

CONSTITUTIONAL LAW  
FINAL EXAMINATION  
Spring 2020

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EXAM INSTRUCTIONS

This is a three- hour exam. There is one essay question to be answered in Question 1, four short answer questions in Questions 2, and 20 Multistate Bar Exam-type questions in Question 3. Each question will count for 1/3 of your exam grade. The credit for the 2 quizzes and the practice exam represent a total of 10% of your grade for the course and the final exam represents 90%. (Extra credit may be added for your class participation).

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

Based on Findings that misinformation and false statements had created a serious risk to public health during a world-wide virus pandemic, Congress enacted The Truth Act, which made it a crime for any person to make knowingly false or misleading statements about communicable diseases, cures or treatments for communicable diseases during any pandemic as declared by the World Health Organization. Two persons were charged with violating the Truth Act:

Dr. Donald, a retired physician, placed an advertisement in the New York Times newspaper stating, "You can greatly reduce your risk of contracting the virus by doing daily exercises and breathing treatments" which Dr. Donald would demonstrate online for a small fee. Over 500 New York City residents paid for this service; none of them were known to have contracted the virus. Dr. Donald was prosecuted for violating the Truth Act.

Pastor Adams, a famous television evangelist, warned in a broadcast that government orders to wear a facemask and to stay away from large gatherings, including church services, was part of "a Satanic agenda" and that true believers will never get sick because "God will protect us from the virus." After this broadcast over 500 people attended Pastor Adam's church for Easter services, contrary to the "shelter" order in place in that city; 10% of the attendees were diagnosed with the virus within two weeks of the service. Pastor Adams was prosecuted for violating the Truth Act and also for violating the City's Shelter Order.

What arguments can Dr. Donald raise in defense to challenge the constitutionality of the prosecution on grounds that the Truth Act violates rights protected by the First Amendment? How will the Prosecutor respond? Analyze each issue and conclude.

What arguments can Pastor Adams raise in defense to challenge the constitutionality of the prosecution on grounds that the Truth Act and the City's Shelter Order violate rights protected by the First Amendment? How will the Prosecutor respond? Analyze each issue and conclude.

For all issues, state how the U.S. Supreme Court should rule on them and why.



Question No. 2

Please write a short answer to these four questions. Each question is worth 25 points.

A. A city park regulation requires an advance permit for all parades or assemblies of more than 10 participants, and prohibits granting any permits for events held after 9:00 P.M. A group opposing the death penalty held a silent candlelight vigil at midnight, the time set for an inmate's execution, after they were denied a permit. Analyze the constitutional issues group members can raise to defend against prosecution for violating the city ordinance. How is the court likely to rule on them and why?

B. A state enacted a nondiscrimination law prohibiting discrimination in employment on the basis of race, sex, national origin, age, disability, sexual orientation and gender identity, but the statute included an exception for any employer making objections to compliance for religious reasons. A disabled employee filed suit to challenge the constitutionality of the statute after being denied insurance coverage for blood transfusions because the insurance coverage provided through the employee's employment excluded such coverage because the Employers religion prohibits blood transfusions. Analyze the constitutional issues the employee can raise. How is the court likely to rule on them and why?

C. A state enacted a law requiring all hospitals and medical care facilities to permit birth fathers access to the delivery rooms when their children are being born. A state hospital denied access to Abe, the birth father of Sarah's child, after Sarah objected to granting him access to the delivery room. Sarah and Abe were not married and had ended their relationship six months prior to the anticipated birth date. Abe filed a lawsuit seeking an injunction to grant him access to the delivery room to witness the birth of the child. What constitutional issues can Abe and Sarah raise and how is the court likely to analyze and rule on them?

D. A City refused to grant any licenses to operate stores selling "Adult" publications and products. The City's zoning Ordinance did not address "Adult" businesses, but the City Manager deemed such a store "inappropriate for the City". Analyze the constitutional issues the store owner can raise. How is the court likely to rule on them and why?

# MCL CONSTITUTIONAL LAW FINAL EXAM OUTLINE ANSWER

## Outline Answer Question 1

### I. Intro:

Can Dr. Donald and pastor Adams be prosecuted for violating the Truth Act, and can Pastor Adams be prosecuted for violating both the Truth Act and the City Shelter ordinance, or did the government violate their 1<sup>st</sup> Amendment rights?

### II. Is Truth Act unconstitutional because it is content-based?

A. Yes – Prohibits false or deceptive statements, is content and viewpoint based

B. Provides criminal penalty for speech. False speech is protected by First Amendment: *U.S. v. Alvarez*. Must meet strict scrutiny (see below)

### III. Is Truth Act vague?

A. Yes, fails to define “false” statements, leaving determination to government officials;

B. Fails to define “misleading” Vague and overbroad (covers more speech than necessary).

C. Fails to define “cures or treatments” vague and overbroad, includes opinions

### IV. Is Truth Act a prior restraint on speech?

A. Total prohibition of speech before it occurs and criminal penalty – presumed unconstitutional.

B. Can Government meet strict scrutiny?

1. Compelling interest: Health and safety, controlling pandemic

2. Narrowly tailored: least restrictive means, broad by necessary, or

3. Argue not narrowly tailored: many less restrictive means available other than ban on speech, such as prosecution only if harm occurs as result

4. Conclusion re: strict scrutiny met/not met

### V. Commercial speech: Doctor Donald proposes a commercial transaction

A. Central Hudson test: (Analyze each element)

1. Protected: lawful, not deceptive – Argue yes: exercise+ breath treatments help, in Doctor’s opinion not false fact; or No: selling



ineffective treatments are inherently deceptive and create false sense of safety, thus creating risk of spreading infection.

2. Substantial government interest – safety, health, controlling pandemic
3. Regulation directly advances government interest – questionable: Yes, preventing reliance on false treatments directly advanced; or
4. Not more extensive than necessary – or total ban may not be necessary

B. Are conditions met? (Analyze)

VI. Conclusion: Truth Act is Constitutional/or unconstitutional as a violation of rights to free speech: On its face and as applied to Dr. Donald or Pastor Adams.

VII. Is Truth Act unconstitutional as a violation of Pastor Adams Right to Free exercise of religion?

- A. Burdens religious exercise: direct and substantial: prohibits speaking beliefs about spread of virus and government, even if seeming patently untrue to non-adherents; Court cannot decide truth of religious expression. *U.S .v. Ballard*
- B. Is Truth Act neutral and generally applicable: Yes, neutral toward religion, generally applies to all people, religious and nonreligious.
- C. Does *Smith* rational basis test apply? No, Under RFRA Smith applies only to state and local laws, not federal laws so Strict Scrutiny must be met.
- D. Can Government meet Strict Scrutiny: Compelling interest (see above), narrowly tailored (see above). Analyze and conclude

VIII. Is City's Shelter Order prohibiting gatherings unconstitutional as a violation of Pastor Adams' Right to Free Exercise of religion?

- A. Burdens religious exercise: Yes, prohibits church services, study groups, and all communal religious exercises and gatherings; or argue No, prohibits only in-person groups and other options are available through phone, internet media;
- B. Neutral law generally applicable: yes, neutral toward religion and applies to all gatherings. Religious and nonreligious;
- C. Does *Smith* rational basis test apply? Yes, City is subdivision of state and Smith applies, not RFRA. *City or Boerne v. Flores*
- D. Can Pastor Adams prove rational basis test not met? Legitimate government interest, law is rationally related.

IX. Is City's Shelter Order unconstitutional as a violation of Pastor Adams' freedom of Association?

A. Expressive Association: Church exists to exercise religion and express beliefs

B. Directly and substantially burdened? (See above).

C. If so, apply and analyze strict scrutiny; if not, rational basis

X. Likely Rulings by Supreme Court:

A. People v. Doctor Donald

B. People v. Pastor Adams

## Outline Answer Question 2

- A. Analyze prior restraint on speech in public forum: License/permit requires an important government reason e.g. public safety, peace and quiet, etc, Argue requiring permit for just 10 people is not important or reasonable, nor is prohibiting silent vigil at night (no noise or disruption); clear criteria and little official discretion required: only 2 criteria, 10 people plus before 9 p.m. Argue not clear criteria for proposed silent vigil, denies free speech at relevant time of expression (midnight execution). Procedural safeguards: none provided by city. Conclude.
- B. Analyze Religious exclusion from nondiscrimination law prohibiting disability discrimination. Analyze whether employer's religious exercise was substantially burdened by law prohibiting discrimination; What level of scrutiny applies? (*Smith* or *Sherbert*?) Does *Burwell v. Hobby Lobby* control? Conclude.
- C. Analyze fundamental rights of parents, and Birth mother's right to privacy: does nonmarital partner have the fundamental right to be present at child's birth, or does the birth mother's fundamental right to privacy and choice about reproduction, or her right to parent prevail? Conclude.
- D. Analyze test for less-protected speech: non-obscene sexual speech is protected but can be regulated (even though content-based) if meets intermediate scrutiny: Important government interest unrelated to expression: e.g. limiting minor's access to "adult" material, or interest in avoiding secondary effects such as crime, drugs etc. associated with such businesses. (*City of Renton*); Restriction is no greater than necessary to achieve interest: argue Yes, disallowing "adult" stores on case by case basis is narrowly tailored and necessary, or No: blanket denial is overbroad, lacks criteria and vests too much discretion in City Manager. Conclude.



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25

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### Question 1

*good general intro*  
The First Amendment to the Constitution prohibits Congress from making any laws that abridge the Freedom of Speech, or the Free Exercise of Religion, or Establishing National Religion. These prohibitions apply to the States through the 14th Amendment.

*Good read statement*  
The issue is whether Dr. Donald's right to Freedom of Speech has been infringed through his violation of the Truth Act.

*Wells*  
Under the First Amendment, as applied to the states through the 14th Amendment, all people have the right to free speech. While this is not an absolute right, there are certain instances when the government may infringe upon this right. To determine if this right has been infringed the court will look at whether there is compelling government interest, *only if strict scrutiny applies*, is the speech protected, unprotected or less protected, and apply the appropriate scrutiny. Depending on the level of scrutiny the burden may shift to demonstrate whether the government's actions are appropriate or not. To infringe upon an individual's speech is to deny them the ability to speak or their speech was substantially burdened.

To analyze if speech is protected or not, first we must look at the government action?

Here, Congress passed a law which made it a crime for any person to make knowingly false or misleading statements about communicable diseases, cures or treatments for communicable diseases during a pandemic as declared by the World Health Organization. Dr. Donald (D) has placed an advertisement in the New York Times stating, "You can greatly reduce your risk of contracting the virus by doing daily exercises and breathing



treatments." D was charged with violating the Truth Act for placing this ad in the NY Times. D's speech has been infringed.

In order to determine if the government if the government may infringe upon D's right, we must look at the **government action**.

The regulation is restricting the content of the speech, therefore strict scrutiny is applied. The government regulation specifically refers to the content of the an individual's speech and making it a crime to knowingly make false or misleading statements. Does the government have sufficient justification for infringing upon his speech? The government based the development of this law on findings that demonstrated misinformation and false statement had created a serious health risk to public health during a world wide pandemic. The government (P) will argue that strict scrutiny is the appropriate method to determine if D's actions violate the law. Strict scrutiny: is the government action is necessary to achieve a compelling government purpose with no less restrictive alternative. Here the government will argue that the compelling government interest is that a world wide pandemic is killing people and this law is intended to save lives by ensuring that truthful information is provided to the American people so that Americans are not harmed by the peddling of misleading information. P will argue that D's statements are false and misleading. People will believe that they cannot get sick if they follow D's advice or that it is a cure for the virus and this will cause further harm to people. D will assert that his statements are true as exercise and breathing treatments may keep an individual healthy and he is not stating that his advice is a cure. P will argue that he is a doctor and people will believe a doctor's statements as it is their profession to help people. D will argue that strict scrutiny is not the appropriate level of scrutiny because his speech was made via an advertisement in the NY Times and a different type of scrutiny is required. (See Below). The court will agree that because this is commercial speech the Central Hudson Test must be applied.

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Next we must look at whether or not the regulation is vague? Would a reasonable person know what type of speech will cause them to violate this law? .."to make knowingly false or misleading statements about communicable diseases, cures or treatments for communicable diseases during a pandemic as declared by the World Health Organization." A reasonable person may not know enough about the virus or how to stop themselves from getting it and they may share ideas about how to prevent oneself from getting the virus, such as hand-washing or wearing masks. That may not be a cure, but it is a prevention and it is not misleading. it is possible that people don't know enough about the virus to know it is a fomite and can live for three days on hard surfaces..this may sound like misleading statements until science catches up and the reasonable person is not going to know they are knowingly making a false or misleading statement. The law is vague.

Is the regulation overbroad? Yes, the law covers too much speech. It could be speech that occurs in person, in advertising, in movies, in our homes, it could be repeating claims from Presidents who are persons in positions of authority that people trust and think that they are telling the truth, when they didn't really know that injecting disinfectants into their lungs was a bad idea. The law is overbroad.

Is it prior restraint? Yes, this law is preventing speech from occurring and to restrain speech before it occurs requires strict scrutiny. However, as noted above, this law does not require strict scrutiny. And it would fail under prior restraint as it must pass the Central Hudson Test.

Is it Unprotected?

Unprotected speech includes incitement, fighting words, obscenity, pornography, and lies. Here, P will argue that D has knowingly printed false statements. D will argue that his statements are not false that they will help individuals stay healthy and that always helps to

Lies are protected  
u.s.v. Alvarez



Good (OK on your own list) prevent illnesses. Even if the P could prevail on accusing D of lying, lying is protected speech (*U.S. v. Alvarez*) and who will decide what is a lie and what is truth? The court will conclude that D did not lie. His statements are not meant to cure and it is protected speech if he was lying.

The court will find that the speech is protected if D offers a defense of lying.

### Central Hudson Test

If speech is commercial such as an advertisement, then as long as it is not false or deceptive speech, then 1) is there a substantial government interest in regulating the speech 2) Does the regulation directly advance the government interest 3) Is the regulation more extensive than necessary? D will argue that the speech is not false and will argue that is the government wants to accuse him or lying then his speech is protected. However, P will argue that NY times is world renowned, it is seen a credible source, and he is representing himself as a doctor. Placing an ad such as this during a pandemic does not help people remain healthy and safe and it is in the P's interest to regulate this speech. By banning this speech it ensures that the only credible information about cures is published, however the regulation is more extensive than necessary, bringing in too much speech in its vagueness and overbreadth and the court will rule that D will prevail.

The court will find his speech was not false and no one was harmed, his right to speech was infringed and he will not be charged.

### Internet/Public Forum

The internet an unregulated public forum and D will prevail in his speech and advertisements within this media and also because no one was harmed by his advertisement or fee based demonstrations on the internet. *But money was paid for ineffective treatment.*



## Pastor Adams

The First Amendment to the Constitution prohibits Congress from making any laws that abridge the Freedom of Speech, or the Free Exercise of Religion, or Establishing National Religion. These prohibitions apply to the States through the 14th Amendment.

*Excellent  
same  
Different* Here the issue is whether or not Paster Adams (D)'s Freedom of Speech, Freedom of Religion, Free Exercise of Religion, and Freedom of Association has been infringed by the Government charging him with violating the Truth Act and violating the Shelter in Place Order.

Under the First Amendment, as applied to the states through the 14th Amendment, all people have the right to free speech. While this is not an absolute right, there are certain instances when the government may infringe upon this right. To determine if this right has been infringed the court will look at whether there is compelling *not always* government interest, is the speech protected, unprotected or less protected, and apply the appropriate scrutiny. Depending on the level of scrutiny the burden may shift to demonstrate whether the government's actions are appropriate or not. To infringe upon an individual's speech is to deny them the ability to speak and their speech was substantially burdened.

*(This paragraph seems identical to your prior one for Dr. D.)*

### Freedom of Speech

*which one?*  
The regulation is restricting the content of the speech, therefore strict scrutiny is applied.

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the same* The government regulation specifically refers to the content of the an individual's speech and making it a crime to knowingly make false or misleading statements. Does the government have sufficient justification for infringing upon his speech? The government based the development of this law on findings that demonstrated misinformation and false statement had created a serious health risk to public health during a world wide pandemic. The government (P) will argue that strict scrutiny is the appropriate method to

*NOT SO: See prior note  
Government wants more power, lighter burden = Intermediate*

determine if D's actions violate the law. Strict scrutiny: is the government action is necessary to achieve a compelling government purpose with no less restrictive alternative. Here, Pastor Adams warned in a broadcast that orders to wear a face mask and to stay away from large gatherings was part of a Satanic agenda, true believers will never get sick because God will protect us from the virus. *What do these facts prove? Analyze.*

*TV is  
no airwaves  
I was  
free internet*  
Broadcast media is analyzed under less protected speech. Because TV can be broadcast into homes and individuals are able to turn it off as opposed to a radio where the audience is more captive on public airwaves, it is subject to regulations which is managed by the Federal Communications Commission (FCC). Here D broadcast into homes via TV and the FCC can regulate whether or not the speech is appropriate. The speech does not violate the FCC standards and is D is likely to prevail as the regulation is vague and overbroad. D will also prevail because he will argue that it violates his Freedom of Religion.

The Court will find that his Freedom of Speech has been infringed and he will continue to broadcast. *+ Gov't cannot judge falsity of religious speech - US v. Ballard*

### Freedom of Religion/Free Exercise of Religion

*good rule  
strict*  
Religion is not clearly defined in the constitution, however, under Seeger, the definition of religion broadened to include those who not only profess a conformity for moral directive of a supreme being, but also those who have a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by a belief in God. Here D is a famous television evangelist and his name is Pastor Adams. In his fire and brimstone speech, he invokes God, therefore he appears to have a sincere belief in a higher supreme being and is practicing his religion. Therefore, an infringement of this as a fundamental right under the constitution requires strict scrutiny. The Free Exercise Clause

*not always*



ensures that people can practice their religion and there are two tests to determine if the government is burdening their ability to exercise their religious freedom.

Is the government action necessary to achieve a compelling government purpose with no less restrictive alternative? Here, as stated above, there is a worldwide pandemic and the government is seeking to curtail American deaths. D is invoking individuals to disregard masks and to come to church which is not in compliance with both the Truth Act and the Shelter in Place order from the City. Because 500 people got sick, D is causing harm to individuals through his false and misleading statements. D will argue that P is preventing him from practicing his religion and the government will argue they are not preventing D from practicing his religion and that D's actions are dangerous to Americans which is evidenced by the people who became sick.

Because the law is neutral and generally applicable, the Smith test will be used to determine if the Government is infringing on D's right to exercise his religion. The Rational Basis Scrutiny is used: is the law rationally related to a legitimate government interest? Yes, the government's goal is to prevent misinformation and false information during a pandemic that kills people. However, because this is a federal law, under the Religious Freedom Restoration Act only applicable to federal laws, strict scrutiny is applied. P will argue that D is violating the regulation and putting people in harm's way and this is proven by the sick people. Because the scrutiny is the Government will not prevail. Additionally, D will argue that the P cannot prove the Truth or Falsity of D's religious beliefs and he will continue to preach on TV decrying science and invoking God both under his Freedom of Speech and the free exercise clause.

The court will agree with D and he will continue to broadcast. *because? why does D's argument prevail?*  
*Also Analyze shelter order under Smith - state law, not subject to RFRA.*  
**Freedom of Association**



The courts have held that people may freely associate and that those associations may be both intimate and expressive. Here, being a member of the church is an expressive association and the government may not prevent them from associating. However, due to the pandemic and the Shelter in Place order, the Government may prohibit the group from convening if they are members of the group (actively), the knew it was illegal (against the shelter in place order) to gather and they participated with the specific intent of violating the order. The government can apply strict scrutiny and within this analysis D will be found to have violated the Shelter in Place order.

The court will agree that he violated the Shelter in Place Order.

Very good job! You organize & analyze well,  
and state applicable rules & tests.

Remember: Government will never argue for  
strict scrutiny since it is hard to meet  
and reduces government power.

Also, Party opposing gov't will argue for  
strict scrutiny because of the same reason:  
less government power to regulate their conduct/  
speech.

Also, you can incorporate your prior analysis of the  
same issue for a different party rather than  
repeating them.

Keep up the good work!

F +

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Question 2

A. Public Forum and 1st Amend Rights

Public Forum

Where the speech takes place determines how much the government controls. Public forum property is property that has historically been open to speech-related activities (e.g. streets, sidewalks, and public parks). More specifically, it is government property that gov. is constitutionally required to make available for speech.

Here, the facts indicate that a city park regulation requires an advance permit for all parades or assemblies of more than 10 participants. Thus, the court would have no problem finding that a city park is a public forum because parks have been historically used for speech. Good Analogy

1st Amendment & Regulations:

The court has previously determined that reasonable time, place and manner regulations must be content neutral, serve an important gov't interest, and allow ample alternatives for communication. If a permit meets all of this, the the court must consider the following factors: (1) gov must have an important reason, (2) clear criteria, (3) almost no unfettered discretion on part of the city; and (4) some kind of procedural safeguards (somewhere to go quickly to get it reviewed).

Good  
stat.  
of  
rules

Here, the government will argue that the regulation is content neutral because it applies to all parades and assemblies. In other words, it allows all types of speech. The government will argue that the permit has a clear criteria, you must get a permit for ALL parades or



assemblies of more than TEN participants. Further, the permit criteria state that no permit will be granted for events held AFTER 9:00 pm. The government will argue that it has an important government interest, that of reducing chaos and noise at night (after 9:00pm). The government can argue that the government wants all of its citizens to have a good night sleep. On the other hand, the group opposing the death penalty which held a silent candlelight vigil at midnight (after they were denied the permit) will argue that the permit is an unconstitutional prior restraint on their freedom of speech. The group will argue that even if the court finds the regulation to be content neutral, the government regulation is a prior restraint because it does not serve an important interest. According to the group, the group was planning to be silent and a group of 10 people is unlikely to cause any chaos. In other words, the group would not have interfered with anyone's sleep. Further the group will argue that the time, place and manner regulation does not leave ample alternatives of communication and that the denial of the permit does not provide procedural safeguards as the denial of the permit one day before does not give them the opportunity to appeal or in the alternative seek a court order. The government will argue that it leaves ample alternatives of communication because the group can always gather in the day before 9:00. The group will want to argue and say that it is not possible to gather during the day as the inmate's execution was set to take place at midnight. According to the group there would be no point in gathering before time, that would just interfere with the message they wanted to convey. Additionally the government will want to argue that there is no issue with the procedural safeguards that the group could always apply for another permit and gather on another day. The group will argue that applying for another permit would be costly and would not work because the execution would not take place the following day or weeks. The execution was only taking place that day at midnight. The court will likely find that the permit was an unconstitutional prior restraint as the government did not leave ample channels of communication and failed to demonstrate proper procedural safeguards. *good conclusion statement*

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POINT



B. First Amendment and Freedom of Religion.

Both the Establishment and Free Exercise Clauses of the First Amendment apply to the states under the 14th Amendment.

Free Exercise Clause:

*good*  
*rules*  
*state*  
The Free Exercise Clause prohibits the gov. from punishing someone on the basis of the person's religious beliefs. Freedom to believe is absolute, freedom to act is not. There is no constitutional definition for religion. However in Seeger, the court adopted an expansive understanding of religion not based on belief in God. Two fold test for religious belief: (1) whether beliefs are sincerely held; and (2) whether belief occupies a place parallel to an orthodox belief in god. The court in Welsh held that "belief in God is characteristic of most religions but not a prerequisite for religion. The court in Welsh merged religion with deeply and sincerely held moral and ethical beliefs. In U.S. v. Ballard the court found that the gov. cannot declare a religious belief to be false. The judiciary can only determine whether the person is sincerely asserting a belief.

*good*  
*refers*  
Here, the Employer will urge the court to find in his favor. According to the employer, the court should focus on the Burwell v. Hobby Lobby case. In that case the court found that a fed. regulation that businesses (more specifically a corporation) included contraceptive coverage in their insurance coverage for employees violated the Religious Freedom Restoration ACT (RFRA). As a result the employer will say that he should be allowed to discriminate if it is part of his religious beliefs. Unfortunately for the employer this argument will not prevail because the facts do not indicate that we are dealing with a federal regulation/law (in order for RFRA to apply the case must arise under federal law). Thus the court would likely use either the smith test or the sherbert test. The Smith test applies if the law is neutral and generally applicable. Under the smith test the court must meet the rational basis test. Here, the court would find that the law is neutral as it does

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not discriminate on the basis of religion further the law is generally applicable because it applies to ALL employers. The government will likely prevail because as stated before the gov. just needs to meet rational basis. According to the government the law is rationally related to the government interest, that of ending discrimination.

### Establishment Clause:

The establishment clause forbids the gov. from establishing an official religion but also prohibits gov. actions that unduly favor one religion over another. There are three theories under the establishment clause: strict separation, neutrality theory and the accommodation theory. Depending on what theory the court uses the result might be different. Under the accommodation theory, the role of religion in gov. is paramount. Hardly anything can violate this. The establishment clause is violated only by gov. coercion or actual establishment of religion. If the court uses the accommodation theory the gov will be in violation of establishment clause because the statute created an exclusion for employers making objections to compliance for religious reasons.

### Equal Protection clause:

The equal protection analysis is used when the law denies a fundamental right to some. The class must be identified first to determine the level of scrutiny. Here the court would find that the court would use the rational basis test for the disabled employee. OK

### Fundamental Right:

Here, the employees best argument would be that his fundamental right to make medical decisions was also violated so the court should instead use strict scrutiny to analyze the issue before it. This would be the employee's best argument.

C.



### C. Fundamental Right to Privacy

The courts have recognized several fundamental rights collectively referred to as a Right of Privacy this includes the right to avoid disclosures of personal matters. It also includes the right to independence in making certain kinds of important decisions. If the right of privacy is denied, infringed or substantially burdened then the state must meet strict scrutiny.

*Good issue STMT:*  
Here, Sarah will argue that allowing Abe in the delivery room would deny her, her right of privacy. According to Sarah the delivery of a baby entails a lot of exposure. In other words it is very private moment because most of her body is exposed. As a result, the government should meet SS before granting Abe the injunction. Abe will argue that SS should not be required because since he is the birth father of Sarah's child he already fully knows all of Sarah's body, according to Abe, Sarah was not so worried about exposure when she was married to him and engaging in sexual conduct. Abe will argue that even if SS is required the government has a compelling interest, which is having a newborn interact with his birth father. According to ABE also has a fundamental right - the right of parents to control the upbringing of their child. Abe will argue that early interaction with his baby is key for the baby's development. Unfortunately for Abe it is unlikely he will prevail because although the baby-father is important, Abe can always interact with the baby outside of the delivery room, that way Sarah's can maintain her privacy. *Good Point*

*P+*

### D) First Amendment and Content based Regulation

A content based regulation prohibits an entire topic and the court must use strict scrutiny. However, a zoning ordinance may limit the location or size of adult establishment if the regulation is designed to prevent secondary effects. In other words, if the intent of the zoning ordinance is to reduce secondary effects then the regulation is not considered content based. *Good Analysis of Renton case*

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Here, the city will argue that the denial of the license is not content based because it prevents crimes, and increases the quality of the neighborhoods as children are not exposed to adult publications and products. On the other hand, the businesses will say that it is absolutely content based because the license is only denied to stores selling "Adult" publications and products. As a result the government must meet strict scrutiny. The government will say that it has a compelling government interest - increasing the quality of neighborhoods. On the other hand, the businesses will say that the government does not have any compelling government interest as the denial of licenses has nothing to do with the quality of the neighborhoods. the court will likely find that the government does not meet SS.

Obscenity is unprotected speech under the first Amendment and the government just needs to meet the rational basis test. Obscenity is the description or depiction of sexual conduct that, taken as a whole by the average person, applying contemporary community standards: appeals to the prurient, portrays sex in a patently offensive way under the law, and does not have serious literary or scientific value.

The businesses will argue that the Adult publications and products are not obscene and but rather they portray sexual speech and therefore the government does not need to meet the rational basis test but rather the intermediate scrutiny test which the government will not be able to meet because the government has demonstrated no important gov. interest.

Reviews?

P+

Good job! You articulate issues, state & apply the rules & tests to come to a reasoned conclusion.