

CONSTITUTIONAL LAW
FINAL EXAMINATION
Spring 2021

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Hon. DAVID ZULFA

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 8th 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.

*****3*****

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 posted on 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.

1)

ADRIAN v. OUR LITTLE FLOWERS SCHOOL

Is the school's decision to terminate Adrian protected by the 1st Amendment Free Exercise Clause?

The Free Exercise clause prohibits the government from passing any laws restricting the free exercise of religion and from punishing or burdening persons or organizations based on their religious beliefs. Laws specifically designed to restrict free exercise or to interfere with religion must meet strict scrutiny. However, if a law is neutral and generally applicable but happens to incidentally burden religion, the Court will implement the Smith rational basis test.

Here, Our Little Flower School (hereby "School") decided to instantly terminate Adrian after he took a brief medical leave to undergo gender reassignment surgery. In response, Adrian filed suit against the School claiming unlawful sex discrimination. The School seeks to avail itself of the protections of the Freedom of Religion by asserting that it is a religious organization and thus is excepted from abiding by non-discrimination laws. In order to invoke these protections, the Court must first consider the threshold question of whether the Schools beliefs are sincere and merit First Amendment protections. The Court may consider the sincerity of the belief held by the individuals asserting a free exercise challenge. Here the School has a mission statement that directly denies the existence of a supreme being: "...but with no belief in God or a Supreme Being." The Court may consider this to be an "anti-religious" statement. The School will argue that a religion does not require a Supreme Being to be genuine and that the Court cannot inquire into the validity of the religion, but simply whether its faith is genuine. The School will show that before every game, the Principal directed Adrian to lead the students in a prayer and this was done before every game for many years. This shows the sincerity of

Good
Issue
introduction

Excellent
rule
statement

good

good
analysis
+
use of
facts

the schools religious beliefs. The Court will likely find the School has met the threshold burden of a sincerity of belief. The School will then argue the the anti-discriminatory law in question is discriminatory against the school; however, the Court will likely side with Adrian who will argue that the law is neutral and generally applicable because it is intended to apply to all persons equally. A neutral and generally applicable law must meet the Smith rational basis test. Here, Adrian or the government defending the law will argue the state has a legitimate interest in protecting all persons from discrimination and the law is rationally related to that interest. The Court will likely find that Adrian or the govt. has met the burden of showing the laws legitimate interest. However, the School will likely invoke the Minister Exception Defense. Under this exception, religious organizations are exempt from employment discriminations laws because they burden their free exercise. Adrian will argue that he was a teacher and coach and was not a minister nor did he ever serve any ministerial duties. However, a minister may be loosely interpreted and the School may impose that title on its staff. *Good point (Hosanna-Tabor case)*
But here Adria was "not designated a minister" - Does that distinguish? More like Ouellet & Gravelle?

The Court will likely conclude that the School has shown its sincere religious belief and find that although the anti-discriminatory law is constitutional, the School is exempted from complying because of the Minister Exception.

Was Adrian's termination a violation of his Procedural Due Process rights?

Procedural Due Process requires the state give fair process, generally notice and hearing, before depriving an individual of life, liberty, or property.

Here, Our Little Flower school is operated by the Open Flower Society, a presumably private organization. Because it is a private organization, Procedural Due Process rights are not implicated. Were the school a public school, Adrian may have a valid claim for a deprivation of property. There is a deprivation of property where a person has an entitlement and the entitlement is not fulfilled. Adrian's employment would be considered

that property. In determining if there was a violation of his Due Process, the Court would apply the Mathews factors. The importance of Adrians private interest is substantial; his job is his livelihood and he has been there for a long time and is well liked by students and their parents. Secondly, the risk of erroneous deprivation is minimal. The states interests in denying his right to property is not legitimate and much less compelling. Any claims of "protecting children" from "confusing topics" are without merit. Children are exposed to various types of people in society and it is more beneficial to have an understanding and tolerance for all. *Good point*

C The Court will not likely find procedural due process rights at the School, a presumably private organization.

OUR LITTLE FLOWERS SCHOOL v. PROTESTING PARENTS

*Good
ISSUE
Statement*
Does the state law prohibiting speech, leafletting, or picketing within 25 feet of a church or church related school violate the 1st Amendment Freedom of Speech and Expression?

The 1st Amendment guarantees freedoms concerning religion, assembly, and the right to petition and expression. A law is content-neutral if it applies to all speech, regardless of its subject matter. Content neutral regulations are subject to intermediate scrutiny. In order to meet intermediate scrutiny, the state must show the law in questions is substantially related to an important government interest.

Question: Is prohibition on leafletting & picketing viewpoint-based (content)?

Here, the School seeks to enjoin Juan, Christina, and all other parents protesting outside the school by invoking a law that prevents speech and picketing, etc. The Parents will argue that the law is an unlawful infringement on their right to free speech and expression. Because the law is generally applicable, the law must meet the burden of intermediate scrutiny. Here, the School or the State will argue that the law has an

important interest in protecting all churches and school related churches so that their right to free exercise is not unduly burdened. And that the law in question is substantially related to protect that important interest. The Parents will counter argue that the State should not seek to protect churches in this manner, and specifically churches, because it may violate the Establishment Clause by showing religious preference over non-religion. The parents will argue that the the State does not have an important interest in protecting churches and should adhere to the strict separation of Church and State beliefs upon which this country was formed. And any interest it does have does not defeat the Parents' right to speech, and their lawful right to express their beliefs.

The Court will likely find that the School/State has not met the burden of intermediate scrutiny and thus the law preventing the Parents' speech does not meet constitutional muster.

Is the state law an unlawful prior restraint of speech in violation of the 1st Amendment?

Any administrative or judicial order that preemptively prevents speech from occurring violates the 1st Amendment right to free speech.

Here, the Parents challenge a law already in place that prohibits speech, leafletting, picketing, etc., before it takes place. Once the parents' heard about the termination of beloved teacher Adrian, they began protesting. They soon learned the school filed suit to prevent them from protesting. The School did so by invoking a law already in place that was created to prevent speech from occurring near churches or church related school. Because the law prevents all speech, any kind of speech, near churches or church related schools, it is content-neutral. In that it is seeking to restrict content, but not a specific kind of content. Arguably, because the restraint is set for churches and church related school, it is content based - because it likely will regulate anti-religious content. However,

the Court will likely find that the wording of the law is content-neutral. As such, in order for the law to be constitutional: 1) the standards must be narrowly drawn, 2) if the restraint is an injunction, it must be promptly sought, and 3) there must be a prompt and final judicial determination as to the validity of the restraint. The burden here shifts to the state to show the law is constitutional. The state will likely argue that the law is narrowly drawn and limits the speech restraint to only 25 feet away. The Parents will argue that is not narrowly drawn and "church" or "church related school" is far too vague and overbroad. Secondly, the school promptly sought an injunction to prevent the parents from protesting and thus it will likely be found timely. Lastly, the suit was also brought promptly which may lead to a prompt judicial determination.

The Court will likely find that the law is an unlawful prior restraint on speech because the law is not "narrowly drawn." *Refer to the "bubble ordinance" cases: 8 feet? 30 feet? (NOT) 15 25 feet limit acceptable?*

Does the state law violate the parents' Fundamental Right to Child Rearing Decisions?

*good
view
situation* If a fundamental right is denied to all persons, it is a Substantive Due Process issue. If it is denied to some, then it is an equal protection issue. All persons have a fundamental right to privacy which includes marriage, sexual relations, childrearing, and more. State laws impairing child rearing decisions are subject to strict scrutiny.

*good
Analysis* Here, the Parents assert that the state law that prohibits speech, leafletting, picketing, etc., infringes on their fundamental rights to parent their children as they choose. Parents will claim that they are protesting and protecting their children's interest by teaching them it is right to stand up against immoral and unlawful activity like terminating someone because of their sex and or status as a transperson. Parents will argue that the schools mission is to teach tolerance and understanding yet when they are protesting to assert those beliefs, they are brought to court. In order for the law to defeat their fundamental right to parent

as they choose, the state must meet strict scrutiny: a compelling government interest which is advanced through a law that is necessary, narrowly tailored and the least restrictive means. Here, the state has the burden of meeting strict scrutiny. They will argue the law does not infringe upon parental rights and even if it does, it has a compelling interest in protecting churches and church related schools. And in doing so, the law is narrowly tailored to only limit 25-feet outside a church. However, the parents will argue the law is not narrowly tailored and preventing them from asserting their speech does affect their parental decisions.

The Court will likely find that the state does not meet the burden of strict scrutiny and it cannot prevent Parents from their fundamental right to parent as they choose.

Good conclusion statement

Does the state law violate the parents' right to association and assembly under the 1st Amendment?

Good issue statement

Freedom of Association is protected under the 1st Amendment and protects the right to associate with, or not associate with, persons of one's choosing. This includes the right to assemble for a specific purpose or agenda. There are two types of associations: intimate and expressive. Intimate associations are close family and personal relationships. Expressive associations are those with a purpose of expressing or advocating views. The state may not prevent association of these groups.

Here, parents will argue they formed an expressive group brought together for the purpose of promoting their views and beliefs about the Schools policy for terminating someone for undergoing gender reassignment surgery. The parents will argue that the law preventing them from getting together in a meaningful location to express those views is a violation of their 1st amendment right to assembly and association. The group is

Public Forum?

conducting purely lawful activity and thus any law burdening that 1st amendment right will likely be found unconstitutional.

The Court will likely find that the state will not meet strict scrutiny and the law infringing on assembly will be unconstitutional.

END OF EXAM

Excellent organization and analysis. Your use of facts and inferences to support the arguments is very well done and you discern and articulate the issues well. Suggestions:

Expand analysis of the ministerial exception to include criteria used in Our Lady of Guadalupe case for non-designated minister.

Also analyze Public forum (sidewalk) and whether state law is reasonable time, place + manner regulation w/ "Bible ordinance" cases (Hill, McCullen).

Overall, Excellent job!

2)

VAL v. BOARD

Was the school policy to hold graduation on Saturday an unlawful infringement on Val's Freedom of Religion?

The 1st Amendment protects an individual's right to freedom of religion. Specifically, the Free Exercise clause prohibits the government from passing any laws restricting the free exercise of religion and from punishing or burdening persons or organizations based on their religious beliefs. Laws specifically designed to restrict free exercise or to interfere with religion must meet strict scrutiny. However, if a law is neutral and generally applicable but happens to incidentally burden religion, the Court will implement the *Smith* rational basis test.

Here, Val seeks for the Board to accommodate her religious beliefs because she is the valedictorian and thus has earned the right to speak at graduation. She has requested the board change graduation to another day because her religion observes the Sabbath and she will not be able to participate on Saturday. The Freedom of Religion protects individuals from actions that may infringe or burden the free exercise of their religion. However, the Board is a public entity and does not need to accommodate Val's religion. If the Board does not accommodate Val, she may bring a claim against the Board asserting her right of Free Exercise was infringed. Its policy is generally applicable and neutral and in this case only incidentally burden's Val's religion. A Court, in deciding whether this policy violates the Free Exercise clause, must apply the *Smith* rational basis test. The Board, a public entity, holds graduations on Saturday as a longstanding policy to accommodate parents who work and any other children related to graduates who still may be in school during the week. Reasoning behind holding graduation on a Saturday is accommodating the majority of graduating students and their parents and family members

Good issue statement

good rule statement

Excellent Analysis

who may be flying in from outside locations. The decision to hold graduations on Saturday is rationaly related to that purpose of accommodating the majority of graduates. ^{misspelling} which in turn only incidentally burdens Val's religion. ^{because - why is it just incidental? one lesson, etc} Because the policy was not intended to burden religion, it will likely be found constitutional.

A Court will likely find that the policy is constitutional and Val's Free Exercise claim will be defeated. *Good Argument Statement*

Was the school policy to hold graduation on Saturday thus preventing Val from speaking at graduation an unlawful regulation of speech in a limited public forum?

Important issue

The government has broader powers to regulate conduct associated with speech that it does the actual content of speech. A limited public forum is public property that has not historically been held open to speech-related activities, but which the government has opened for a specific speech activity.

good analysis

Here, the school policy to hold graduation on Saturday may bring a suit by Val in which she will argue that it prevents her from speaking at graduation in the limited public forum which has been opened for the purpose of graduation. As valedictorian, Val has earned the right to speak at graduation but cannot do so because of the school policy. Restricting speech at a limited public forum may be constitutional if: 1) the policy is viewpoint neutral, and 2) the policy is reasonably related to a legitimate government interest (rational basis). Should Val claim the school policy is an unlawful restriction of speech at a limited public forum, the Board may assert it meets the rational basis standards and its policy is constitutional. The school policy is legitimate in that it was intended to accommodate the majority of graduates and their families. It was not created to burden a religion or any viewpoint; the fact that it does not accommodate Val's religion is incidental. Further, the Board will argue the school policy is reasonably related to that legitimate purpose of

serving the majority of graduates. The School may reason that graduation is a special and significant event and thus aims to include as many graduates as it can. It is unfortunate that it cannot accommodate Val. *Also, School can control speech it officially sponsors (Kazalwood)*

*Jord
Archer
5/1/2018* A Court will likely find that the policy is constitutional and Val's claim that the policy is an unlawful regulation of speech in a limited public forum will be defeated.

NIMBY v. BOARD

Is the Board's potential decision to reject NIMBY's application an unlawful regulation of speech in a Designated Public Forum?

The government has broader powers to regulate conduct associated with speech that it does the actual content of speech. A designated public forum is public property that has not been historically open to speech-related activities, but which the government has thrown open for speech activities on a *limited* or *permanent* basis. A regulation restricting speech in a designated public forum is constitutional only if it meets the following criteria: 1) must be content neutral, 2) must advance an important government interest, 3) must be narrowly tailored, and 4) must leave open alternative channels of communication.

*good
analysis* Here, the Board has routinely rented the school auditorium to various community groups for a modest fee. Schools and school auditoriums are not considered traditional public forums and have not typically been open to the general public as spaces for speech without distinct permission from schools. However, in opening up a specific space such as an auditorium for the community of select weeknights and weekends, the typically non-public space has become a designated public forum. In this case, a designated public forum existing on a permanent basis, presumptively. Should the Board reject NIMBY's application to rent the auditorium for their member recruitment meeting, it may incur a

suit claiming the Board is unlawfully restricting speech in a designated public forum. If this occurs, the Board may not be able to meet the necessary criteria to restrict the speech.

The first element is that the decision was content neutral. NIMBY will claim their

application was denied because of their beliefs and ideologies in favor of discrimination.

If they can prove the Board rejected the application on this basis, it is not a content neutral decision and thus cannot restrict NIMBY's speech. However, the Board will likely succeed in showing an important government interest that is narrowly tailored. The Board has an important interest in ensuring the safety of its community and doing what it can to prevent violence and criminality. The police chief has informed the Board that opposing

groups intend to remove NIMBY members using physical force. In order to prevent violence and destruction of property on school grounds, the rejection of the application serves an important interest that is narrowly tailored. Rejecting the application resolves

any threats of violence. Lastly, the Board may again not be able to overcome the final element of leaving open alternative channels of communication. In rejecting the use of this designated space which is considered open to the community, it closes one of the primary locations for speech. The board may attempt to argue that other forums are available such as parks or other public locations. NIMBY will likely argue that this location has the benefit of being an indoor forum and will not accept a park.

A Court will likely find that the Board's rejection of the NIMBY application is an unlawful regulation of speech in a Designated Public Forum.

Is the Board's potential decision to reject NIMBY's application an unlawful prior restraint of speech?

Any administrative or judicial order that preemptively prevents speech from occurring violates the 1st Amendment right to free speech.

Here, a policy to reject NIMBY's speech before it occurs may be an unlawful prior restraint. If NIMBY can show the rejection occurred because of the content of their beliefs, then the policy is content based and must meet strict scrutiny standards. This may be difficult to overcome. If the Board can show that the true reason it rejected the application was to prevent violence at their school site and to prevent destruction of school property, then the rejection was content neutral and the Board must meet a lower constitutional standard. The Board could successfully argue that the lower standard should be imposed because preventing violence and destruction of property is important. Under the lower standard, a rejection of the application is a "narrowly drawn" resolution which will protect the important interest of preventing violence and destruction of property.

But isn't the threat by opponents itself because of content?

A Court will likely find that the potential decision to reject the application is not an unlawful prior restraint of speech because it was intended to prevent violence. *By others? (This is a Truyl question)*

Is the Boards potential decision to reject NIMBY's application "without serious consideration" an unlawful violation of NIMBY's Procedural Due Process? *Good Question*

Procedural Due Process requires the state give fair process, generally notice and hearing, before depriving an individual of life, liberty, or property.

Here, the Board is presented with an application from NIMBY to use the auditorium for their speech. The board has received pressure from the community to reject the application "out of hand, without even the slightest appearance of giving it any serious consideration." Should the Board take this approach, NIMBY may file suit alleging the Board violated their Procedural Due Process rights. NIMBY will assert the rejection of their application was an unlawful deprivation of a significant constitutional liberty, in this case speech and assembly. In determining whether Due Process is required, a Court will

assess the *Mathews* factors. The importance of NIMBY'S interest are significant; they have the right to free speech and assembly and denial of the use of the auditorium infringes on that right. That significant interest is not balanced by the important of the Board's interest in fiscal and administrative efficiency.

A Court will likely conclude that NIMBY merited fair notice and hearing before their application was rejected, and it would be a violation to reject their application for pressure from the community for a swift rejection. *Good conclusion*

Is the Board's potential decision to reject NIMBY's application an unlawful infringement on the 1st Amendment Freedom of Association?

Good issue start!

Freedom of Association is protected under the 1st Amendment and protects the right to associate with, or not associate with, persons of one's choosing. This includes the right to assemble for a specific purpose or agenda. There are two types of associations: intimate and expressive. Intimate associations are close family and personal relationships.

Expressive associations are those with a purpose of expressing or advocating views. The state may not prevent association of these groups.

Here, NIMBY may claim the rejection of their application infringes on their 1st amendment right to freedom of association and assembly. NIMBY will argue they are an expressive association and thus any restrictions on their freedom to assemble are unconstitutional. NIMBY has expressly shared their purpose of advocating racial and religious discrimination. Because of NIMBY's mission/purpose, the Board may argue that they are engaging in illegal conduct and thus restricting them from associating is permitted. Under the Scales test, the state may prohibit or punish associations only if they require active participation, members have knowledge of illegal objectives, and members

Excellent analysis

have the specific intent to further those objectives. The Board has no evidence of any illegal intentions and thus will not likely succeed at restricting their right to assembly.

good | A Court will likely find that the Board's potential decision to reject NIMBY's application would be an unlawful infringement on the 1st Amendment Freedom of Association.

END OF EXAM

Excellent!

Your Organization is Perfect - identifying the issues clearly and citing applicable rule accurately + fully, then analyzing convincingly citing facts and applying the law. You even came up with issues I did not think of myself - showing promising legal creativity. The only suggestion is to review the "Hostile Audience" cases re censoring or punishing the speaker because of unruly or threatening audience.

Keep up the great work!

3)

A. FREEDOM OF EXPRESSION

The freedom of expression is guaranteed by the First Amendment's Free Speech Clause, which prohibits the federal and state government from enacting laws that unduly restrict an individual's right to freely communicate information, ideas, and opinions through speech or conduct.

Here, Marty's freedom of expression is restricted by not being allowed to use a billboard for his business.

COMMERCIAL SPEECH

Commercial speech is protected to some extent, but commercial speech that is false, misleading, deceptive, or concerns illegality is not protected and may be restricted.

Government must meet the Central Hudson test to regulate commercial speech which is lawful and not misleading.

Here, since Marty wants to advertise on a billboard his action would be commercial speech. *Good point*

Under the Central Hudson test the government may restrict commercial speech only if the regulation serves a substantial government interest, directly advances that interest, and is narrowly tailored such that there is a reasonable fit to serve that interest.

Here, the state may argue that prohibiting advertising of marijuana sales on billboards serves the substantial government interest of not promoting marijuana to minors and not having billboards that are visible to children directly advances that interest. However, it can be argued that it is not narrowly tailored such that there is a reasonable fit to serve

that interest because it prohibits billboards advertising marijuana sales ANYWHERE in the state. In addition, advertisements for "vices" such as restrictions on tobacco and liquor have been held invalid as not narrowly tailored. However, it can be argued that because under federal law marijuana remains illegal that means that it is unprotected commercial speech due to concerning illegality. However, since it is a STATE law prohibiting the advertising this argument is likely to fail. *why? (e.g. state is bound by its own laws)*

2. RIGHT TO ABORTION

Abortion has been recognized as a substantive due process right included in the right to privacy. However, regulations on abortions are analyzed under the undue burden test. Government may not ban abortion, but may regulate it as long as it does not create an undue burden. An undue burden will be found where the government regulation has the effect or purpose of placing a substantial obstacle in the path of a woman seeking an abortion. *book rule statement*

Here, the woman can argue that the ordinance places an undue burden on a woman's right to choose abortion because it prohibits abortion throughout the city and by making those who help a woman secure an abortion liable for a lawsuit. Firstly, the city bans ALL abortions throughout the city which is an unconstitutional ban on abortion. In addition, it places a substantial obstacle in the path of women seeking an abortion by making it possible for people who help another get an abortion to be sued. *Thus denying help to women seeking abortion*

END OF EXAM

Also: 1st Am Free Speech Association?

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?)

