be deprived of equal protection of the laws. Where a law regulates on a suspect or quasi suspect class, or infringes a fundamental right, strict scrutiny or intermediate scrutiny may be used. However, for all other activities or classes, only a rational basis test is used. Specifically, the claimant must demonstrate that the law is not rationally related to a legitimate government purpose. This test is very deferential to the government.

In this case, CCTC will argue that its equal protection rights are violated. Particularly, it will argue that the regulation targets only commercial buses, and not other buses. However, commercial buses are not a suspect or quasi suspect class. Additionally, no fundamental rights are infringed by Regulation B. Thus, only a rational basis review will be used to determine the validity of the law. The state purpose of these regulations is to ensure safe streets and highways. This is clearly a legitimate government purpose.

Additionally, the law is rationally related to this purpose because regulating commercial drivers, who would frequently be on streets and highways, is a manner of ensuring that the roads are safe for other drivers.

As such, an equal protection challenge to this regulation will fail.

Substantive due process

The due process clause analysis is similar to the equal protection analysis. However, we are not concerned with discrimination based on a group or class, but a law which equally deprives people of constitutionally protected rights. Where a law infringes upon fundamental rights, strict scrutiny must be used. However, for all other rights only a rational basis test is used.

The analysis is the same as the equal protection analysis above, and the law will be upheld.

Taking

CCTC may also argue that the regulation affects a taking of private property. The 5th Amendment provides that the federal government shall not take private property for public use without paying just compensation. The takings clause can apply both to physical takings as well as regulatory takings which deny owners the economic use of their property.

CCTC will argue that the law affects a taking, because it requires them to put in seat belts. Specifically, it will argue that Regulation B is [a] governmental act which requires them to pay money to install seat belts, thus decreasing the value of their overall business enterprise.

However, Congress will argue that in no way does the regulation deprive CCTC of all economically viable uses of its buses. To the contrary, it is simply making the buses

safer for their continued commercial use in which CCTC was making profits. And although the takings clause does apply to regulations, it typically applies to those regulations which limit the use of the land. In this case, the regulation only requires that CCTC install seat belts in its buses, which would in no way limit the use of the buses.

Conclusion

As such, Regulation B will be upheld under the US Constitution.

3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed?

Standing

Again, the 3 standing requirements must be met. The State Highway Department (SHD) can show that Regulation C injures it because the state will lose federal funding if it does not implement adequate measures for providing seat belts. Causation is met, since the funding will be cut due to the requirements of Regulation C. And finally, redressability is met, because a successful constitutional challenge will overturn the law, meaning SHD no longer has to comply.

Intergovernmental immunity

Here, a challenge based on violations of intergovernmental immunity might succeed. As stated above, the federal government cannot commandeer state executive officers or state legislatures to ensure enforcement of federal laws. Specifically, the federal government cannot force the states to enact laws or regulations.

In this case, Regulation C punishes states which fail to enact adequate measures under the federal scheme. The SHD will argue that this violates intergovernmental immunity,

since the federal government is requiring states to regulate and punishing them if they don't.

In response, Congress will argue that this is perfectly acceptable under its taxing and spending power. As indicated above, this is a successful argument, and a challenge based on intergovernmental immunity will fail.

The power to tax and spend

Article I of the Constitution grants Congress the power to tax and spend to ensure a common defense and provide for the general welfare. This essentially allows Congress to spend money for any purpose which is related to the general welfare of the United States. Of particular importance, under the Spending Clause, Congress may “attach strings” to congressional grants of money to require [that] States act in a certain way. Thus, although Congress may have no power to regulate a certain area, it can require states to regulate as a condition of receipt of federal funds.

In this case, Congress cannot constitutionally require states to legislate on the subject of commercial drivers' licenses. However, under the spending clause, it can incentivize [sic] states to so regulate by conditioning the receipt of federal funds on enacting proper measures under the federal scheme. Here, the facts indicate that Congress has indicated that states will forfeit 10% of federal funds for highway conditions if they fail to enact measures to ensure compliance with Congress' regulation of seat belts on buses. The SHD will argue that Congress has no power to require states to regulate, and thus this scheme is unconstitutional. However, as discussed above, Congress can properly condition receipt of federal funds on state compliance with federal regulations, and thus Regulation C is constitutional.

Conclusion

As such, Regulation C is constitutional.



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**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth \$4,000,000 if development is permitted and \$200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.
2. A partial taking? Discuss.

Answer A to Question 5

1. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a total taking?

The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without just compensation.

Taking

There are two types of takings: permanent physical occupation and regulatory takings. The former is not at issue because Paula's complaint contends the County is liable for a regulatory taking.

A regulatory taking is considered a "per se" taking if it deprives the owner of 100% of all economic viable use of the owner's property. Here, Paula owned 100 acres and 10 of those acres bordered a small lake in which she [was] seeking to develop to construct 30 homes thereon. However, the County denied Paula's application to develop the 10 acres on the basis that the 10 acres constituted protected wetlands. Thus, Paula owned 100 acres but only 10 of it was denied development. Because the County did not deny development of the entire 100 acres owned by Paula (rather, the County only denied development of 10 acres), Paula was not deprived 100% of all economically viable use of her property.

Denominator Problem

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth \$200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth \$200,000 if development is not permitted. Thus, Paula would be awarded \$200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to \$4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be \$4,000,000 because Paul lacks a vested right to develop.

Vested Rights

A private property owner has a vested right to develop when a government body has specifically approved, by individualized action, the development of a particular piece of property.

Here, although Paula has expended a substantial amount of expenditures in determining the feasibility for developing the 10 acres, she nonetheless has no “vested” right to develop because she lacks the requisite government approval. There are no facts indicating the government issued Paula any type of building permit or other individualized action specific to her property that would vest her rights to develop. Thus, because she has no vested right to develop the 10 acres, the value of the 10 acres is tantamount to its value as undeveloped wetlands, i.e., \$200,000.

Conclusion

Although Paula’s property is private property and the state law is pursuant to public use, the trial court’s decision that a total taking has not occurred is correct because Paula was not deprived of 100% of all economic viable use of the owner’s property.

2. Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute a partial taking?

Taking

A regulatory taking does not have to be a “per se” taking to implicate the 5th Amendment. A regulatory taking is also considered a “taking” under the 5th Amendment if it does not pass the Penn Central Balancing Test. In the Penn Central case, the U.S. Supreme Court analyzed three factors in determining whether a “taking” has occurred: (1) the nature of the government action, (2) the private property owner’s reasonable investment-backed expectations, and (3) the level of diminution in the owner’s private property value.

1. Nature of Government Action

Here, a state law was enacted to protect wetlands to protect certain endangered species. It was not enacted to punish Paula. And it's probably safe to presume the state law is also applicable [to] other properties alongside the lake and that it was not similar in form to that of "spot zoning" – where the government singles out a piece of property and changes its use in a way that's distinct from other adjacent properties. Because the nature of the state law was to protect endangered species and not to single out Paula's property, this factor weighs in favor of the trial court's decision that a partial taking has not occurred.

2. Private Property Owner's Reasonable Investment-backed Expectations

Last year, Paula expended a "substantial amount" of money in determining the economic feasibility of developing 10 acres of the parcel. Thus, she invested a considerable amount in her expectation to develop eth property. The County may argue, however, that Paula's level of investment was not reasonable under the circumstances because she had no "vested right" (see heading Vested Rights under question 1 above) to develop her 10 acres. The County would argue she should not have spent a substantial amount at a point in time when the probability of her being able to develop her property was so speculative.

However, the facts state Paula did the economic feasibility study "in compliance" with County regulations. Thus, Paula has a strong argument that her investment was reasonable because the County required her to do an economic feasibility study. On balance, Paula's expenditure of a "substantial amount" was probably reasonable under the circumstances.

3. Level of Diminution in Value

Here, the parties stipulated that the 10 acres are worth \$4,000,000 if development is permitted and \$200,000 if it is not. Thus, Paula would likely argue that the level of diminution in the value of her property is great because of the difference in what her

property would be worth if the state did not prohibit her from developing her property. However, the \$4,000,000 figure is a “would be” value and not an “as is” value. The court may weigh this factor differently if it was the case that Paula owned property worth \$4,000,000 and, due to a state law, it is now worth \$200,000. However, that is not the case. Here, Paula’s property is worth \$200,000 as it sits right now, undeveloped. Because Paula’s property has not diminished in value, this factor weighs heavily in favor of the trial court’s decision that a partial taking has not occurred.

Denominator Problem

A court’s review of the trial court’s decision that a partial taking has not occurred would have to grapple with the same denominator issue (as analyzed above and repeated below) as they would regarding the trial court’s decision that a total taking has occurred.

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned “for many years”) 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth \$200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula’s property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth \$200,000 if development is not permitted. Thus, Paula would be awarded \$200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to \$4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be \$4,000,000 because Paula lacks a vested right to develop.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a partial taking has not occurred is correct because the factors under the Penn Central balancing test weigh in favor of the trial court's decision.

Answer B to Question 5

1. DID THE TRIAL COURT CORRECTLY RULE THAT COUNTY'S DENIAL OF PAULA'S DEVELOPMENT APPLICATION DID NOT CONSTITUTE:

A. A TOTAL TAKING?

TAKINGS CLAUSE

The 5th Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. Through the Doctrine of Selective Incorporation, this is made applicable to the states via the Due Process Clause of the 14th Amendment. In this case since the County is a state municipality Paula will challenge under the 14th Amendment clause.

A taking can either be physical, where the government physically occupies the land, or a taking can be regulatory, where a government regulation renders the land economically unviable. In either case, if there is indeed a "taking" and the taking is for public use the government will be required to pay just compensation.

PHYSICAL TAKING

As mentioned above, a physical taking occurs when the government physically occupies the land either in part or in total. If there is actually any "physical" occupation in any way, it will constitute an official taking. If the taking is for public use the government will be required to pay just compensation.

In this case the only governmental action is a regulatory statute preventing Paula from developing the 10 acres. There is no actual physical occupation, but rather a regulation affecting Paula's use.

Therefore, there is no physical taking.

REGULATORY TAKING-TOTAL

A regulatory taking occurs when a government regulation renders property economically unviable. For there to be a taking under the takings clause through, and unlike a physical taking, the regulatory taking must leave no economically viable use of the property.

Here the court concluded that there was no total regulatory taking of Paula's property when they rejected her application. Let's explore this further to see if indeed there was a total taking.

Paula owns 100 acres of land and had done so for many years. Paula has farmed the land, but the facts don't state how much of the land she actually farms. Presumably Paul also lives on the farm as well.

In this particular case, Paula is seeking to build 30 homes on 10 acres of her land sitting next to a small lake. The government is claiming that due to a state law the 10 acres is protected land and Paula is not able to build. It should be immediately noted that only 10 of Paula's 100 acres is being negatively affected by the government's regulation. Paula is still free to use the remaining 90 acres as she sees fit. She can continue to farm it, or even build the 30 homes on any of those remaining 90 acres. It's presumed that Paula's intentions in building the homes is for business purposes. Moreover, since the 10 acres abuts a small lake, Paula will likely be able to make a bigger profit on selling the homes as she'll be able to advertise that they are "waterfront property". The facts don't specifically state what type of condition the remaining 90 acres is. 90 acres is a lot of land and perhaps there is another equally viable place for her to build the 30 homes.

However, the government regulation is not a total taking here since there appears to be a lot of economically viable use of the land remaining. First, Paula has possession and can make use of 90 of the 100 acres presumably as she sees fit. The government regulation only affects 10% of Paula's land. Paula still has a lot of remaining of which [it] has tremendous economical use. Paula can continue farming the 90 acres of land,

and even perhaps the 10 acres in question. Additionally, she may even be able to move her development plans to those 90 acres as well. In this case the government regulation may not even affect her that much at all.

Since the regulation only affects 10% of the land, and there is still considerable economical use of the remaining 90 acres of land, the government regulation is not a total taking.

B. A PARTIAL TAKING

PARTIAL REGULATORY TAKING

A partial regulatory taking occurs where the government regulation affects some economic use of the land, but there still remains a sufficient amount of economic use.

Here, Paula will argue that by preventing her from building the 30 homes on the 10 acres the government regulation is rendering those 10 acres economically unviable. She will further argue that while in relation to the total 100 acres 10 acres is only 10%, but in relation to the 10 acres in question, the government regulation is preventing her from making any economic use of the land. By not allowing Paula to build the 30 homes on the 10 acres the government is preventing her from making a profit from her use of the land. The state law in question requires the 10 acres to be undeveloped, meaning Paula cannot build any structures on the land, or make any profitable use of it.

INVESTMENT BACKED OPPORTUNITIES

Paula will argue that the government regulation destroys her investment backed opportunity since she's invested a substantial amount of money in determining the economic feasibility of developing the 10 acres. While the facts don't say, Paula has perhaps entered into contracts with prospective buyers of the homes and/or even contractors to build the land. Further, Paula will argue that she complied with County regulations the entire step of the way in her pursuit of this endeavor.

The government will argue that she should not have invested that much money before researching if her prospective use was legal. In doing so she created her own detriment and will suffer the burdens of it.

BALANCE OF INTEREST

Finally, the court will likely balance the interest of both parties to determine if there is a substantial partial regulatory taking of which compensation should be paid.

Here, Paula's interests are obvious. She wants to be able to build 30 homes on the 10 acres of land so she can make a profit on them. Also Paula can argue that by building the homes she's providing adequate housing for the public. Alternatively, the government wants to protect endangered species from becoming extinct. Weighing the two factors, given the fact the Paula's interests are purely pecuniary, the government will likely prevail in this battle. Their interest protects more of the public at large while Paula's merely protects a few, if any.

In conclusion there appears to be [not] any total or partial taking. However, in the event the court finds that there was, the taking must be for public use.

PUBLIC USE

The government may only take land if is for public use. Here, the government regulation is to preserve endangered species. This is a benefit for the public at large since it preserves the wildlife for all to enjoy.

JUST COMPENSATION

Finally, in the event that there is a taking for public use, the government must pay just compensation. This is the market value of the land to the owner at the time of the taking.

In this case, if there is a taking the government will have to pay Paula \$4,000,000 since the taking prevents her from developing her land as she wants to.

STATE LAW INVALID

Paula may try to argue that the state law guiding the government's decision is invalid.

10th AMENDMENT & PREEMPTION

Under the 10th Amendment, powers not reserved to the federal government are reserved to the states.

Here the state law protects certain wetland and endangered species. Paula will argue that the state law is preempted by federal law since under the federal property power, the federal government is in control of preserving the land.

In conclusion, the court did not err in ruling that the County's denial of Paula's development application did not constitute a total or partial taking.



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**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
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Question 2

Out of a sense of patriotism, Charles enlisted in the United States Army. Charles had risen to the rank of Captain.

Shortly after that promotion, after serious reflection, Charles began to rethink his previous religious, philosophical, and political views. He modified the religious preference he listed on his Army records from “Christian” to “Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You.” Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B.

Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy. Since the charges were brought, Charles has frequently criticized American involvement in Country B.

Charles wishes to raise a defense against the refusal to deploy charge based solely on (1) the Free Exercise Clause and (2) the Establishment Clause of the First Amendment to the United States Constitution.

What is the likelihood of Charles prevailing? Discuss.

Answer A to Question 2

The First Amendment prohibits the federal government from interfering with the free exercise of religion, and it also prohibits the federal government from establishing a religion. In general, because the First Amendment protections are so important, laws are subject to strict scrutiny, which means they must be necessary to achieve a compelling state interest. Additionally, there must be no less restrictive alternative.

(1) FREE EXERCISE OF RELIGION

MUST THE RELIGION PROTECTED BE A RECOGNIZED RELIGION?

As indicated above, the federal government cannot enact laws that interfere with the free exercise of religion. A necessary threshold question, therefore, is which religions are protected by the First Amendment Free Exercise Clause. The Supreme Court has indicated that the religion need not be a generally accepted or recognized religion, so long as the individual who practices the religion has a genuine belief in the religion.

In this case, Charles' new religion, "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You," is not a generally accepted or recognized religion. However, no facts indicate that Charles does not have a genuine belief in this religion. As indicated in the facts, he had rethought his views, which gives credence to the fact that Charles genuinely considered and believes in his new religion.

Accordingly, Charles' new religion qualifies as one which is subject to First Amendment limitations.

FREE EXERCISE OF RELIGION V. LAWS OF GENERAL APPLICABILITY

The Supreme Court has indicated that a law will be struck down as violative of a person's free exercise of religion only in the event that the law was enacted with the

purpose of interfering with the person's religion, and the law in fact does so interfere. Thus, laws of general applicability will not be struck down under the Free Exercise Clause. A good example of this is where the U.S. Government prevents mind-altering substances (i.e., drugs). In Native American religions, the Native Americans use peyote, a mind-altering substance, in the exercise of its religion. However, because the Supreme Court determined the law against drugs was one of general applicability and not directed at inhibiting Native Americans from practicing their religion, the law was upheld. Notably, two exceptions have been found: 1) The Amish do not have to send their children to school until age 16; and 2) people may still receive unemployment benefits if they quit a job due to religious beliefs. Neither exception is applicable here.

Rather, in this case, as is similar to the Native American peyote example, it appears the federal law is one of general applicability. Specifically, federal law requires military personnel to "accept any assignment to duty." Therefore, because the law was not enacted with the intent to interfere with religion [sic].

The law may, however, actually interfere with Charles' exercise of religion. Because he must accept any assignment to duty, and because he was charged with refusing to deploy, he therefore cannot exercise his religion which necessitates he refuse assignment to Country B. However, as indicated above, because the law was not enacted with the purpose of interfering with Charles' religion, it is one of general applicability and will be upheld.

NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST

Even if the federal law to "accept any assignment to duty" was enacted with the intent to interfere with religion, it may still pass muster under the Free Exercise Clause if it is necessary to achieve a compelling state interest. Of note, under this strict scrutiny standard, the burden is on the government to so prove the law passes muster.

Here, the law is necessary, as the U.S. military must maintain order with respect to its troops. There are hundreds of thousands of people in the U.S. military, and for

efficiency and administrative purposes alone, it would not make sense to allow individual military personnel to "pick and choose" where they are assigned. Indeed, the U.S. might have to forego a presence in dangerous areas if such was the case, as some military personnel may decline to go to war-torn parts of the world. Moreover, it is important that the military retain obedience from its troops and reduce tension, given the gravity of their missions and likelihood that American troops may be killed. Indeed, once Charles was assigned to duty in Country B, he frequently criticized American involvement in Country B, thereby disrupting efficiency and perhaps causing others to lose faith in the mission. Accordingly, the law is necessary.

There is also a compelling state interest - the protection and defense of the United States. Because national security and defense is such a profound interest to the United States, it qualifies as "compelling."

Moreover, there does not appear to be any less restrictive alternative. For example, the law could not allow some military personnel to accept some duties and reject others, while maintaining that others must accept any assignment (as such a law would be subject to equal protection claims).

Accordingly, because the law is necessary to achieve a compelling state interest, as maintaining order in troops in order to accomplish national security and defense, the law is valid. The government meets its burden in so proving.

Thus, given all of the above, Charles cannot successfully raise a defense based solely on the Free Exercise Clause.

(2) ESTABLISHMENT CLAUSE

As indicated above, the First Amendment prohibits the federal government from establishing a religion.

APPROVING ONE SECT OF RELIGION OVER ANOTHER

In the rare event that the U.S. government might establish one sect of religion over another, said law would be subject to strict scrutiny, as described above. Here, it does not appear that the federal government is approving one sect over another, as one must accept assignment to duty regardless of religious sect.

Therefore, the government is not approving one sect of religion over another.

LEMON TEST

The basic test the Supreme Court uses in determining whether the federal government has established a religion is the Lemon test, which is comprised of three inquiries: 1) was the law enacted for a secular purpose; 2) does the primary effect neither inhibit or advance religion; and 3) is there no excessive entanglement by the government? If all three inquiries can be answered affirmatively, the law passes the Lemon test, and accordingly, the Establishment Clause is not violated.

A) SECULAR PURPOSE?

As indicated above, the first inquiry is whether the law was enacted for a secular purpose. Here, the law that military personnel must accept any assignment to duty does not reference religion whatsoever. Moreover, it appears the purpose of the law was to maintain order and faith in the military missions, and not to establish a religion.

Accordingly, there is a secular purpose behind the law.

B) PRIMARY EFFECT?

It must be decided whether the primary effect is to advance or inhibit religion. The effect of the law is that a person in the military will have to accept assignment regardless of his religious preferences, and without taking said preferences into account. Thus, it cannot be said that the law advances or inhibits religion, as the fact that one has a religious leaning toward a particular assignment in a particular country is inconsequential as to whether the person is eventually assigned to a particular country.

Rather, the primary effect of the law is to maintain order and administrative military efficiency.

Accordingly, the primary effect of the law neither advances or inhibits religion.

C) EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION?

In order for a law to be valid under the Lemon test, there must not be excessive government entanglement with religion.

This inquiry may be Charles' best argument that the law should fail the Lemon test. Specifically, he can argue that the Army records list a religious preference. Accordingly, because he listed his religious preference, the military was on notice that his beliefs under his religion may conflict with assignment into particular countries.

However, the government can argue that any preference that Charles indicated has little to do with where he is eventually assigned to duty. Rather, military personnel are assigned where they are needed; where ongoing conflicts arise; etc. Thus, the law that a person must accept any assignment to duty, even if the military knows your religious preference/beliefs, does not excessively entangle with religion.

Accordingly, there is no excessive government entanglement with religion.

Thus, because the Lemon test is not satisfied, a court will likely find that the Establishment Clause has not been violated.

Charles will not succeed under either the Free Exercise Clause or the Establishment Clause.

Answer B to Question 2

1. Free Exercise Clause

Under the First Amendment's Free Exercise Clause, the federal government may not prohibit the free exercise of any religion.

Are Charles's beliefs religious?

The first question is whether Charles's nontraditional belief system is religious. A religion need not be a popular or generally recognized system of belief, like Christianity, but it must be religious rather than political or philosophical in nature. There is no single test for determining whether a belief system is religious, but courts look to factors such as whether the system has indicia of traditional religious beliefs like dealing with questions about the existence and nature of a higher power, life after death, holidays, rituals, and moral teachings for living one's day-to-day life.

Here, Charles's belief system seems to lack any of these traditional indicia of religious beliefs. The single belief that his religion espouses is one of noninterference, but that gives only limited guidance on how to live one's day-to-day life. There is no indication of beliefs in a god or gods, views on life after death, holidays, or rituals. Moreover, the fact that Charles's beliefs here are tied closely to the situation in particular countries (rather than, for example, a belief in nonaggression to all) and that Charles has been criticizing U.S. policy on this basis suggests that the beliefs are more political than religious.

A court likely would conclude that Charles's belief system is only political or philosophical, not religious, and therefore his Free Exercise Clause claim will fail on this basis alone.

Genuineness

Religious beliefs also must be genuinely held to qualify for First Amendment protection. Here, there does not seem to be any question that Charles genuinely believes in his principle of noninterference, and thus this requirement would be met.

Religious accommodation

The Free Exercise Clause generally does not require accommodation of religious beliefs. The government may require a person to comply with neutral laws of general applicability even if doing so violates that person's genuinely held religious beliefs.

Here, the federal law requiring military personnel to accept any assignment is a neutral law of general applicability. It does not target only the religious or single out one religion for disfavored treatment, and there is no indication that it was adopted specifically to disadvantage religious persons. To the contrary, it probably was adopted for purely secular reasons, to prevent soldiers from undermining military planning by refusing to serve when deployed.

Even if it were not a neutral law of general applicability, the statute would be lawful if it satisfied strict scrutiny -- that it was necessary to achieve a compelling governmental interest and the least restrictive means of doing so. Although strict scrutiny is a demanding standard and the burden of proof is on the government, this law has a good chance of surviving this standard. The federal government has a compelling interest in military readiness and discipline among the troops; indeed, raising an army is one of the federal government's most important functions. The law is necessary to achieve that interest because if soldiers could refuse deployments, it would become difficult if not impossible to plan troop movements adequately and to keep units that trained together intact for battlefield activities. Even allowing a few religious exemptions could severely complicate these efforts if, for example, the objecting soldier had a unique role. And here the fact that Charles is a Captain rather than a low-level soldier suggests that there would be disruption in the chain of command if the unit were deployed without him. Therefore, the law should survive strict scrutiny even if that were the standard.

(I should note that Charles might have a claim under the Religious Freedom Restoration Act, which subjects all Free Exercise Claims to strict scrutiny. Although the law was struck down as applied to States, most courts continue to find it valid as applied to the

federal government. This is beyond the scope of the question, but as explained above Charles likely loses even under strict scrutiny.)

Therefore, the government can require Charles to comply with this law even if doing so violates his religious beliefs. Charles is likely to lose on this basis alone as well.

Military exception

Finally, another barrier to Charles's claim is the fact that he voluntarily enrolled in the army. Soldiers give up many of their constitutional rights, to the extent that they are inconsistent with important military functions. And as noted above the military has a strong interest in enforcing its requirement that soldiers accept all assignments. While conscientious objectors -- those who are religiously or philosophically opposed to all use of military force -- have traditionally been exempted from military service entirely, those who object to some but not all wars have never been exempted. And because Charles enrolled voluntarily rather than through the draft, his claim to an exemption would be particularly weak.

Conclusion

Charles will not prevail on his Free Exercise Clause claim.

2. Establishment Clause

The Establishment Clause prohibits the federal government from establishing an official religion or preferring religion over irreligion. A federal statute passes muster under this clause if it (1) has a secular purpose, (2) does not have the primary effect of promoting religion, and (3) does not excessively entangle the government in religious or ecclesiastical matters.

Secular purpose

As noted above, the federal statute has a valid secular purpose of promoting military readiness and troop discipline. Because this has nothing to do with religion, Charles will not prevail under this test.

Secular effect

The primary effect of this statute also does not seem to be promoting religion. The primary effect is to keep military units intact no matter where they are deployed. Religious and irreligious soldiers are treated the same way regardless of their belief. In fact, if the rule was to the contrary and religious soldiers could refuse particular deployments, that would at least raise serious Establishment Clause questions about whether the government was promoting particular religious beliefs (although most religious-accommodation statutes have been upheld against Establishment Clause challenges). Therefore, Charles is likely to lose under this test too.

Excessive entanglement

There is no real risk of entanglement between the government and religion under the statute. The statute does not require the government to make any quintessentially religious determinations because it applies equally to all regardless of religion or belief. Again, the rule Charles seeks would raise more difficult questions than this one does if it required the government to decide whether a person had a genuine religious belief precluding a particular deployment. Therefore, Charles will lose under this test too.

Conclusion

Charles will not prevail on his Establishment Clause challenge.

**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 2

City recently opened a new central bus station.

Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish because City's population is about equally divided between English- and Spanish-speaking people.

City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advised of the time and place of meetings and solicited memberships at \$10 each.

Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the U.S. Constitution? Discuss.

Question 2 Answer A

Free Speech

Under the 1st Amendment as applied to the states via the 14th A, all persons have the right to free speech. While this right is not absolute, there are only certain instances when the government may infringe upon this right.

Strict Scrutiny

America for Americans Organization (AAO) will argue that strict scrutiny should apply. Normally when a government actor limits or regulates speech based on its content, it will have to survive strict scrutiny analysis. Under this, a law will only be upheld if it is necessary to achieve a compelling government interest.

AAO will claim that the city is a government actor so the protections of the 1st A will apply. Further, they will say that the law regulates the content of their speech—that it must include parts in Spanish. The court will probably not agree because it is not regulating what they say, rather how they say it. Therefore, it will take it out of strict scrutiny analysis.

Time, Place, & Manner Restrictions

One way a government may validly regulate speech is by controlling the time, place, and manner of the speech. These regulations are put under less scrutiny because they are not limiting what the people can say but rather how and where they can say it.

Public Forum

A public forum is a place that is traditionally open to the public and allows somewhat unrestricted speech. These include parks, sidewalks, open fields. The bus station bulletin boards are likely not considered a public forum.

Limited Public Forum

Limited public forums are not traditionally open to public speech, but the government opens them up to the public. Therefore, they receive the treatment of a public forum while open.

AAO will claim this is a limited forum because the boards, while not traditionally open to public speech, are open here to post documents for free. The court will likely agree.

While open to public speech, a limited public forum may only regulate the time, place, and manner of speech if:

1. Content neutral
2. Alternative channels of communication are available, and
3. Regulations are narrowly tailored to achieve a significant government interest.

1. Content Neutral

As mentioned, AAO will claim that the requirement that all posted documents be in both English and Spanish is a regulation based on the content of the speech. The city will claim it is content neutral because it doesn't matter exactly what you say, just how you say it. City will claim this regulates the manner of the speech.

AAO may counter by saying that since the organization has a primary goal of restricting immigration, the regulation goes to the content of their speech because they're speaking out and trying to make it clear that everyone in America should speak/read English. The court may agree with this point but will likely side with the city because the overall requirement that docs be in English and Spanish is not regulating content of the docs but rather the manner in which their speech is conveyed.

Therefore, the regulation is likely content neutral.

2. Alternative Channels

City will also likely show that AAO has other channels of communication available. They can post on other boards or directly hand out fliers. The English/Spanish requirement appears to only apply to this bus station's bulletin board.

3. Narrowly Tailored to Further Significant Interest

City will also argue that this final element is satisfied. They will say they have a significant interest in communicating with and including the Spanish speaking population, which make up about ½ of the people.

Because it is necessary to communicate with your residents, the court may agree with City that this is a significant interest. AAO may argue that City may have a significant interest in relaying government communications, but its interest shouldn't expand to private communications. Further, the burden it would impose on everyone to translate communications into Spanish would be immense, AAO will say.

Even if the court finds the interest in communicating significant, AAO will say this regulation is not narrowly tailored to it. They'll say they could achieve this in other , less restrictive ways, like making communications around heavily populated Spanish speaking areas be in both English/Spanish.

Narrowly tailored means a tight fit. However, because this is a central bus station, it is likely that many Spanish speaking people use it and therefore need the translation.

Therefore, so long as the court finds this regulation is content neutral and is narrowly tailored to a significant gov interest, it will likely be able to refuse to post AAO's flyer for not being in Spanish.

NonPublic Forum

The city may also try to argue this is a nonpublic forum, where speech has traditionally been able to be severely limited. Such places include military bases, airports, and gov buildings. The court has also found a bus advertising signs to be nonpublic.

City will argue this isn't like the inside of a bus where people cannot escape looking at the ads because this is at the station where they could just leave. Court will agree.

Gov can regulate speech in nonpublic forums [as] long as it is reasonable and viewpoint neutral.

Here, the law is likely reasonable due to the ½ Spanish speaking population. Also it is viewpoint neutral because it doesn't discrim on only one side of a viewpoint. It applies to all communications.

Commercial

City may also try to argue this is commercial speech so they can regulate more. That speech can be regulated if not false/misleading, directly advances substantial gov interest, and narrowly tailored into it.

However, even though it seeks membership, City denied it because not in Spanish too.

QUESTION 2

Answer B

Justiciability: In order for a matter to be justiciable there must be standing, the case must be ripe, and not moot. Here, AAO has not filed suit yet, however, it must have standing to raise any objections to the city's requirements.

Standing: standing requires that there be an injury in fact, causation and redressability. Here, AAO is injured as it cannot post its flyers in English only, without potential reprimand. Moreover, the city requirement directly causes its injury, and a court decision in favor of AAO would remedy it. However, an organization will not have standing unless 1) its members have individual standing 2) the interest is germane to the purpose of the organization, and 3) neither the remedy nor the claim would require individual member participation. Here, an individual member who would want to post only flyers in English would have standing, the interest is germane to the purpose of the organization as its primary goal is to restrict immigration and therefore, posting flyers in Spanish would be against its interest and finally, neither a claim or remedy by AAO would require individual member participation.

Ripeness: a court will not award pre-enforcement review for purposes of an advisory opinion. Here, the city has already implemented these requirements. It is unclear whether it is an actual ordinance, regulation or law, but assuming that there are reprimands for violating the city requirements, then the issue is ripe, as AAO would be violating the city requirements if it only posted the flyer in English.

Mootness: there must be a dispute at all times of the litigation. Here, if the city removed its requirement during the litigation the matter would be moot. However, because the city would be free to apply the restriction again whenever it wants there [sic] matter is not moot.

Government conduct: in order for there to be a constitutional violation, there must be government conduct. Here, the city is implementing the requirement; therefore there is government conduct.

First Amendment: the government may not restrict an individual's or organization's freedom of speech unless the speech is not protected or less protected.

Content-Based Restrictions: if a law restricts speech based on its content, whereby it is based on the subject matter or viewpoint of the speech, strict scrutiny review applies. The government must show that the law is necessary to achieve a compelling state interest and it must be the least restrictive means of accomplishing its purpose. Here, AAO will argue that the law is content-based, because it is only allowing flyers that are posted in Spanish and English, and therefore, it is restricting the AAO's message against immigration which would require only posting flyers in English, as posting flyers in Spanish would communicate to the Hispanic community, which is an immigrant population. This is a very far stretched argument. It does not appear that the restriction is based on the subject matter or viewpoint of the speech. AAO could post the same flyer in Spanish stating that its primary purpose is to restrict immigration and advise of the time and place of meetings. Therefore, this argument will fail.

Content-Neutral Restrictions: if a law is content-neutral, then the government must show that the law is substantially related to an important government purpose and is narrowly tailored. As discussed above, the restriction is not content-based, rather, it is content-neutral. The city will argue that the restriction is substantially related to the purpose of communicating to all individuals in its population. The city's population is about equally divided between English and Spanish speaking people, and therefore it has an important purpose of making sure that messages posted on the board for free will be communicated to all its population. Moreover, the city has narrowly tailored the restriction by not requiring that people post the flyers in multiple languages, but only in two. A court will likely uphold the restriction.

Prior Restraint: if a law restricts speech prior to its communication there is a prior restraint and strict scrutiny applies. The law must be reasonably, narrowly tailored, and definite. Moreover, the government must seek a prompt injunction, and there must be a prompt determination of the validity of the law. Here, AAO will argue that this restriction is a prior restraint on speech. It will argue that because it is required to post flyers in two different languages and expend the money to have the English flyer translated into Spanish it is a prior restraint on speech. As discussed above, however, the restriction is not a prior restraint on speech. The restriction is allowing speech; however, it is requiring that it be posted in two different languages. This is not a prior restraint because it is not prohibiting speech.

Vagueness: a restriction is unconstitutional if it is vague and a reasonable person could not understand the type of speech that is being regulated. Here, the restriction is not vague; it is requiring that all free-posted documents be in both English and Spanish. Therefore, the restriction is valid.

Overbroad: the restriction is unconstitutional if it restricts more speech than is constitutionally allowed. Here, the restriction is not overbroad because it is only requiring free-posted documents to be in both English and Spanish; therefore, it is valid.

Symbolic Speech: the government may restrict symbolic speech when it is narrowly tailored to achieve an important state interest, and it is not directed at the suppression of speech. The burden of proof is on the government. Here, posting flyers will be deemed symbolic speech as they communicate a message. As discussed above, the government will argue that it has an important state interest because it want its entire population to understand the flyers that are posted. The restriction is narrowly tailored as it is only requiring the flyers to be in the languages that are dominant in the population, and the restriction is not directed at the suppression of speech. Rather, it provides the opportunity of communicating to the entire population. AAO will argue that the speech is directed at the suppression of speech, because it is directed at the suppression of AAO'S message against

immigration. However, this argument will likely fail as AAO can communicate this same message of its purpose in restricting immigration in Spanish; therefore, the restriction would not suppress AAO's message.

Public Forum: public forums are areas which the constitution requires that the government open to speech. These areas typically includes [sic] parks and sidewalks. Here, the restriction is taking place within the central bus station, wherein the city has provided a large bulletin board that is available for free posting of documents. Because the bulletin board is within the central bus station which is likely government owned this forum will not be deemed a public forum, as it is not a constitutionally required forum for the government to open up to speech. Nevertheless, if it were to be considered a public forum the following analysis would apply:

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the language.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

Designated/Limited Public Forum: this is a forum which the government is not required to open up to speech, but it has chosen to open up to speech regardless. The same analysis as the public forum applies as to designated public forums. Content-based speech must pass strict scrutiny, while in content-neutral speech the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication.

It is likely that the bulletin board within the central bus station will be considered a designated public forum. The government is not required to place a bulletin board in the bus station for organizations and individuals to post flyers, nor is it required to open the central bus station to speech at all; nevertheless it has chosen to do so.

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the speech. AAO can get the same message across in both languages.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

Nonpublic forum: A nonpublic forum is a forum wherein the government may constitutionally restrict speech. These include military bases, sidewalks next to a post office, ad space on buses, and solicitation for money in airports. The restriction, however, must be viewpoint neutral and must pass the rational basis test. Here, AAO would have to argue that the restriction is not rationally related to a legitimate government interest.

The city will argue that the central bus station is a nonpublic forum and that the government must not open it to speech. Although the central bus station is likely to be deemed a nonpublic forum, the city has changed the status of the forum by providing a large bulletin board and making it available for people to post their flyers and messages. By doing so the city transformed the public forum to a nonpublic forum. However, the city may also argue that because AAO is soliciting money (\$10 for its membership) that it is a nonpublic forum as it can restrict speech of solicitation for money in bus stations as it can in airport. However, this argument is unlikely to apply since AAO is not directly soliciting money by standing at the central bus station and asking for money, rather, only if individuals show up at the time and place of the meeting would it ask for membership fees. At that point, the government would be unable to regulated [sic] the speech. Nevertheless, assuming that the court would deem that this is a nonpublic forum, which it will not, the following analysis would apply.

AAO would argue that the law is not rationally related to a legitimate purpose. However, the city can easily counter this by arguing that its purpose is to have its entire population be able to read the flyers. Therefore, AAO's argument will fail. AAO will then argue that the restriction is not viewpoint neutral as it restricts only anti-immigration speech and not pro-immigration speech. This argument will again fail, as AAO can post the same message of anti-immigration in both languages and it would not deter its purpose. Therefore, AAO would not prevail under this argument.

Freedom of Association: the government may not punish individuals for joining any association unless the individuals know of the 1) unlawful purpose of the association, 2) the individual actively participates, and 3) the individual intends to advance the illegal purpose. Here, AAO's primary goal is the restriction of immigration. This is not an unlawful purpose; therefore, the government may not punish anyone for their freedom to associate with the AAO. AAO will argue that it is violating its freedom of association by restricting its message. It will argue that the requirement is unconstitutional because the AAO is an intimate association and it would chill its expressive activities. However, this argument is unlikely to prevail as argued above, because AAO's message of anti-immigration can be communicated in multiple languages and would not violate its freedom of association rights.

Equal Protection/Substantive Due Process: AAO would also have potential argument under the equal protection and substantive due process clause of the 14th Amendment. The equal protection requires that the government afford its citizens and organization equal protections of the law. If the law does not discriminate against a suspect or quasi-suspect.



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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 2

The Legislature of State X recently completed a study on the behavior of teenagers residing in the state that revealed a connection between an increase in the school dropout rate and an increase in the level of criminal activity. The study indicated that the connection was most pronounced among boys ages 15 to 18 years old.

Troubled by what it perceived as a breakdown in personal responsibility and social order among its teenagers, State X's Legislature has enacted a statute creating the State Forestry Corps ("Corps"). The Corps drafts boys ages 15 to 18 who have dropped out of school. It sends them to camps located on public lands administered by the State Forest Service. It also provides them with a comprehensive education leading to a high school diploma. To defray a portion of the costs, the Corps requires the boys to work on reforestation projects for a few hours each day.

Pete, age 15, has dropped out of school and, consequently, has been drafted into the Corps. Pete and his parents have filed a declaratory relief action attacking the validity of the statute under three provisions of the United States Constitution: (1) the Thirteenth Amendment's Involuntary Servitude Clause; (2) the Fourteenth Amendment's Due Process Clause; and (3) the Fourteenth Amendment's Equal Protection Clause.

What arguments could Pete or his parents reasonably make in support of their action, and how should the court rule on each? Discuss.

SELECTED ANSWER A

State Action

In order to prevail in their constitutional declaratory action under the 13th Amendment, 14th Amendment due process, and 14th Amendment equal protection against State X, Pete and his parents will need to show state action by State X in passing and enforcing the law against them.

The law in question regarding the compulsory forestry school was enacted by State X law and is applicable to Pete. Because the law was passed by State X, its procuring the law and enforcing it will constitute state action against Pete because he stands to be injured as well as Pete's parents so long as they can prove standing.

Standing

The constitution requires that each plaintiff have standing to seek any type of relief under its provisions. It requires (1) actual or certainly imminent injury in fact, (2) causation, and (3) redressability through judicial remedies.

Here, it appears that Pete has been actually drafted by the Corps against his will. Pete stands to face injury in fact because he is compelled against his will to enlist and it is certain that he will enlist if he takes no action. State X law caused the law to be passed and enforced; thus causation is clear. Further, a declaratory judgment deeming the law facially invalid as to Pete will save him from the injury of entering the Corps.

Pete's parents have standing, in their argument, because they are losing their son and being discriminated against in the fundamental right to parent and make choices for their minor child. By compelling Pete to work at the Corps, their fundamental right is arguably undermined and infringed as they cannot choose a school for their son. Thus, they can likely show injury in fact. The State X law caused injury, as above. Also, a declaratory judgment would save the parents from injury as it would give them the fundamental power to make parenting decisions for their child and not be compelled by the State.

11th Amendment Sovereign Immunity

States are protected from being sued in federal court (and in some state courts where states retain traditional sovereign immunity in their own courts) where the action seeks money damages from its treasury. However, declaratory judgments do not seek money damages and may be adjudicated.

Here, the 11th Amendment is not implicated because no plaintiffs seek money damages; rather, they seek declaratory relief and thus the action is not preempted by sovereign immunity concerns.

A. 13th Amendment

The 13th Amendment of the Constitution abolished involuntary servitude in all of the United States. It applies directly to states like State X. Further, it was construed to allow Congress to pass laws which abolish the badges of slavery, which continue to linger, and which allows Congress to make prophylactic legislation to correct existing badges of slavery in the several states. Laws which force servitude to other individuals or the state are invalid absent an exception in federal case law or other federal authority.

Here, Pete will challenge that the law violates the 13th Amendment because the law purports to require three hours of compulsory labor at the Corps per day and that it threatens to infringe on the constitutional mandate against involuntary servitude. The strongest argument against Pete is that, absent a narrow exception for the Amish, the Supreme Court has ruled that states have the right to mandate that all children under the age of 16 be enrolled in compulsory education. This embraces the states' rights to oversee education and welfare of its citizens guaranteed to the states under the 10th Amendment, which states that all states retain power not otherwise usurped by the federal government in the constitution. Thus, the state will argue that since the Corps is educational, and that the forestry work on projects is part of that education, and that because Pete is merely 15 years old, that the requirement is akin to that of requiring students to attend regular public school in a compulsory manner absent special circumstances. The state will argue that Pete is not Amish or that he has a special disability to set him apart from other participants and that he should be required to

attend school at the Corps. The goal of the program is educational, just like regular school.

Pete will argue that the Corps's education labor is not aimed at education, but rather at reducing state costs, and thus since the state gains pecuniary benefit the program's work mandate is akin more to slavery than it is akin to formal education. Pete will argue that the program is an alter ego of the state's goal of saving money at the hands of slave labor by him and similarly situated individuals.

Because of the prior Supreme Court mandates regarding the 13th Amendment, and because there is no prophylactic federal legislation to pre-empt education of this kind, Pete will have difficulty showing that the law, as applied to him, infringes on the 13th Amendment's mandates. This is because prior case law allows states to require school attendance under the age of 16. Since Pete is 15, he would need to show special circumstances and argue those to show that he should be an exception to the rule. While the cost-saving goal of the state brings some questions regarding slavery intent, ultimately it prepares Pete for the real world of jobs, which is likely reason enough. Also, the goal of the program is to avoid criminal activity through education for this critical class of young men.

Thus, on balance, Pete would likely fail under a 13th Amendment argument.

B. Due Process

Substantive Due Process

The Constitution guarantees certain fundamental rights to individuals that they will not be deprived of life, liberty, or property without due process of law. The Supreme Court has interpreted the 5th Amendment, applied to the states via the 14th Amendment, to extend other fundamental privacy rights to individuals as well, which give them rights to procreate, have children, and to raise those children as they please without interference from the state as to that right. When a state infringes on fundamental rights of individuals, such as the right to liberty or the right to privacy, the state must show that the law is narrowly tailored to serve a compelling government interest, the highest judicial scrutiny under constitutional law. This is substantive due process and applies here to State X's Corps law. The burden is on the state to meet the strict scrutiny.

Pete

Pete has a fundamental right to liberty in his person. This includes the right to free movement and not to be compelled in movement of his body by the state without due process of law. Pete has not been adjudicated a criminal or otherwise, and thus the compelled requirement that he attend Corps infringes on his fundamental right to move freely as he pleases has been infringed upon by the law. Because the right of liberty in movement is a fundamental right, the state must show that the Corps law is necessary to further a compelling government interest. Pete will also argue that he has a privacy interest in his body and personal choices.

Pete will argue that the law violates his liberty interest because it compels his movement and participation in the Corps program. He will argue that he is not a criminal and that his rights have not been sacrificed merely because he dropped out.

The state will argue that it has a compelling interest in educating its young men and women below the age of 16. The state will likely prevail on that point. The state will further argue that its concerns regarding criminality avoidance and preserving future peace is compelling. This is also correct as it is part of the state's interest in welfare to protect its citizens. The state will argue that it has rights to dictate the education of its youngsters under the age of 16 under Supreme Court decisions. The state will likely prevail on that point, because of the above rules.

However, Pete will argue that while the purpose of the law is compelling, the means are not narrowly tailored because the program reaches too far in undermining his rights of freedom. The program is at a remote camp, far from a regular school, and subjects students to daily labor that appears to be more physical than other students. Pete will argue that the school would do better to have a day program that is supplemented by the required work and not mandated daily, which is more like prison over the students.

Pete will have the most success on this argument. The state will argue that the means are narrowly tailored because of the woes of young men 15-18 through the study. However, the study does not show that compulsory physical labor is the answer to the problems facing State X teen boys; it is but one idea, and a relatively extreme one at

that. The state could have employed its goals in a less infringing fashion on the liberty of its students.

While schools are entitled to more deferential invasions of students' freedoms, such as to discipline as a parent, and to search the student upon reasonable suspicion, the compulsory work mandate does not fall within those categories because of its extreme nature. Because the state's means are not narrowly tailored, the law will be unconstitutional as applied to Pete.

Parents

Parents have a fundamental right in making decisions about how to raise their child. Laws that infringe on parents' right to choose and raise their children are subject to strict scrutiny above. Parents also have a fundamental right to keep a family together.

Here, the law infringes on the parents' rights to choose which school Pete attends because the decision is mandatorily imposed by the state. While the state may require attendance to school under 16, parents' fundamental interest in choice is still fundamental and must generally be deferred to by the state. Here, because the parents could have forced their child to go to school under state law at a different school or done homeschool, for example, the school's infringement by making the parental choice for them infringes on their fundamental right.

The State will argue that their rationale is compelling because of the study indicating criminality with dropout rates. However, as above, the means that it carries out is likely too broad. The parents will show that the concerns could have been met by allowing the parents to choose the schooling forum, rather than the state, and that it hurts their right to decide as parents. Thus, the law is not narrowly tailored.

Further, the parents will argue that they have a fundamental right to keep their family together. The law undermines that right by taking their boy away from them for months at a time. The state's broadly applied law could also apply to children who drop out for good cause, another basis for being too broad. Stripping families apart requires strict scrutiny and narrow laws that fit the purpose well. Here, the action is simply too broad for its extremity on hurting family relations.

Thus, because the parents' fundamental rights to parent and to keep the family together exist, the state failed to show that its law is narrowly tailored and the parents will be successful.

Procedural Due Process

Whenever a fundamental right is infringed upon, generally a plaintiff is entitled to a notice and pre-deprivation hearing prior to the state intentionally depriving that individual of life, liberty, or property. This is procedural due process. Once a fundamental right/liberty is identified, there is a three part balancing required to know whether additional process is necessary.

Here, both Pete and his parents are deprived intentionally of their rights to liberty and privacy (respectively). These are fundamental rights and under the 14th Amendment, State presumptively was required to give notice and hearing with fact finding by a neutral fact finder in determining the rights of the individuals prior to deprivation of those rights. Here, no such process was given to either Pete or his family and the law does not provide for one. In balancing, the court considers (1) weight of interest, (2) interest in additional procedures based on the interest, and (3) efficiency and cost to the government.

Here, the weight of interests is great. Pete faces compulsory servitude to the state as a student and the parents lost their right to parent and choose what is right for their son. A process should have been in place to avoid prejudice.

Further, society has a great interest in liberty of their movement, even for young students, and privacy right of parents is compelling. Without those choices, parents are stripped of their ability to raise their children and protect them.

On balance, an additional process would not be costly to employ by the state; they would simply need to give notice to Pete and his parents, allow for facts to be presented, and make sure that Corps was in Pete's interest and/or that he qualifies for the program. Safeguards should have been in place.

Thus, because fundamental rights were at issue, both Pete and his parents were entitled to due process of law.

Equal Protection

Where a state discriminates based on class either facially or actually and with intent to do so, this triggers equal protection. Laws that discriminate based on fundamental rights trigger strict scrutiny. Laws that discriminate based on sex must be narrowly tailored to serve an important interest with exceedingly persuasive justification. The burden is on the state. Other laws need only further legitimate state reasons and be rationally based and burden is on the challenger.

Pete

Pete will first argue that the law discriminates against him in his exercise of a fundamental right of liberty without adequate justification. Just as under the above arguments, the state will have to show a compelling interest. Here, because of lack of narrowly defined means and the broad requirement of all boys to attend between 15-18 who drop out, the discrimination as to the fundamental right is on the face of the law (boys are clearly required to join the Corps who qualify) and thus the law is unconstitutional as applied to Pete because it infringes on his assertion of his liberty rights. State will argue that it can do so and that it is justified under the above arguments, but it will likely fail.

Pete will then argue that the law is facially discriminatory against him and others based on their sex, males. Pete will argue that State's study and criminal reasoning are not exceedingly persuasive based on the fact that many girls drop out, yet are not included and that State's law is under inclusive, discriminatory, and lacks sufficient rationale.

The State will argue that its basis is important because it is aimed at lowering crime. This is likely sufficient. It will also argue that the study specifically showed that boys were the prime offenders who needed the Corps program specifically. However, the state fails to point to facts showing why girls are not treated alike. It appears no equal program exists for delinquent girls, but just for the boys. Also, manual labor is often a

stereotype attached to boys, that they can handle it and girls cannot. The State's law leaves many questions as to its unequal treatment of the boys over the girls, which may rest on stereotypes based on sex which the Supreme Court has clearly stated it does not support. Also, not all dropout boys offend. The State lacks some hard numbers showing recidivism and actual offender likelihood to justify its one-sided measures that are discriminatory. Only boys are impacted, not girls.

Thus, because there lacks an exceeding persuasive justification and because the law is under inclusive, it will fail equal protection and Pete will be successful in his action on these grounds.

Pete will also argue that because the law targets only boys between 15-18 that it discriminates based on age. He would be correct. However, the court only applies rational basis review for discrimination based on age and experience.

Here, the State's interest in protecting young men and the community through the Corps is a rational basis because it makes sense; saving boys from dropping out and avoiding the statistics of offending is legitimate and it is rational that a special school may help. Pete has the burden to prove otherwise, and it is unlikely that he can do so. This is because logic shows that boys who get through school will not offend as much.

Parents.

Like Pete, the parents will be successful in showing discrimination based on their assertion of the fundamental right to privacy. The law is too overbroad in its infringement and offends equal protection of the parents' fundamental right to choose Pete's school and parent him and keep the family physically together.

SELECTED ANSWER B

1. Thirteenth Amendment Involuntary Servitude Clause

The Thirteenth Amendment is one of the broadest amendments to the Constitution, applying not only to government actions, but also private actors. A regulation is unconstitutional under the Thirteenth Amendment if it compels one person to work for another, even if compensation is paid. Here, Pete will argue that he is being forced into indentured servitude because the Corps requires the boys to work on reforestation projects for a few hours each day. On the other hand, State X will argue that the work on reforestation projects are part of the education process for the boys. State X will argue that the work is only to defray a portion of the costs, and that it is only for a few hours per day. State X will try to compare the project to community service, where people are compelled to work on a community service project on a daily basis. Nevertheless, the boys have not committed a crime. The Corps and the work is not a punishment for the boys, but rather an attempt by State X to reduce criminal activity. It is therefore improper to compare the work to community service. Thus, the statute compels the boys into involuntary servitude and should be found unconstitutional under the Thirteenth Amendment.

2. Fourteenth Amendment's Due Process Clause

There are two prongs to the Due Process Clause of the Fourteenth Amendment. The procedural due process prong strikes down any law that deprives a citizen of a fundamental right without proper procedural safeguards. On the other hand, the substantive due process prong strikes down any law that denies a citizen a fundamental right. Here, Pete and his parents can challenge the State X statute under both the procedural and substantive due process prong.

Procedural Due Process – Deprivation of a Fundamental Right without a Hearing

Procedural due process requires the government to provide the proper procedural safeguards to prevent the erroneous deprivation of a fundamental right. Typically, procedural safeguards include notice, a hearing, and/or the right to have an attorney. When evaluating whether a particular law requires these procedural safeguards courts

look at the person's interest in the right, the court's interest in efficiency, fairness and accuracy. Here, the State X statute compels boys 15 to 18 years old to attend camps run by the Corps. Pete is 15 years old and was drafted by the Corps. By being forced to join the Corps and live on the camps in the State Forest lands, Pete has been deprived of his fundamental right of liberty. The right of liberty is the most tantamount of the fundamental rights, and Pete therefore has a very strong interest in receiving proper procedural due process.

State X will argue that with a high number of dropouts, it would be impossible to administer hearings for each student efficiently. State X would also argue that the hearings would not create a fairer or more accurate outcome as its study already linked school dropouts with criminal activity. Pete and his parents will argue that the statute is too broad, and a hearing should be held to determine whether Pete has a propensity to commit criminal activity, and therefore needs to join the Corps. Ultimately, because State X is essentially creating an educational juvenile detention system, at least a hearing is required before State X can deprive Pete of his liberty. Therefore, Pete could successfully challenge the statute under the procedural due process prong of the Fourteenth Amendment.

Substantive Due Process – Right of Liberty

As previously discussed, the statute violated Pete's right of liberty because it forces him to live on the State forest land, to receive their comprehensive education and to work on reforestation projects a few hours each day. There is no indication that Pete is free to come and go as he pleases. Instead, the facts tend to indicate that the boys must remain at the camp at all times until they reach the age of majority. Because this statute denies Pete his fundamental right of liberty, it must meet strict scrutiny. Strict scrutiny requires State X to prove that the statute is necessary to achieve an important government interest. Courts use the least restrictive alternative test – if there is a lesser restrictive alternative to the statute, then the court will strike the statute down.

Here, the state's interest is preventing criminal activity. This is a compelling state interest and State X may enact laws to further this interest. The statute creating the Corps, however, is not necessary to achieve this interest. State X will argue that it has

linked an increase in criminal activity with the dropout of boys aged 15 to 18. It will further argue that in order to prevent these boys from entering into illegal activities, it had to create the Corps to remove the boys as a threat to society. However, there are many other less restrictive alternatives State X could have used to decrease criminal activity. State X could invest more in its educational system, providing better education to boys at an earlier age to prevent them from dropping out. State X could provide the Corps as an option for parents that were having difficulty dealing with children. State X could set up a scholarship fund for graduating boys to encourage them to stay in school. All of these actions could decrease the dropout rate and thus criminal activity without depriving the boys of their fundamental right of liberty. The law therefore is not necessary and would most likely be found unconstitutional.

Substantive Due Process – Right of Privacy

Pete's parents can argue that the law unconstitutionally violates their rights to privacy. The Supreme Court has held that the "penumbra" of the Bill of Rights, incorporated and applied to the states through the Fourteenth Amendment, has created a fundamental right to privacy. Moreover, the Supreme Court has found that included in the fundamental right of privacy is the right of parents to control the upbringing of their children. Here, the State X law drafts boys who are aged 15 to 18. These boys are still in the minority, and their parents therefore still have a legitimate interest in their upbringing. In addition, the law compels these boys to attend camps on public lands administered by the State Forest Service. On its face, the law does not appear to give parents a choice once their boy drops out of school. The parents cannot refuse to send him to the Corps, nor can they take their own remedial actions – hiring a tutor, homeschooling, sending the boy to private or military school, etc. Control is taken away from the parents.

Because the law takes away the ability of the parents to control the upbringing of their children by compelling the boys to enter the Corps when they drop out of school, the law is unconstitutional unless it passes strict scrutiny. That is, the law must be necessary to achieve a compelling state interest. As discussed previously, while reducing criminal activity is a compelling state interest, the Corps is not necessary to

achieve this purpose. This statute therefore could also be successfully challenged by the parents under the Due Process Clause of the Fourteenth Amendment.

3. Fourteenth Amendment's Equal Protection Clause

A regulation that has a classification on its face is subject to constitutional attack under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no state shall enact a law favoring one citizen over another. Here, State X has two classifications on its face: an age-based classification and a gender-based classification.

Age-Based Classification

The Supreme Court has ruled that age-based classifications are non-suspect classifications that are subject to the rational basis test. Under the rational basis test, the law will be upheld unless Pete or his parents can prove that the law is not rationally related to a legitimate government purpose. Here, State X completed a study on the behavior of teenagers, which indicated a positive correlation between school dropout rate and criminal activity. Moreover, the connection was most pronounced among boys 15 to 18 years old. The reduction of criminal activity is a legitimate government purpose. Because of the link between criminal activity and school dropout rate, State X decided to send boys aged 15 to 18 to camps in order to provide them with a comprehensive education, and to remove them as a threat for criminal activity elsewhere in the state. State X's law creating the Corps to draft boys aged 15 to 18 is therefore rationally related to the government's purpose of reducing criminal activity. If most 15 to 18 year-old male school dropouts become involved in criminal activity, sending them to the Corps should reduce criminal activity. Thus, the law will be upheld as constitutional if it is attacked as an age-based classification.

Gender-Based Classification

While age-based classifications are subject to the rational basis test, gender-based classifications required heightened scrutiny. In order to withstand a constitutional challenge, a gender-based law must be substantially related to an important government interest. Unlike the rational basis test, here the government bears the

burden of proving that the law is constitutional. As previously discussed, the statute aims to reduce the amount of criminal activity within State X by confining male dropouts to the Corps. Reducing criminal activity is an important government interest. The dispositive question is therefore whether the Corps is substantially related to State X's interest in reducing criminal activity.

As already discussed, the law is not necessary as it is not the least restrictive means of achieving the government's objective. The law also does appear not to be substantially related to the government's purpose. A study linked the dropout of boys ages 15 to 18 years old with an increase in criminal activity. There is no evidence, however, that this is a strong causal connection. For example, a 50% increase in dropout rate could only lead to a 1% increase in crime. State X must positively demonstrate a strong correlation between the Corps law and its purpose of reducing criminal activity. Without more evidence, it is unlikely a court would find that the law is substantially related to State X's interest and thus the law will likely be found unconstitutional.



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 5

For many years, the Old Ways Fellowship, a neopagan religious organization, received permission from the City's Building Authority to display a five-foot diameter symbol of the sun in the lobby of City's Municipal Government Building during the week surrounding the Winter Solstice. The display was accompanied by a sign stating "Old Ways Fellowship wishes you a happy Winter Solstice."

Last year the Building Authority adopted a new "Policy on Seasonal Displays," which states:

Religious displays and symbols are not permitted in any government building. Such displays and symbols impermissibly convey the appearance of government endorsement of religion.

Previously, the Building Authority had allowed access to a wide variety of public and private speakers and displays in the lobby of the Municipal Government Building. Based on the new policy, however, it denied the Old Ways Fellowship a permit for the sun display.

After it was informed by counsel that courts treat Christmas trees as secular symbols, rather than religious symbols, the Building Authority decided to erect a Christmas tree in the lobby of the Municipal Government Building, while continuing to prohibit the Old Ways Fellowship sun display.

The Old Ways Fellowship contests the Building Authority's policy and its decision regarding the Christmas tree. It has offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. The Building Authority has turned down this offer.

The Old Ways Fellowship has filed suit claiming violation of the First Amendment to the United States Constitution.

What arguments may the Old Ways Fellowship reasonably raise in support of its claim and how are they likely to fare? Discuss.

QUESTION 5: SELECTED ANSWER A

OLD WAYS FELLOWSHIP'S FIRST AMENDMENT CLAIMS

The Old Ways Fellowship ("Old Ways") has several arguments to support its First Amendment Claims. The threshold question for all of its claims is whether there is government action. Government action occurs when the government acts, when a private entity takes on a public function, or when the government is entangled (encourages, participates in, or enables) in private conduct.

Here, Old Ways' claim is against the City Building Authority, which is a part of the City's Municipal Government. Thus, the First Amendment applies because state action is involved.

First Amendment Right to Freedom of Speech

Old Ways has several arguments related to its first amendment right to freedom of speech.

Content-Based Restrictions. Old Ways may also argue that the Policy is an invalid restriction of speech in a public forum. Here, the speech is occurring in the City's Municipal Government Building, which is open to the public, and has permitted public use for speech purposes for many years.

All content-based restrictions on speech conducted in a public or designated public forum are subject to strict scrutiny. Under the strict scrutiny standard, the government has the burden to show that a law is narrowly tailored, using the least restrictive means, to reach a compelling governmental interest. Content-based restrictions on speech arise when the government regulates either subject-matter based speech, or viewpoint based speech. Content-neutral speech conducted in a public or designated public

forum must further an important government interest, be narrowly tailored, leave alternatives for speech open, but need not be the least restrictive means available.

Here, Old Ways would first argue that its five-foot diameter symbol of the sun constitutes symbolic speech, as it symbolizes the religion organization's beliefs. It would then argue that the Building Authority's Policy on Seasonal Displays ("Policy") is a content-based regulation because it bars the use of "religious displays and symbols" rather than all symbols and/or displays. If it successfully shows that the Policy is content-based, the city has the burden to establish a compelling interest, and that the Policy is narrowly tailored to reach that interest.

The City will likely argue that the purpose of the policy is not to stop symbolic speech, but to avoid the appearance of government endorsement of religion, which likely qualifies as a compelling interest. It would then argue that completely barring religious symbols and displays is the least restrictive means of accomplishing this goal. Although such an argument may be persuasive in a vacuum, these facts do not indicate that the Policy is the least restrictive means available. Old Ways offered to put up a disclaimer along with its symbol, stating that the sun is not endorsed by the City, but the Building Authority rejected this offer. Such an option restricts Old Ways' speech less, while arguably avoiding government endorsement of religion, but the Building Authority will not allow it. The City's refusal to adopt a less restrictive alternative is a failure to meet the requirements of strict scrutiny.

Prior Restraint. Old Ways can also argue that the Policy is an impermissible prior restraint on speech. Prior restraints are subject to strict scrutiny because they put a barrier on speech before the speech can occur. One such type of prior restraint is a permit that permits speech. To be valid, a permit must further an important government interest, involve little to no discretion by the person or group issuing the permit, there must be clear criteria to obtain the permit, and there must be a procedure in place for timely resolution of the permit and/or an immediate appeal of a decision.

Here, the fact that Old Ways needs a permit to display its sun arguably constitutes a prior restraint. Old Ways would argue that the permit requirement is impermissible because the Building Authority does not have a clear description of what items are and are not permitted to be displayed, beyond a bar on the religious symbols. Because the Building Authority decided to put up a Christmas tree, Old Ways can argue that the standards are not applied in an equal way because certain religious symbols are permitted (the Christmas tree), while other symbols (the sun) are not permitted. Also, Old Ways can point out that the Building Authority uses discretion in determining what to erect in the government building, and that there is no set policy in place for review of a decision rejecting a display. The City may, again, argue that its interest in avoiding the appearance of government endorsement of religion permits the permit requirement, and that there is no discretion involved in the policy because the City completely bars the use of any religious displays and symbols. It will also argue that the Christmas tree does not constitute a religious symbol. However, it is unlikely that the City will prevail in these arguments because there is no set procedure in place for determining who gets a permit, nor an appeals process for rejection of the permit.

Overbreadth. A government regulation of speech is overbroad and invalid where it regulates more speech than intended.

Old Ways may also argue that the Policy is an overbroad regulation of speech. It is unlikely that it will succeed in this argument, however, as the Policy clearly applies to "religious displays and symbols" and there are no facts indicating that the Policy has extended to restrict speech beyond religious speech.

Vagueness. A regulation of speech is vague and invalid where it is unclear what speech is prohibited and what speech is not prohibited.

Old Ways could argue that the Policy is vague because it does not define exactly what constitutes a religious display and symbol. It can argue that because the Christmas tree is not considered a religious symbol, the Policy is vague because Christmas trees are

often interpreted to be religious symbols. Such an argument might succeed here. The Building Authority's position is that "courts treat Christmas trees as secular symbols," but the Policy itself does not include a description of what does and does not constitute religious displays or symbols. The lack of specificity in the Policy results in confusion, and thus Old Ways likely will succeed in challenging the Policy on vagueness grounds.

First Amendment Right to Freedom of Religious Expression

Old Ways can also contend that the new policy on seasonal displays unjustifiably infringes upon its freedom to exercise its religion. The general rule regarding freedom of expression is that neutral laws of general applicability that have the effect of infringing on freedom of expression do not violate the right to freedom of expression. However, when a law is not neutral, strict scrutiny applies, requiring the government to show that the law is necessary to further a compelling government interest, and that the law is the least restrictive means possible.

Here, Old Ways would argue that the Policy is not neutral because it bars religious displays and symbols specifically, not just any displays and symbols. Old Ways would also point out that the policy interferes with its ability to spread its Winter Greeting, which is an important aspect of its religion. Thus, strict scrutiny likely applies. As explained above, although the City may have a compelling interest in avoiding government endorsement of religion, the policy is not the least restrictive means available. Thus, Old Ways will likely succeed in challenging the Policy on freedom of expression grounds.

First Amendment Right That the Government Will Not Establish Religion

Old Ways can also contend that the Policy, in practice, establishes religion.

Establishment Clause. The government may not establish a particular religion under the Establishment Clause of the First Amendment. To determine whether government

action violates the establishment clause, the court applies what is called the Lemon test, which analyzes the government action under 3 prongs: (1) whether the government action has a secular purpose, (2) whether the action has the effect of promoting or inhibiting a particular religion or religion in general, and (3) whether the action results in excessive entanglement between the government and religion.

Secular Purpose. Here, Old Ways may concede that the purpose of the Policy is secular, and a court would likely agree. The Policy states outright that it is meant to avoid the appearance of government endorsement of religion, and so the first prong does not indicate a violation of the establishment clause.

Effect. Old Ways will argue that the effect of the Policy actually inhibits its religion and promotes a certain religion -- Christianity -- because the Building Authority permitted erection of a Christmas tree but no other religious symbols. The court would likely agree that the effect does promote Christianity and not other religions because the Christmas tree -- and only the Christmas tree -- is displayed. Had the Building Authority permitted other types of symbols along with the Christmas tree, the effect may not be to promote Christianity, but the winter season generally. Thus, this factor supports a finding that the Policy establishes religion.

Entanglement. Finally, Old Ways would argue that the Policy results in excessive entanglement between the government and religion. The City would argue that the Policy seeks to avoid religious involvement completely. Although the Policy appears on its face to attempt to avoid entanglement with religion, because the Building Authority erected the Christmas tree, the City's position is weaker, and the court may find that entanglement has occurred because the Building Authority has permitted an arguably religious symbol, but not others.

Balancing the three factors, it is likely that Old Ways' argument would succeed, and that the court would find that the Policy, as applied by the Building Authority, establishes religion, and is unconstitutional.

QUESTION 5: SELECTED ANSWER B

First Amendment: Freedom of Speech

Old Ways Fellowship will argue that the Building Authority's (BA) "Policy on Seasonal Displays" violates its right to free speech under the First Amendment.

State Action

In order for Old Ways to challenge the Policy under the Constitution there must be state action. Here, BA is the City's agency that issued the policy restricting religious displays and symbols from government property. Thus, since BA is a branch of the City, there is state action.

Content-Based vs. Content-Neutral

Old Ways' success under the First Amendment Free speech clause will depend on whether the Policy is found to be content-based or content-neutral. Here, BA adopted the Policy on Seasonal Displays which expressly prohibits "religious" displays and symbols on government property but does not appear to apply to non-religious displays. Old Ways will argue that the policy does not restrict groups or organizations from displaying other forms of artwork or paintings but directly is singling out religious displays and other secular symbols. Thus, the policy will likely be found to be content-based.

City may try and argue that the Policy does not single out a particular religion and thus it should be found to be content neutral but this is a weaker argument since religious content, by itself, is a category of speech and thus the policy will likely be found to focus on this content.

Strict Scrutiny

Laws that are content-based and restrict speech must pass strict scrutiny. The government bears the burden of showing that the law or statute is necessary to achieve a compelling state interest with no less discriminatory alternatives.

City/BA will claim that the policy is designed to prohibit the appearance of government endorsement of religion. City will further attempt to show that certain symbols are clearly religiously oriented and that simply by their presence in the Municipal building, this gives off the impression that the City endorses the religions associated with those symbols or displays. The prevention of endorsement of religion is likely a compelling interest since the First Amendment does not permit the government to favor one religion over another.

The weakness in City's arguments is that the law does not appear to be necessary, even if the City has a compelling interest in preventing the appearance of religious endorsement. Old Ways will argue that the City has a long history of allowing it to display its Winter Solstice display along with a variety of other public and private speakers and displays in the lobby. Old Ways will claim that the city is randomly choosing to single out religious displays by completely preventing them in government buildings via its new Policy. The law is likely not necessary to achieve the City's interest here.

As Old Ways will point out, there are less discriminatory alternatives in achieving the City's desired purpose. Old Ways offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. Presumably people that take the time to observe the displays in the Municipal building would also notice the disclaimer assuming it was prominently displayed beside the various displays. This would be sufficient to allow Old Ways to continue its time-honored tradition of wishing people a Happy Winter Solstice through its display while not suggesting that City endorses Old Ways religious beliefs. City could also hand out pamphlets at the entrances to

government buildings describing its policy of allowing the displays and putting the disclaimer there as well.

Thus, as strict scrutiny is a difficult standard to meet, it appears that BA will have a difficult time showing the policy is necessary when there are less discriminatory alternatives present. The law should be struck down as unconstitutional.

Time, Manner, Place

Even if the court were to find that the BA Policy is not content-based but rather is content-neutral because it does not single out any particular religion and appears to apply to all religions equally, Old Ways will argue that it is still an invalid time, place and manner regulation.

Time, manner and place regulations are permitted for content neutral and viewpoint neutral regulations depending on the type of location where the speech is being regulated. Traditionally, public forums are those that have historically been open to the public such as sidewalks and parks, while designated or limited public forums are those that the government has chosen to hold open to public speech but can close at any time. Public forums and designated/limited public forums must meet intermediate scrutiny, such that the law is substantially related to an important government and there must be other nondiscriminatory alternatives available.

Here, the Policy is affecting government buildings, including the lobby of the Municipal building. A lobby of a government building would not be a public forum but rather a designated public forum since it appears that City has for some time chosen to allow various organizations to put their displays and speakers in the lobby of the Municipal building. City could certainly close off the lobby to such displays if it wanted to.

Old Ways will argue that, while City may have an important interest, even a compelling interest as discussed above, in preventing the appearance of government endorsed

religion, the Policy is simply not substantially related to this interest. Furthermore City will have the burden of demonstrating the substantial relation. City will likely claim that the law is substantially related because it singles out displays from buildings that are government owned and that the Policy only focuses on the interior of government buildings. City will claim that there are other nondiscriminatory alternatives such as Old Ways displaying its displays outside the buildings or on the plazas in front of the building. This argument will likely fail however, because while Old Ways may indeed have other options for displaying its Winter Solstice display, it cannot join the other displays that are permitted to be inside the Municipal building and this particular location is where people have come to expect to see the Winter Solstice display each year.

Therefore, because the Policy still singles out only religious displays from government buildings, the City may have a difficult time prevailing on a time manner place argument since there are other less discriminatory options that would allow Old Ways to actually continue to display the displays inside the building while notifying viewers that there is no endorsement by City of any particular religion.

Symbolic Speech

Old Ways will argue that the policy impermissibly regulates symbolic speech. Symbolic speech can be regulated if it is done in a way that is unrelated to the suppression of speech and if there are other less discriminatory alternatives.

City will argue that by adopting the Policy it was not attempting to regulate Old Ways' right to free speech through the Winter Solstice displays. While there may be other alternatives, as previously mentioned, for Old Ways to continue this form of symbolic expression, City will likely lose on the ground that the Policy was related to the suppression of speech. The Policy directly bans symbols and displays with religious content. Thus, it would appear that the BA, in considering the adoption of the Policy, had a direct motive to regulate what types of displays would and would not be allowed.

Furthermore, Old Ways will argue that City continues to allow the display of Christmas trees in the buildings and that Christmas trees are typically associated with a religious holiday. Thus the policy may be found to impermissibly regulate only certain religious symbolic speech while other groups attempting to display Christmas displays will be allowed.

Since Old Ways' displays are not permitted in the buildings and the policy directly and expressly provides for this, the law will likely be found to be an unconstitutional restriction of symbolic speech.

Vagueness and Overbreadth

Old Ways may bring a vagueness or overbreadth challenge to the Policy. Laws are vague if one cannot tell what speech is banned and what is permitted. Overbreadth laws are those that impermissibly burden more speech than is allowed.

Here, the Policy could be struck down as vague because it does not define what exactly constitutes religious displays; thus it is insufficient to put one on notice as to whether its display is or is not affected by the policy. Furthermore, the policy may be overbroad in that it bans all symbols and displays, even if they do not have any religious meaning associated with them. Old Ways may or may not succeed on these grounds.

Free Exercise of Religion

The free exercise clause of the Constitution prohibits the government from preventing one's free exercise of his or her religion. Laws of general applicability are permissible while laws that target a specific religion must meet strict scrutiny.

Here, the Policy, while it does apply to all religious displays and symbols, does not appear to single out any particular religion. Nor is there any evidence of BA singling out Old Ways' particular religious beliefs as a motive for adopting the law. Thus, Old Ways

would have a better likelihood of success challenging the policy under the Establishment clause.

Establishment Clause

Old Ways will argue that the Policy respects an establishment of religion since the City is allowed to display Christmas trees while other religious displays and symbols are banned. The Establishment clause prohibits the government from respecting the establishment of a religion. If a law has a secular purpose on its face, it must meet strict scrutiny. Laws that are not secular on their face must pass the three part lemon test.

First the law must have a nonsecular purpose. Here, the law bans all religious displays and symbols. If the court finds that this is a secular purpose because it specifically targets religious displays, then this requirement will fail.

Second, the law must neither advance nor inhibit religion. The law appears not to advance religion since it bans displays to prevent government endorsement of religion so this requirement is satisfied.

Third, the law must lead to no excessive government entanglement with religion. Here, the problem is that the City policy is banning Old Ways displays while allowing the erection of a Christmas tree in the same space as where Old Ways displays were permitted. Thus, the court may find that the policy impermissibly entangles the government with religion if it finds that the City is really making space for its own preferred religious displays while forcing out other displays such as Old Ways that it finds unattractive or not interesting.

Thus, Old Ways may have a colorable claim under the Establishment Clause.