

KERN COUNTY COLLEGE OF LAW

**CONSTITUTIONAL LAW**

Midterm Examination

Fall 2019

Prof. E. Schlaerth

INSTRUCTIONS:

There are two (2) essay questions in this examination.

You will be given three (3) hours to complete the examination.

Your answer should evidence your knowledge of the law, your ability of apply the law to the given facts, and your ability to reason in a logical manner to reach a sound conclusion. State fully the reasons that support your conclusion and discuss all points as thoroughly as you can.

### Question One

Concerned about the growing problem of homelessness and its effects on health care, transportation, and the economy, Congress passed the Getting Homeless Off the Streets (GHOS) Act, which states:

Preamble: Congress finds that homelessness is a national problem affecting health care, transportation, and the economy in general. Homeless encampments have blocked roadways, contributed to traffic collisions, and delayed delivery of interstate goods and also created health hazards from unsanitary conditions. In order to promote the general welfare, reduce the increased costs of health care and transportation, and reduce the blight on our communities, ending homelessness is a national priority.

Section One: Every person must have a physical residence for at least nine months out of a calendar year. A physical residence shall include a street address, a structure (with a roof and four walls), and be registered with the Department of Housing and Urban Development (HUD). Failure to maintain a physical residence for at least nine months out of a calendar year is a misdemeanor, punishable by six months in prison.

Section Two: Any state that provides welfare benefits to any person who is in violation of this Act, will be entitled to only 50% of the appropriations to which it would be otherwise entitled for highway construction and maintenance.

The State of California, in order to help its residents comply with the GHOS Act, has passed legislation calling for the construction of one million new housing units. To speed construction, the state has mandated that all wood, metal, and plastic used in the construction of all new housing, come from inside California. Home Free Inc., a corporation located within 1 hour of the CA State border, provides housing materials for home builders, including state owned public housing managed by the California Housing Authority (CHA), had its contracts cancelled because most of its building materials are manufactured outside California.

Citizens for Free Living (CFL), an advocacy group for California's homeless population, has sued in federal district court to enjoin enforcement of the GHOS Act.

Home Free Inc. has also filed suit in the Kern County Superior Court against that state and CHA.

What constitutional arguments are raised in both federal and state courts? (Do not discuss any Equal Protection or Substantive Due Process arguments.) What is the likely ruling by the courts? Explain your answers.

### Question Two

The Upper Tehachapi School District (UTSD) operates three public high schools in Kern County, California. In response to the state's budget crisis, California's legislature has reduced funding for public schools. The school board of UTSD closed Hageman High School and ordered the reassignment of students to the two remaining high schools achieve cost savings and promote efficiency. All students learning English as a second language were assigned to Ming High School. All students with mental or physical disabilities were assigned to Truxtun High School. After the reallocation, Ming High School enrolled 90% of the school district's Asian students, 10% of its white student, and no disabled students. Truxtun High School enrolled 90% of the school district's white students and 10% of its Asian students. All of the Asian students at Truxtun High School were mentally or physically disabled.

After reassigning its students, UTSD received notice from the U.S. Department of Education that the school district was no longer eligible to receive federal funds because the statute authorizing federal education funding is conditioned upon nondiscrimination in the assignment of students to schools. The U.S. Department of Education found, pursuant to its statute, that UTSD discriminated against students based upon their race, national origin, and mental or physical disabilities.

A student and teacher want to challenge UTSD's assignment of students as a violation of Equal Protection under the United States Constitution. Lizzie Kim is an 18 year-old Asian student of Korean descent assigned to Ming High School instead of Truxtun High School because she is learning English as a second language. Charlie Chavez is a teacher at Truxtun High School who objects to the assignment of all disabled high school students to Truxtun High School because of the negative effects on the education of both disabled and non-disabled students, according to social science data.

UTSD wants to challenge the constitutionality of the denial of federal funding to the school district after the reassignment of students.

Does Lizzie Kim have standing to challenge the action of UTSD? If so, what constitutional challenges can she bring? Is she likely to succeed? Explain.

Does Charlie Chavez have standing to challenge the action of UTSD? If so, what constitutional challenges can he bring? Is he likely to succeed? Explain.

Does UTSD have standing to contest the denial of federal funds? If UTSD challenges the constitutionality of the denial of federal funds, why will they fail? Explain.

1)

Citizens for Free Living (CFL) v US

**Justiciability**

In order for a case to be heard in Federal Court there must be a case and controversy. Case and controversy are determined by a case meeting the requirements of the five justiciability doctrines; standing, mootness, ripeness, prohibition of advisory opinions, and prohibition of political questions.

**Standing**

In order to have standing, a plaintiff must have a concrete interest in the outcome of the case. The plaintiff must have a personal, palpable actual injury, that injury must have causation - directly traceable to government's wrongful conduct; and redressability - a positive outcome in the plaintiff's favor is likely to redress the harm alleged.

**Third Party Standing**

A third party may also have standing if they themselves meet the requirements for standing and there is also a substantial relationship with the injured party and that party would have a difficult time filing the case themselves. (Roe v Wade)

**Organizational Standing**

An organization may have standing if the members themselves could satisfy the standing requirements: the interest is germane to the organizations purpose; and no member must be a party to the case (no indispensable parties).

Here, CFL is an advocacy group for their homeless population. In order for them to have standing in any form, they must themselves have an actual injury. This means at least one of their members would need to themselves be homeless and attest to an injury sustained like being arrested for not having a physical residence. The advocacy group's main purpose is to advocate for the needs of the homeless who have no voice, so filing a suit in this capacity would be germane to the purpose of the organization. No specific parties were named in the fact pattern, so the third prong of organizational standing would also be met.

Therefore, if there was one member of organization who was homeless and injured and could meet the traditional standing requirements, then the group would have standing.

### Ripeness

A case must have an actual injury or threat of immediate injury. If not, there is a risk that the case is no more than an advisory opinion which is prohibited. The facts state that the law was passed, although it doesn't specify when. The Government will argue the case isn't ripe yet because nobody can be punished until at least 9 months have passed and therefore the case isn't ripe because nobody in the group has been harmed. However, the group will argue that there is an imminent threat to their freedom if they aren't in a home immediately.

Most likely, the court will say the case is not ripe unless the law has been in effect for several months and there is risk of immediate loss of liberty.

### Mootness

There must be a live controversy at every stage of the proceeding. If the harm has already passed it is moot and non-justiciable, unless there is a wrong capable of repetition yet evading review; voluntary cessation of a wrong by the defendant that could reoccur at any moment; or a class action with one member of the class still harmed. Here, there is a live controversy since the Act has been passed and harm is or could be occurring soon.

## Legislative Powers

### Necessary and Proper Clause

Congress has 17 enumerated powers given to them by the Constitution. Through the Necessary and Proper Clause, Congress and the other branches are given auxiliary power to pass whatever laws are necessary to effectuate those enumerated powers. (McCullough v Maryland)

### Commerce Clause

Art 1, sec 8 in addition to the Necessary and Proper Clause gives Congress plenary power to regulate interstate commerce. (Gibbons v. Ogden). Congress may regulate the channels of

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commerce (roads, waterways, highways); instrumentalities of commerce (cars, boats, planes); and anything that has a substantial effect on interstate commerce. However, that substantial effect must be an economic activity (Lopez - Gun Free Zones act did not count as being an 'economic activity'). Congress may also regulate intrastate commerce when it can be shown that an economic activity has an aggregate effect on interstate commerce (Wickard - wheat case). If it is a non-economic activity, there must be a direct and substantial effect on interstate commerce.

Here, the preamble of the act states its explicit purpose is to stop the problem of blocked roadways, traffic collisions, and delayed delivery of goods. Regulation of the channels of commerce such as roadways is certainly within the purview of Legislative powers. Further, if goods were frequently delayed people over and over, people would perhaps get on the road to deliver it themselves and an aggregate effect on the increase in even more accidents and lack of using shippers and buying goods would have an effect on the national economy. The advocacy group would argue that the effect would not be that substantial and the risk of locking up every homeless person would have far greater consequences. Although they may be right, the plenary power of congress through the Commerce Clause with the rationale supported by the facts within the preamble will have the courts find it is constitutional pursuant to congress's plenary power to regulate interstate commerce.

#### Spending and Tax Clause

Art 1 section 8 gives Congress the power to tax and spend for the common defense and general welfare. The tax must be uniform across the states and be related to the regulation; the court will look at the dominant intent of the tax to see if its purpose is to raise revenue and not an attempt to usurp power from the States . Also, they may not tax just to regulate general welfare.

#### Conditional Grants

Through the Spending Powers, Congress may put conditions on the funds given to the states to encourage them to the comply with a federal regulation. However, the conditions must be expressly stated and they cannot be coercive. In Dole, a 5% regulatory tax was considered constitutional, however in NFIB when there was a 100% forfeiture of money already given, that was considered coercive and unconstitutional.

Here, Congress is conditioning 50% funding of welfare if the State does not comply with the regulation of putting all homeless people in homes. Considering the severe consequence this would have on the state, this is likely to be found unconstitutional. To comply might also put the States in an impossible economic position because of the costs associated with funding all the residences

and shelters. When states aren't truly given a choice to comply, the Act will be found unconstitutional.

#### 10th Amendment: Commandeering

The Tenth Amendment states that what powers are not given to the federal government through the enumerated powers given to them by the Constitution, and what is not prohibited by the States, are given to the States or the people. States in their sovereignty are not allowed to be forced to follow a federal regulation, however they cannot prevent the federal government from enforcing their laws. Thus, the Federal government cannot commandeer a state to follow its regulations. (NY v US). However, a government is allowed to regulate for a legitimate public purpose (Garcia - wage law regulations were constitutional.)

Here, the law is forcing the state to follow a regulation as discussed above. This is akin to commandeering and it unconstitutional per NY v US. However, the government will argue that its more like Garcia where they are allowed to regulate for a legitimate purpose, yet it is unlawful to 'regulate' for the general welfare and the Preamble specifically says in part that the Act is passed "...in order to promote the general welfare.." Therefore the court will likely find this to be unconstitutional commandeering.

#### Bill of Attainder and Separation of Powers

Congress is not allowed to usurp the judicial process and punish a particular individual or named group of individuals without proper procedural due process of notice and a hearing. If there is a direct punishment and a relinquishment of a right or entitlement, then that amounts to an unlawful Bill of Attainder.

The Act states that failure to maintain a physical residence for at least nine months of the year is a misdemeanor, punishable by six months in prison. This amounts to a loss of liberty and freedom therefore the procedural due process requirements of notice and an opportunity to be heard would apply.

#### **Home Free Inc. v CA**

#### 11th Amendment and Sovereign Immunity

Although a Federal court has original jurisdiction to hear a case against a State, the States are given sovereign immunity through the 11th Amendment and are immune from suit unless they consent, or

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if the suit is against a state officer where the treasury is not responsible to pay any monetary damages, or if there is an injunction prayed for (ex parte Young), or if Congress clearly and expressly assents due to their assertion of section 5 of the 14th Amendment.

Here, the case against CA is being held in Kern County Superior Court, not federal district court. However, through the Bill of Rights, the State is immune from suit unless an exception applied. Here, the state did not consent, nor are they suing a state officer. Therefore, the state is immune unless they consent and waive their immunity.

### Supremacy Clause and Preemption

The Constitution and the federal laws are the supreme laws of the land and therefore any state law that conflicts either directly or indirectly with a federal law will be preempted. Preemption can occur either expressly, by its very terms and language, or impliedly. Implied preemption occurs directly when a federal law conflicts with a state law in such a way that it is physically impossible to comply with both; or indirectly if a federal law is meant to occupy the field, meaning the law is so pervasive it leaves no room for supplementary state law. Also, the federal law may be preempted if the state law in some way obstructs or frustrates the purpose of the federal law. However, a federal law that merely sets minimum standards may coincide with a state law that enforces higher more stringent standards.

Here, the federal law mandates that everyone live in a structured building or home. The California law is meant to help the citizens comply with the law in an even faster way by speeding construction using local materials. The CA law does not conflict with or frustrate the federal law, nor was the federal law meant to occupy the field in the means to which states comply. Therefore there is no preemption

### Dormant Commerce Clause

When Congress is silent in an area, states are given the power to regulate commerce as long as it does not discriminate or unduly burden interstate commerce. A law that is economically protectionist is per se invalid. A law will discriminate either facially, or if its facially neutral then through its discriminatory purpose OR effect. A law may overcome this discrimination only through passing rigorous scrutiny whereby the State can prove that the discriminatory law is the only means available to achieve a legitimate public interest. Generally, a non-discriminatory law will be considered valid if it passes the Pike's balancing test and it can be shown that the benefit to the local interest outweighs any governmental burden. (Hunt). The court also looks to see if the burden to the

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Government is too great in terms of free flow of goods in commerce, and the weight of any costs that come with burden the State is placing on interstate commerce. (Exxon) However, even a discriminatory state law can still be valid if Congress expressly approves of the law or if the government is acting as a market participant.

Here, California is discriminating on the face of the law by mandating that all the building materials for the one million housing units come from inside California. Because the law is facially discriminatory and would clearly be discriminatory in effect as well by denying out of state builders and contractors from using their local and perhaps much cheaper materials, the state must then pass the higher scrutiny test of having no less discriminatory means of achieving the local legitimate purpose. However, clearly there are other ways of meeting the need. First, California is trying to go faster than the Act even necessitates. An out of state material might even be in greater surplus at a lower price which would help cut state costs and be more efficient. California is enacting protectionist measures that are per se invalid. However, there is an exception to the discriminatory rule since California is acting as a market participant.

#### Market Participant Doctrine

A State may discriminate to the benefit of the local economy if they themselves are acting as market participants through the buying and selling of goods rather than the market regulator.

Here, California is acting through CHA as a housing authority who purchases building materials. HomeFree will argue that CHA is still acting in a regulatory capacity, however, if the court deems CHA to be a market participant, then the local discriminatory statutes will be valid.

#### Privileges and Immunities Clause of Art. 4 section 2

A state may not deny citizens of other states the privileges and immunities they afford their own citizens. (Toomer v Witsell) This should not be confused with the Privileges OR Immunities Clause of the 14th Amendment which primarily has to do with the right of citizens to migrate/travel between states. In the Art 4, section 2 clause, discrimination must be present and it must effect either a fundamental civil liberty or commercial activity. Recreational activities are not protected by this clause. (Elk hunting in Baldwin Elk v. Montana, not protected because it's recreational rather than affecting livelihood through commercial activity.) However, this clause does not apply to aliens or corporations. This is meant to limit the scope of the market participant doctrine

Here, the state is discriminating against an out of stater in a commercial activity of buying and sellign goods. It's only 1 hour from the border (just like the cantaloupe case). However, Home Free Inc is a corp therefore it is not protected under this clause.

#### Contract Clause

A state may not interfere retroactively with presently enforceable contracts. To overcome the government has to prove there is a substantial interest and the law substantially relates to the substnatial govt interest.

Here California cancelled all current contracts only because most of its building materials are manufactured outside califonria. That is protectionist and not a substnatial local interest. Therefore it would be unconsitutional.

#### **Home Free Inc v. CHA**

#### State Action

The protections given under the Constitution apply only to Government action. Private actions are not protected unless an exception applies. In the public function test, state action is said to exist if the private party is performing an activity traditionally performed exclusively by the Government. In the Entanglement doctrine, state action is also said to exist when there is such a substantial nexus between the private party and the government that is can be said the government encouraged, facilitated, or approved of the conduct.

Here, the State is acting through CHA as its housing authority who is managing the building contracts. There is a substantial nexus between the government and CHA because the state is acting through them as an agent to contract with builders and buy and sell materials. Therefore there is state action through the entanglement doctrine.

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**END OF EXAM**

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**Standing:**

To determine standing is to determine whether the plaintiff is the correct person to bring suit. In order to have standing, the plaintiff must have suffered an actual or imminent injury, caused by the conduct of the government defendant's, and the injury can be redressed by the court's - meaning a ruling in the plaintiff's favor will remedy the harm. If an injunction is sought, the plaintiff must prove that he is likely to be injured, personally, in the future (Lyons).

Lizzie Kim, Student:

Lizzie Kim is an individual seeking to determine that she has standing to bring suit against the action of UTSD. Lizzie must show that she has been injured because of the defendant's conduct and that a decision in her favor would remedy the injury suffered. Here, Lizzie has been injured. She has been placed in a school that is not of her choosing, and filled with students who are learning English as a second language. Because the schools were separated based on language and disability, it is fair to say that schools were not equal. The court in *Brown v. Board of Education* held that separate is NOT equal. Here, the students at Ming High School will suffer because the curriculum at an ESL school is not as high and up to par as a school filled with students who know English and can learn extra because language is not a hindrance. Because Lizzie is stuck at a school with ESL students only, and the courts have ruled that separate but equal is not equal, Lizzie has suffered an injury. Lizzie's injury is due to the fact that the UTSD ordered the reassignment based on discriminatory classifications. If the Court finds the reassignment order to be invalid, Lizzie's injury will be remedied.

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Charlie Chavez, Teacher:

Mr. Chavez would need to prove that he is the correct third party to bring standing on behalf of the students because of the negative effects on education. Mr. Chavez would have to prove that the disabled students have standing on their own, but are unlikely to assert their claim. The disabled students would have standing because they have been injured. For the same reasons as Lizzie, the disabled students would argue that the separate but equal is not equal, and they are being discriminated against and provided with a substandard education because of their disability. The disabled students, if under 18 cannot bring suit for themselves and would require a guardian ad litem to represent their interests. Some parents of disabled students are likely to avoid attention and will not assert the rights of the students in order to avoid the attention and face the stigma of having the public know the child is disabled and being discriminated against. Mr. Chavez would pass the first prong. However, the courts have never ruled on whether a teacher student relationship is sufficiently close. The courts have ruled on cases where doctors were able to bring suit as a third party for their patients, or in the case where the bartenders were able to bring suit for their male customers. Mr. Chavez may be able to convince the courts that as a teacher and educator, his relationship with his students is sufficiently close, as to allow him to stand in as a third party. Where Mr. Chavez is going to have a hard time is proving that the social science findings is enough to bring suit. Due to the fluidity of the every changing findings, social science studies are not always the best findings to use. Mr. Chavez may be able to use the case that did allow social science findings in order to avoid a more rigorous battle if morals or religion was brought in. Here, disabled children are a soft topic for most people, and if the

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court accepts the findings that the effects on their education would be negative, Mr. Chavez may have standing.

### **Equal Protection**

No state can deprive any person in its jurisdiction equal protection of the laws. The equal protection clause applies to the states through the 14th Amendment, and applies to the federal government through the 5th amendment. Equal protection rights do not prevent the states from acting in a discriminatory manner if the appropriate level of scrutiny has been satisfied. The Equal Protection clause applies when the government is distinguishing between similarly situated people. We must look at three things: (1) what is the classification of people being discriminated against; (2) what is the appropriate level of scrutiny; and (3) does the government's intent survive the scrutiny applied?

Classifications based on race, national origin, or alienage will be subjected to strict scrutiny. Classifications based on gender and illegitimacy will be subjected to intermediate scrutiny. All other classifications, such as age, disability, wealth, education, will be subjected to the rational basis test.

Where strict scrutiny applies, the government has the burden to prove that the legislative action is necessary to achieve a compelling government interest and that it is narrowly tailored and the least restrictive means in furthering the government interest. Where intermediate scrutiny applies, the government has the burden of proving that the legislative action is substantially related to an important government interest. Where the rational basis test applies, the challenger has the burden of proving that the legislative action is not rationally

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related to a legitimate government interest. the interest does not have to be actual, but instead can be any conceivable interest.

Lizzie Kim, Student:

Lizzie will argue that the order reassigning the students is facially discriminatory. On its face, the order is distinguishing between students who learned english as a first language v. students who are learning english as a second language. the purpose of the reassignment is to separate english speakers from non-english speakers. the school district will argue that it is not facially discriminatory because it does not mention any class of people. However, at the very least, the order is facially neutral - may not have the intent to discriminate, but still effectively discriminates. Lizzie will want strict scrutiny applied because she will argue that the discrimination is based on race or national origin. Generally, when a person does not speak english first, it is because he is not originally from the states. In the alternative, even if the student was born here, if his parents are nonAmerican and only speak their native language at home, the student will enter school learning english as a second language. The school will argue this is not the case because nowhere does it mention race or national origin. But the court's will likely apply the strict scrutiny test. The district will have the burden to show that the discrimination is necessary to achieve a compelling interest. However, the reason the district implemented the reassignment was to save money and promote efficiency. Saving money is not a compelling interest and the district will lose.

Lizzie will likely prevail in her suit against the district.

Charlie Chavez, Teacher:

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If Mr. Chavez is found to have standing, and he bring his suit. He will argue that the reassignment order is discriminatory. However, because the classification is based on disability (disabled v. nondisabled), and disability is not a suspect class, the proper scrutiny will be the rational basis test. Here, Mr. Chavez, not the district, will have the burden of proving that the district's interest is not rationally related to a legitimate purpose. the school's purpose in reassigning students based on disability is to achieve cost savings and promote efficiency. Unlike in Lizzie's case, saving money and promoting efficiency is a legitimate purpose and the district will likely prevail against Mr. Chavez' case.

#### School District

(See definition of Standing above). In order to have standing, the district will have to prove that it has suffered an actual injury, or threat of injury, caused by the government, and that is redressable by the courts. Here, the district has suffered an injury - it is losing the funding from the U.S. Department of Education due to the statutes nondiscrimination policy. The injury is caused by the government because the funding was pulled after the reassignment occurred. If the court find that the reassignment was not discriminatory in nature, the Department of Education can reinstate funding to the district. The case is ripe and ready for judgment as the school has already lost its funding. The case is not moot. there is adverse litigants and an actual controversy. No political question is being address. No advisory opinion is being addressed.

#### Tax & Spend Clause

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Congress has the plenary power to tax for the general welfare. The tax must be uniform across the states and must be rationally related to the general welfare. The court will grant great deference in determining whether the tax is rationally related to the general welfare. Congress also has plenary power to spend for the common defense and general welfare. The spending can be for any purpose and is not restricted to the enumerated powers. Regulations can be imposed on entities that accept government funding if the regulations are (1) rationally related to the government purpose; (2) specific and unambiguous; and (3) not coercive. Coercion is not determined by all or none. Coercion is based off of the states ability to proceed without the government funding and without using their own resources. In *Dole*, the court held that a 5% penalty was acceptable, but in *NFIB v. Sebelius*, the court held that a 100% penalty was unconstitutional.

Here, the federal money is given for education. The funding is rationally related to the government purposed of providing all students with a proper education in order to build educated citizens who will go into the workforce one day. the terms are specific and unambiguous - do not discriminate based on race, national origin, and mental or physical disabilities. The first two prongs are met and would probably be found to be constitutional. However, the fact that the district has lost 100% of the funding because of the reassignment, the court will likely say the regulations were coercive. The department of education will not prevail if it is stern in taking 100% of the funding.

However, education is a legitimate government interest. The district will not prevail because it discriminated against a suspect class - race and further violated the regulations of the federal statute.

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**END OF EXAM**