

**SAN LUIS OBISPO COLLEGE OF LAW**  
**CONSTITUTIONAL LAW II**  
**FINAL EXAM**  
**Spring 2020**  
**Professor Erica Flores Baltodano**

**INSTRUCTIONS:** This exam consists of 3 essay questions worth 100 points each. You will be given four hours to complete the examination. The 2020 Spring and Summer Exam Policies, including the modified open resources rules, apply to this exam.

Answer all questions presented by stating the constitutional principle at issue and the relevant legal test. Use the facts to support your analysis under the law, arguing both sides as necessary, and clearly state your conclusion.

Your answers should demonstrate 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 state legal principles. Instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusion, you will receive little credit. State fully the reasons that support your conclusions, relying on historical context, public policy, and theory as appropriate, and discuss all points thoroughly.

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**QUESTION 1:**

Arkansas passed a law to prohibit food manufacturers from “representing food products as meat or meat products when the product is not derived from harvested livestock, poultry, or deer.” Arkansas claims the purpose of the law is to prevent misbranding and misrepresenting food products.

Good & Plant-y Co. was charged with violating the Arkansas law because it sells “Chorizo-Style Sausage,” “Veggie-Delight Burgers,” and “Just Like Chicken Tenders.” The Government alleges the use of the words “Sausage,” “Burgers,” and “Chicken,” are misleading and will confuse the public. Good & Plant-y voluntarily, clearly, and prominently includes the words “All Vegan” or “Plant-Based” on its packaging and puts a letter “V” in a circle on the front of the packaging, a common indicator that a product is vegan or vegetarian.

Good & Plant-y asserts the Arkansas law is unconstitutional and that it was passed because the legislature favors the livestock industry, which has an interest in people eating more animal products and less plant-based alternatives. In the case of *Arkansas v. Good & Plant-y Co.* how will the court rule? Assume there are no issues with procedural due process.

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**QUESTION 2:**

In March 2020 Kentucky lawmakers tightened its existing photo identification law, eliminating a “catch-all” provision that allowed voters to give their own reason for being unable to obtain acceptable identification if they signed an affidavit swearing they were unable to obtain acceptable identification. Now voters have to provide one of the specific and approved reasons for lacking ID to vote. The legislators also tweaked the law so that IDs from other states are not acceptable. The law leaves in place a requirement that Kentucky voters must provide an excuse for being unable to vote in person if they want to vote absentee.

The bill’s backers say the measure is needed to prevent in-person voter fraud and ensure public confidence in elections. Opponents say the law creates unnecessary obstacles to voting and they note there have been zero confirmed incidents of voter impersonation in Kentucky.

The lawmakers made the changes in a committee days after Kentucky’s governor closed the state capitol to the public over coronavirus concerns. DMV offices, one of the most common places people would obtain a photo ID throughout the state are also closed as Kentucky deals with a rising number of Covid-19 cases.

If the constitutionality of Kentucky’s revised voter ID law is challenged in court by a party with standing to sue, will it survive? Discuss the underlying principles related to the constitutional right at issue and the standard of review or rule that applies. You may make policy arguments relevant to the facts presented and to support your analysis under relevant legal precedence.

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**QUESTION 3:**

In February 2020 President Trump's re-election campaign sued the New York Times for libel, alleging an opinion article published by the newspaper falsely asserted that Mr. Trump's 2016 campaign worked in concert with Russian officials to help his campaign. The headline of the essay published in the opinion section of the New York Times in March 2019 was "The Real Trump-Russia Quid Pro Quo." The opinion piece, which was based on publicly available facts, discussed communications between Mr. Trump's inner circle and Russian representatives in the lead-up to the 2016 election. The lawsuit argues the article's conclusion that Trump campaign and Russian officials "had an overarching deal: to help in the campaign against Hillary Clinton in exchange for a new pro-Russian foreign policy," is false and that the article was published "knowing it would misinform and mislead readers." Assuming the re-election campaign's lawsuit survives summary adjudication and is able to proceed, is the Court likely to award damages?

**(Exam end.)**

**QUESTION 1 SAMPLE ANSWER/ISSUE OUTLINE**

- I. Issue/Background
  - A. First Amendment free speech—applies to states via Due Process Clause of the 14<sup>th</sup> Amendment. Statute here regulates commercial speech.
  - B. Commercial speech defined—Court has held commercial speech goes beyond advertisements (*Virginia Pharmacy* case) and includes commercial transactions (*Hair Expressions* case); *Hudson Gas & Electric Co.* defines commercial speech as expression related solely to the economic interests of the speaker and its audience
  - C. Commercial speech is not given the strongest First Amendment protection (it is not like political speech) but commercial speech brings value to the marketplace of ideas, access to information, promotes informed decision-making, etc. so it does receive some First Amendment protection; commercial speech is given intermediate-level scrutiny
  - D. *Hudson Gas & Electric Co.* case sets forth a four-part test (or an inquiry followed by a three-part intermediate scrutiny test) to determine if a regulation of commercial speech is constitutional.
- II. Analysis: Does commercial speech at issue concern an illegal activity or is it misleading or fraudulent?
  - A. Arkansas will argue the food products Good & Plant-y sells are misleading because they use words associated with livestock, poultry, and deer (burgers, chicken, and sausage).
  - B. Good & Plant-y will argue the food products are not misleading. The words burgers, chicken, and sausage are used in conjunction with other words to make clear to consumers they are not actual livestock, poultry, or deer products (“Chorizo-Style Sausage,” “Veggie-Delight Burgers,” and “Just Like Chicken Tenders.”). Moreover, Good & Plant-y can say it went out of its way to present the products as plant-based non-meat alternatives; it displayed the words “All Vegan” or “Plant-Based” on its packaging and used a common circle-V symbol to indicate a product is vegan or vegetarian. It did all this labeling prominently and clearly. Finally, Good & Plant-y could argue that it has no commercial interest in tricking consumers; it wants to attract consumers interested in plant-based diets. Its entire business model is presumably based on reaching a growing number of consumers interested in eating vegan products. Its products are neither misleading nor fraudulent and no one would argue that labeling food products for sale is an illegal activity.
  - C. A court will likely find the commercial speech is not misleading and it will continue on to the three-part intermediate scrutiny test.
- III. Analysis: Intermediate Scrutiny: *Hudson Gas* tells us a regulation, such as Arkansas’s regulation, is constitutional if it (1) serves a substantial government interest, (2) directly advances the asserted interest, and (3) is no more necessary to achieve the government’s interest. The third prong does not require the government use the least

restrictive alternative; it just requires a reasonable fit between the legislature's end goal and the means chosen. The government bears the burden.

A. Substantial government interest: Arkansas will argue preventing misbranding and misrepresenting food products is a substantial government interest. Good & Plant-y may argue the state's actual goal is to protect the livestock industry, but we don't have enough facts to know this to be true. It will be difficult for Good & Plant-y to refute Arkansas' stated goal because protecting consumers from misleading food labels is a substantial state interest. As such, the bulk of the Court's analysis will turn on the second and third prongs.

B. Directly advances asserted interest: Arkansas will argue its regulation directly advances its goal of preventing misbranding and misrepresentation of food products by not allowing food manufacturer's use words like burger, sausage, and chicken when they are not selling actually harvested livestock, poultry, or deer products. But Good & Plant-y has already convinced the Court that its products, which do include the words burgers, sausage, and chicken, are not misleading. Arkansas will have a hard time proving the statute directly advances its goal because Good & Plant-y both uses the forbidden words and does so without misleading. Good & Plant-y might also argue that the statute is vague because it does not exactly define what sort of labeling is legal or illegal. A statute that is vague may be an indication that the statute does not directly advance the state's interests; it does not advance the state's interests if food manufacturers are not clear how to avoid violation. The Court will likely determine Arkansas cannot meet its burden under this prong, but discussion of this prong ties in closely with the third prong.

C. Regulates no more than necessary to achieve asserted interest: Arkansas will argue its ordinance regulates no more speech than is necessary to achieve its interest, but Good & Plant-y's own voluntary actions in placing vegan and plant-based labels prominently and clearly on the package, using words to modify the words burgers, sausage, and chicken, and using a commonly understood symbol of vegan or vegetarian food products demonstrate that the law is more extensive than necessary. Arkansas could achieve its goal of preventing mislabeling or misrepresenting foods by requiring the types of labeling that Good & Plant-y did own its own. LRA not required, but is the law even a reasonable fit? It is not reasonable to essentially ban certain food descriptions that includes the words burgers, chicken, and sausage when it could simply require it to use appropriate labeling to avoid consumer confusion of the sort Good & Plant-y actually used.

IV. Conclusion: In *Arkansas v. Good & Plant-y Co.*, a Court is likely to rule in favor of Good & Plant-y because Good & Plant-y's speech is not misleading and the statute does not directly advance the state's interest in preventing misbranding or misrepresenting food products (given that the labels are not misleading) and because the ban on certain descriptions is more extensive than necessary.

## QUESTION 2 SAMPLE ANSWER/ISSUE OUTLINE

- I. Right to vote: historical context, theory, and general standard of review
  - A. The right to vote was historically limited to a small number of property owning white males; several Constitutional Amendments (15<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, and 26<sup>th</sup>) have expanded the vote.
  - B. The Supreme Court has deemed the right to vote a fundamental right—even necessary to preserve all other right; essential to democracy; through the vote “we the people” hold our elected representatives accountable; discrimination in voting undermines legitimacy of representative government; voting is a form of expression; our most basis rights are meaningless if the right to vote is undermined (*Westberry v. Sanders*).
  - C. Laws may infringe the right to vote by restriction (poll taxes, literacy tests) or dilution (malapportionment, gerrymandering). As a fundamental political right, laws infringing the right vote are subject to strict scrutiny (they must be narrowly tailored to serve a compelling state interest). However, the Court has not always applied strict scrutiny to all laws infringing the right to vote.
- II. Voter photo ID requirements
  - A. Voter photo ID laws are a form of restricting (not diluting) the vote. They highlight a debate between two competing political interests: concerns about voter fraud v. concerns about voter suppression.
  - B. The leading case is *Crawford v. Marion County of Election Board* (Indiana)
  - C. *Crawford* Court did not apply strict scrutiny, but it did not result in a majority opinion. Three justices used a balancing test and found the interest in ensuring the integrity of the electoral process outweighed the burden on voters; three justices concurred, but argued voter ID laws should be upheld unless they constitute a severe restriction on the right to vote; and three justices were willing to use a balancing test, but argued in dissent that the plurality struck the wrong balance because the burden on voters would be great and there was no evidence of voter fraud the voter ID law would fix.
  - D. *Crawford* is the best guide for analyzing whether Kentucky’s revised voter ID law will survive a constitutional challenge.
- III. Argument: Kentucky asserts two reasons for tightening the voter ID Law: to prevent in-person voter fraud and ensure public confidence in elections. Opponents assert there have been no reports of in-person voter impersonation and that the laws will unnecessarily restrict access to the vote. Under *Crawford*, the court will need to weigh these interests. Arguments to consider:
  - A. Analysis re: voter fraud: Not clear from facts why Kentucky’s existing voter ID law needed to be tightened. Even if there had been some reports of voter fraud (opponents report none), the previous voter ID contained a significant safeguard: voters had to sign an affidavit (presumably under penalty of perjury) before being allowed to vote without a photo ID. That requirement alone is significant. The dissenting justices in *Crawford* explained how voter ID laws create obstacles for individuals for whom voting even without an ID can be challenging: poor people, disabled people, seniors, people of color, people living in rural communities, and young people all struggle to get to the polls. Adding a requirement of either having a photo ID or signing an affidavit to vote without a photo ID adds an

additional hurdle that voters must jump over to exercise their right; the revised photo ID simply sets the hurdle even higher. Signing an affidavit under the original voter ID law means voters could be tracked and charged with voter fraud. It is unclear why limiting the number of excuses a voter can present in order to vote without a photo ID changes anything other than reducing the number of people who can ultimately vote. In addition, if Kentucky's goal really is to prevent voter fraud by requiring photo ID, why revise a law requiring photo ID at a time when the DMV—the place where voters most commonly obtain photo ID—is closed? Why stop allowing voters from using photo IDs from other states at a time when access to a Kentucky photo ID has been severely curtailed? And why make it harder to vote with a photo ID without simultaneously making it easier to vote absentee? Absentee voters are also required to present an excuse before voting absentee, meaning voters have a hurdle to jump over to vote absentee if they cannot vote in person. Absentee ballots often require advance notice to ensure receipt of absentee ballots on time and a voter may not know she needs to request an absentee ballot until she is denied the right to vote in person under the new voter ID law. The motive of the legislature's revised voter ID law is suspect: opponents cite zero cases of voter fraud reported in Kentucky, the prior law contained an ample and legally enforceable mechanism for tracking potential fraud, the timing coincides with a pandemic that has made it even harder for voters to obtain photo ID, and law does nothing to make absentee voting easier. The revised voter ID law seems as if it was passed not to prevent voter fraud, but to limit the number of people who can cast a ballot. On balance, given the fundamental right to vote (discussed above), the revised voter ID law does more to restrict access to the vote than prevent in-person voter fraud.

- B. Analysis re: ensure public confidence in elections: the public may lose confidence in elections if there are high (or even low) rates of voter fraud, but as discussed above, there is no evidence of voter fraud in Kentucky. Also discussed above are reasons why the prior voter ID law was sufficient to ensure public confidence. Indeed, if the prior voter ID law had not been sufficient, more cases of voter fraud would have been reported and we are told by opponents there are zero cases. But most importantly, during this unprecedented coronavirus crisis, in which government buildings have closed and much of the United States (and world) has been sheltering in place and limiting non-essential travel to control the spread of COVID-19, it seems Kentucky voters may have a more legitimate claim to a loss of confidence in elections on account of the newly tightened voter ID law. How can voters be confident they will be able to vote when they cannot access a DMV? How can they be confident people who are particularly at risk for COVID-19 (elderly, disabled, poor, etc.) will be able to vote? Depending on when Kentucky's next election occurs, voters may not have time to learn the new requirements and since the absentee ballot rules have not changed, they may not be able to vote absentee unless that take certain steps in advance. The people most impacted by COVID-19 seem to closely trace the people most impacted by voter ID laws. Kentucky's desire to ensure public confidence in elections by passing a revised voter ID law in the midst of the current crisis seems disingenuous at best and directly contradictory at worst. The fact that Kentucky's



revised voter ID law happened after a committee vote, without the opportunity for a full public debate, only serves to strengthen opponents concerns about the actual motives and benefits of the law.

- IV. Conclusion: In *Crawford*, a plurality of justices upheld an Indiana voter ID law. A few of the justices apparently did not find the hardships placed on voters “severe” enough to warrant overturning the law. Kentucky’s revised voter ID law is different from *Crawford* because it tightens an already existing, sufficient (and presumably constitutional voter ID) law without justification at a time when even ordinary hurdles are magnified due to a global health pandemic that has shuttered government buildings and the DMV in Kentucky. The law also fails to alleviate (and instead exacerbates) public confidence in elections. These circumstances place hardships on voters that are more severe than those placed on voters in Indiana. The law will not survive constitutional scrutiny.

### QUESTION 3: SAMPLE ANSWER/ISSUE OUTLINE

- I. Issue/background: First Amendment guarantees free speech and free press. While violations of free speech require a state actor, the First Amendment can come into play in civil lawsuits between private parties when the remedies involved impose liability for speech. Defamation is an example of a tort that brushes up against the First Amendment.
- A. Defamation is speech that injures reputation and it includes spoken speech (slander) and written speech (libel). The challenge for courts evaluating defamation claims is to protect reputation while safeguarding free expression.
  - B. The Court has developed different rules for evaluating defamation cases depending on whether the plaintiff is a public official/figure or private figure and whether the alleged defamatory acts are a matter of public or private concern. The Court is typically more protective of expression involving public matters and public officials because this type of speech is more important to the political process and more protective of reputation when the plaintiff did not voluntarily enter the public sphere and when the matter is not a matter of public concern.
  - C. The leading cases are *New York Times v. Sullivan* (public figure/matter of public concern), *Gertz* (private figure/matter of public concern), and *Dun & Bradstreet* (private figure/matter of private concern). A court will first need to determine if the plaintiff is a private figure or public figure. The Court has said that public officials and public figures include people running for public office. As discussed below, the plaintiff in the case presented is a public figure and the topic involves a matter of public concern—namely, alleged interference of a foreign government in a U.S. presidential election. Therefore, the Court will apply the rule set forth in *New York Times v. Sullivan* (not *Gertz* or *Dun & Bradstreet*).
- II. Rule/Analysis: Under *NYT v. Sullivan*, a plaintiff can recover damages in a defamation case if the plaintiff is a public official or running for office and proves with clear and convincing evidence that the allegedly defamatory statements are false and were made with actual malice. A difficult issue arises when statements are made as opinion. While the Court has said simply labeling a publication “opinion” is not

sufficient to avoid liability, the publication must contain false statements of fact. Actual malice means the defendant knew the statement(s) were false or made with reckless disregard of the truth. It is not enough if the defendant entertained serious doubts as to the truth of the publication. Plaintiff must prove the defendant had serious doubts about the accuracy of the statements before making them.

- A. Analysis of whether plaintiff is this case (President Trump's re-election campaign) is a public official or individual running for office: The campaign itself is not running for office and it is not an individual, but it is a public entity that purposefully and deliberately thrust itself into the public limelight. In fact, campaigns seek as much publicity (preferably good) as possible during a campaign. Moreover, campaigns serve as an extension of the candidate: speaking, acting, raising and spending money, and serving as a surrogate for the candidate is its sole purpose. The actions and speech of a campaign are one-and-the-same as the actions and speech of the candidate himself. Certainly, a campaign to re-elect a U.S. president is not a private party, so we can safely assume the plaintiff qualifies as a public figure. This means we can continue the analysis under *NYT v. Sullivan* (as opposed to applying the more lenient rules provided in *Gertz*, which apply when the plaintiff is not a public figure).
- B. Analysis of whether plaintiff can prove with clear and convincing evidence that the allegedly defamatory statement is false: here, the relevant statement is that the Trump campaign and Russian officials "had an overarching deal: to help in the campaign against Hillary Clinton in exchange for a new pro-Russian foreign policy." Without relying on news/facts outside those provided in the fact pattern (i.e., impeachment hearings; Mueller Report, other sources students are not assumed to have followed), we only know that the opinion piece was based on publicly available facts. This suggests plaintiff will have difficulty proving the falsity of the "overarching deal" statement. Indeed, the New York Times likely published the piece exactly because it found truth in its statements. We rely on a free press and professional journalists such as those employed by the New York Times to inform the public, provide the public with access to information it may not otherwise have, and connect the dots between data points to help the public understand complex facts, moving pieces, and facts that amount to important information necessary to public discourse. It would be hard for plaintiff to prove with clear and convincing evidence that defendant's statement was false, especially because the Court has said defendants in public official defamation cases cannot be expected to prove the truth of its statements. Moreover, the article at issue was clearly published as an opinion piece in the opinion section of the newspaper. This, in and of itself is not enough to avoid defamation liability, but in junction with other factors, it suggests readers would not be confused about the type of piece being published.
- C. Analysis of whether plaintiff can prove with clear and convincing evidence that defendant acted with actual malice: this is a substantial burden for plaintiff to overcome; it is a subjective standard and would involve plaintiff proving the New York Times published the opinion piece knowing its statement about the "overarching deal" was false or with serious doubt about its truth. The New York Times most likely published the article with exactly the opposite knowledge.

Relying on facts publicly available, the opinion piece made an allegation of an “overarching deal” precisely because it found the allegation to have merit, truth, and veracity. Indeed, the opinion piece was probably refuting a different version of facts coming from plaintiff of the candidate that it deemed to be untrue or unsupported. Since actual malice is an exceedingly difficult standard to meet, plaintiff will probably be unable to demonstrate with clear and convincing evidence that the statement made by defendant was made with actual malice. Moreover, the theory behind libel laws involving public officials is that they have extensive opportunities to present a different story, refute allegations, and shape public opinion. The Court’s framework for libel laws errors on the side of free press/free expression when it comes to public officials and issues of public concern.

- D. Conclusion: Assuming the re-election campaign’s lawsuit survives summary adjudication and is able to proceed, a court is not likely to award damages. The Court’s framework for libel laws errors on the side of free press/free expression when it comes to public officials and issues of public concern and it is unlikely plaintiff will meet its burden here.

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Q1

What constitutional issues Good & Plant-y Co (Good Plant) can raise after being charged in violation of Arkansas law?

For the purpose of exam it is presumed that Good Plant has proper standing. Good Plant would assert violation of its constitutional right of freedom of speech.

Freedom of Speech

The First Amendment to the Constitution prohibit the government from interfering with freedom of speech. Congress "shall make no law abridging freedom of speech. The freedom of speech applies to the state through the 14th A.

When regulations applies to the speech based on its content (content-based) they are presumptively unconstitutional unless the government prove that such regulations are necessary to achieve a compelling state interest, they are narrowly tailored and the least restrictive alternatives. When regulations are content-neutral the government must prove that regulations serves an important state interest, unrelated to suppression of speech, the regulations are narrowly tailored (without prove of less restrictive means) and do not burden more speech than necessary.

Good Plant would content that the AZ regulation are content-based because prohibit Good Plant from placing specific meat related information on labels, that such prohibition is aimed specifically against vegan product in favor of meet products. The AZ would argue back that Good Plant does not fall under category of speech that is highly protected because it is commercial speech and different standard of review applies.

Commercial speech (CS)

CS motivated by economic interest or refer to commercial product. CS receive low value protection under the 1st A. The state can prohibit advertisement of illegal activity or misleading, false or deceptive content.

The AZ will argue that Good Plant's advertisement is misleading and false and therefor is unprotected. And AZ properly charged Good Plant for violation of AZ law. The state alleged that the names of labels as "Chorizo-Style Sausage" or "Just Like Chicken Tenders" would mislead

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consumers and raise false expectations about the product. The average consumer read only big letters on the label, and catch mostly main words that state Sausage or Chicken that is commonly associated with meat product. Because such words are used in Good Plant's product, such label is misleading and deceptive. False and deceptive commercial speech can be prohibited and the state properly applied law against Good Plant.

The Good Plant would argue in its defense, that since they used the words "All Vegan" and "Plant Based" on the same label in from of the packaging that is next to the name of the product, it is not hidden on the flip side and the average consumer has an opportunity to read whole label and make truthful understanding about the nature product. Moreover, the letter "V" is commonly known, is also on the label, and helps to identify the product as vegan. Good Plant will argue that the speech is not misleading and the State must meet three-prong test in order to validate constitutionality of regulations.

Three prong test from Central Hudson Gas and Electric

When the law is not illegal or deceptive, the regulations will be upheld only if meet three requirements: (1) regulations must serve an important governmental interest; (2) directly advance such interest; and (3) not be more extensive than necessary to serve such interest.

Important state interest

The state has an important interest to provide safety and health to the community. The primary goal of regulation was to educate citizens about nature of the product, its ingredients and content. In enacting legislation the AZ aimed to prevent misbranding and misrepresentation of the meat products. This is an important state interest.

Good Plant, in its turn would argue, that an actual purpose of the legislation is to promote interest of the livestock industry because the state favors meat producers as a valuable source of revenue, and there is little to do with the health of citizens and their wellbeing. Such allegations can go either way, but absent to evidence of entanglement with livestock producers, it sounds somewhat speculative.

Directly advance such interest

The purpose of regulation, and specifically labeling, must directly advance interest of the public to be healthy and safe. The labeling is important tool of communication between the producers and the consumers. Labeling must be truthful and accurate, this is in direct connection to provide the public

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with information about product, content, ingredients. This prong will be proved because in requirement for proper labeling the state directly inform the consumer.

Not be more extensive than necessary to achieve interest.

There must be nexus between the means used and ends sought.

Since Good Plant did not have intent to mislead and did not place deceptive label, but simply identify the product "Just like" or Chorizo-Style", Good Plant would argue that the law applies to him improperly. Because he is not a meat producer and his products are plant-based, he properly labeling his product, did not place misleading information stating that his products contain any mentioned meat, the law applies in more extensive way than necessary. There is no nexus between having him truthfully labeling vegan product under "Burger" or "Sausage" label and the state's interest in promoting health and safety in community.

Conclusion: the Court would found that even though the law promote an important state interest and directly advance such interest, it more extensive than necessary.

Good Plant would also challenge the law as vague.

Vagueness doctrine

The law will be found vague when the person of common intelligence would not understand what conduct is prohibited and what is permitted, or the definition is not clear to understand is explicitly.

Good Plant will argue that the definition of Sausage and Burger is ambiguous and can apply to any other type of product, including vegetarian. Even though these two products were initially made from meat, lately many people who adhere healthy style of life, who eat solely plant-based food expect to buy vegetarian burger or sausage, and can use such words as Sausage and Burger in different contest. These words are ambiguous and improperly applied under AZ law to charge Good Plant for violation thereof.

The state would argue that the law clearly state that such words are traditionally understood as the products made from meat, and even though there are expectation of vegetarians, the law must be clear in definition to avoid misleading of the consumers.

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Good Plant would contend that since the words Sausage and Burger are not stated in the regulations as solely meat products, the law must give more narrow definition of such products, because of many other manufacturers of plant-based food could be caught in violation for the same reason. Good Plant would not argue about definition of Chicken as it properly state the name of poultry.

Overly broad and over-inclusive

The law is overly broad when (1) it regulates substantially more speech than necessary, or (2) if the person to whom it applies constitutionally can prove that it would be unconstitutional to apply it to the others.

Good Plant would argue that the law is over-inclusive and too broadly apply to more people than necessary. More and more manufacturers adopt to use different type of products to satisfy the needs of the vegan and meat eating consumers, and if AZ law would apply to producers of other plant-based products or to meat other than livestock, poultry, or deer (for instance, bizon meat), or from any other wild animals, it would be unconstitutional. When the law is overly broad or over-inclusive the state will not be able to prove that it is narrowly tailored to achieve the state interest.

Conclusion: the Court may found that the law is vague and applies to more producers than necessary, such law can be struck down unless can be narrowly construed and interpreted or severed.

**END OF EXAM**

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Q2

### **Fundamental Right (FR) - Right to Vote**

#### **State Action**

When the government makes a regulation that infringes upon an individual's FR, the court will review the regulation's constitutionality under a standard of review depending on the classification of the right. In order for a constitutional analysis to be triggered, there must be a government actor. Here, Kentucky lawmakers have tightened existing photo ID laws regarding voting. Kentucky lawmakers are elected and appointed officials to the government. The 1A applies to the states through the incorporation doctrine of the 14A. Thus, Kentucky lawmakers are the government actor.

#### **Is a FR Involved? / Has the FR Right to Vote been Infringed?**

An enumerated FR is the right to vote, which is generally subject to strict scrutiny. Different regulations have also been placed on the right to vote, traditionally as a way to suppress the minority voter. Regulations concerning voter ID laws remain fiercely debated. Voter ID laws remain supported to protect the integrity of elections and confidence from the public. Opponents of the law will claim that individuals' right to vote is infringed by the requirement to obtain a valid ID. Some people do not have the money, or the ability to obtain an ID. Under the new regulations, if a person is unable to meet one of the specific and approved reasons for lacking ID, they will be unable to vote. Also, new residents to the state are unable to use an out-of-state ID to vote. Proponents of the law state that voter ID laws prevent voter fraud and ensure public confidence. The court has not set out a standard of review for voter ID laws, but rather uses a balance test and weighs the interest of the state versus the burdens on the individual to meet the requirements.

#### **Voter ID Law Balance Test**

The court will examine the interests of the government in enacting the voter ID law and balance that against the burden upon the individual to meet the law's requirements. Here, Kentucky tightened the voter ID regulation in several ways - did away with the "catch-all" provision that allowed voters to give their own reason for being able to obtain acceptable identification, requiring new voters to provide one of the specific and approved reasons for lacking ID to vote, disallowing the use of IDs from other states, and requiring that voters provide an excuse for being able to vote in person if

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they want to vote absentee. Kentucky will argue that the laws were needed to prevent in-person fraud and ensure public confidence in voting. Opponents of the law will point to the fact there have been zero confirmed incidents of voter impersonation in Kentucky. The facts do not say whether Kentucky has taken any other action to combat voter fraud or whether laws exist to criminalize it. Generally, however, the court does favor government safeguards of elections to ensure the public's confidence against fraud.

However, the court will also consider the burden to the individual who is unable to vote because of the law. Opponents argue that the laws create unnecessary obstacles to voting. Additionally, Kentucky made these changes in committee, just days after the capitol was closed to the public due to Covid-19. Through the lens of Covid-19, the burden to the individual has taken upon a new character. The public has not had opportunity to review and comment on the changes proposed by the legislation. The DMV, one of the most common places people would obtain a photo ID, closed all offices throughout the state also due to Covid-19. If there is a member of the public that did not yet have an ID prior to the Covid shutdown, it will be more difficult for them to obtain one. Also, if a person has recently moved from out-of-state, they would not be able to use their old ID, but also will have difficulty obtaining a new one. The burden upon the individual, especially considering Covid, appears to outweigh the government's interest.

However, the law does leave in place the requirement that a voter must provide an excuse for being unable to vote in person if they want to vote absentee. The government will argue that by allowing a voter to provide an excuse to vote absentee, a voter is not required to get an ID. Opponents will argue that forcing people that cannot get an ID to vote absentee and provide an excuse is a further burden to those people exercising their right to vote. People that do not regularly have an ID will likely not undertake the additional requirements to submit an absentee ballot. However, the ability is there for the individual to vote. Even with Covid in play, people who are unable to get an ID to fulfill the ID requirement have an avenue to vote by the absentee process, which is not unduly burdensome. By leaving in place the requirement to provide an excuse to vote absentee, the legislation may have created a safety net for the voter ID law. Thus, it is likely that if the regulation were to be challenged by a party with standing, the court will find the regulation constitutional.

**END OF EXAM**

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### **Freedom of Speech**

The First Amendment Provides: "Congress shall make no law, abridging the freedom of speech, of the the press, of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The government may neither censor all categories of speech nor engage in content-based discrimination among different categories of speech (even if that speech is offensive), with some exceptions.

### **Exceptions to Freedom of Speech**

The freedom of speech is a fundamental right, but not an absolute one. Defamation is an exception that is relevant in this case.

Here, the New York Times is being sued for libel. If the lawsuit by President Trump survives summary adjudication his ability to recover damages will depend on whether the opinion piece published is based on lawfully obtained information and relied upon as such by the New York Times. President Trump will have the burden to prove the falsity of the published statements in order to establish that New York Times acted with actual malice.

### **Defamatory Speech**

Constitutional restrictions apply to defamatory speech where the plaintiff is either a public official or public figure, or where the defamatory statement involves a matter of public concern.

When the plaintiff is a public official or public figure, the plaintiff must prove the state law requirement of defamation plus **actual malice**, defined as knowledge of the falsity or reckless disregard of the truth or falsity of the statement.

President Trump is a public official that claims the article's conclusion that his campaign and Russian official's "had an overarching deal: to help in the campaign against Hillary Clinton in exchange for a new pro-Russian foreign policy" is false and the article was published "knowing it would misinform and mislead readers." He will argue the New York Times acted with actual malice because the information is false and has the effect of misleading readers.

The defamatory statement at issue here is a matter of public concern because the United States citizens elect a president that they believe has the American citizen's best interest. Thus, a president

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that is intending to impose a pro-Russian policy is not furthering american interests but instead another country's interests (specifically, the headline of "The Real Trump-Russia Quid Pro Quo" gives that interpretation).

The New York Times will argue that the opinion piece was based on publicly available facts that were discussed in communications between Mr. Trump's inner circle and Russian representatives in the lead-up to the 2016 election. Under *Cox*, New York Times will argue that these were publicly available facts and it cannot be held liable for publishing truthful information obtained from public records.

The challenge will be for President Trump to prove that the information is false or assert that the information obtained was not public record. Likely, whether or not the information was obtained lawfully, President Trump will find it more helpful to prove that the "overarching deal" is completely false. He will be required to provide substantive proof to render the headline and communications entirely false and made up by New York Times. It will not serve his best interest to advance on a "unlawfully obtained information" theory because this will prove New York Times' message is actually truthful.

In conclusion, the court will likely not award damages to President Trump. When public officials take office, they accept that their lives are put on display and subject to higher public scrutiny than the average person. Absent any facts or proof provided by Mr. Trump that New York Times unlawfully obtained information and that the defamatory statement is false, Mr. Trump will not recover damages.

**END OF EXAM**