

CONSTITUTIONAL LAW  
FINAL EXAMINATION  
Spring 2021

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EXAM INSTRUCTIONS

Due to the risks of technical difficulties of a remote test format, you will have 4 hours to complete this three- hour exam. There are two essay questions to be answered in Questions 1 and 2; Question 3 consists of two short answer questions and 15 Multistate Bar Exam-type (MBE) questions. Each question will count for 1/3 of your exam grade.

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts 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 the 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 that are not pertinent to the solution of the problem.

Question No. 1

Adrian was employed as a basketball coach by Our Little Flowers School, a kindergarten through 8<sup>th</sup> grade school operated by the Open Flower Society. The stated mission of the Society and its School is “To teach and live by the highest moral and ethical standards but with no belief in God or a Supreme Being.” Adrian was instructed by the Principal to gather student team members together before each game and offer a prayer “to play fair with the strength to win and the grace to lose.” Adrian did this before every game. She was not designated a minister and she had no other instructional or other duties related to the School’s mission. Under Adrian’s coaching the school’s team won championships in their league for 5 years and Adrian became very well-loved by students and parents. Adrian took a brief medical leave of absence in 2020. When the principal heard that Adrian had used the leave for gender reassignment surgery Adrian was not allowed to return to the School as a transgender man and his employment was terminated.

Many parents and students were outraged by Adrian’s abrupt termination and viewed it as a violation of the School’s moral standard of fairness and nondiscrimination. Two parents, Juan and Christina, organized parents to begin daily picketing on the public sidewalk directly in front of the School to demand Adrian’s return. They carried signs and banners calling the Principal a “sexist” and a “hypocrite.” Local television news broadcasts covered the story extensively. Assume the parties below all have standing:

1. Adrian filed suit against Our Little Flowers School alleging unlawful sex discrimination against him in violation of the state’s laws prohibiting employment discrimination based on sex and gender. The School filed a motion to dismiss the suit on grounds that the school is operated by a church and enforcing the state’s nondiscrimination laws against it violates their Constitutional right to the free exercise of their religion. Analyze the Constitutional issues the parties will raise and state how the Court will rule.
2. In a separate action, Our Little Flowers School filed a lawsuit seeking an injunction against Juan, Christina and any persons picketing with them at the School based on a state law that prohibited speech, leafletting, or picketing within 25 feet of a Church or Church related school. Juan and Christina filed an Answer alleging that the statute violated their rights to free speech and expression, and their rights to parent their children as they chose. Analyze the Constitutional issues the parties will raise and state how the Court will rule.



MONTEREY COLLEGE OF LAW

Welsh, Wagner, Zulfa, Professors  
Midterm Examination Spring 2021

Question No. 2

The Neptune County Board of Education (Board) seeks your legal advice as Board's legal counsel regarding two current problems:

1. The public school in the County District has scheduled graduation ceremonies for a Saturday morning, as has been the custom for all schools in the District. This year's valedictorian, Val, holds religious beliefs that prevent her from attending the graduation ceremony because Saturday is the sabbath day observed by her religion. Val has demanded that Board reschedule the graduation so she can attend and deliver the traditional valedictory address.

2. Board has routinely rented the school auditorium to various community groups on select weeknights and weekends for a modest rental fee. Board recently received an application for use of the auditorium from Not In My Backyard ("NIMBY") an organization which promotes and advocates racial and religious discrimination. NIMBY planned to use the auditorium for a major recruiting meeting on May 15th. Several local residents and groups wrote to Board expressing great concern and outrage over what they characterized as the "extremist and anti-Christian views of NIMBY" and they demanded that Board swiftly reject NIMBY's application "out of hand, without even the slightest appearance of giving it any serious consideration." The local police chief also opposes NIMBY's application on the basis of reports that some fervently anti-NIMBY groups plan to remove members of NIMBY from the school grounds by physical force if the meeting takes place.

Both Val and NIMBY have delivered letters to Board invoking rights under the U.S. Constitution in support of their respective demand and application. What issues arising under the U.S. Constitution are presented by:

1. The demand of Val? Discuss.
2. The demand of NIMBY? Discuss.

\*\*\*\*\*3\*\*\*\*\*

Question No. 3

Please write a short answer to questions A and B. Each question is worth 25 points.

A. The State of Columbia enacted a state law legalizing marijuana in the state but marijuana remains an illegal drug under federal law. The state statute also prohibits advertising marijuana sales on billboards anywhere in the state. Marty owns a marijuana dispensary and want to advertise on a billboard beside a nearby highway. Analyze the constitutional issues Marty can raise in an action to enjoin the billboard ban. State how the court is likely to rule on them and why?

B. A city enacted an ordinance declaring the City “A Sanctuary City for the Unborn.” The ordinance bans abortion in the City and also authorizes a lawsuit against anyone who helps a woman secure an abortion. What constitutional issues can be raised by a city resident who was sued for driving a woman to a clinic and giving her information about access to abortion services. How is the court likely to rule and why?

C. Please answer the 15 Multistate Bar Exam (MBE) questions embedded in Exemplify. Read each question carefully and choose the best answer even though more than one answer may be “correct”. Review your answers for accuracy before you finish.

Answer Key -Constitutional Law Final II Exam Spring 2021 - -Welsh, Zulfa, Wagner

Question 1:

Issues raised: Interrogatory #1 (Adrian) religious exemptions based on free exercise claims by what is arguably a "church" school, calling for analysis of the "Ministerial exemption" under *Our Lady of Guadalupe School v. Morrissey-Berru* (Supp. p. 105) and *Hosanna-Tabor Evangelical Lutheran v. EEOC* (p.1700), question is whether or not the ministerial exemption applies to a school coach without many religious duties, plus analysis of what is or is not a religious organization under *Seeger*, *Welsh* etc. (note: per cases a belief in God is not required; belief must be sincerely held and occupy the place of an orthodox belief in God), and whether state's nondiscrimination laws are neutral laws generally applicable under *Empl. Division v. Smith* (p.1681) rational basis analysis or if not, strict scrutiny applies per *Sherbert v. Verner* (p. 1677); Issues raised: Interrogatory #2 (Juan and Christina) free speech in a public forum limited by a 25 foot "bubble ordinance" around the church school, Requiring analysis under *Hill v. Colorado* (p.1540, bubble 8 feet from a person) and *McCullen v. Coakley* (1545, bubble 35 feet), and fundamental rights of parents to direct children's education (*Meyer v. Nebraska* p. 942, *Wisconsin v. Yoder*). As extra credit, Students could address lack of procedural due process for injunction against unnamed parties. Students were asked to assume standing for all parties (covered in first semester).

Question 2:

Issue Outline / Comments

Rog #1

This interrogatory is inviting a discussion on Freedom of Religion and it breaks-out into two separate discussions; Free Exercise and Establishment Clause. There is some value in addressing Free Speech, but the fixed Saturday custom would likely be viewed as a Time, Place and Manner restriction (if any).

State Action is met, as this is a "County Board."

The Free Exercise discussion would call for students to engage in a balancing test commonly used for religious conduct. There is no evidence that Board is preventing Val from believing in her religion. Since one of the tenants of Val's belief system is to observe Saturday as a holy day of obligation, Board must show that it has a compelling governmental interest that outweighs Val's interest in carrying-out her religious beliefs, and that the state's interest cannot be achieved through a less restrictive means. Here, the balance would tilt in favor of Val, as the graduation ceremony date/day could seemingly be moved, whereas Saturday as the sabbath cannot (See *Wisconsin v. Yoder* as case on point).

The Establishment Clause and Free Exercise Clause are always in inherent conflict or tension. Board may assert that if it were to change the date of the graduation, it may be deemed as aiding Val's religious beliefs. However, this proposed date change would not rise to the level of excessive entanglement.

MBE Q+A's  
omitted



## Rog #2

NBP's application and the surrounding facts raise the following issues connected to First Am. Freedom of Speech/Expression: Public Forum analysis, Prior Restraint analysis, Unprotected Speech analysis ("Clear and Present Danger" and "Hostile Audience"), Freedom of Association (Group Membership) and Equal Protection (Group Bias?)

Question 3: (two short answer questions plus 15 MBE's)

1. Issue raised: commercial speech regulation of an arguably illegal product; analyze and apply Central Hudson test if found not illegal or strict scrutiny of content based regulation if found illegal.
2. Issue raised: Undue burden on the fundamental right to reproductive autonomy to have an abortion. Is a "Sanctuary City for the unborn" abortion ban and restrictions ( a real proposed ordinance in Lubbock, Texas) unconstitutional on its face by creatin an undue burden on all women seeking an abortion, and does prohibition on assisting a woman to obtain an abortion violate free speech or other rights of a resident? Extra credit: does party assisting have standing to raise abortion issues on behalf of another or all women? (3rd party standing?)

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**1) ADRIAN V. OUR LITTLE FLOWERS SCHOOL (OLF)**

**EQUAL PROTECTION CLAUSE (EPC)**

*Government discrimination based on classifications violates the EPC. Classification based on race or national origin must meet strict scrutiny. Gender discrimination must meet intermediate scrutiny. Discrimination based on sexual orientation only has to meet rational basis test.*

Here, text, because there is no state action, EPC does not apply,

Thus, a court is likely to rule no EPC violation.

**PROCEDURAL DUE PROCESS (PDP)**

*Procedural Due process provides that the government cannot deprive a person of life, liberty or property without due process of law.*

Here, because not state action, Due Process does not apply.

Thus, a court is likely to find no PDP violation.

**FIRST AMENDMENT - FREE EXERCISE CLAUSE (FEC)**

*The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits the government from making any law, which inhibits the free exercise of religion.*

Here, OLF will argue that the state anti-discrimination statute infringes upon their free exercise of religion. Because the law is passed by the state, state action is met and the first amendment FEC is implicated.

**Sincerely Held Religious Belief**

*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 sincerely and meaningfully held religious belief. The court will inquire as to whether the religion occupies a place parallel to an orthodox belief in God.*

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**Here**, OLF will argue that the Open Flower Society (OFS) is their religion; and, because the mission of the school they operate is to teach and live by the highest moral and ethical standards but with no belief in God or a Supreme Being, that their religion is to be ethical and moral. A court will look at whether their belief in this is sincere, to which the school will argue that the principal instructed the coach to start the games with a prayer to play fair, win with strength, and lose with grace, is proof of such sincerity and grace. The court will also look at whether OFS' belief in their religion occupies a place parallel to an orthodox belief in God. To this element, the Adrian will argue wanting to live in an ethical and moral manner is not parallel to an orthodox belief in God or a Supreme Being, especially, when they state that they do not believe in a God or a Supreme Being. OLS will counter by saying that they opened up and operate a school to teach this belief and that they start games with a prayer, and that they asserted a lawsuit against the picketers under a state statute that applies to churches. Because courts will not question the belief, but only the sincerity, a court is not likely to decide that OLS is not a religion that deserves FEC protection.

Thus, a court is likely to find that OLS sincerely and meaningfully believe in their religion.

### **Free Exercise Clause**

*The first amendment, applicable to the states, through the Fourteenth, prohibits the government from making any law, which inhibits the free exercise of religion. If the law targets religion, it must meet strict scrutiny. Neutral laws that unintentionally interfere with a burden of the free exercise of religion when the government is pursuing other objectives of general applicability cannot be challenged under the free exercise clause and only have to meet rational basis test. Smith states that there are two exceptions to the use of rational basis for Free Exercise. In those situations, strict scrutiny must be met: (1) hybrid cases in which free exercise and another claim are present and (2) individualized determinations like unemployment. Burwell doesn't apply because state law, not federal, so no RFRA and no strict scrutiny, just rational basis.*

**Here**, OLF will argue that the state law intentionally infringes upon their free exercise of their religion, because the law is preventing them from firing a transgender person. Adrian will argue that the state law prohibits employment discrimination based on sex and gender, and does not intentionally interfere with or burden the free exercise of any particular religion, because there is not such mention of religion. Further, Adrian will argue, even if the law does prevent them from exercising OLF's religion by firing him as a transgendered person, the law is applicable to the general public, and even laws that incidentally burden religion are valid as long as they are generally applicable to everyone. OLF will argue that under the RFRA and Hobby Lobby, laws that are generally applicable but still incidentally burden religion must meet strict scrutiny. Adrian will successfully counter by

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arguing that such law only applies to federal statutes, and the law being challenged here is a state statute, and only needs to meet the rational basis test to survive. The state has a legitimate interest, like promoting economic development or having a strong workforce, in seeing that workers aren't discriminated based on their sex or gender and that a law prohibiting such discrimination is rationally related to that interest.

Thus, a court is likely to find that OLF's free exercise rights were not violated.

**Conclusion:**

The court will conclude that OLF violated Adrian's rights and that OLF's constitutional rights were not violated.

2) SCHOOL V. JUAN, CHRISTINA, PICKETERS

FIRST AMENDMENT - FREEDOM OF SPEECH

*The First Amendment states that "Congress shall make no law...abridging the freedom of speech." The First Amendment is applicable to states and local government through the fourteenth amendment.*

Here, OLF is suing under state statute that prohibits some speech around churches or school run churches, which is state action implicating the First Amendment via the 14th Amendment. The state action is the state enforcement of the state statute, not OLF's action. Because OLF is not sponsored by the state, state action is only implicated through the enforcement of the injunction by state law.

**Content Based vs. Content Neutral**

*Governmental restrictions on viewpoint or subject matter are content based restrictions and must meet strict scrutiny. Application of laws that depend on their subject are subject matter restrictions, application of laws that depend on the ideology of the message are viewpoint based. To meet strict scrutiny, the regulation must be necessary to achieve a compelling state interest and narrowly tailored to effectuate that interest. If the government r*

**Here**, the picketers will argue that because they are protesting the discriminatory firing of Adrian, that OLF's injunction is limiting their speech based on their subject matter and view on the firing. However, because the statute under which OLF seeks the injunction, does not mention

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ideology or subject matter of the message, OLF will argue that the statute is content neutral only needing to meet intermediate scrutiny based the place of the speech.

Thus, a court is likely to that the state statute is content neutral.

### **Time, Place and Manner Restrictions - Public Forum**

*A government may validly regulate speech by controlling the time, place, and manner. These regulations, are put under less scrutiny because they are not regulating what people can say, but rather, how and where they can say it. Public forums are government properties that the government is constitutionally required to make available to speech, like parks and sidewalks (not in front of the post office.) For a public forum regulation to be valid, it must be content neutral, a reasonable time, place or manner restriction, that serves an important government interest, other than suppression of the message, that is narrowly tailored, but not the least restrictive means, and leaves open other channels of communication.*

**Here**, as the analysis above, the state law is content neutral. Because this is occurring on a public sidewalk, OLF will concede that this is a public forum. OLF will argue that because the regulation says prohibits picketing within 25 feet of a church or church based school is subject matter restriction because of the location, a court is likely to agree with OLF that this is a reasonable regulation of the place and manner of speech. There can be several important interests, besides the suppression of the message, like making sure the students have a safe route to and from school, that they are not interrupted in their studies by protesters. Additionally, because it does not prevent picketing and speech no closer than 25 feet, OLF will argue that the regulation is narrowly tailored to meet the important state interest. This 25 foot buffer zone also leaves open alternative channels of communication. The state has met all elements of a valid time place and manner restriction.

Thus, a court is likely to rule that the state statute is a valid time place and manner restriction.

### **Prior Restraint**

*Government action that restricts speech in advance of publication is generally invalid. A special societal harm will result if the injunction is not issued but be shown such as national security, obscenity, contractual agreements and preserving a fair trial.*



**Here**, because an injunction to enforce a valid time place an manner restriction in a public forum must burden no more speech than necessary, an injunction preventing pickers from being within 25 feet of the school will meet the element of being narrowly drawn, reasonable, and definite. It does not appear that OLF can show substantial societal threat if the injunction is not issued.

Thus, a court is likely to prevent the injunction as an unconstitutionally invalid prior restraint.

### **Vague and Over Broad**

*Due process requires that statute be clear enough that a person of ordinary intelligence will be able to understand. A law is void on its face if it regulates substantially more conduct than the constitution allows.*

**Here**, the picketer will argue that the law is overbroad because the terms "prohibited speech, leafletting, or picketing" regulates substantially more speech than the constitution allows to be regulated. The law does not make any distinction between what type of speech is allowed, and thus, is substantially overbroad. The picketers could also argue that the law is invalid because it is vague as to what constitutes a church or a church related school.

Thus, a court is likely to find the statute vague and over broad.

### **Fighting Words / Incitement**

*Abusive words directed to the hearer that are inherently likely to provoke an immediate violent reaction in an ordinary person are fighting words and are not protected. The government may punish speech if there is a substantial likelihood of imminent lawless action and that the speaker intended to cause the imminent lawless action.*

Here, OLF will argue that the picketers used fighting words and incited violence, which is not protected under the first amendment. OLF will argue that the words "sexist" and hypocrite" on the banners and signs are fighting words because they are targeted at their principal. The picketers will argue that those words are not intended to direct a imminent lawless action, nor likely to produce a lawless action, nor did they produce a lawless act. Further, the picketers will argue that their words were not intended to illicit an inherent immediate violent reaction in an ordinary person. OLF will argue that because their religion is to be moral and ethical people, and the picketers are parents of the school and likely understood the teachings, they knew that calling someone an hypocrite or sexist



would illicit a immediate violent response. The picketers will counter by saying there was no violent response, and that the test is based on an ordinary person, not one that is trying to leave a highly ethical and moral life.

Thus, a court is likely to rule that the picketers did not engage in fighting words or incite violence.

#### FUNDAMENTAL RIGHT TO CONTROL CHILD'S UPBRINGING

*Parents have a fundamental right to control their own children's upbringing, and any law infringing upon such right must meet strict scrutiny.*

**Here**, the protesters will argue that they have a fundamental right to control their child's upbringing, and that allows them to protest the firing of a beloved coach of their children, and state law that allows the school to stop them from exercising their rights infringes upon those rights. OLP will counter, that while the parents have a right to control their kids upbringing, that does not extend to controlling the decisions of the school, especially, when there is not fundamental right to education, and the doctrine of in loco parentis takes over when school administrators take the place of parents while the kids are in school. The picketers will have a better chance at challenging the injunction under first amendment grounds than under this issue.

Thus, a court is likely to rule that an injunction will not infringe upon the picketer's fundamental right to control their kids upbringing.

**There may also be a freedom of association issue, which is fundamental,**

**END OF EXAM**

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### **Val's Cause of Action**

#### **1st Amendment - Freedom of Religion**

The First amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

#### **Free Exercise Clause**

The free exercise clause is implicated when there is state action that restricts the religious beliefs of a religion or requires behavior that a religion prohibits. Although religion is not clearly defined, the Court has relied on the interpretation in Seeger that a belief is sincerely held, occupies a place parallel to an orthodox belief in God.

Under the FEC, the court will apply the Sherbert or Smith test. Under the Sherbert test, laws that intentionally interfere with or burden the free exercise of religion or that are not generally applicable must meet strict scrutiny. Whereas, under Smith, neutral laws that unintentionally interfere with or burden the free exercise of religion when the government is pursuing other objectives of general applicability cannot be challenged under the FEC. The incidental discriminatory impact of government action on a religious practice is insufficient to establish a violation of the free exercise clause. In order to establish FEC violation, the challenger must show that the government action targeted the religious practice in question.

Val's religious belief prevent her from attending the graduation ceremony because Saturday is the sabbath day observed by her religion. In holding the ceremony on a saturday, Val would argue this action by the public school in this district is burdening her right to observe a Sabbath day which her religion takes a part in. Specifically, Val will argue that the school making graduation take place on Saturday is an intentional interference with her free exercise of religion and therefore the Board must survive strict scrutiny if it denied her request. However, the government would argue that the rule that graduation takes place on saturday falls under Smith and unintentionally interferes with her free exercise. The Board would support this position by showing that graduation ceremonies taking place on Saturday has been the custom not just for Val's school but for all schools in the district. The incidental impact on her religion alone was not intentional so even if it does burden her exercise of religion, the Board did not intend to burden as this rule is of general applicability. The school likely

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has reasons for such rule such that it allows for family members or loved ones of the graduates to attend, as well as does not impede with the school schedule during the week.

Here, Val's demand to change the graduation ceremony under the Free exercise clause will fail.

### **Establishment Clause**

The provision of the 1st Amendment of the US Constitution prohibits the government from making laws that establish or favor a religion, or no religion. The overall purpose of the EC is to maintain a separation between church and state. There are three theories applied when analyzing EC cases: separation theory, neutrality theory, and accommodation theory.

Strict Separation Theory (Lemon Test) - Under this test, a law will be found invalid unless it meets the Lemon test. The law must have a secular purpose, its primary effect must neither advance nor inhibit religion, and must not produce excessive government entanglement with religion.

Under this approach, the Board will support its rule of Saturday graduation ceremonies on the fact that it allows for graduates, other students that are not graduating, teachers who want to see student's special day, and loved ones to attend. These are all secular purposes that have nothing to do with religion. The primary effect, the board can argue, is that it allows for people to attend this special day. Most people are busy during the week due to other responsibilities, so weekends, especially Saturday's are the best day to pick from. The Board could also argue that it knows Sundays, many religions attend church and that may be difficult. However, making such argument would support Val's position that the Board is taking the views or practices of religions who may attend church or take Sunday off over her religion which does so on Saturday. The rule here does not produce excessive government entanglement. The rule does not foster Board's entanglement with religion.

Under the lemon test, Val's demand would fail.

Neutrality Theory - A different approach under the EC is the neutrality theory which states that the government must be neutral on religion, meaning it cannot favor religion over secularism, or one religion over others when taking action or inaction.

Under this theory, Val would argue the government must be neutral and it is not doing so by not taking her religion and its practice into consideration. However, the board would board could say in not selecting Sunday as a date for the holiday it is doing its best at staying neutral.

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Under this theory, Val's demand would too fail.

Accommodation Theory - Under this theory, the government violates the EC only if the government literally established a church or government coercion in religious participation which is backed by a penalty. The accommodation theory recognizes the long-standing role of history and presence of religion in government therefore, it will accommodate some government involvement with religion so long as the state does not indoctrinate, favor one religions over another, or compel religious activities or belief.

Here, an argument under this theory would be weak on Val's part because the board is not establishing or coercing participation. Val would argue it is coercing her to attend on a day that her religion observes as Sabbath day. The board could rely on the long-standing history of the schools district-wide to host ceremonies on saturday. Further, the history has nothing to do with religion, but rather secular purposes.

Val's claim under the accommodation theory would fail.

### **Prior Restraint**

Prior restrain is government action, whether by judicial order or an administrative system that restricts free speech in advance of publication and is generally invalid. As a general rule, prior restraints are disfavored and carry a heavy burden, on the theory that it is better to punish unprotected speech after it occurs than to restrain speech before it occurs, because prior restrain might prevent some protected speech from occurring.

If the school does not reschedule the graduation to a day that she can attend, Val could argue the school's inaction in essence is a prior restraint on her delivering the traditional valedictory address. The board would argue that it is not denying Val or any valedictorian to make their address to the graduating class but rather, the focus is on the date it is held, not the speech itself.

A demand under prior restraint would fail.

### **Public Forum**

#### **Public Forum**

Traditional public forums are government properties that the government is constitutionally required to make available for speech. To be held constitutional, the regulations must

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be :content and viewpoint neutral, and the method of regulation applicable is time, place manner restrictions.

Designated public forums are public properties not historically available for speech but that the government has opened for speech through practice or policy.

Limited public forums are public property not traditionally open for speech, but the government allows speech in otherwise nonpublic forums. The government may enact time, place, and manner restrictions on designated *and* limited forums if they meet the same standard as for public forums (TPM).

Time, Place, Manner Restrictions - Time, place, and manner restrictions is the ability of the government to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech. The court has often approved reasonable TPM restrictions provided they are justified without regard to content of the regulated speech, that they serve a significant government interest, are narrowly tailored, and if banned, they leave open ample alternative channels for communication of the information.

Here, val would argue that there must be proper TPM restrictions since the school where the graduating ceremony is held is a designated public forum. Here, the board would respond that in making graduations take place on saturday it is minimizing disruption of a designated public forum (school) that typically hosts classes during the weekdays. Further, the content of Val's speech is not of the board's concern therefore, the regulation is content neutral. The significant government interest in this case is to see that graduates can have loved ones attend the ceremony on this special day, as well as teachers whom they have built professional relationships with. The rule is narrowly tailored as it specifically sets the day the ceremony will be held . Val could argue there are no alternatives for her to communicate her information since saturday is observed in her religion. The school would have trouble with this element, but changing a ceremony because of one's student's views would not suffice.

Here, the board's restriction is a valid forum restriction with proper TPM restrictions.

### **Not in My Backyard's (NIMBY) Cause of Action**

### **Freedom of Association**

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Freedom of association is a fundamental right protected by the 1st Amendment. The USSC held that the freedom of association protected by the 1st Amendment prohibits a state from inquiring about an individual's association in order to withhold a right or benefit because of an individual's membership.

Freedom of Association is one of NIMBY's strongest arguments. NIMBY is an organization which promotes and advocates racial and religious discrimination. The organization's plan to use the school auditorium for a major recruiting meeting on May 15th . Although several local residents and groups wrote the Board expressing great concern and outrage over what they characterized as "extremist" and "anti-Christian views" these grounds alone are not proper to demand the Board swiftly reject NIMBY's application. Simply because NIMBY might be the minority view or disfavored group does not mean that the Board may prohibit its association because of NIMBY's specific membership criteria. However, since the school auditorium is not public property, (discussed above) the Board could potentially restrict who uses the auditorium.

Any claims by the Board targeting the association of NIMBY specifically due to its view is invalid.

#### Prohibiting Groups from Discriminating

Laws prohibiting a group from discriminating are valid unless the group is an intimate association or if discrimination is integral to the purpose of the group. If the activity is not within either category, the law must meet strict scrutiny.

The Board could potentially respond to NIMBY and state that several community members and groups have expressed their concern with the organization's racial and religious discrimination advocacy. NIMBY could quickly dismiss this claim on the grounds that in fact, the organization does promote and advocate racial and religious discrimination . However this is not grounds for the Board to allow the association as long as they do not promote racial and religious discrimination because NIMBY's expressive activity cannot be compelled to go against their purpose. Just as in the *Boy Scouts v. Dale* case, expressive association cannot be compelled to include members whose presence would be contrary to its views or objectives. Although NIMBY is not specifically being compelled to include certain members, the purpose of the organization is racial and religious discrimination therefore, the Board cannot respond and condition use of the auditorium based on changed objectives. Further, NIMBY would be able to deny certain racial and religious people from attending the recruiting meeting if not in line with NIMBY's integral purpose.

The Board would not be able to rely on this law to exclude NIMBY from the use of the auditorium or compel acceptance of certain individuals.

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## Freedom of Speech

### **Public Forum**

Traditional public forums are government properties that the government is constitutionally required to make available for speech. To be held constitutional, the regulations must be :content and viewpoint neutral, and the method of regulation applicable is time, place manner restrictions.

Designated public forums are public properties not historically available for speech but that the government has opened for speech through practice or policy.

Limited public forums are public property not traditionally open for speech, but the government allows speech in otherwise nonpublic forums. The government may enact time, place, and manner restrictions on designated *and* limited forums if they meet the same standard as for public forums (TPM).

Time, Place, Manner Restrictions - Time, place, and manner restrictions is the ability of the government to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech. The court has often approved reasonable TPM restrictions provided they are justified without regard to content of the regulated speech, that they serve a significant government interest, are narrowly tailored, and if banned, they leave open ample alternative channels for communication of the information.

If the board denies the NIMBY application based on its message, then the regulation would be content based since it would be focused on the message and its viewpoint rather than other restrictions. The Board could avoid a suit if instead it places time place manner restrictions. Since the school is a designated public forum, the Board could provide TPM restrictions. The restrictions must be content neutral, meaning not based on the message or viewpoint. Since the school has received reports of anti-NIMBY groups plan to remove members of NIMBY by physical force, it could deny the application relying on public safety on school grounds and to avoid danger to students. However, this likely would not be enough to deny the application. Instead the board could allow them to use the auditorium on a weekend, when students are not on campus, or even better, during a winter or summer break. If it does this, the rule would be narrowly tailored to the date and it would leave alternatives to communicate its information while still serving the significant interest of safety.

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## **Due Process**

The government cannot deprive a person of life, liberty, or property without due process. The DPC serves two functions: it imposes certain procedural requirements on the government before it may deprive a person of life, liberty, or property (procedural due process) and it limits the substantive power of the government to regulate certain areas of life (substantive due process).

Procedural Due Process - The due process clause obligates the government to provide an individual with a fair procedural opportunity, meaning adequate notice and hearing by an impartial decision maker when the government takes an action that deprives the individual of life, property, or liberty interest that is protected by the clause.

Here, it is likely that in its letter to the Board, NIMBY argued that they are entitled to procedural due process before rejecting its application to use the school auditorium to hold their recruiting meeting. The Board can respond that in order to have a procedural due process claim, the Board must deprive the organization of life, liberty, or property and here none of those apply. The NIMBY may believe they have an interest in property because of an entitlement to property, however the school auditorium is the Board's property and as such, NIMBY may think they have interest but that would be unreasonable expectation.

A due process challenge by NIMBY would fail.

**END OF EXAM**



3)

3A)

Commercial speech speech whose purpose is a commercial transaction. Commercial speech is less protected speech. Regulation of commercial speech is not subject to strict scrutiny but rather the Government must meet the Central Hudson test; 1) does the speech concern lawful activity that is not misleading or fraudulent, 2) the regulation serve a substantial government interest, 3) the regulation directly advances the asserted government interest, and 4) the regulation is narrowly tailored to serve a substantial interest, (the regulation does not need to be the least restrictive means available).

Here the speech at issue is commercial speech, restriction the advertisement of marijuana, which would propose a commercial transaction. The government may argue that the advertisement concerns illegal activity, because marijuana is illegal under federal law, however Marty will argue that the state had legalized the use of marijuana within the state and the regulation concerns only billboards within the state. The court will find the advertisement concerns lawful activity. The state will argue that the regulation serve a substantial government interest in keeping advertisement away from area where they would be easily visible by minors who would be unwitting exposed to the large advertisements. The statute serve to advance that government interest. The state will also argue that the the regulation is narrowly tailored to serve the substantial government interest. The state has not completely banned all advertisement but only large billboard advertisements. marijuana sales may be advertised in other manners.

The court will find that the state regulation of marijuana advertisement is constitutional.

**3B**

Access to an abortion is not a fundamental right, however the court have found that the right to an abortion falls under the umbrella of a right to privacy. Restriction to abortion are not governed by strict scrutiny but rather the undue burden standard. A woman has a right to an abortion under certain circumstances. **Pre-viability rule** - provides that a state may adopt regulations protecting the mother's health and life fo the fetus only if it does not impose and undue burden or substantial obstacle to the right tot have an abortion. **Post-viability rule**- provides that once a fetus is viable the state's interest in the fetus's life can override the woman's right to have an abortion due does not override the state's interest in the woman's health. A law will be held to be unconstitutional is the

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purpose or effect of the law places a substantial obstacle in the path of women seeking an abortion before the fetus has attained viability.

Here the city ordinance's ban on abortion and in turn criminalizing assistance to any woman in obtaining an abortion has placed an undue burden and substantial obstacle for women who are seeking an abortion viability of the fetus. The statute would create a substantial obstacle for women who are seeking information about a possible abortion. The statute in essence would deny a woman the right to an abortion. The court should find the law to be unconstitutional.

**END OF EXAM**