

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.

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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.

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

**Freedom of Religion**

The First Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, states that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Decisions recognize that there is room for play in the joints between the clauses, some space for legislative action neither compelled by the free exercise clause nor prohibited by the Establishment Clause.

**Establishment Clause**

✓ Facial discrimination of religion is held to strict scrutiny, however if there is not facial discrimination, then the primary purpose is reviewed under the *Lemon* test: 1) the statute must have a secular purpose, 2) the principal effect must neither advance nor inhibit religion, and 3) there must not be excessive entanglement with religion. See analysis below as the entanglement section overlaps.

**Free Exercise Clause**

The free exercise clause does not protect all religiously motivated conduct. Neutral laws of general applicability will be upheld if the law is rationally related to a legitimate government interest. If not neutral or generally applicable, it must be necessary to uphold a compelling interest and narrowly tailored to the interest.

Based upon *Hosanna Tabor*, it is a violation of both the Free Exercise Clause and the Establishment Clause to hold a religion liable for who they choose to be a minister in their religion. *Our Lady of Guadalupe* expanded upon that by saying that there is no rigid

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key component

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formula, but that the ministerial exception needs to review what the employee does. In that case it was a religious school employee and they were considered a minister even though they were not a minister, had no background in religion, and was teaching a secular subject. However, here it clearly states that "[He] was not a designated minister and [he] had no other instructional or other duties related to the school's mission." Just because someone was not a designated minister does not mean that they could not be one in application. It is stated that he said a secular prayer with the students prior to each basketball game. The school would use that fact to point towards him being a minister. However, Adrian may then say that the school is not religious at all, even though it is run by a church. The school's mission is "to teach and live by the highest moral and ethical standards but with no belief in God or a Supreme Being." However, a church does not have to believe in God to be religious. To receive the protection of the free exercise clause, a religious belief must just occupy a place in the believer's life parallel to that occupied by orthodox religious beliefs, but does not have to follow a set religious structure. While "Little Flower" is typically a reference to the Catholic saint, St. Therese of Lisieux, this church (or society as it is called above) does not need to follow a set religious structure to receive protection. Based on that, and the low bar for the ministerial exception set in *Our Lady*, the society may be successful on this issue.

### Freedom of Association

While not enumerated in the First Amendment, the Court has declared that the freedom of association for expressive purposes is a fundamental right protected by the First Amendment because it is integral to both speech and assembly. There are two forms of freedom of association: freedom to enter into relationships (freedom of intimate association) and freedom to associate for a first amendment purpose (freedom of expressive association). The freedom of intimate association is not applicable here as it relates to those small, selective human relationships such as those of a family unit.



The right to associate for expressive purposes is not absolute and may be justified by compelling state interests unrelated to the suppression of ideas that cannot be achieved through less restrictive means. If the society is not deemed to be a church, or their involvement with the school deemed not to be religious then they may ~~try to~~ assert freedom of association as the Boy Scouts did in *Boy Scouts of America v. Dale*. Along the same analysis as the Boy Scouts did, the society could say that their moral standards are a part of their mission and that does not include allowing transgender individuals as a part of their organization. They could say that their expressive association of expressing those morals is hindered by allowing Adrian to be a part of their group. However, in that case, the Boy Scout leader could not be discriminated against due to his sexual orientation, but rather for his activism related to LGBT issues. This case is missing that element, so the compelling interest in stopping discrimination would likely outweigh. It could not be achieved by a less restrictive means.

### Equal Protection Clause

2000 | The Equal Protection Clause prohibits states from treating a similarly placed person or class of persons differently. Gender is a quasi-suspect classification which receives intermediate review. However, this is not applicable against the school's action of firing because they are not a government actor (not a public school; operated by the Open Flower Society). So this would not be a helpful argument for Adrian.

### Other

The state action here is the law, not the employer, so government employee cases do not apply which could have limited Adrian's speech.

### 2. Our Little Flowers School v. Juan and Christina

### Free Speech

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The First Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, states that Congress shall make no law abridging the freedom of speech. However, the courts have interpreted this as allowing certain regulations on speech

### Overbreadth

A law is constitutionally overbroad if it regulates substantially more speech than the constitution allows to be regulated. This law bans speech, leafleting, or picketing within 25 feet of a church or church-related school. This prohibits speech as a whole not for particular purpose, so in theory parishioners, students, teachers, etc. could not speak outside of their school. Students could not chat with classmates. This could entirely invalidate the law.

### Content-based v. Conduct Based

Content-based regulations are aimed at messages or viewpoints either facially or subtly through their purpose. Conduct-based regulations are content-neutral, with only incidental impacts on speech. A law is content-neutral if it applies to all conduct affecting speech regardless of the message. The government may appropriately regulate the time, place, and manner in which speech may be expressed. Content-based laws fall under strict scrutiny review (narrowly tailored to compelling state interest), unless the speech is protected or less protected. Conduct-based regulations fall under intermediate scrutiny (significant government interest, narrowly tailored, leaving open alternative forms of communication).

Juan and Christina will argue that the law prohibiting speech, leafleting, or picketing within 25 feet of a Church or Church related school is content-based, in order to get the higher level of scrutiny analysis. They would state that the prohibition is only at churches

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or church schools, making it only applicable to content of those in protest against religion or the practices of those institutions. However, in McCullen v. Coakley the court found that a regulation banning standing within 35 feet of an abortion center was not content based. There are differences here, 25 feet and 35 feet, and abortion instead of church. The biggest distinction is the court's reasoning in *McCullen*: that the rule depending on where they were, not what they were saying. This regulation in contrast impacts what they may be doing/saying, prohibiting speech, leafleting, or picketing instead of standing. A court may find this to be content based, and it would likely not hold up under that standard of review. The compelling interest could be in protecting school children. However, it is not narrowly tailored because it prohibits all speech: children saying goodbye to their parents as they leave for school for the day, teachers greeting students, etc.

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(discuss)

The state could argue that they were trying to prevent **secondary effects**. Facial regulations of speech based upon viewpoint or message are content-based, but if the predominate concern of the legislature is the secondary effects, not the content-itself, courts have considered it content-neutral. This has more often been used on cases with adult entertainment, such as *Renton*, however a secondary effect could be increasing the quality and safety of the space around churches and schools. This is more of a stretch.

If it is found to be conduct-based, either through secondary effects or through just not finding it to be content-based, public forum should be reviewed.

### Public Forum

Public forums are locations in which there has been a tradition of assembly and debate (e.g. sidewalks, parks, streets). A designated public forum is created by government entities when government property that has not been traditionally regarded as a public forum, is opened for use as a public forum. There are also limited public forums in which the government opens property limited to use by certain groups or dedicated solely to the

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discussion of certain subjects and nonpublic forums which may be closed to speech activities. The area out front of a church or church school is typically sidewalks and streets, which are traditional public fora.

The reasoning for legislation would play into which level of review is used. If content-based, strict scrutiny applies (see above). However, if the regulation is content neutral (e.g. a valid safety concern unrelated to speech), then there must be an important government interest, the burden of speech must be no more restrictive than necessary, and alternative channels of communication must be available. Again, *McCullen v. Coakley* is illustrative. The court in that case found that there was a justified reason for public safety and healthcare access, but that it was not narrowly tailored to the interest because harassment laws could have sufficed. Here, there may be a safety concern for church parishioners and students that could be an important government interest. There may be other laws that protect individuals in the city making this not narrowly tailored to that interest like in *McCullen*, but none are stated. However, there are other measures that could be stated such as having school officials on site to keep an eye on students. Other channels are available, they could protest 26 feet away potentially just as effectively. 25 feet is a short distance. Because the law may not be narrowly tailored enough, this intermediate scrutiny review may fail.

## Fundamental Rights

Parents have a fundamental right to make decisions concerning the care, custody, and control of their children. While who is allowed to teach someone's child is covered under that fundamental right, that is not at issue here. At issue is whether Juan and Christina are allowed to continue to protest the decision of the principal in firing Adrian. The state law prohibiting this is unrelated to how they parent their children and therefore their fundamental right is not infringed.

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**END OF EXAM**

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Demand of Val

Justiciability:

Under Article II of the Constitution, the courts require that a cause of action be justiciable. There must be an actual case and controversy and the P must have standing.

State Actor:

A constitutional challenge requires a state actor. Here the fact pattern is silent as to whether the school is public or private. Schools often receive federal and state funding and as such become entangled as government actors. State action can be inferred where a private organization is performing functions traditionally and exclusively held by the state or where the private organization is entangled. When a school receives state funding it becomes essentially the agent of the government and takes on the role of a state actor. For the purposes of this exam question, the presumption is that the school is either a public one or an entangled state actor.

Here it is unclear as to whether Val has standing. She has not suffered a direct injury as of yet, but one may be imminent if she is not permitted to speak at her graduation because the school policy requires a Saturday graduation.

The fact that the injury would be imminent will likely provide for the necessary standing

Are Vals Constitutional right to freedom of religion violated by the custom to have graduation on Saturday?

Freedom of Religion:

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What is religion?

The court may not base their decision on whether or not Val practices a legitimate religion. Per Ballard, a court can determine only whether the beliefs are sincerely held and not whether they are true. Val will argue that her beliefs that Saturday is a sabbath is a firmly held belief. The court may only inquire as to whether her beliefs are sincere. Val will assert that they are sincere because she is asking for the ceremony to be rescheduled. She is the Valedictorian and it is important that she be able to attend. If her beliefs were not sincere, there would be no point in requesting a change in date.

The court will determine that her beliefs are sincerely held.

Free Exercise

Is the practice of having the ceremony on Saturday violating Val free exercise of her religion?

Under the First Amendment to the Constitution and extended to the states by the 14th amendment the government is prohibited from making any law respecting the establishment of religion and preventing the free exercise thereof. The government must justify the regulation demonstrating that it is necessary to a compelling government interest.

The Free exercise clause bars any regulation that prohibits or seriously burdens the free exercise of religion unless there is a compelling government interest, except when they are laws of general applicability that do not intentionally burden religious beliefs. [Here the state has a law prohibiting the employment discrimination based on sex.] This is a regulation that does not implicate religion at all. It is designed to protect individuals of all sexual orientations. Per the holding in Smith the free exercise clause is not violated if the

law is 1. neutral, 2. they must have general application and 3. does not burden religious conduct.

Here Val will argue that the policy violates her ability to exercise her religion. Val believes that Saturday is the sabbath and she cannot participate if it is held on that day. The school will argue. The school will argue that the policy is one of general applicability per Smith. The policy is neutral in that it doesn't target any religion and it is applicable to all faiths. Further it does not burden religious conduct. It is the custom for all schools and all students in the district.

It is likely the government will prevail in this argument because the policy does not prohibit Val from practicing her faith.

→ Sabbath = Holy Day of obligation

Establishment clause:

The Establishment clause prohibits laws respecting the establishment of religion and is violated when the government shows bias towards or against a religion. There are a few ways the government demonstrates bias. There is incidental favoring where the govt. favors one religion over another in an attempt to benefit the public. There is sect preference where a regulation favors one sect over another and there is no sect preference, where the govt. action contains no sect preference.

Lemon Test:

Here, there is no sect preference in the regulation. Per Lemon, the constitution is not violated if the regulation is secular, the primary effect does not promote religion and there is no excessive entanglement.

The school will argue per Lemon that the policy is secular in nature it has nothing to do with religion at all. It does not promote or inhibit one faith over another. It treats all

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students the same. The regulation does not promote excessive entanglement between the church and state.

NIMBY

FACIAL CHALLENGE

Justiciability-defined above

NIMBY does not have to have standing in order to bring a facial cause of action. They will assert that the rejection of the application is both a prior restraint and unfettered discretion

Prior restraint:

Prior Restraint is based on the prevention of speech before it happen. Per NY v. Sullivan, it arises when the government action seeks to restrict free speech in advance of its publication. It occur administratively when a permit or application is denied before the party can engage in an expression of speech. Here, NIMBY will be denied the use of the auditorium if the board swiftly denies the application. This could be seen as a prior restraint on speech because they were not permitted to even begin.

NIMBY may have a case for prior restraint if the board denies.

Unfettered Discretion:

✓ UD occurs when the government does not have a procedure in place to issue licenses and permits. It leaves the decision making process up to the hands of the government

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employees. Here if the board denies with out any review, swiftly rejecting the application they could be facially challenged under unfettered discretion.

Nimby may have a case for Unfettered discretion.

NIMBY will have to have standing which requires a direct injury. Given that they have not suffered the denial of the application yet, this recommendation is based on if the permit is denied.

### Procedural Due Process

Did the lack of process violate NIMBY's due process rights.

Procedural Due Process guarantees that when the government intentionally takes life liberty or property from an individual, he is afforded due process of law. This includes sufficient notice and the opportunity to be heard. Here the NIMBY will argue that they have a fundamental right to freedom of speech. When the right to free speech is impeded upon by the government, the govt. must afford the individual due process. In this case, Per Matthews, an evidentiary hearing is required when an individual is being denied a fundamental right. If the council does not follow any set procedure and instead swiftly rejects the application, they will violate NIMBY'S due process rights.

### Freedom of Speech

Under the 1st amendment and 14th amendment speech is a fundamental right protected by the constitution. The government may not regulate the message or viewpoint in the speech because it is protected in a public forum. There are two types of speech. Content based and content neutral. Content based speech regulates the message or viewpoint. Here the charge from NIMBY will be that the council is trying to regulate the message or the viewpoint because the organization promotes racial and religious discrimination.

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✓ Strict Scrutiny applies when the message or viewpoint is regulated. This requires the government prove the regulation is necessary to achieve a compelling government interest. Under *Schwimmer*, the court held that the government is required to protect the thoughts we hate.

The council will argue that the speech is unprotected speech

Unprotected speech affords lesser protection In this case the council will argue that it is likely to promote incitement

INCITEMENT:

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Speech that is likely to cause the incitement of illegal activity is unprotected speech. Per *Brandenburg*, if speech is intended to advocate illegal action it may be restricted. The speech must be directed at producing imminent harm. It must be likely to produce illegal action. It must be delivered with the intent to cause illegal action. NIMBY is known to promote racial and religious discrimination. They plan to use the room for a major recruitment. Several residents and the police chief oppose the use of the auditorium. They will argue the intent of the organization is to illicit activity that will cause harm. They will argue that it is likely to occur because of the nature of their speech and the fact that people may show up in protest. They will say they have the intent to cause harm because they promote racial and religious discrimination. NIMBY will argue that incitement is inappropriate because they have not done anything. There is not intent to cause harm and it is just an opinion.

The council will not have a successful argument.

Fighting words

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FW is another form of unprotected speech. Per Chaplinsky speech that is likely to instigate a violent response or speech that is an insult likely to cause emotional harm is not protected. Here the council will argue that the type of speech that N is likely to have will cause emotional harm or a violent response. N will argue that there is no way to predict the response of others and some people will get angry but that does not rise to the level of unprotected speech.

The council will not prevail in an argument for Fighting words.

#### Time Place and Manner Restriction

Time place and manner restrictions are permissible dependent on the location (public, limited public or non public). Here the regulation is a rented school auditorium which historically is seen as a limited public form. A regulation in a public forum must be content neutral, and reasonably serve a government interest. Additionally there must be alternate avenues of communication available. The council will argue that the restriction on the place in which the speech is conducted is permissible because it is not a public forum and the group can rent another facility.

The council will not prevail in an argument for TPM restrictions.

#### Conclusion:

The N group is likely to prevail in any challenge of the denial of their application because despite the fact that they have an unpopular viewpoint, their speech is protected as content based speech under the first amendment.

**END OF EXAM**

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### Constitutional Issues Raised by Marty

Is the Governments regulation Content Specific?

#### Content Based Regulation

If a law restricts speech based in its content (based on the subject matter or viewpoint of the speech) strict scrutiny review applies. The government must show that the law is necessary to achieve a compelling state interest, it is narrowly tailored, and the least restrictive means available.

Here, Marty (M) will argue that the regulation is content specific because it is directed at the subject matter of the message, advertising marijuana, thus will need to pass strict scrutiny. M will continue that the regulation is not serving a compelling gov interest because the sale of marijuana is legal in the state. In addition if the gov wished to regulate the advertisement of marijuana, a per se ban on billboards is not the least restrictive means. M will show that the gov can limit the imagery or the words used, or even the location of the billboard without limiting all opportunities to advertise.

However, the gov will argue that the regulation is not content based, but the regulation of commercial speech (see infra), and thus not subject to strict scrutiny.

M is likely to success on his content based regulation as the gov will not be able to pass strict scrutiny.

## Commercial Speech

Commercial speech receives less protection from the constitution than other types of speech. States can prohibit commercial advertising of illegal matters, or advertising that is untruthful, misleading or deceptive. If the regulated commercial speech is not for illegal matters and not untruthful or deceptive, the constitutionality of the regulation is subject to a 3-part test: (i) does it serve a substantial government interest, (ii) does it directly advance the substantial gov interest and (iii) it must not be more extensive than necessary to serve the substantial interest.

Here, the gov will argue that marijuana sales is still federally illegal so the regulation is valid because commercial speech is entitled less protection, and illegal commercial speech can be regulated or ban in this way. The gov will argue that out of towners driving through the state will be subjected to the billboard so limiting the advertising of marijuana is a substantial government interest, and its interest is directly advanced by keeping its highway free from federally illegal drugs. However, this is a weak argument as the sale of marijuana is legal in the state. People may even be coming to the state to specifically purchase marijuana. M will argue that if the gov desired to regulate based on marijuana being federally illegal it can, as mentioned, do that without eliminating all billboard advertising. M will argue once again that this regulation is more extensive than necessary as the gov could regulated imagery or wording.

The gov is likely to be unsuccessful in asserting an illegal commercial speech argument because the sale of marijuana is legal in the state.

In conclusion, the court is likely to rule against the gov as the reg is of commercial speech that is not illegal or misleading and also content based without the ability to pass strict scrutiny.

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### Constitutional Issues Raised by Resident

#### Fundamental Rights

Certain fundamental rights are protected under the constitution (right to vote, right to travel and right to privacy). If they are denied to everyone it is a fundamental rights violation, and also potentially a substantive due process (see infra) issue. The applicable standard of review in either case is strict scrutiny. Thus to be valid, the government must show that the law is (i) necessary to achieve a compelling state interest, (ii) it is narrowly tailored, and (iii) the least restrictive means available.

#### Right to Privacy - Abortion

The USSC has held that the right to privacy includes the right of a woman to have an abortion under certain circumstances without undue interference from the state. Before viability a state may adopt a regulation protecting the mothers health and the life of the fetus only if the regulation does not impose an undue burden or substantial obstacle to the woman's right to have an abortion. H.S.W.

Here, the facts are silent as to how far along the woman was in her pregnancy but if the woman was at the point before viability the regulation would be a fundamental rights violation against her right to privacy. Thus would need to meet strict scrutiny. The gov may argue that due to the fact that it is a sanctuary city for the unborn the complete ban on abortion, including assistance, is necessary to achieve its compelling interest.

However, resident and the woman could argue that it is not narrowly tailored to achieve that interest and the regulation is a direct and substantial interference of her right to

receive an abortion. If the city chooses to be a sanctuary city for the unborn, it can promote alternatives to abortion by offering services for adoption. Creative a direct and substantial interference with a woman's right to choose will likely be ruled a fundamental rights violation.

The government is likely to be unsuccessful in defending the regulation because it is a direct and substantial interference of ones right to receive an abortion.

### **Due Process**

The Due Process Clause (DPC) of the 14th Am prevents the gov from taking a persons life, liberty or property without first giving them due process of law. The DPC has been interpreted to have 2 sets of rights, substantive due process (SDP) and procedural due process (PDP) . SDP prevents the gov from arbitrarily denying rights, PDP requires notice and a hearing before the gov takes life, liberty or property

The resident will argue a **substantive due process** violation as the law to not assist a woman in securing an abortion is not reasonable and is also arbitrary and vague. The resident will argue that being punished for giving someone a ride and providing information to a lawful activity is unreasonable and may further the gov interest but is significantly more restrictive than necessary.

The resident will likely be successful in the SDP violation claim.

**END OF EXAM**

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