

CONSTITUTIONAL LAW  
MIDTERM EXAMINATION  
FALL 2020

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EXAM INSTRUCTIONS

This is a four - hour exam. There are two essay questions to be answered in Questions 1 and 2; Questions 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.

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Question No. 1

In the aftermath of a virus pandemic in New York City, the U.S. President issued an Executive Order that all medical waste resulting from the pandemic must be examined by federal waste investigators employed by the U.S. Department of the Interior. The President further ordered the States to reimburse the U.S. Government for any additional costs incurred and for the salaries paid to the Federal Investigators assigned to facilities doing business in their state. Congress had recently failed to pass an identical Medical Waste bill by five votes.

The State of New York required all waste from New York City to be shipped to New Jersey for processing pursuant to an interstate compact. New Jersey law imposed a surcharge on the state of New York for “special handling” of processed waste which was to be collected and paid to New Jersey by the processing company. New Jersey also required that all employees processing waste in New Jersey be paid “a living wage” which was \$2.00 per hour higher than the Federal minimum wage and \$1.00 higher than the wages paid to the federal waste investigators assigned to facilities in New Jersey.

WasteCo, the largest processor of New York City Waste operating in New Jersey, was prosecuted in New Jersey State Court for failure to collect and pay the “surcharge” for “special handling” of the medical waste resulting from the New York pandemic, for refusing to allow Federal Waste Investigators to enter its facilities to inspect the medical waste, or to reimburse the U.S. Government for salaries of the Investigators at the “living wage” rate required by New Jersey Law. WasteCo had objected to the Executive Order on grounds that the Executive order was an unconstitutional federal executive mandate, and the “living Wage” law was preempted by federal wage and hour laws. The State of New York filed a separate lawsuit in federal court seeking an injunction to prohibit enforcement of the Executive Order by the United States, raising the same constitutional issues on its own behalf, and citing the 10<sup>th</sup> Amendment, the Supremacy Clause and the Commerce Clause.

Analyze the Constitutional issues WasteCo can raise in defense to the charges and the issues the State of New York can raise in its Federal injunction lawsuit; analyze the arguments the State and U.S. Attorneys General can make in response. For all issues, state how the U.S. Supreme Court should rule in each case and why.

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Question No. 2

In response to the need for more control over the uniform transportation of goods, State A bought Thunder Express Lines ("TEL"). At the time of this purchase, TEL was the largest transportation company in State A, carrying 80% of its freight by rail and long-haul trucking. TEL's transport rates are generally lower than other shippers. In signing the Act authorizing the purchase of TEL, the governor stated that it would ensure uniform and safe freight service for State A industry. The Act authorizing the purchase of TEL provided that manufacturers with factories in State A shall have first choice of space on all TEL carriers and that State A manufacturers who utilize TEL shall be given reduced insurance rates with their respective State A insurance companies.

Perry, a citizen of State B, which borders State A, grows and harvests oranges in State B for sale to State A. Before its purchase by State A, Perry exclusively used TEL for shipping oranges to his many State A customers. Perry has lost nearly all of his State A customers over the last 3 years because he cannot guarantee timely delivery of oranges because shipping space on TEL is so uncertain.

Juice-Up is a State C company and manufacturer of high-end mixers and fruit juice extraction equipment commonly used in stores like Jamba Juice and Smoothie Land. Juice-Up claims that as a result of Perry's loss of State A customers and Juice-Up's difficulty securing space on the TEL carriers, Juice-Up has also experienced a reduction in both sales and lease agreements with State A merchants.

Insurance Co is a State A insurance broker with open and active lines of insurance coverage with many State A merchants who utilize TEL. Perry, Juice-up and Insurance Co have now filed suit in Federal District Court in State A.

1. What claims can Perry make under the United States Constitution and how should the court rule? Your response must address all threshold requirements regarding case and controversy, justiciability and standing to be heard on the merits. Discuss.
2. What claims can Juice-Up make under the United States Constitution and how should the court rule? Your response must address all threshold requirements regarding case and controversy, justiciability and standing to be heard on the merits. Discuss.
3. What claims can Insurance Co make under the United States Constitution and how should the court rule? 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. Based on reports from the 2016 presidential election that voters of African American descent and voters under 40 years of age suffered discrimination in exercising their rights to vote, Congress enacted a law pursuant to section 5 of the 14th Amendment to the U.S. Constitution requiring that all persons registering to vote in a presidential election identify their date of birth and race on their voter registration so that data can be gathered to monitor discrimination in voting. What Constitutional issues can be raised by a group of voters who were not permitted to vote in the 2020 election after refusing to identify their age and race? Analyze the Constitutional issues and state how the court is likely to rule on them and why.

B. A city zoning ordinance required a permit for any development in the designated "historic area." A developer who owned a large Victorian home in the historic area applied for a permit to convert the house into five rental units, promising investors a 25% return on their investment when the units are completed. The permit was denied on grounds that the development would change the historic character of the neighborhood. The developer sued, alleging that he was deprived of his property because it cannot be developed into rental units. Analyze the constitutional issues the Developer can raise and state how the court is likely to rule on them and why?

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Constitutional Law – Fall 2020 Midterm Exam QUESTION 1 – OUTLINE ANSWER

- United States v. WasteCo
  - Justiciability
    - Standing: Injury? (prosecution: risk of criminal penalties for violating unconstitutional law, but can Co. raise if state agrees?); Traceable to Gov't? (caused by Executive Order); Redressable? (by court Judgment)
    - Ripe: Case and controversy exists – prosecution
    - Not moot: still current controversy
  - Unconstitutional Executive Order
    - Beyond President's executive Powers per Article II : contrary to Congressional intent (Identical legislation failed) executive power is at "lowest ebb"
    - Congress has exclusive power to regulate interstate commerce and to tax
      - President cannot regulate disposal of waste interstate by executive order;
      - President has no power to impose tax for salaries of Inspectors
      - President cannot "commandeer" state to enforce federal laws (Printz, US v. NY) But: here New Jersey chose to comply with Ex. Order.
      - Note: Taking of property is not an issue: No possessory or regulatory taking of property by ordering access for inspectors.
  - New Jersey Laws are unconstitutional and unenforceable
    - Surcharge violates Dormant Commerce clause: not discriminatory on face but affects commerce (see below: Pike Balancing test),
    - New Jersey "living wage" law is preempted by federal wage law applying to federal investigators (see below)
  - Conclude: How will Supreme Court Rule and why?
- New York v. United States
  - Justiciability:
    - Standing: Injury? (must pay unconstitutional tax - reimbursement); Traceable to state? (caused by Executive Order, New Jersey Laws); Redressable? (Court injunction, money Judgment)
    - Ripe: Case and controversy exists re legitimacy of tax payment
    - Not Moot: still current controversy
  - Unconstitutional Executive Order (see above)
    - Even if New Jersey is willing to comply, New York objects to "commandeering" by President to enforce the Executive Order
    - Note: Impairment of Contract NOT an issue: Art. I section 10 applies only to states, not federal government
  - Preemption: Supremacy Clause Art. VI
    - Federal Law: Minimum wage and federal employees' salaries set by federal laws Is state law adding to or interfering with federal wage laws preempted?
      - Conflicts: can NY comply with both state and federal law? No: NY cannot comply with state living wage and also reimburse pay under federal law.

- Impede Federal objective? Possibly: Does state tax impede? (Federal objective is totally different from state's objective, not related if state pays more)
    - Federal law occupies the field? Probably not: "Field" is different, and many states have higher wage rate laws
  - Commerce Clause: Dormant CC Art. I Section 8
    - State Law imposing surcharge is Not Discriminatory on its face: treats in-state and out of state businesses alike by taxing all who have special processing
    - Does state law unduly burden commerce? Imposes tax on out of state businesses to fund handling only for state's business, discourages interstate commerce if businesses try to avoid tax etc. but: is this burden undue?
    - *Pike* Balancing test: does burden on commerce outweigh benefits to state of having reparations law fully funded?
  - Due Process Clause 14<sup>th</sup> Amendment
    - State's taxing power: Did of New Jersey exceed its power by special handling tax or Living Wage law? Apply rational basis test
      - Is taxing businesses based on how waste is processed rationally related to a legitimate state interest?
      - Is taxing out of state businesses to pay wage reimbursements to enforce (unconstitutional federal )law rationally related to a legitimate state interest?
- Conclusions: How will the Supreme Court Rule and why

Constitutional Law 2020 Midterm Exam Outline Answer Question 2 **ISSUE OUTLINE /**  
**ANTICIPATED DISCUSSION Question No. 2 — Con Law Midterm 2020**

There are three potential aggrieved parties in this question; Perry (Rog #1), Juice-Up (Rog #2) and Insurance Co. (Rog # 3). There are some nuanced differences relative of Case & Controversy (specifically “Standing”) among the three plaintiffs/potential aggrieved parties.

**Rog #1 (Perry’s Claims)**

State A’s Purchase of TEL / Dormant Commerce Clause Implicated (DCC)?

Threshold Case & Controversy

Perry has suffered a direct injury in fact in the form of economic damages resulting from loss of customers. Here, Perry would meet the threshold requirement of **standing**. Perry’s claims of economic harm and business disruption would qualify as a **direct injury in fact**. Moreover, there is a **causal connection** between the impact of the State A Governor’s actions (the imposition of The Act) and Perry’s alleged harm. It would also appear that if the court were to intervene, the harm suffered would be **redressable**, meaning that the court could fashion a remedy (i.e., deem it violative). If Perry asserted challenges to the Act, the court would deem the matter to be **ripe**, as it appears to be a live or ongoing controversy or harm. Perry’s challenge or claim would not be deemed **moot**.

Perry would assert that State A’s Act is in violation of the DCC, the Privileges & Immunities Clause and the Contracts Clause.

The Commerce Clause; Article I Section 8 (Clause 3) allows Congress to “regulate commerce with foreign nations and among the several states, and with Indian Tribes,…”

State A may also regulate commerce so long as Congress has not regulated in the specific subject area. The facts do not state that Congress has occupied the field of transportation.

Students should find that State A may engage in this regulation. The action next turns on the issue or **discrimination (facial and/or neutral, yet discriminatory as applied)**. Here, the Act seems to favor State A manufacturers by giving them first choice (**the is preferential treatment**) of space on all TEL carriers.

The Act appears to have as its purpose, **protectionism-based motives**. The court would place the burden on State A to justify the purpose and basis of the Act. Students are expected to discuss **facial discrimination** first. As a State B citizen and company (logical inference), Perry will assert that the Act is facially discriminatory, as it favors State A to the detriment of State B. State would counter that the language of the Act does not specifically single-out State B as inferior or unworthy. Is the “first choice of space, …provision the **least restrictive means** of fostering State A’s alleged purpose (ensuring uniformity and safe freight service)? This is a point of contention and worthy of discussion (**analysis**).

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Is the Act facially neutral, yet discriminatory as applied? This would be the alternative discussion and form of discrimination. Standard and burden is **important government interest**.

Is State A acting as a "Market Participant?" What facts support this theory?

Privilege and Immunities Clause (Art. IV Section 2)

This overlaps with DCC. Perry's Fundamental Rights and Civil Liberties may have been violated.

Contracts Clause (Art. I Section 10)

A logical inference can be made that Perry has active/ongoing contracts and business agreements in place with State A businesses/residents. This raises the issue of **Government interference with Private Contracts**

**Rog #2 (Juice-Co's Claims)**

Juice-Co will assert the same claims as Perry. The twist here is Juice-Co's **standing and cognizable injury**. Juice-Co appears to be tacking-on and bootstrapping Perry's claimed harm. Has Juice-Co actually suffered a **direct injury in fact**? This may also raise a **ripeness issue**. Are Juice-Co's damages **speculative** in nature?

**Rog #3 (Insurance Co's Claims)**

The main issue here is **State A's interference with Contract / Prospective economic advantage**. The **Contracts Clause** is once again implicated. There is also a **mootness/ripeness** issue, as Insurance Co's claims may be deemed speculative.



Constitutional Law 2020 Midterm Exam Outline Answer Question 3

- A. Congress Power: Remedial Powers under 14th Amendment section 5 requires current data per *Shelby Count v. Holder*, and congruence and proportionality per *City of Boerne v. Flores*. Arguably neither is present here. Can Congress use remedial power to gather data? Is requirement for all to disclose age and race disproportionate to remedy unconstitutional acts? Equal Protection: 5<sup>th</sup> and 14<sup>th</sup> Amendments. Discrimination on face of legislation? Arguably yes, since race must be identified but statute applies to everyone and is not itself discriminatory. If discriminatory based on race, apply strict scrutiny (compelling interest, narrowly tailored); If discriminatory based on age, apply rational basis (rationally related to legitimate state interest); (Note: Fundamental right to vote and right to privacy are raised but not covered in first semester.)
- B. Taking: Regulatory, not possessory, taking through zoning is allowed as long as it does not deprive the owner of all beneficial use; diminished value is not a taking. (*Lucas*). Apply *Penn Central* test: Economic impairment, Investment-backed expectations, character of government action. Apply *Nollan/Dolan* rough proportionality test: nexus between state interest and conditions imposed.
- C. MBE Questions: refer to Answers on form MBE

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1. WasteCo

Justiciability in Federal Court.

For case to be justiciable there must be a case or controversy. This means there must be an actual case or controversy in dispute. The plaintiff must also have standing. Standing requires a plaintiff prove: an actual or imminent injury, the injury is caused by the conduct complained of, and it is likely the injury will be redressed by a favorable decision. The case must also be timely. Courts determine this by looking at ripeness and/or mootness.

Case or controversy:

Here, WasteCo has a live controversy because they have been prosecuted by New Jersey for refusing to follow the surcharge for special handling, not allowing the federal waste investigators to enter their facilities or to reimburse the US government at the wage required by new jersey law.

Standing:

Here, WasteCo does have standing. WasteCo has actual injury as they are being sued for failure to comply with the surcharge for special handling, not allowing the federal waste investigators to enter their facilities or to reimburse the US government at the wage required by new jersey law. The cause of this harm is the executive order and the New Jersey state laws. Should the court redress these issues then WasteCo would no longer be prosecuted for these violations nor have to reimburse the US government.

Ripeness: a case will not be heard if there is not yet a live controversy or immediate threat of harm.

Here, WasteCo's (W) case is ripe. There is a live controversy, as established above and therefore, ripe for review.

Mootness: a case will not be heard if a live controversy existed at the time of the complaint's filing but has since been eliminated.

Here, W's case is not moot. The harm is ongoing and has not been extinguished.

The court will find that W's claims have merit and will be heard. The court will also find that there is a live controversy, W has standing and that the case is ripe rather than moot.

**State Actor:**

For an action to violate the constitution there must be government involvement with the challenged action.

Here, the New Jersey government and the US government are the state actors. They are issuing these laws and seeking enforcement.

**Executive Orders:**

The president has certain powers granted to them by the constitution. one of them being executive orders. executive orders are valid unless they are inconsistent with a congressional statute or some specific provision of the constitution itself. Where congress is silent the President's actions will be upheld if they do not impede or take over the powers of another branch. Also, when the president has the express or implied authority of congress his authority is at a maximum and his actions are likely valid.

Here, W will argue that the Executive Order was invalid. The Attorney General of the US (AGUS) will argue that the President properly acted with his enumerated powers and thus the action is valid. The AGUS will also argue that the President had the implied authority from congress to execute this order because they did not remark negatively and have let the President go ahead with his order. However, W will argue that this is untrue. W will argue that infact Congress had spoken when they had failed to pass a similar bill. W will argue that Congress is the legislating body and thus by the president executing an executive order that enforces a bill that had not passed, this is hijacking the legislative branches power. Congress had spoken regarding the bill and that answer was no. This executive order thus should be deemd invalid.

The court will likely find that the executive order oversteps the presidents powers.

**Supremacy Clause:**

This states that the constitution is the supreme law of the land. Any state law that conflicts with the federal alw, impedes the objective of the federal law, or regulates an area traditionally occupied by congress will be preempted by federal law. Conflict preemption is where a state law is inconsistent with a valid federal law covering the same subject matter, the state law is invalid. Field preemption is where the federal government intends to occupt the entire field the states cannot even regulate in that field.

Here, W will argue that New Jersey's wage law is preempted by federal law. The federal minimum was 2 dollars lower than the jersey living wage. Here, the Attorney General of New Jersey (AGNJ) will argue that they cannot be forced to comply with federal law. W will argue that there is conflict preemption, the state law is higher than the federal minimum regarding wages. Thus, the court should preempt the wage law. However, the AGNJ will argue that the federal standard is a minimum and that the state may not create laws that go below the minimum but may create laws that go above it, granted the law doesn't defeat the federal objective. The AGNJ will say that the federal objective is to create a minimum wage so that every US citizen will be required to be paid a basic wage. New Jersey creating a wage law that requires higher pay does not impede this objective as the standard of living in NJ is higher and thus aides the federal objective in creating a uniform wage. However, the wage may be preempted to federal workers who are employees of the federal government.

The court will likely find that the wage law is not preempted by federal law.

## 2. State of New York's Lawsuit

### Justiciability in Federal Court.

For case to be justiciable there must be a case or controversy. This means there must be an actual case or controversy in dispute. The plaintiff must also have standing. Standing requires a plaintiff prove: an actual or imminent injury, the injury is caused by the conduct complained of, and it is likely the injury will be redressed by a favorable decision. The case must also be timely. Courts determine this by looking at ripeness and/or mootness.

### Case or controversy:

Here, New York (NY) has a live controversy because they are being told to comply with an executive order and being burdened by NJ with surcharges for their waste collection in potential violation of the constitution.

### Standing:

Here, NY does have standing. NY has actual injury as their companies are being charged a surcharge and being forced to comply with an executive order in violation of the constitution. NY is required to send the waste to NJ based upon a previous compact. The cause of this harm is the executive order and the New Jersey state surcharge laws. Should the court redress these issues

then NY would no longer be forced into complying with laws that are violative and overreaching of their state sovereignty.

Ripeness: a case will not be heard if there is not yet a live controversy or immediate threat of harm.

Here, NY's case is ripe. There is a live controversy, as established above and therefore, ripe for review.

Mootness: a case will not be heard if a live controversy existed at the time of the complaint's filing but has since been eliminated.

Here, NY's case is not moot. The harm is ongoing and has not been extinguished.

The court will find that NY's claims have merit and will be heard. The court will also find that there is a live controversy, NY has standing and that the case is ripe rather than moot.

State Actor:

For an action to violate the constitution there must be government involvement with the challenged action.

Here, the New Jersey government and the US government are the state actors against New York. They are issuing these laws and seeking enforcement.

Executive Orders:

The president has certain powers granted to them by the constitution. one of them being executive orders. executive orders are valid unless they are inconsistent with a congressional statute or some specific provision of the constitution itself. Where congress is silent the President's actions will be upheld if they do not impede or take over the powers of another branch. Also, when the president has the express or implied authority of congress his authority is at a maximum and his actions are likely valid.

Here, the Attorney General of New York (AGNY) will argue that the Executive Order is invalid and argue similarly to W (see indepth discussion above). AGNY will say that the order overreaches and takes over congress's legislative powers. However the AGNY will also argue that in addition to the order being invalid, the President is overreaching and violating NY's 10th amendment rights.

The court will likely find that the executive order oversteps the presidents powers.

The Tenth Amendment:

The powers not expressly granted to the federal government are reserved to the states through the tenth amendment police power. Therefore, congress cannot compel a city or state to pass a law. In order for a state to justify action under the police powers, the action must be based upon the health safety or welfare of its citizens.

Here, the AGNY will argue that the president has attempted to commandeer NY by imposing targeted or coercive duties on the state legislature or officials. The AGUS will argue that it is within the federal governments power to impose regulatory statutes that apply to both state and private actors. However, the AGNY will argue that this the regulations have crossed the line into commandeering the state by forcing them to reimburse the government for salaries paid to the federal officials assigned to business. The AGNY will say that the president has coopted the legislature of NY by compelling them to spend the states money to pay people that the federal government has forced upon them through an invalid executive order. The AGNY will say that this is an abuse of power from the executive branch and that they are overstepping and taking over the state's spending power.

The court will likely find that the executive order violates the 10th amendment.

Supremacy Clause:

This states that the constitution is the supreme law of the land. Any state law that conflicts with the federal alw, impedes the objective of the federal law, or regulates an area traditionally occupied by congress will be preempted by federal law. Conflict preemption is where a state law is inconsistent with a valid federal law covering the same subject matter, the state law is invalid. Field preemption is where the federal government intends to occupt the entire field the states cannot even regulate in that field.

Here, NY will argue that the surcharge be enjoined. The AGNY will argue that the surcharge ashould be preempted. However, it is likely that the court will not find the laws to be preempted. This is because NJ may apply charges for services as it sees fit. There is no federal law preventing this or setting a minium standard. The court will likely find that the surcharge is not preempted by federal law.

Commerce Clause:

Commerce Clause:

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Congress has certain enumerated powers granted by the US constitution, one of them being the power to regulate interstate commerce. Congress may regulate channels of interstate commerce, instrumentalities of interstate commerce, persons and things moving interstate commerce and activities that substantially affect interstate commerce. The Dormant Commerce Clause restricts the states and local governments from regulating an activity that affects interstate commerce if the regulation is either discriminatory or unduly burdensome.

Here, NY will argue that the surcharge by NJ is violative of the commerce clause. The AGNY will argue that this surcharge is not rationally based and puts an undue burden on interstate commerce in regards to the medical waste process. NY will argue that the surcharge also creates substantial economic effect on interstate commerce because it is unknown how much longer the virus will be in effect. There is no vaccine and so the surcharge could be an indefinite amount of time. Also, NY is in a compact with NJ. This means that there is no other reasonable means of disposing of the waste as they are in a compact with NJ and cannot break it. The AGNJ will argue that there is a rational basis to the surcharge. The waste is a potential hazard to NJ citizens and the surcharge is the bare minimum that NJ can do to ensure that the risk of exposure is worth it. NJ will say that this surcharge is enacted in order to better protect the health safety and welfare of its citizens by being able to afford the special handling processes for the waste.

The court will likely find that the surcharge is rationally based and will keep it in effect, so long as it is a reasonable amount of money.

**END OF EXAM**

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### 1. Perry's Claims

#### **Justiciability**

Marbury v. Madison established the power of the judiciary to review the constitutionality of the actions of the legislative and executive branches. Article III section 2 sets out certain cases and controversies (justiciability doctrines) that federal courts are allowed to hear. These limits include standing, ripeness, mootness, advisory opinion, and political questions.

Does Perry have standing?

The constitutional requirements for standing are an injury in fact (personally suffered or imminent), causation fairly traceable to the defendant, and redressability by the courts. Perry has suffered an injury because he has "lost nearly all of his State A customers over the last 3 years". It is traceable to State A because due to the act "he cannot guarantee timely delivery of oranges because shipping space on TEL is so uncertain." State A is protecting their own citizens. This could be remedied via an injunction. Perry likely has standing. Prudential standing issues are not applicable.

Is the case ripe or moot?

The ripeness and mootness doctrines examine the problem of justiciability from the perspective of time. Ripeness focuses on the potential prematurity of a lawsuit (not yet an issue) while mootness addresses the potential staleness (resolution of the issue). The controversy must remain live at all phases of the litigation. Perry is still being harmed by the statute, thus it is not moot and ripeness is precluded.

#### 11th Amendment

The Eleventh Amendment provides that a state may not be sued in federal court for monetary damages without consent. It is stated that this case is being brought in a Federal District Court in State A. Likely Perry is seeking an injunction, but there may be an issue if he is seeking monetary damages and is suing the state. It is also unclear if he is suing State A, or the governor. More information is needed for a determination on this.

The fact pattern does not bring up any other justiciability issues.



### Dormant Commerce Clause

The Commerce Clause provides that Congress has the plenary power to regulate interstate commerce (including channels, instrumentalities, and activities with a substantial effect on interstate commerce, including intrastate if there is a substantial effect on interstate commerce). However, in this case the power being questioned is that of the state, implicating instead the Dormant Commerce Clause (DCC). Per the DCC, if Congress has not regulated in an area, a state or local government may regulate local aspects of interstate commerce if it does not discriminate against out of state competition (facially or facially neutral with a discriminatory effect) and is not unduly burdensome).

Is the law facially discriminatory?

Likely yes. Facial discrimination is the purposeful favoring of in state interests in an express manner. The act expressly discriminates by stating that "manufacturers in with factories in State A shall have first choice of space on all TEL carriers and that State A manufacturers who utilize TEL shall be given reduced insurance". They are expressly giving preference to manufacturers in State A (protectionism).

Is there a local purpose and was it gone about in the least restrictive means?

Because the law is facially discriminatory, the state has the burden of rebuttal by showing under strict scrutiny that the statute serves a legitimate local purpose through the least restrictive means. The governor said that the local purpose is to ensure uniform and safe freight service for State A industry. 80% of freight and rail transportation went through TEL, so that does effectively get at the purpose. However, the court should review whether there was an issue with uniformity and safety prior, or if that is just a front for protectionist reasonings.

Does the market participant exception apply?

A state or local government may favor its own citizens when they are acting as a market participant. Examples include when the state is the purveyor of goods and services and is actively engaged. State A bought TEL and did not turn over operations to another organization, so likely run it themselves. This company covered 80% of the transporation of freight in the state. They do regulate it through the act (who has priority). If they just regulate, it is not enough, but if they are actively engaged (as may be inferred), then the market participant exception might apply, meaning DCC is a not an issue.

Privileges and Immunities

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The privileges and immunities clause states that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. If a state or local law discriminates (protectionism) against out of staters with regard to a fundamental right or important economic activity, a challenge can be brought under the P&I clause.

Has the state intentionally and expressly discriminated against out of staters with regard to privileges and immunities that it accords to its own citizens?

Perry will claim that his economic liberty of a common calling (profession) was infringed upon by giving priority to State A manufacturers, so much so that he has lost nearly all of his State A customers.

If an economic activity is impacted, rational basis scrutiny is used--whether there is a substantial relationship to a state interest. Here, State A says that ensuring uniformity of freight service promotes the safety of industries in State A, which is a valid state interest (health, safety, welfare). Rational basis scrutiny is low, so the court will likely find State A's argument to be sufficient and find no violation of P&I.

#### Contracts Clause

The contracts clause states that no state shall pass any law impairing the obligation of contracts. This only applies to existing contracts, not future contracts. *Energy Reserves Group* sets out three tests:

Has the state law operated as a substantial impairment of a contractual relationship?

This is questionable. It is not expressly stated whether Perry had/has contracts, however it does say that over the past 3 years he has lost customers because he cannot guarantee timely delivery due to the space on TEL being uncertain. Timely delivery is a contractual term and there is a contractual relationship between buyers and sellers of goods. So there was likely a substantial impairment of his contracts for selling oranges.

Did the state have a significant and legitimate public purpose behind the regulation?

As mentioned above, State A likely did have a legitimate purpose.

Is the regulation appropriate to the purpose?

Assuming the second test is met, the regulation of prioritizing the State A manufacturers is appropriate to the purpose of maintaining uniformity of service (by using the same company).

## 2. Juice-Up's Claims

Does Juice-Up have standing?

See above. While Juice-Up has a harm (reduction in sales and lease agreements), their loss of sales due to Perry's loss of orange customers is likely too attenuated for the element of causation. And redressability for that injury would have a trickle-down effect that would not be immediately fixed. However, Juice-Up goes on to say that they have their own difficulty securing space on TEL carriers which has contributed to the injury. If there is enough of a direct nexus from that, then they may have standing. The court may review how directly that impacted their sales.

Ripeness and Mootness

See above. Still experiencing their harm, likely no issue.

DCC

The analysis above applies as it reviews the state, not the plaintiff.

Privileges and Immunities

See above. Juice-up is a company. The facts do not state whether or not they are a corporation (there are different types of businesses). If they are a corporation, P&I does not apply.

## 3. Insurance Co's Claims

Does Insurance Co have standing?

It is unclear what Insurance Co is suing for. If they are suing for their own injuries of being forced to offer reduced rates to all manufacturers who use TEL, then they likely have their own redressible harm. They likely would not be suing for their State A merchant clients because they have no issue in this case (but if so, likely could not under association or third party standing because State A people are not harmed).

If standing applies, Contracts clause issues (potentially affects contracts they had already by requiring them to offer lower rates). P&I and DCC not apply because they are a company in State A (so no issue for them re discrimination to out of staters).

#### Takings Clause

If the harm is forcing the insurance company to offer their services for a lower rate to State A manufacturers who utilize TEL, the Takings Clause may be at issue.

Eminent domain is the state and federal power to take private property when necessary for government activities. The limitation to this is found within the Takings Clause within the Fifth Amendment: "Nor shall private property be taken for public use without just compensation." State governments may give this power to local governments. In order to see if there was a violation of the Takings Clause, courts review the following:

Was there a taking? There are two types. A possessory taking occurs when the government confiscates or physically occupies property. The court almost always finds a taking when this is argued. By requiring them to offer a discount, the state is taking away that income that they previously would have received. It is gone. The other type of taking is regulatory taking. This is similar to *Horne v. Department of Agriculture*, where raisins were physically taken by the government without just compensation.

Assuming there was a taking, was it for public use? The state was doing it to encourage state A manufacturers to choose TEL as a carrier and thus have more uniformity, without requiring them to use TEL. But this is a bit attenuated, so the court may not find this to be a valid purpose.

Was just compensation paid? No. The insurance company needs to be reimbursed if they were forced to offer the discount.

**END OF EXAM**

3)

**A**

### **Due Process - DP**

The 5th and 14th Amendments say that neither the federal nor the state governments can deprive a person of life, liberty, or property without due process. The DP clauses have been interpreted to provide 2 different types of protections (i) procedural DP: the procedures that the gov must follow when it takes away a persons life, liberty, or property without due process and (ii) substantive DP: whether the gov has an adequate reason for taking away a persons life liberty or property. Under the substantive DP (SDP) the focus is on the sufficiency of the justification for the governments action, not the procedures the gov has followed.

Here a group of voters were not permitted to vote in the 2020 election after refusing to identify their age and race under a violation of SDP. This was a failure to comply with a congressional law requiring all persons registering to vote in a pres. election give this information. The voters will argue that this is a violation of their due process rights as the right to vote is a fundamental right and they were denied that right without due process. Congress will argue that they have an adequate reason for enacting this law to identify and monitor possible voter discrimination. Congress is attempting to see if the African American community and voters under 40 are being discriminated against in the voting process. Congress will argue the goal is to eliminate voter discrimination, not encourage it. The voters will argue that if congress is attempting to gather and monitor voting discrimination there are less restrictive ways to go about that than to deny people the right to vote who choose not to give over personal information. The court is likely to find that monitoring voter discrimination is a valid reason for collecting age and ethnicity information on voters, however denying people the right to vote is not the least restrictive means to go about that.

Conclusion: The court is likely to find that the voters were denied their due process rights when they were denied the right to vote.

**B**

### **Takings Clause**

The 5th Amendment prohibits governmental taking of private property for public use without just compensation. A use will be held to be public as long as it is rationally related to a legitimate public

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purpose. There are 2 basic ways of finding a taking. A possessory taking occurs when the gov. confiscates or physically occupies property. Alternatively, a regulatory taking is when the gov regulation leaves no reasonable economically viable use of the property. The property can be personal or real. Just compensation to the owner will be deemed the fair market value of the property at the time of the taking.

Here Developer (D) applied for a building permit to turn his large Victorian in a historic area into 5 rental units. D promised investors a 25% return on their investment. D will argue a taking in being denied this permit on the grounds that it will change the historic character of the neighborhood. D will argue that he is experiencing a regulatory taking and must be justly compensated. The court will apply a 3 part test in determining if a regulatory taking has occurred: (i) the economic impact of the legislation (ii) interference with D's reasonable investment backed expectations (iii) does the gov action reasonable effectuate a legitimate gov. purpose.

#### The economic impact of the legislation

D promised his investors a 25% ROI and will argue this is an heavy economic impact. However this is speculative, D hopes to get that ROI but it is not guaranteed. The city will argue that the project could be overall unsuccessful and D will suffer no economic loss. If D is unable to get a permit his actual out of pocket expense is \$0. He has not contributed any money to the project so he will not be at a loss if it does not move forward.

#### Interference with D's reasonable investment backed expectations

Again D will argue that he has a very reasonable and researched expectation of a 25% ROI. Depending on how well this number is based on research and the likelihood it is accurate the court may heavily weigh this factor in the taking analysis. However, D will still have a Victorian home in a historic district that will likely still be valuable even if he is unable to subdivide it. The city will argue Ds reasonable investment backed expectations are speculative and he is not being deprived of ALL economic value of his property. The court is likely to agree that D is not being deprived of ALL economic value of his property

#### Does the gov action reasonable effectuate a legitimate gov. purpose.

D's Victorian house is in a historic area and the city has a reasonable legitimate public purpose to maintain that historic area. Maintaining this area for the public is a public purpose even though it is an aesthetic one. The court will likely find the city has a legitimate purpose for maintaining the historic area.

Conclusion: Due to D's inability to show he suffered a regulatory taking the court is likely to hold for the city.

**END OF EXAM**