CONSTITUTIONAL LAW
FINAL EXAMINATION
Professors Malaguti and Winig

Fall 2010 Semester

YOUR ENTIRE STUDENT ID NUMBER:

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INSTRUCTIONS:

The instructions run onto the next page. You may read this page and then turn the page to finish reading the instructions. You are not to look beyond the second page of instructions until you are instructed to begin the exam.

YOU ARE NOT TO HAVE A CELL PHONE, OR ANY OTHER DEVICE THAT CAN TRANSMIT AND/OR RETAIN INFORMATION, ON YOUR PERSON DURING THIS EXAM. POSSESSION OF A CELL PHONE OR SUCH OTHER DEVICE SHALL BE TREATED, AND DEALT WITH, AS CHEATING.

Please take two (2) blue books. Please write "Scrap" on one of the blue books. Please write "Two" on the other blue book. Please write your student id number *on both* blue books as well as on this exam booklet.

Please do not identify yourself in any way other than by student id number. Please do not write any information in your blue book, scrap book, or this exam booklet that might reveal who you are.

This is a closed-book examination; other than writing implements, you are not to have any materials on your table or at your feet. Please place all books, knapsacks, briefcases, etc. at the side or front of the room.

Please do not use your own scrap paper. You may use the blue book labeled "Scrap" as scrap paper. Please turn in your scrap blue book with your exam blue book and this exam booklet. I will not accept any blue books after you have turned in your exam materials -- no exceptions.

This examination consists of two parts:

Part One – Directed Essays consists of a series fact patterns, each of which has a number of questions that follows and inquires about the law and analysis that applies to

the particular fact pattern. You are to read each fact pattern carefully and answer each question that follows. There are a total of 50 questions, and you are to answer them all.

The suggested time for Part One is two hours (120 minutes).

Please place your answers to Part One in the space provided in this exam book, not in the blue book. Please limit your answers to the lines provided below each question. We will not read beyond the lines provided under each question. Please make each answer readable in terms of neatness and the size of your handwriting. (We will not use a magnifying glass to read your answers.) Please answer the question responsively; don't provide information not asked for in the question. For example, if the question asks "Who wins?" please state the name of the person who wins; don't state why he or she wins. Please state your reasoning only if the question asks for it.

PLEASE NOTE THAT THE LINES GIVEN FOR YOUR ANSWER SOMETIMES RUN ONTO THE NEXT PAGE.

Part Two consists of one (1) essay question. Please put your answer in a blue book entitled "Part Two," and not into this examination booklet. Please limit your answer to four (4) single-spaced bluebook pages. (The front side of a sheet of paper is one page, and the back side is a second page; together the front and back consist of two pages.) The suggested time for Part Two is forty-five (45) minutes.

Please take note again that Part Two goes in a **separate** blue book, not on this exam booklet. Part One goes on this exam booklet, not in a blue book.

You have three and one-half (3 ½) hours to complete the exam.

Please make your answers legible. There is a bathroom book at the front of the room. Please sign out and in when you leave the room.

We will tell you when there are 15 minutes left, at which point *no one* may leave the room. We will also warn you when there are 5 minutes left and 1 minute left. When we call time, you are to bring up your exam and blue books *immediately*.

GOOD LUCK!

PART ONE

DIRECTED ESSAYS

SUGGESTED TIME: TWO HOURS (120 MINUTES)
PERCENTAGE OF EXAM POINTS: 75%

INSTRUCTIONS FOR PART ONE:

This part consists of a series of fact patterns, each of which has a number of questions that follows and inquires about the law and analysis that applies to the particular fact pattern. You are to read each fact pattern carefully and answer each question that follows. On one or two occasions, there may be questions that appear without a prior fact pattern. There are a total of 50 questions, and you are to answer them all.

Please place your answers in the space provided **in this exam book**, not in the blue book. Please limit your answers to the lines provided below each question. We will not read beyond the lines provided under each question. Please make each answer readable in terms of neatness and the size of your handwriting. (We will not use a magnifying glass to read your answers.) Please answer the question responsively; don't provide information not asked for in the question. For example, if the question asks "Who wins?" please state the name of the person who wins; don't state why he or she wins. Please state your reasoning only if the question asks for it.

Please work quickly but carefully through these questions. You will have enough time to answer all of the questions within the suggested time if you have adequately learned the law.

WE SUGGEST THAT YOU QUICKLY REVIEW EACH OF THE QUESTIONS FOLLOWING THE FACT PATTERN BEFORE ANSWERING ANY ONE OF THE QUESTIONS. THIS WILL PREVENT THE QUESTIONS FROM TAKING YOU BY SURPRISE AND REPETATIVE ANSWERS.

If you have not finished this Part of the exam when the suggested time is up, you should go onto the next part of the exam, and come back to finish it later.

The questions for Part One begin on the next page.

Questions 1 and 2 are based on the following fact pattern:

In early 1996, Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia entered into an interstate compact called the "Southeast Interstate Low-Level Radioactive Waste Management Compact" (the Compact). The purpose of the Compact was to create facilities to dispose of low-level radioactive waste generated in the region. The Compact established an "instrument and framework for a cooperative effort" to develop new facilities for the long-term disposal of low-level radioactive waste generated within the region.

The Compact was to be administered by a "Southeast Interstate Low-Level Radioactive Waste Management Commission" (the Commission), composed of two voting members from each participating state. While an existing facility in Barnwell, South Carolina would serve as the disposal facility, it was scheduled to close by the end of 2002. The Compact therefore required the Commission to develop "procedures and criteria for identifying ... a host [S]tate for the development of a second regional disposal facility," and to "seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 2001." The Compact authorized the Commission to "designate" a party State as a host State for the facility.

In September 1996, the Commission designated North Carolina as the host for the second facility. Although the Commission was "not responsible for any costs associated with the creation of any facility," North Carolina asked the Commission for financial assistance with building and licensing costs. The Commission responded by adopting a resolution providing financial assistance to North Carolina. To that end, the Commission created a "Host States Assistance Fund" to help North Carolina with the "financial costs and burdens" of "preliminary planning, the administrative preparation, and other pre-operational" activities.

The Commission estimated in 1999 that it would cost about $21 million and take two years to obtain a license for the North Carolina regional-disposal facility. That proved to be wildly optimistic. By the end of 2006, the estimate would rise to $139.5 million, and issuance of a license was not anticipated until August 2010.

Between 1997 and 2005 the Commission provided North Carolina with approximately $67 million. Those funds came from surcharges

and access fees collected from the operation of the existing Barnwell facility. In July 2005, however, South Carolina withdrew from the Compact, thereby depriving the Commission of continued revenues from the Barnwell facility. The Commission then informed North Carolina that it would no longer be able to provide financial support for licensing activities. On December 19, 2007, North Carolina informed the Commission it would commence an orderly shutdown of its licensing project; it took no further steps to obtaining a license for the facility.

Alabama, Florida, Tennessee, and Virginia would like to sue North Carolina for breach of the Compact.

1. In what Court should Alabama, Florida, Tennessee, and Virginia bring its suit against North Carolina?

_____

2. In the space below, briefly explain the reasoning for your answer to Question 1.

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_____

Questions 3 through 12 are based on the following fact pattern:

The State of Cerveza has a firearms control law that permits properly licensed persons to carry limited firearms for the purpose of self-protection, hunting and/or "lawful recreational shooting." There is no right to possess, carry or transport any kind of firearm in the State of Cerveza without a proper license. The Cerveza firearms law allows all forms of non-automatic rifles, but limits possession of handguns to "those capable of firing only a single shot without the necessity to reload."

Prior to applying for a "License to Carry a Firearm" (LTC) - the only firearms permit recognized by the State of Cerveza - an

applicant must complete a "Certified Firearms Safety Course" run by the Cerveza Department of Animal Control and Hunting Safety. Entry into the course, which requires 60 hours of attendance and a tuition payment of $1,200, is limited to high school graduates or those possessing a GED (high school equivalency) certificate. Although the course can lead to the issuance of an LTC, the primary tenet espoused by the course instructors is that, when it comes to firearms possession, "abstinence is the best policy."

Then, the applicant must complete a detailed application which includes: a full listing of employment positions since the age of 16; a full listing of all public and private schools attended; a full listing of all degrees and certificates awarded by all schools ever attended; a full listing of all criminal charges ever filed against the applicant with the disposition of each; a full listing and description of all civil actions in which the applicant was a party; a full listing of any and all motor vehicle infractions of the applicant, in each and every jurisdiction, since the applicant started driving; and a signed waiver allowing a thorough background check.

The applicant for an FTC must submit the completed application to the "Cerveza Firearms Licensing Review Board" (the Board), a state agency. The applicable statute prescribes that the applicant "shall bear the burden of proving his suitability to receive an LTC by clear and convincing evidence."

By statute, the Board meets twice a year, but will only consider applications filed at least 90 days prior to each such meeting. The typical semi-annual meeting concludes in about two eight-hour sessions. The Board does not take testimony or accept exhibits in regard to applications (other than the background check that is conducted), but allows each applicant to submit a one-page, double spaced statement in support of his or her application. No stenographic transcript or tape is made of the meetings. The Board does not issue written opinions regarding any application, instead stamping each either "approved" or "denied." There is no right of appeal to a higher administrative agency. Additionally, the statutory scheme presents no right of judicial review of Board determinations.

The firearms control law automatically disqualifies licensure of anyone "convicted or adjudicated to be guilty or responsible for an offense, or offenses, in the aggregate, that is or are punishable by a term of at least 60 days of imprisonment, whether such offense(s) was committed as an adult, youthful

offender or delinquent child." The law further provides that "the Board may, in its sole and absolute discretion, consider the impact of any ethical, moral or lifestyle matter in determining the fitness of any applicant to be issued an LTC." The Board typically approves between 60 and 65 percent of the LTC applications it considers.

* * *

Venable Dos Equis, a 68 year old resident of the suburb of Staythursty, about a half hour north of Maifrends, the capitol of Cerveza, has lead a life of global exploration, high-stakes gambling, jai alai supremacy, multi-linguism, culinary excellence, multi-culturism, fast cars, sexual satisfaction, espionage and an unyielding interest in erudite subjects. A gifted raconteur, Venable graduated from the Moss-Tenter-Esting Preparatory Academy in 1960 and attended the prestigious Aztec University, where he graduated summa cum laude with a degree in Eclectic Arts. Thereafter, Venable pursued a prestigious post-graduate "Corona Scholarship" (a program established by former Senator Rhoda Carona - America's first woman Senator) at the Dom Perignon College of Oxford University. After taking his Oxford post-graduate degree, Venable interned with MI5, the famous British counterintelligence and security agency. Then, Venable disappeared for about a dozen years, presumably working as a spy for Great Britain and the United States. He is said to have killed 26 men with only his hands and feet; he always eschewed firearms in favor of the martial arts.

In 1980, Venable resurfaced and commenced a period of narcissistic exploration. While hiking the Chilean portion of Patagonia, Venable drank from a mountain stream and exclaimed to his companion, "this water is delicious, someone should bottle it," to which his obtuse companion responded, "Yeah, sure! Why would anyone pay for a liquid that they can get from their kitchen sinks for free?" At that point Venable recognized the marketing genius of his pronouncement and, against the unanimous advice of his marketing advisors, as well as his dimwitted hiking companion, decided to start the world's first bottled water company: "Venable Springs." By the millennium, Venable was a billionaire. Then, capitalizing on his surname, Venable started filming Dos Equis beer advertisements in 2008, in the process earning an additional several million dollars. In 2009, along with Warren Buffet, Ted Turner, and Bill and Melinda Gates, Venable took a pledge to donate at least half his fortune to charity.

* * *

Recently, Venable has been hobbled by an old Jai Alai injury that has left him unsure about his martial art skills, and even his amorous capabilities. In fact, he is no longer ambulatory without the assistance of a cane. To make matters worse, a burglar recently broke into Venable's home and stole some expensive art. Venable confronted the intruder with a Jiu-Jitsu pose and threatening cane display, but the interloper merely laughed and walked out of the house with Venable's valuable art in tow. It was then and there that Venable determined he would shun his martial arts credo and purchase a handgun.

* * *

Venable paid the $1,200, sat through the 60 monotonous hours of Cerveza's required Certified Firearms Safety Course, and fastidiously completed every jot and tittle of the onerous firearms application. He filed the application well before the deadline and included a one-page explanation addressing the fact that he had once been arrested in Washington, D.C. for assaulting an assailant who was attempting to kill the Secretary-General of the United Nations, but had been set free once the local authorities came to understand his standing in the security community. Venable stressed that he never was charged with a crime, and had only been performing his lawful duties as joint-CIA/MI5 operative. Venable patiently awaited the Board's response and was confident that he would soon have his firearm.

* * *

Some eight months later, the five-person Cerveza Firearms Licensing Review Board convened to review the numerous firearms applications before it. Well into the second day of review, when most Board members were tired, grumpy and ready to go home, Venable's application came up for review. The eye of one member immediately came to Venable's one-page explanation of the D.C. incident. She exclaimed, "this guy's been arrested for assault!" Another Board member followed, "Look, this dude has a degree in Eclectic Arts! He's got to be a faggot!" Then, another Board member immediately grabbed the "denied" stamp and punched the back with the bold, red letters that sealed Venable's firearms fate. No Board member bothered to review Venable's background check, which was pristine.

* * *

Venable has sued the State of Cerveza contending that: (1) the entire statutory firearms scheme is unconstitutional, and (2) the Board's handling of his application was unconstitutional.

3. Venable's claim that the entire statutory firearms scheme is unconstitutional should be styled as a(n):

CIRCLE ONLY ONE OF THE FOLLOWING:

AS APPLIED CHALLENGE FACIAL CHALLENGE

4. Venable's claim that the Board's handling of his application was unconstitutional should be styled as a(n):

CIRCLE ONLY ONE OF THE FOLLOWING:

AS APPLIED CHALLENGE FACIAL CHALLENGE

Assume for the following questions that the State of Cerveza responds to Venable's complaint with a Rule 12(b)(6) motion to dismiss for failure to state a cause upon which relief can be granted.

5. The most likely ground upon which Cerveza's motion to dismiss would be granted is:

CIRCLE ONLY ONE OF THE FOLLOWING:

PROHIBITION OF ADVISORY OPINIONS STANDING RIPENESS

MOOTNESS THE POLITICAL QUESTION DOCTRINE THE ADEQUATE AND INDEPENDENT STATE GROUNDS ABSTENTION

ELEVENTH AMENDMENT IMMUNITY

6. In the space provided below, please explain why the answer you chose for Question 5 is better than the other answers.

7. In the space provided below, please state whether the defense you chose in your answer to Question 5 will succeed, and **apply the facts to the law to justify your conclusion.**

Assume for the following questions that the Cerveza firearms licensing scheme leaves the decision up to the municipality where the applicant resides, and that the Board was comprised of residents of the town of Staythursty. Venable's suit was against Staythursty rather than Cerveza. And it was the municipality of Staythursty, rather than the state of Cerveza, that has raised the defense identified in your answer to Question 5. In all other respects, including the manner in which the Board made its decision, the facts remain the same.

8. Will these changes have any effect on the outcome of Staythursty's motion to dismiss?

CIRCLE ONLY ONE OF THE FOLLOWING:

YES NO

9. In the space provided below, please explain your answer to Question 8, making sure the specific effect, if any, and reasons that the changes will or will not have an effect on the outcome of the motion to dismiss.

Assume for the following questions that Cerveza does not prevail on its Rule 12(b)(6) motion. (Please do not use this assumption to change your prior answers.)

10. The individual right upon which Venable is most likely to prevail on his substantive claim is:

CIRCLE ONLY ONE OF THE FOLLOWING:

FREE SPEECH	PRIVILEGES & IMMUNITIES ARTICLE IV	2ND AMENDMENT
PRIVILEGES & IMMUNITIES (14TH AMENDMENT)	EQUAL PROTECTION CLAUSE	CONTRACTS CLAUSE
TAKINGS CLAUSE	SUBSTANTIVE DUE PROCESS	RIGHT TO TRAVEL

11. How will the individual right you identified in your answer to Question 10 be applied against the State of Cerveza? Through the:

CIRCLE ONLY ONE OF THE FOLLOWING:

DUE PROCESS CLAUSE OF THE 14TH AMENDMENT	DUE PROCESS CLAUSE OF 5TH AMENDMENT
PRIVILEGES & IMMUNITIES CLAUSE OF ARTICLE IV	PRIVILEGES & IMMUNITIES CLAUSE OF 14TH AMENDMENT
THE GENERAL APPLICABILITY CLAUSE OF THE PREAMBLE	THE ENFORCEMENT CLAUSE: § 5 OF THE 14TH AMENDMENT

12. In the space provided below, please state whether Venable's cause of action asserting the individual right you identified in your answer to Question 11 will be successful, and **apply the facts to the law to justify your conclusion.**

Questions 13 through 15 are based on the following fact pattern:

The Federal Food, Drug, and Cosmetic Act ("FDCA") was enacted in 1938. It prohibits the misbranding of food. In 1990, Congress amended the FDCA through the passage of the Nutrition Labeling and Education Act ("NLEA"). The NLEA aimed to "clarify and ... strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods." The many subsections of 21 U.S.C. § 343 establish the conditions under which food is considered "misbranded." Generally, food is misbranded under 21 U.S.C. § 343(a)(1) if "its labeling is false or misleading in any particular." Two statutory sections - §§ 43(q) and (r) - impose more specific labeling requirements. Respectively, these sections regulate the information that goes into the "nutrition box" section on all packaged products and nutrient content claims that appear elsewhere on the label.

Section 343(q) governs "nutrition information" and discusses information that must be disclosed about certain nutrients in food products. It is principally in the nutrition box area that a food manufacturer must inform consumers of, for example, the total number of calories per serving or the quantities of various nutrients contained in a food product. An accompanying regulation further requires "[a] statement of the number of grams of trans fat in a serving, defined as the sum of all unsaturated fatty acids that contain one or more isolated (i.e., nonconjugated) double bonds in a trans figuration...." More simply, this regulation requires a declaration of trans fat content, at least where trans fat is meaningfully present in a food. The regulation states that "[t]rans fat content shall be indented and expressed as grams per serving to the nearest 0.5 gram increment below 5 grams and to the nearest gram increment above 5 grams. If the serving contains less than 0.5 gram, the content, when declared shall be expressed as zero." Where a product contains less than 0.5 gram, the manufacturer need not include the zero gram statement at all unless a nutrient content claim is made elsewhere about fat, fatty acid or cholesterol content. In a final rule issued in 1993, the FDA described this rounding down regulation as follows: "[t]he nutrition labeling regulation prescribed levels for nutrients that are nutritionally trivial, i.e., those nutrients that are present in a food at insignificant amounts and that consequently are declared as zero on the nutrition label (e.g., less than 5 calories and less than 0.5 g total fat)

Section 343(r) discusses "nutrition levels and health-related claims" about a food product made anywhere on a product label.

This provision governs all voluntary statements about nutrient content or health information a manufacturer chooses to include on a food label or packaging. Specifically, the section covers claims that "expressly or by implication," "characterize[ ] the level of any nutrient," or "characterize[ ] the relationship of any nutrient ... to a disease or health related condition."

The FDA has promulgated regulations regarding three specific kinds of claims made about packaged food: express nutrient content claims; implied nutrient content claims; and health claims. An express nutrient content claim is a direct statement about the level or range of a nutrient in a food, like "100 calories." A purveyor may include such a claim as long as it "does not in any way implicitly characterize the level of the nutrient in the food and it is not false or misleading in any respect (e.g., "100 calories" or "5 grams of fat"), in which case no disclaimer is required." An implied nutrient content claim describes food or an ingredient in a manner that suggests that a nutrient is absent or present in a certain amount, such as "high in oat bran." An implied content claim might also make a comparative statement, like "contains as much fiber as an apple," or might suggest that the product is consistent with a nutritional or healthy diet. Notably, the section prohibits the use of certain terms-such as "free," "low," or "good source" that characterize the level or range of any nutrient in a food unless these terms conform to definitions established by the Secretary. Finally, a health claim is one that specifically "characterizes the relationship of any substance to a disease or health-related condition." A food purveyor may include implicit content claims so long as they are "consistent with a definition for a claim," as provided in a federal regulation.

Section 343(r) adds that, "[a] statement of the type required by [Section 343(q)] that appears as part of the nutrition information required or permitted by such paragraph is not a claim which is subject to this paragraph." An accompanying regulation further instructs, however, that "[i]f such information is declared elsewhere on the label or in labeling, it is a nutrient content claim and is subject to the requirements for nutrient content claims."

Section 343-1(a)(4) expressly preempts any state or local "requirement for nutrition labeling of food that is not identical to the requirement of section 343(q)." Section 343-1(a)(5), in turn, preempts state or local governments from imposing any requirement on nutrient content claims made by a

food purveyor "in the label or labeling of food that is not identical to the requirement of section 343(r)."

* * *

A number of plaintiffs have commenced a class action law suit against the Quaker Oats Company in regard to the alleged mislabeling of trans fat on the packages of Chewy Granola Bars.

Trans fat is a substance that is chemically manufactured through a process called hydrogenation. Manufacturers add hydrogen atoms to normal vegetable oil by heating the oil to temperatures above 400 degrees Fahrenheit in the presence of certain ion donor catalyst metals. In its natural state, fat appears in two chemical varieties: (1) fats that lack carbon double bonds, known as saturated fat; and (2) fats that have carbon double bonds, with hydrogen atoms on the same side of the carbon chain, known as cis fats. Trans fats differ from natural fats in that they have double bonds on opposite sides of the carbon chain. The chemical difference is meaningful in several respects. Trans fats boast useful traits characteristic of both types of natural fat: like many vegetable fats occurring in nature, trans fats are legume-based, are relatively inexpensive and, like saturated animal fats, have long shelf-lives in which flavor and texture are maintained. Trans fats are therefore something of a "wonder product" for the packaged food industry and appear in as much as 40 percent of processed, packaged foods.

Artificial trans fat does not exist in nature and some contend the human body has not evolved to digest it properly. Trans fats opponents assert that the very same chemical properties that make trans fat appealing to the food industry also make it "highly toxic" to human health. The opponents rely upon a number of scientific studies (private and governmental) that suggest a link between trans fat consumption and serious, negative health effects such as heart disease, diabetes and cancer. They also point out that certain states and countries have restricted or banned the sale of food products containing trans fat.

Quaker Oats makes Chewy Granola Bars that include hydrogenated vegetable oil in the ingredient list. The nutrition label states that a single Chewy Bar contains "0 grams trans fats." In fact, there is some trans fats in Quaker Oats Chewy Bars but federal regulations governing such nutrition labels expressly instruct that any level of trans fat that falls below 0.5 gram per serving must be rounded down to zero.

On a side panel of the Chewy Bars box, Quaker Oats repeats the "0 grams trans fats" statement. The class action plaintiffs claim that this side-panel writing - removed from the nutrition facts section but plainly visible to consumers - is false and misleading. The plaintiffs also point to the fact that, elsewhere on the box, Quaker Oats describes Chewy Bars as "wholesome," and "a good source of calcium and fiber." The box reads that the bars are "made with whole grain oats," contain "no high fructose corn syrup," and are among "smart choices made easy." This final statement connotes participation in an industry-sponsored "Smart Choices" program.

The plaintiffs maintain that the statements imply Chewy Bars are healthful or part of a healthful lifestyle, notwithstanding the hydrogenated oil indisputably contained within them. They suggest images of oats, nuts and children in soccer uniforms that also appear on the box contribute further to defendant's inaccurate message.

The named plaintiffs allege they repeatedly purchased defendant's Chewy Bars for personal consumption in numerous California stores. Absent Quaker Oats's "material deceptions, misstatements, and omissions," relating to the presence of trans fats in defendant's product, the plaintiffs insist they would not have made those purchases.

13. Quaker Oats would like to move for summary judgment. The most likely ground upon which its motion for summary judgment would be granted is:

CIRCLE ONLY ONE OF THE FOLLOWING:

THE NONDELEGATION DOCTRINE

THE LEGISLATIVE VETO

THE DORMANT COMMERCE CLAUSE

PREEMPTION

THE STATE ACTION DOCTRINE

ECONOMIC SUBSTANTIVE DUE PROCESS

14. The ground you have chosen as your answer to Question 11 is divided into different types. In the space provided below, please list and describe the types.

15. In the space provided below, please state whether Quaker Oats's motion for summary judgment will be successful, and **apply the facts to the law to justify your conclusion.**

Questions 16 through 28 are based on the following fact pattern:

The Massachusetts Real Estate Bar Association, Inc. (REBA), formerly known as the Massachusetts Conveyancers' Association, Inc., is a 150-year-old bar association with a membership of approximately 3,000 Massachusetts real estate attorneys. REBA's website describes its members as representing "lenders, buyers, sellers, owners, landlords and tenants in every real estate practice area and specialty including resolving title issues and title insurance, commercial leasing, transactional matters for both residential and commercial property, affordable housing, environmental, zoning, permitting and land use, alternative dispute resolution and litigation." REBA is not an integrated bar; that is, it is not an association of attorneys in which membership and dues are required as a condition of practicing law in the jurisdiction. Nor has the Massachusetts Supreme Judicial Court (SJC) delegated to REBA the resolution of questions about what is the unauthorized practice of law.

REBA has a history of attempting to curtail what it calls "witness" or "notary" real estate closings, in which all of the documents required to complete a real estate transaction are compiled by non-lawyer third parties; an attorney will only witness the closing of the transaction. REBA believes that the essential tasks involved in a real estate transaction are an "interconnected series of activities that must be performed in order to convey the various legal interests in ... real estate," and each of the activities must be overseen, if not personally conducted, by an attorney. REBA's position is that some

mechanical tasks, such as creating title abstracts, may be delegated to non-attorneys, so long as "the lawyer maintains a direct relationship with the client, supervises the delegated work, and has responsibility for the work product." REBA also alleges that the issuance of title insurance policies is the practice of law because title insurance policies are based on the examination and legal analysis of the seller's legal title in the property, which REBA asserts must be conducted by an attorney.

Consistent with its views, REBA has opposed bills in the legislature that would formally recognize witness closings in Massachusetts and has tried to persuade affiliated bar associations to petition the SJC to adopt, through rulemaking, REBA's own definition of the practice of law into the Massachusetts Rules of Professional Conduct. REBA also filed and won two lawsuits in 1993 and 2001 in Massachusetts Superior Court to enjoin local companies, not run by lawyers, from providing real estate settlement services. Neither decision was appealed to the SJC. Neither the Massachusetts Rules of Professional Conduct nor the Massachusetts Statutes dealing with the authorized practice of law specifically address the propriety of witness (or similar) closings in Massachusetts.

National Real Estate Information Services, Inc. (NREIS) is a Pennsylvania-based corporation that provides real estate closing and title insurance-related services for mortgage lenders throughout the country. It is a member of the Title/Appraisal Vendor Management Association ("TAVMA"), a national trade association of companies providing real estate closing services. NREIS's customers are mostly national mortgage loan companies. NREIS provides these companies with centralized back-office operations in support of their lending transactions. Aside from third-party lawyers with whom NREIS contracts to attend closings, NREIS does not employ any lawyers to provide its services. NREIS asserts that it does not hold itself out to its customers as practicing law or having the ability or qualifications to practice law.

NREIS both provides real estate closing services and acts as a title insurance agent in Massachusetts. In helping to coordinate a real estate closing, NREIS, at the lender's request, may provide any of the following services in Massachusetts: (1) obtaining valuations of a property and third-party reports such as tax certifications and flood reports; (2) obtaining title searches from a third-party vendor; (3) drafting the settlement statement; (4) scheduling the closing with a Massachusetts attorney who will attend and transmitting the lender's documents

to that attorney for the closing; (5) disbursing settlement funds, held by NREIS in its own bank account until the mortgage has been executed by a borrower; and (6) ensuring that the transaction documents were completed properly and properly recorded. NREIS describes these activities as administrative rather than legal.

For each NREIS closing, a third-party vendor under contract to NREIS conducts the title search. One of those companies, Connelly Title, itself does not employ any lawyers and purports only to provide title abstracting services and no legal analysis. NREIS does not conduct its own review of the title abstract provided by Connelly Title. When a lender-customer requests that NREIS provide a deed for a transaction, NREIS complies by contracting with another third-party vendor, a Las Vegas, Nevada-based company. That company also is not a law firm. As to the closings themselves, NREIS schedules the closing to be attended by a Massachusetts attorney, selected from a list it maintains of around seventy-four lawyers. Before the closing, NREIS sends the relevant documents to the attorney. NREIS does not provide any instructions as to how the attorney should conduct the closing.

NREIS also acts as a title insurance agent on its transactions when requested. When acting as a title agent, NREIS does not review the status of the real estate title. It prepares the title insurance policy based on a title abstract provided by a third-party vendor, simply copying the contents of the abstract into the policy documents. NREIS issues polices for several companies that write title insurance in Massachusetts, including Stewart Title, First American, Ticor Title, and Old Republic.

In November 2006, REBA brought suit in state court against NREIS seeking a declaratory judgment that "an attorney retained to perform a conveyance of a legal interest in Massachusetts real property on behalf of a bank or lender must have a direct attorney-client relationship with the bank or mortgage lender client, and that [NREIS is] not permitted to interpose [itself] into that attorney-client relationship or otherwise control it." REBA also sought relief in the form of a preliminary and permanent injunction to prevent NREIS from "engaging in any of the activities which constitute a conveyance of real property unless they are acting under the supervision or control of a Massachusetts attorney." REBA did not seek monetary damages. That suit, REBA hoped, would ultimately result in an authoritative judgment by the SJC on the continuing issues surrounding witness closings. REBA served as the only plaintiff on its lawsuit; no lawyer members of REBA joined the suit as

party plaintiffs.

NREIS removed the case to federal district court on diversity of citizenship and counterclaimed against REBA. In its counterclaim, NREIS sought a declaratory judgment against REBA contending that: (1) REBA's activities constituted interstate commerce; (2) that REBA's lawsuit against NREIS, and its other activities seeking to prevent witness closings in Massachusetts "discriminated against NREIS in the marketplace and burdened interstate commerce;" (3) REBA's activities violated NREIS's constitutional rights in violation of 42 U.S.C. § 1983; (4) NREIS deserved a preliminary and permanent injunction preventing REBA from continuing to "interfere with its commercial activities properly conducted in interstate commerce; and (5) NREIS deserved attorneys' fees and costs "on account of REBA's violations of NREIS's constitutional rights under 42 U.S.C. § 1983. NREIS did not seek to add the SJC or any other political division of the Commonwealth of Massachusetts in furtherance of its claims that it had a federal right to conduct witness closings within the state.

* * *

NREIS has sought summary judgment against REBA on the ground that REBA lacks standing to bring its action.

16. In the space provided below, please state and explain the requirements for, and elements of, constitutional standing.

17. Which of the types of prudential standing listed below is most pertinent to the facts presented above?

CIRCLE ONLY ONE OF THE FOLLOWING:

THIRD-PARTY STANDING	TAXPAYER/GENERALIZED STANDING	ORGANIZATIONAL STANDING

18. In the space provided below, please state and explain the requirements for, and elements of, the specific type of prudential standing you chose in your answer to Question 17.

19. In the space provided below, please state whether NREIS's motion for summary judgment on the ground of standing will be successful, and **apply the facts to the law to justify your conclusion.**

REBA has brought a motion for summary judgment asserting that NREIS's counterclaim should be dismissed without a consideration of its substantive claims.

20. Which of the following grounds best supports REBA's motion for summary judgment?

CIRCLE ONLY ONE OF THE FOLLOWING:

THE STANDING DOCTRINE	THE UNCONSTITUTIONAL CONDITIONS DOCTRINE	THE POLITICAL QUESTION DOCTRINE
THE STATE ACTION DOCTRINE	THE PREEMPTION DOCTRINE	THE RIPENESS DOCTRINE

21. In the space provided below, please state and explain the requirements for, and elements of, the ground for summary judgment you chose in your answer to Question 20.

22. In the space provided below, please state whether REBA's motion for summary judgment on the ground you chose in answering Question 20 will be successful, and **apply the facts to the law to justify your conclusion.**

Assume for the following set of questions that NREIS did implead the SJC and Commonwealth of Massachusetts, and contended that their rulemaking and lawmaking activities concerning the practice of law in Massachusetts actively prevented witness closings in Massachusetts and "discriminated against NREIS [and other out of state title companies] in the marketplace and burdened interstate commerce" in violation of the dormant commerce clause.

23. In the space provided below, please generally describe the dormant commerce clause and how it operates.

24. In the space provided below, please state and describe the various standards of review that may be employed when confronting a dormant commerce clause issue.

25. In the space provided below, please state whether NREIS will be successful in claiming that its rights under the dormant commerce clause have been violated, and **apply the facts to the law to justify your conclusion.**

Congress has not enacted any legislation regarding the propriety of so-called witness closings and the ability of the states to prevent or allow them. Assume for the next set of questions that Congress desires to enact a law allowing witness closings nationwide, setting uniform standards and procedures regarding such closings, and setting the terms and conditions upon which the states might prevent or limit their occurrence.

26. Which of the following sources of authority would best support Congress's prerogative to legislate in regard to so-called witness closings?

CIRCLE ONLY ONE OF THE FOLLOWING:

THE COMMERCE CLAUSE	THE DORMANT COMMERCE CLAUSE	THE 10TH AMENDMENT
THE 11TH AMENDMENT	THE ENFORCEMENT CLAUSE OF THE 14TH AMENDMENT	THE TAKE CARE CLAUSE

27. In the space provided below, please state and describe the various standards of empowerment that may be employed when considering whether Congress possesses the power to act as described above.

28. In the space provided below, please state whether Congress does possess the authority to act as described above, and **apply the facts to the law to justify your conclusion.**

Questions 29 through 33 are based on the following fact pattern:

Frederick Acker is the executive director of the S.P.C.A. of Connecticut, Inc., a nonprofit corporation engaged in the sheltering and adoption of homeless cats and dogs and doing business in Monroe, Connecticut. Acker has been engaged in

animal adoption there since 1999, when he applied for and obtained a valid commercial kennel license for the premises under the name "Animal Adoption Network, Inc."

On April 14, 2004, the Monroe Zoning Commission (the Commission) conducted a site visit of the premises, apparently in response to complaints from neighbors. At a meeting held on May 13, 2004, the commission adopted several findings, concluding that (1) the structures and animal runs on the premises were nonconforming and were not permitted to be expanded or modified; (2) the maximum number of dogs that may be kept there was twenty-nine; (3) no expansion of activity shall be permitted; (4) no commercial vehicles of any type shall be parked or stored; and (5) any trailers stored on the premises were not to be used or occupied by an animal.

On February 11, 2005, a zoning enforcement officer authorized by the Commission served on Acker a cease and desist order providing notice that he was in violation of each of those findings. Acker appealed the order to the Monroe Zoning Board of Appeals (the Board), and after the zoning board upheld the order, he appealed to the Superior Court. In a decision rendered on February 11, 2008, the court sustained the decision of the Board, finding that there was substantial evidence that the nature, character and use of Acker's property had changed since Acker began operating the kennel on the premises. The court specifically found that Acker's violations included: use of a greenhouse to store dogs contrary to the Commission's prohibition against expansion or modification of the structures; Acker's keeping of 87 dogs on the premises instead of the permitted 29; the continued holding of "open houses" on the premises even though it constituted an unlawful expansion of activity; the parking of a tow truck on the premises "for some time;" and the use of a trailer to house dogs. Neither the court nor any governmental agency has confiscated Acker's dogs or claimed that they have been mistreated. Neither the court nor any governmental agency has claimed that his business included anything other than the sheltering and adoption of homeless cats and dogs. Neither the court nor any governmental agency has claimed that Acker failed to attend to his animals' health needs.

The court's decision was covered in a *Connecticut Post* article published on February 13, 2008. The article discussed the events leading up to the decision and reported that Acker vowed to appeal to the Appellate Court. On June 17, 2008, the *Connecticut*

Post published a second article reporting that the Appellate Court declined to hear Acker's appeal.

Barbara Pittcalf, does not know and has never met Acker. Like Acker, however, she is involved in the sheltering of animals, and is currently a volunteer "adoption advisor" for the Trumbull Animal Group, which assists in the placement of homeless cats and dogs. After reading the two *Post* articles, Pittcalf wrote and submitted a letter to the editor of the *Monroe Courier*. On July 17, 2008, the *Courier* published the letter, which reads:

> To the Editor:
>
> I was pleased to see that the Appellate Court refused to hear Fred Aker's [sic] case. I was happier still to read that he'll comply. Had he done that years ago, he would have saved the town and his neighbors a lot of grief, and himself a lot of legal fees. He knew the restrictions when he moved there so I could never understand why, if he wanted to sell dogs on a grander scale, he just didn't move to a larger facility where he would be allowed to do so legally.
>
> Mr. Aker [sic] should be ashamed of the way he mistreated the dogs kept at his establishment. Forcing 87 dogs to reside in space suitable for only 29 is despicable. What's worse is that those dogs cannot healthy. It's one thing for Michael Vick to face the music for mistreating dogs, but it is completely another thing when one who is supposed to provide shelter delves into the darkness.
>
> I'll pray for Mr. Aker and hope he'll find another business.
>
> Barbara Pittcalf, Trumbull

Above Pittcalf's letter, the *Monroe Courier* inserted the following title: "Spring Hill Road resident compares shelter owner to Michael Vick; happy to see neighbor comply." Pittcalf does not live on Spring Hill Road and is neither a resident of Monroe nor a neighbor of Acker.

Finding his business dwindling, and his friends acting very cool toward him, Fred Acker has sued Barbara Pittcalf and the *Monroe Courier* for defamation.

29. There are four categories of plaintiffs in defamation cases. Please state them in the space provided below.

1. _____

_____

2. _____

_____

3. _____

_____

4. _____

_____

30. Please state the standards and elements of defamation applying to each of the category of plaintiffs you identified in your answer to Question 29.

1. _____

_____

_____

_____

2. _____

_____

_____

_____

3. _____

4. _____

31. Which category of plaintiff would apply as to Fred Acker?

32. In the space provided below, please state whether Fred Acker will prevail upon his claim of defamation, and **apply the facts to the law to justify your conclusion.**

33. In the space provided below, please address whether Acker, if he prevails (even if you concluded in the last answer that he does not), will recover special or punitive damages.

Questions 34 through 38 are based on the following fact pattern:

In December 2009, Lee Knowlin was convicted of burglary and sentenced to prison for 20 years. When prisoners enter the Wisconsin Department of Corrections, they receive an initial "assessment and evaluation" to determine their security classification and program assignments. In May 2010, as part of his assessment and evaluation, Knowlin was given a "substance abuse subtle screening inventory" to determine whether he needed alcohol or drug treatment. The classification specialist

administering the test concluded that "The client is substance dependent. It is recommended that the client be referred to an education program." At Knowlin's classification hearing on the same day, the classification specialist recommended Knowlin for "AODA Level 5-B-COGN."

The Wisconsin Department of Corrections runs its own Alcohol and Other Drug Abuse treatment program for prisoners. The main goal of the program is to "promote changes in attitude and behaviors that will assist inmates in drug and alcohol free reintegration into the community." Refusal to participate in the program is one of fourteen factors that may be considered in assigning a custody classification under Wisconsin law. Custody classification may affect institution placement. In addition, the parole commission may deny presumptive mandatory release to a prisoner if he "refus[es] ... to participate in counseling or treatment that the social service and clinical staff of the institution determines is necessary for the inmate."

Knowlin has steadfastly refused to enter Wisconsin's substance abuse program for prisoners. Prison officials have consistently reported that he is uncooperative in general, borderline violent, grumpy and disruptive, all because of his substance abuse issue. The prison officials contend that Knowlin's behavior are having a detrimental impact on prison safety and security. They have threatened to transfer Knowlin to a high-risk facility, where he will spend most of his time in solitary confinement unless he enters the recommended program. Knowlin's only response is that the prison officials are seeking to retaliate against him for exercising "a legitimate constitutional right."

34. Is Knowlin correct that his situation involves a legitimate constitutional right that he holds?

CIRCLE ONLY ONE OF THE FOLLOWING:

YES NO

35. If the answer to the preceding question is in the affirmative, identify that right below and describe its full reach. If it is in the negative, please explain why not.

36. Do the facts and applicable law implicate a constitutionally-protected right in favor of the state?

CIRCLE ONLY ONE OF THE FOLLOWING:

YES NO

37. In the space below, briefly explain the law supporting your answer to Question 36.

38. Please make your best argument that Knowlin has the right to refuse substance abuse treatment, and that the state cannot punish him for so refusing.

Questions 39 through 46 are based on the following fact pattern:

"Sexting" is the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet. In October 2008, school officials in the Tunkhannock, Pennsylvania, School District discovered photographs of semi-nude and nude teenage girls, many of whom were enrolled in their district, on several students' cell phones. The officials learned that male students had been trading these images over their cell phones, and turned the phones over to the Wyoming County District Attorney's Office. George Skumanick, then District Attorney, began an investigation.

In November 2008, Skumanick stated publicly to local newspaper reporters and an assembly at Tunkhannock High School that

students possessing "inappropriate images of minors" could be prosecuted under Pennsylvania law for possession or distribution of child pornography, or for criminal use of a communication facility. A few months later, Skumanick sent a letter to the parents of between 16 and 20 students on whose cell phones the pictures were stored and students appearing in the photographs. The letter threatened that Skumanick would bring charges against those who did not participate in what has been referred to as an "education program."

The letter described the education program to be divided into a Female Group and Male Group. The "Female Group" syllabus lists among its objectives that the participants "gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages." In the first session, students are assigned to write "a report explaining why you are here," "[w]hat you did," "[w]hy it was wrong," "[d]id you create a victim? If so, who?," and how their actions "affect[ed] the victim[,][t]he school[, and] the community." The first two sessions focus on sexual violence, and the third on sexual harassment. The fourth session is titled "Gender identity-Gender strengths," and the fifth "Self Concept," which includes an exercise entitled "Gender Advantages and Disadvantages."

The letter concluded by demanding that affected students attend a group meeting in advance of the start of the education program. At the group meeting scheduled by the letter, held on February 12, 2009, Skumanick repeated his threat to bring felony charges unless the children submitted to probation, paid a $100 program fee, and completed the education program successfully. One parent, whose daughter had appeared in a photo wearing a bathing suit, asked how his child could be charged with child pornography based on that picture. Skumanick responded that she was posing "provocatively." When one child's father asked Skumanick who decided what "provocative" meant, Skumanick refused to answer and reminded his audience he could charge all of the minors with felonies, but instead was offering the education program. He exclaimed, "These are the rules. If you don't like them, too bad."

Skumanick then asked the parents to sign an agreement assigning the minors to probation and to participation in the program. Only one parent did so. Skumanick gave the other parents one week to sign.

Before the meeting, Skumanick had shown one set of parents a two-year-old photograph of their daughter, in which the daughter

and a friend, both 12 or 13-years-old at the time, are shown from the waist up wearing white, opaque bras. One was speaking on the phone, while the other was making a peace sign. Despite the parents' protests that their daughter and friend were merely being "goof balls" and were not naked, Skumanick claimed the image constituted child pornography because they were posed "provocatively." He promised to prosecute them on felony child pornography charges if they did not agree to his conditions and attend the proposed program.

After the meeting, Skumanick showed another parent the photograph of her daughter taken about a year earlier. In the photograph, the daughter is wrapped in a white, opaque towel, just below her breasts, appearing as if she just had emerged from the shower.

Eleven days later, on February 23, an administrator from Juvenile Court Services wrote the parents to inform them of an appointment scheduled for the following Saturday, February 28, at the Wyoming County Courthouse, "to finalize the paperwork for the informal adjustment." Most of the parents and minors agreed to the conditions.

One set of parents has sued Skumanick, seeking a temporary restraining order and preliminary injunction to prevent him from initiating criminal charges against their daughter for the photographs.

39. In the space below, please list as many kinds of unprotected speech as you can think of.

40. Are the "sexting" activities described above protected speech or unprotected speech under First Amendment law?

CIRCLE ONLY ONE OF THE FOLLOWING:

PROTECTED UNPROTECTED

41. In the space below, explain the law supporting your answer to Question 40.

Assume for the next set of questions that the "sexting" activities described above constitute protected speech.

42. Was the District Attorney's threat to prosecute the students based on content-based or content-neutral speech?

CIRCLE ONLY ONE OF THE FOLLOWING:

CONTENT-BASED CONTENT-NEUTRAL

43. Please explain your reasoning in choosing your answer in the prior question, making sure to **apply the facts to the law to justify your conclusion.**

44. Based upon your answer to the prior question, what would be the standard of review a court would apply in on the case?

45. The District Attorney countered the children's First Amendment claim at the court hearing on the motion for injunctive relief by presenting the affidavit of a child psychologist, who claims to be an expert in regard to the effect that "sexters" have in schools. The psychologist asserts in the affidavit that even one "sexter" can disrupt the disciplinary structure and learning environment of an entire school. He further claims that "Sexters" cause other students to skip classes, and sometime entire school days, generally forsake their work, and engage in delinquent behavior. Whether you agree or disagree with this claim, please briefly make the government's best legal argument in this regard.

46. Please state whether there are any other counter-arguments the government can raise in response to the children's First Amendment claim, and address the likelihood of success of the counter-argument.

Questions 47 through 50 are based on the following fact pattern:

Julliard, an African-American woman, applies for a job with XYZ Inc., a private company that owns and operates an area of land with retail establishments, commercial buildings leased out for office use and residential buildings leased to tenants who live

there. The land area is so large that XYZ, Inc. calls it "Nicetown." Nicetown has a private security force that operates as a police force, and it has numerous employees who run the day-to-day affairs of Nicetown. Before her interview begins, an officer of the corporation informs her that XYZ is no longer hiring. The next day, Julliard learns that in fact XYZ was hiring when she went in for an interview. Julliard would like to sue XYZ for discrimination on the basis of race.

47. What are the three possible classifications with their standards of review that the court may follow in analyzing her case?

A. _____

_____

_____

_____

_____

_____

B. _____

_____

_____

_____

_____

_____

C. _____

_____

48. Who bears the burden of proof for each of the above-stated standards? (Circle the correct answer.)

A.	Julliard	XYZ
B.	Julliard	XYZ
C.	Julliard	XYZ

49. Which one of the above-stated standards will apply to Julliard's lawsuit?

50. In the space provided below, please state whether Juliard will prevail upon her claim, and **apply the facts to the law to justify your conclusion.**

END OF PART ONE

ONE SHORT ESSAY QUESTION

SUGGESTED TIME: FORTY-FIVE (45) MINUTES
PERCENTAGE OF EXAM POINTS: 25%

INSTRUCTIONS FOR PART TWO:

This part consists of one (1) short essay question. Please put your answer in a blue book entitled "Part Two," and not into this examination booklet. Please limit your answer to four (4) single-spaced bluebook pages.

QUESTION

City, a municipal corporation in Massachusetts, operated a public school system. City's schools were experiencing significant racial imbalance. Several schools in City's school system had a percentage of nonwhite student s significantly greater than the percentage of nonwhite students in City's school system as a whole. In general, City's school system was

plagued by high absentee rates, racial tension and low test scores. In 2006, to remedy racial imbalance and improve the schools, City instituted a School Improvement Plan ("the Plan") which categorized schools as "racially balanced" or "racially imbalanced". Under the Plan, each student could attend his or her neighborhood school. A student who did not wish to attend his or her neighborhood school could apply to transfer to another school in City's school system. Approval of the transfer depended, in large part, on the requesting student's race and the racial makeup of the sending or receiving schools. Under the Plan, a student in a "racially balanced" school could transfer to another "racially balanced" school without regard to race. A transfer that would increase the racial imbalance in either the sending or receiving school was not permitted. Mary is the mother of a student who was denied a transfer request by City's school system because the transfer would increase the racial imbalance under the Plan.

In an effort to create a more cohesive and unified student body, the Plan required that each student participate in the recital of the Pledge of Allegiance before the start of classes each morning. Frank, father of a student attending City schools, is an atheist and objected to the recital of the Pledge of Allegiance because it contained the phrase "under God". A voluntary parent organization called Parents Organized for City Schools ("POCS") also opposed the Plan.

Mary, Frank and POCS filed suit in United States District Court against City alleging the Plan was unconstitutional.

What are the rights of the parties?

END OF EXAM