Con law Final

Question #: 1

Question One

One of the fifty American states ("the State") has 20 judicial circuits set under State law. As required by the state constitution, each circuit has an elected "state attorney" who serves as the circuit's chief criminal prosecutor. Although state attorneys are deemed a part of the executive branch, state law does not consider them to be employees of, or supervised by, the governor. Instead, a state attorney is a constitutional officer: an officer of independent stature within state government. Under state law, a "state attorney has complete discretion in making the decision to charge and prosecute" any given case.

Of course, it sometimes happens that a governor and state attorney are members of different political parties with divergent views on political issues and how the prosecutorial function should operate. But, unlike the President of the United States, a state governor is stuck with the state attorneys that the voters in the various circuits elect. Policy differences are an inevitable consequence of the system the state constitution has put in place. Still, under State law a governor may suspend certain officials, including state attorneys, for "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony." Even so, "the power to remove is not analogous to the power to control." Running a state attorney's office is the job of the state attorney's job, not the governor, and a governor cannot legitimately suspend a state attorney based on policy differences.

When he was running for election, a particular candidate for state attorney of a judicial circuit (the "State Attorney") campaigned on the position that a state attorney, and the judicial system itself, would lack the resources to prosecute every single crime brought to the attention of a state attorney. He repeatedly announced that he would: "exercise prosecutorial discretion at every stage of every case in order to best use the limited resources of my offices and the limited resources of the courts of this circuit, bearing in mind that it is essential to keep persons residing in the circuit safe while simultaneously achieving fairness in the judicial system." The governor of the State (the "State Governor'), a member of a different political party than the State Attorney, publicly disagreed with the State Attorney on how a state attorney should operate; indeed, the State Governor openly campaigned for the State Attorney's opponent. For example, the State Governor proclaimed that electing the State Attorney "would result in enabling the foxes to run the hen house" and insisted that the State Attorney's campaign "has been funded by George Soros," a nationally known billionaire and frequent donor to liberal political causes. The State Governor also announced that a judicial district directed under the State Attorney's leadership "would cater to the needs of violent mobs, Islamic terrorists, and illegal immigrants rather than those of Christian folks merely trying to live a good, decent life." Despite the State Governor's

opposition, the State Attorney won the election. The State Governor's response once the election results were announced was that, "George Soros has just purchased a judicial district for the liberal lawyers' socialist agenda. He may have won the battle, but the good and decent Christian citizens of this state will win the war."

Within two weeks after the State Attorney's inauguration, the State Governor suspended the State Attorney by executive order, asserting that the State Attorney's above-quoted statement constituted a "blanket non-prosecution policy demonstrating both a neglect of duty and incompetence." The State Governor's executive order did not refer to a particular act or instance of a failure to prosecute. Under State law, "neglect of duty" involves the "neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law." And "incompetence" refers to "any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office" and "may arise from gross ignorance of official duties or gross carelessness in the discharge of them . . . [or] from lack of judgment and discretion."

The State Attorney challenged his suspension by suing the State Governor and the State in the appropriate Federal District Court. He asserted two general claims: (1) 42 U.S.C. §1983 (the federal statute allowing plaintiffs to sue for violations of the Civil Rights Act of 1964) and the First Amendment itself (a claim of retaliation for the State Attorney's protected speech), which sought monetary damages; and (2) state-law claims called "quo warranto," declaratory relief, and injunctive relief, which challenged the State Governor's authority to fire him and demanded his reinstatement. This second claim sought no monetary damages.

A. The State Governor and State have moved to dismiss the State Attorney's action on the ground that they are immune from such civil claims. Will they prevail on their motion to dismiss? Explain.

B. Assume that the State has the same tripartite form of government as the United States federal government (legislature/executive/judiciary). Also assume that the State Supreme Court law applies the same justiciability doctrines when handling state cases as does the United States Supreme Court when handling federal cases. The State Governor and State have moved to dismiss the State Attorney's action on the ground that it poses a nonjusticiable political question. Will they prevail on their motion to dismiss? Explain.

C. Assume for this question only that the State Attorney's case has survived the motions to dismiss and has reached the summary judgment stage, at which the State Governor and State have moved to dismiss the First Amendment free speech claim on the facts established above. Will they prevail on their motion for summary judgment? Explain.

Question #: 2

Question Two

While Carlos Daniel Travieso (the "Plaintiff") was travelling home from a youth camping trip in a church leader's vehicle, a fourteen-year-old girl (the "Shooter") who was also returning from the camping trip shot him with a Glock 19 nine-millimeter handgun ("the handgun"). The Shooter picked up the handgun, which was not hers but had been in the car, and it discharged, firing the live round in its chamber; the handgun's magazine was not inserted into the gun when it discharged. The round struck the Plaintiff in his back, and he suffered numerous severe spinal and organ injuries that rendered him a paraplegic. No criminal charges were filed against any party connected to the shooting.

The Plaintiff sued Glock, Incorporated (the "Manufacturer"), alleging that, due to the absence of a magazine, the Shooter was deceived into believing the gun was empty of ammunition even though a live round had remained in the chamber. The Plaintiff's complaint alleged that the handgun, which had not been modified since its purchase, "lacked adequate safety features and warnings" and that the Manufacture engaged in "negligent, reckless, unnecessary, and unreasonably dangerous actions," including its "design, manufacturing, marketing, distribution, and sale of a handgun without a magazine disconnect safety, effective loading chamber indicator, internal lock, or other safety features that would have prevented it from being fired by a child or any other person who did not have proper authority or maturity to use it, or effective warnings." The Plaintiff's complaint thus alleged theories for recovery under strict products liability based on the defective design of the handgun, as well as negligence and negligent design.

Some years prior to the accident, on October 26, 2005, Congress had enacted the Protection of Lawful Commerce in Arms Act ("PLCAA"), which prohibits the institution of a "qualified civil liability action" in any state or federal court against firearms sellers or manufacurers. The act defines a "qualified civil liability action" as:

> A civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of [a firearm that has been shipped or transported in interstate or foreign commerce] . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . [.]

Although the clear intent of the PLCAA was to cause firearms manufacturers to be immune from "qualified civil liability actions," this immunity was subject to several exceptions. For example, the statute does not protect a seller who knowingly transfers a firearm that will be used in a crime of violence, nor a seller being sued for negligent entrustment or negligence per se. Nor does the PLCAA protect a manufacturer or seller who knowingly violates "a State or Federal statute

applicable to the sale or marketing" of a firearm. Most applicable to this action, the PLCAA does not grant immunity from:

an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, *except that where the discharge of the product was caused by a volitional act that constituted a criminal offense*, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage ... [.]

(Emphasis added). Enacted in 2005 by a Congress whose houses were both controlled by Republicans, the PLCAA aimed, at least in part, to safeguard the Second Amendment from efforts to indirectly assault what Congress had considered to be the individual right to bear arms, and which the Supreme Court would later affirm in the 2008 case of *District of Columbia v. Heller* (the Second Amendment defends an individual's right to "keep and bear arms [for] lawful purposes") and reaffirm in the 2010 case of *McDonald v. City of Chicago* (the Second Amendment is "fundamental[ly] . . . necessary to our system of ordered liberty"). The PCLAA contains a clear statement of Congress's intent to preempt statutory and common state law that conflicts with its reach.

NOTE: Although the Second Amendment serves as a backdrop to the facts presented, this question is *not* about the substantive provisions of the Second Amendment, which we did not cover in class.

A. The Manufacturer has moved to dismiss the Plaintiff's state common law action on the claim that it is preempted by the PCLAA. Will the Manufacturer prevail on its motion to dismiss on the ground of preemption? Explain.

B. The Plaintiff asserts that the PCLAA is inapplicable because its very existence is unconstitutional; the Plaintiff claims that Congress lacked proper authority to enact the PCLAA. Is the Plaintiff correct in his assertion that the PCLAA lacked proper Congressional authority? Explain.

Question #: 3

Question Three

Texas Health &Safety Code §170A generally prohibits abortions in the state. However, §170A.002(b)(2) provides an exception allowing an abortion when:

> in the exercise of reasonable medical judgment, the pregnant female . . . has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.

Because the abortion prohibition only applies to those who "perform, induce, or attempt an abortion," the doctor performing the abortion is at risk of prosecution under the law, but the woman having the abortion is not. And the penalties for physicians performing abortions are steep: a civil penalty of at least, $100,000, a first degree felony charge that can lead to up to 99 years in prison, and a loss of the physician's medical license. For this reason, Texas physicians are generally unwilling to perform an abortion without adequate assurance that they will not face the penalties provided by the Texas anti-abortion law.

Kate Cox and her husband Justin are the parents of two children. Ms. Cox is about twenty weeks pregnant with a third child, one who has received a tragic diagnosis: Trisomy 18, a disorder in which babies are born with 3 copies of chromosome number 18 instead of 2 copies. For reasons unknown, Trisomy 18 occurs at the time of conception and, in 90-95% of the cases, all cells in the body will have this structure. Only 50% of Trisomy 18 babies will be carried to term and be born alive. The median survival time for Trisomy 18 babies born alive is between 2.5 and 14.5 days. Less than 5% of Trisomy 18 babies born alive live beyond the first year. Those who do survive past the first year almost always suffer from severe cardiac issues and intellectual disability. In the month prior to taking legal action, Ms. Cox had been to an emergency rooms four times due to severe cramping and diarrhea, leaking of fluid, and elevated vital signs. Although there is little chance that carrying the fetus to term will kill Ms. Cox, because she was forced to give birth two prior times by cesarean section for, she will have to deliver the current fetus by C-Section and her physicians tell her that she faces a likelihood of being unable to carry another fetus to term if this fetus is not aborted.

The Coxes and their doctor, Damla Karsan, filed a lawsuit seeking injunctions and a declaratory judgment that Dr. Karsan can legally perform an abortion on Ms. Cox within the State of Texas. Dr. Karsan has asserted that carrying the fetus to term will likely cause Ms. Cox to become unable to have any additional children, but has not otherwise specifically asserted that carrying the fetus to term presents a "life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced."

A Texas trial court ruled that Ms. Cox was entitled to have the abortion under Texas law and issued a temporary restraining order to allow it. But the State Attorney General appealed to the Texas Supreme Court, which reversed, stating that Ms. Cox and her doctor had not provided sufficient evidence to demonstrate satisfaction of the exception from the general rule prohibiting abortions. The Texas Supreme Court vacated the restraining order and remanded the action to the trial court for further proceedings.

At about the time the Texas Supreme Court issued its ruling vacating the restraining order, the Coxes left Texas and had the abortion performed in another state.

A. After returning from obtaining an abortion in another state, the Coxes and Dr. Karsan sought to continue the case, arguing that Ms. Cox has a fundamental right to an abortion protected by the United States Constitution. Will they prevail on that claim? Explain.

B. Ms. Cox has asserted a constitutional right to the autonomy of her body and her right to make her own medical decisions under the Fifth and Fourteenth Amendments' due process clauses. She claims that the State of Texas is interfering with these constitutionally protected rights. Will she prevail on her claims? Explain.

C. After the Coxes returned, the Texas Attorney General moved to dismiss the case brought by the Coxes and Dr. Karsan on the ground that Ms. Cox is no longer pregnant and "the subject matter of the suit no longer exists." Will the Texas Attorney General prevail in getting the case dismissed? Explain.

Question #: 4

Question Four

Kentucky imposes a “severance tax” on all companies extracting coal within its borders, whether the companies reside in-state or out-of-state. At the same time, Kentucky law directs its utilities to buy the most competitive coal, with cost being one of the most important factors. Predictably, this combination of measures, along with the fact that many coal-producing other than Kentucky do not impose a severance tax, makes Kentucky utilities less likely to buy Kentucky coal than out-of-state coal. Recognizing the problem, the Kentucky legislature enacted a law directing the agency that regulates Kentucky utilities to evaluate the reasonableness of coal prices after subtracting any severance tax paid from the actual bid price. In practice, the policy makes coal from states with severance taxes, like Kentucky, appear to be cheaper than states without severance taxes although the utilities will pay more in the end than if they had purchased out-of-state coal that was not subject to a severance tax.

A coal producer from Illinois (the “Illinois producer”), where there is no severance tax, has challenged the constitutionality of Kentucky’s policy.

A. Will the Illinois producer prevail on a claim that the Kentucky policy violates the negative implications of the Commerce Clause? Explain.

B. Will the Illinois producer prevail on a claim that the Kentucky policy violates the due process clauses of the Fourteenth Amendment? Explain.

C. Will the Illinois producer prevail on a claim that the Kentucky policy violates the equal protection clause of the Fourteenth Amendment? Explain.

Question #: 5

Question Five

In certain parts of a state, single-family residences had become so expensive that the vast majority of families could no longer afford to buy a home. To alleviate this problem, the legislature enacted statutes creating a housing agency. The agency, organized along the lines of a private corporation, was authorized to act as a general contractor and build homes in counties where the average cost of a new home exceeded by 50% the national average cost of a new home, then to sell the homes at the cost of materials and labor to first-time homebuyers. In one medium-sized city in the state, the average cost of a new home exceeded the national average by 15% while, in a nearby large city, the average cost of a new home exceeds the average by 50%. The agency began building and selling homes in the large city but did not operate in the medium city. About 35% of the population of the medium city is of Middle Eastern ethnicity.

A citizen of Middle Eastern heritage brought a class action against the state, seeking to have the agency's failure to operate in the medium city declared a violation of the right to equal protection of the Middle Eastern citizens of that city.

What fact would be most helpful for the citizen in challenging the statute?

(A) The state could have permitted the agency to build and sell homes in all areas of the state.

(B) Citizens of Middle Eastern descent find it difficult to afford single-family residences.

(C) The legislators setting up the agency intended to discriminate against citizens of Middle Eastern descent.

(D) The percentage of citizens of Middle Eastern descent is much higher in the medium city than in the nearby large city.

Answer: _____

Legal Issue on Which You Reached Your Conclusion:

No More than Five (5) Line Legal Support Statement for Your Conclusion:

Question #: 6

Question Six

A recent regulation promulgated by the State of Missouri Department of Public Health specifically requires that practitioners of “African Style Hair Braiding” (ASHB) be licensed in the same manner as traditional cosmetologists or barbers/hair stylists before they can practice their craft on the general public for money. ASHB is a distinctive form of natural hair care that involves braiding, locking, twisting, weaving, or otherwise physically manipulating a person's hair without the use of artificial chemicals. Traditional cosmetologists or barbers/hair stylists do not generally provide ASHB services; likewise, most ASHB practitioners do not provide services that traditional cosmetologists or barbers/hair stylists provide. The Missouri’s Department of Public Health nevertheless now requires practitioners of ASHB to meet the same educational, training, and testing requirements as traditional cosmetologists or barbers/hair stylists, asserting that the licensure of ASHM professionals promotes the public health and protects consumers from incompetence or fraud. The law provides a $1,000 administrative fine for the first violation of practicing ASHB, cosmetology, barbering, or hair styling without a license. The fines progressively increase to as much as $5,000, for successive subsequent violations.

Two practitioners of ASHB, asserting that the practice of ASHB employs techniques distinct from cosmetology, barbering, and hair styling, have sued the Missouri Secretary of Public Health over the licensure requirements. They seek a declaratory judgment that application of the Missouri licensing regime to them violates their rights to substantive due process and equal protection (on the basis of racial discrimination) under the Fourteenth Amendment.

In that action, the plaintiffs are most likely to:

(A) Lose, because regulations concerning criminal conduct must be made by legislative enactment rather than by agency rules.

(B) Lose, because the standard of review for both the economic due process and equal protection claims is rational basis.

(C) The $5,000 fine is excessive, in violation of the Eight Amendment’s prohibitionof cruel and unusual punishment.

(D) Congress’s law regarding the manufacture of car seats created an unconstitutional legislative veto.

Answer: _____

Legal Issue on Which You Reached Your Conclusion:

No More than Five (5) Line Legal Support Statement for Your Conclusion:

Question #: 7

Question Seven

A man intensely disliked his neighbors, who were of a different race. One night, he spray-painted their house with racial epithets and threats that they would be lynched. The man was arrested and prosecuted under a state law providing that "any person who intentionally threatens violence against another person with the intent to cause that person to fear for his or her life or safety may be imprisoned for up to five years." In defense, the man claimed that he did not intend to lynch his neighbors, but only to scare them so that they would move away. Can the man constitutionally be convicted under this law?

(A) Yes, because, regardless of his actual intent, an objective reasonable person would have construed his communication to constitute a true threat by which his neighbors justifiably would feel threatened.

(B) Yes, because his communication was a true threat by which he either subjectively intended to intimidate his neighbors or consciously disregarded a substantial and unjustifiable risk that his conduct would cause harm to another.

(C) No, because he was only communicating his views and had not perpetrated any overt action against the neighbors.

(D) No, because he also engaged in trespass and, when applying the Free Speech Clause of the First Amendment, the state can only charge the least restrictive crime involved.

Answer: _____

Legal Issue on Which You Reached Your Conclusion:

No More than Five (5) Line Legal Support Statement for Your Conclusion:

Question #: 8

Question Eight

Congress passed a statute directing the United States Forest Service, a federal agency, to issue regulations to control campfires on federal public lands and to establish a schedule of penalties for those who violate the new regulations. The statute provided that the Forest Service regulations should "reduce, to the maximum extent feasible, all potential hazards that arise from campfires on Forest Service lands." The Forest Service issued the regulations and the schedule of penalties directed by Congress. The regulations include a rule that provides for the doubling of the fine for any negligent or prohibited use of fire if the user is intoxicated by alcohol or drugs. Which of the following is the best argument for sustaining the constitutionality of the Forest Service's rule providing for the fines?

(A) The executive branch of government, of which the Forest Service is part, has inherent rule-making authority over public lands.

(B) The rule is issued pursuant to a valid exercise of Congress's power to delegate rule-making authority to federal agencies.

(C) The rule is justified by a compelling governmental interest in safeguarding forest resources.

(D) The rule relates directly to law enforcement, which is an executive rather than legislative function, and hence it does not need specific congressional authorization.

Answer: _____

Legal Issue on Which You Reached Your Conclusion:

No More than Five (5) Line Legal Support Statement for Your Conclusion:

Question #: 9

Question Nine

Articulating a desire to professionalize municipal and state police officers and firefighters so that they may be able to handle the "increasingly technical and scientific aspects of public safety," a state recently enacted legislation requiring that all full-time municipal and state police officers and firefighters hold a bachelor of science or bachelor of arts degree from a four-year institution of higher education accredited by or through the United States Department of Education. A group of African Americans and Latinos who each had already worked as police officers or fire fighters competently for at least a decade, and who faced termination because of a lack of the requisite degree, sued the appropriate state party in a federal court alleging that the state's law violates the Fourteenth Amendment's equal protection clause. In opposing the state's motion for summary judgment, the plaintiffs presented extensive evidence from qualified educational experts demonstrating that the law in question will have a disproportionate adverse effect on persons from lower socio-economic classes, as well as racial and ethnic minorities. But the plaintiffs proffered no evidence demonstrating or suggesting that the state's motivation in enacting the statute was to discriminate against particular races or ethnicities.

In deciding the state's motion for summary judgment, the federal court should:

(A) Find for the state unless the plaintiffs can prove that the law is not rationally related to a legitimate governmental purpose.

(B) Find for the state unless the plaintiffs can demonstrate that the law is not necessary to achieve a compelling governmental interest.

(C) Find for the plaintiffs unless the state can prove that the law is necessary to achieve a compelling governmental interest.

(D) Find for the plaintiffs unless the state can prove that the law is rationally related to a legitimate governmental interest.

Answer: _____

Legal Issue on Which You Reached Your Conclusion:

No More than Five (5) Line Legal Support Statement for Your Conclusion:

Con Law Midterm Fall 2023

Question #: 1

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) out of concern that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” Congress found that many of these children were being “placed in non-Indian foster and adoptive homes and institutions,” and that the states had contributed to the problem by “fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” This has harmed not only Indian parents and children, but also Indian tribes. As Congress put it, “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” Testifying before Congress, the Tribal Chief of the Mississippi Band of Choctaw Indians was blunter: “Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.”

The ICWA thus aims to keep Indian children connected to Indian families. If the Indian child lives on a reservation, ICWA grants the tribal court exclusive jurisdiction over all child custody proceedings, including adoptions and foster care proceedings. For other Indian children, state and tribal courts exercise concurrent jurisdiction, although the state court is sometimes required to transfer the case to tribal court. When a state court adjudicates the proceeding, the ICWA governs from start to finish. That is true regardless of whether the proceeding is “involuntary” (one to which the parents do not consent) or “voluntary” (one to which they do).

Any party who initiates an “involuntary proceeding” in state court to place an Indian child in foster care or terminate parental rights must “notify the parent or Indian custodian *and* the Indian child’s tribe.” The parent or custodian and tribe have the right to intervene in the proceedings; the right to request extra time to prepare for the proceedings; the right to “examine all reports or other documents filed with the court”; and, for indigent parents or custodians, the right to court-appointed counsel. The party attempting to terminate parental rights or remove an Indian child from an unsafe environment must first “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” Even then, the court cannot order a foster care placement

unless it finds “by clear and convincing evidence that includes testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” To terminate parental rights, the court must make the same finding “beyond a reasonable doubt.”

The Act also applies to voluntary proceedings. Relinquishing a child temporarily (to foster care) or permanently (to adoption) is a grave act, and a state court must ensure that a consenting parent or custodian knows and understands “the terms and consequences.” Notably, a biological parent who voluntarily gives up an Indian child cannot necessarily choose the child’s foster or adoptive parents. The child’s tribe has “a right to intervene at any point in [a] proceeding” to place a child in foster care or terminate parental rights, as well as a right to collaterally attack the state court’s decree. As a result, the tribe can sometimes enforce ICWA’s placement preferences against the wishes of one or both biological parents, even after the child is living with a new family.

For adoption cases involving Indian children, “a preference shall be given” to placements with “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” For foster care of Indian children, a preference is given to (1) “the Indian child’s extended family”; (2) “a foster home licensed, approved, or specified by the Indian child’s tribe”; (3) “an Indian foster home licensed or approved by an authorized non-Indian licensing authority”; and then (4) another institution “approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.” Indians from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Indians for both adoption and foster care. And for foster care, institutions run or approved by any tribe outrank placements with unrelated non-Indian families. Courts must adhere to the placement preferences absent “good cause” to depart from them.

The ICWA contains and express statement that its terms will preempt any conflicting state law. It also requires each state department responsible for administrating adoptions and foster care to keep detailed records of each placement affected by the ICWA, including a description of the efforts made to comply with ICWA’s order of preferences in placing children. States are required to make yearly detailed reports to the Secretary of the Interior of the placement history of all adoptions and foster care placements occurring in the state that year. Both the Secretary of the Interior and the child’s tribe also have the right to request the record of placement history at any time. The ICWA also requires state courts

must also transmit all final adoption decrees and specified information about adoption proceedings to the Secretary within 14 days of issuance.

Three sets of non-Indian parents, each set from a different state (the “Parents”), attempted to adopt three young children who qualified as Indians under the ICWA, but were denied adoption because of one of the impediments of the ICWA described above. Each set of parents had already been deemed compliant with all state requirements independent of the ICWA, and their adoptions would have been approved but for the requirements of the ICWA.

Each set of parents have filed a suit in an appropriate federal court challenging the constitutionality of the ICWA and seeking declaratory judgments recognizing their right to adopt an Indian child free of ICWA requirements. The cases have been consolidated for argument at the United States Supreme Court. The Parents have challenged the ICWA on three specific grounds: (1) Congress did not have the power to enact the ICWA, at least to the extent it regulated Indians as individuals rather than Indian Tribes as entities that engage in commerce; (2) Congress lacked power to regulate matters involving family law, which traditionally is reserved to the states for regulation; and provisions of the ICWA unconstitutionally commandeer state employees and legislatures in violation of the Tenth Amendment.

Please answer the following questions of Constitutional law, and be sure to organize your answer to each question under an appropriate heading, and in the order provided:

1. Do the Parents have standing to bring their Constitutional claim? Explain.
2. Is the Act a valid exercise of Congress’s power? Explain.
3. Understanding that matters involving family law are almost always determined by state law rather than federal law, does the ICWA violate the Tenth Amendment? Explain.
4. Do any of the provisions of the ICWA violate the anti-commandeering doctrine arising under analysis of the Tenth Amendment? Explain.

Question #: 2

A private citizen filed a slander action against the president for remarks the president made during a presidential debate prior to taking office. The president denied making the remarks and pled executive immunity.

Which of the following is the most constitutionally appropriate action for the court to take?

(A) Dismiss the case with prejudice because the president enjoys complete immunity from civil liability.

(B) Dismiss the case with prejudice because of the Speech or Debate Clause.

(C) Dismiss the case without prejudice with leave to file again once the president leaves office.

(D) Permit the case to go forward.

Correct Answer: _____

Explanation:

Question #: 3

A federal statute imposes a $500 tax on all new automobiles sold in the United States. It requires that all proceeds of the tax will be allocated to a special fund, which will be distributed to school boards in every state for the purchase of new science textbooks.

Is the statute constitutional?

(A) No, because the tax is not rationally related to the use of the proceeds.

(B) No, because the regulation of school agendas is not one of the enumerated powers of Congress.

(C) Yes, because it is a reasonable exercise of Congress's power to tax and spend.

(D) Yes, because providing schoolchildren with textbooks is a compelling government interest.

Correct Answer: _____

Explanation:

Question #: 4

A federal statute generally makes age discrimination in the hiring or firing of employees illegal and provides for a civil action for damages against the offending employer. The statute applies to public as well as private employers and contains a clear statement of Congressional intent to abrogate state immunity. In federal court, an employee sued her employer, a state agency, for violation of this statute and sought relief in the form of retroactive money damages. The state agency moved to dismiss the action as constitutionally prohibited. The state employee conceded that the age discrimination that she experienced was rationally related to a legitimate state interest.

Should the court dismiss the action on constitutional grounds?

(A) No, because Congress was acting pursuant to its power under the Commerce Clause.

(B) No, because Congress was acting pursuant to its power under the Enabling Clause of the Fourteenth Amendment.

(C) Yes, because the Eleventh Amendment prevents the recovery of retroactive money damages by citizens against a state agency.

(D) Yes, because the strict scrutiny test must be met for there to be a violation of the Equal Protection Clause.

Correct Answer: _____

Explanation:

Con Law Final Fall 2022

Question #: 1

Following a series of terrorist attacks in a small foreign country in which five American citizens were taken hostage, the President issued an executive order to cut off all diplomatic ties with that nation, including a prohibition on virtually all trade agreements. Under the terms of the executive order, the country's embassy was closed and its consul was ordered to leave the United States. The Prime Minister of the foreign country, which imports two billion dollars of corn from the United States each year, threatened to stop all U.S. imports immediately unless the embassy was reopened and the consul reinstated. The consul brought an action against the United States in federal district court to enjoin enforcement of the President's action. Will the court hear the case?

A. Yes, because the President's action usurps the power of Congress to regulate issues directly or indirectly affecting foreign commerce.
B. Yes, because the consul has suffered redressable harm.
C. No, because lower federal courts lack original jurisdiction over cases involving ambassadors and consuls.
D. No, because Presidential recognition of foreign governments is a non-justifiable political question.

Question #: 2

Which of the following acts would be improper for the United States Senate to perform?

A. Adjudicating a border dispute between states.
B. Defining certain qualifications for being a member in good standing of the United States Senate.
C. Sitting in joint session with the House of Representatives.
D. Passing a resolution directing the President to pursue a particular course of foreign policy.?

Question #: 3

Congress has enacted a law providing that all disagreements between the United States and a state over federal grant-in-aid funds shall be settled by the filing of a suit in the federal district court in the affected state. The law further provides: “The judgment of the federal court shall be transmitted to the head of the federal agency dispensing such funds, who, if satisfied that the judgment is fair and lawful, shall execute the judgment according to its terms.” Is this law constitutional?

A. Yes, because disagreements over federal grant-in-aid funds necessarily involve federal questions within the judicial power of the United States.
B. Yes, because the spending of federal monies necessarily includes the authority to provide for the effective settlement of disputes involving them.
C. No, because it vests authority in the federal court to determine a matter prohibited to it by the Eleventh Amendment.
D. No, because it vests authority in a federal court to render an advisory opinion.

Question #: 4

A state legislature enacted an excise tax on any automobile sold in the state that had not been manufactured within the state. The tax was intended to ease the desperate plight of the thousands of auto workers suffering layoffs, plant closures, and pay cuts from lost sales to foreign competitors. The tax was graduated, from 5% of the sales price of inexpensive automobiles down to 1% for automobiles selling for more than $100,000. A corporation that manufactures automobiles in a neighboring state brought an appropriate action in federal court to enjoin enforcement of the automobile tax statute as to its products. Which of the following is the strongest constitutional argument supporting the invalidity of the special tax?

A. It is an undue burden on interstate commerce.
B. It violates the Equal Protection Clause of the Fourteenth Amendment.
C. It violates the Fourteenth Amendment's protection of the privileges and immunities of national citizenship.
D. It violates the Due Process Clause of the Fourteenth Amendment. ?

Question #: 5

Due to budget shortages and a critical need of funding to fight a war, Congress enacted a $25 tax on each person flying into an airport in the five most popular vacation destinations in the country, as determined by Congress. The tax was implemented, and officials in the five destinations were outraged, fearing that the number of vacationers to the taxed destinations would decrease due to the tax. If the tax is challenged in federal court by an official with standing, is the most likely result that the tax will be held constitutional?

A. No, because it makes it significantly more difficult for persons to travel between the states.
B. No, because the tax unfairly discriminates against certain vacation destinations by taxing them and not taxing other, similar vacation destinations.
C. Yes, because the tax is necessary to achieve a compelling government interest.
D. Yes, because Congress has plenary power to impose taxes to raise revenue.

Question #: 6

State A imposes a corporate income tax of 5% on domestic business entities that do business in the state but has the following provision regarding foreign (out-of-state) business entities: “Any foreign business entity that conducts business in State A will pay the higher of 5% of its income earned from doing business in State A, or the corporate income tax rate assessed to State A business entitles doing business in the state in which the foreign business is chartered.” Congress had previously enacted a bill, which the President signed into law, permitting states to charge higher corporate income taxes to foreign business entities than to domestic business entities provided the state from which the foreign business entity hails assesses higher rates than the particular state’s domestic corporate income tax rate.State A assessed a 7% corporate tax on the instate income of a tire company that was chartered in State B and did business in State A. State B charged foreign business entities from State A at the corporate income tax rate of 7%. The tire company filed suit in the Federal District Court located in State A, asserting that State A’s corporate income tax structure is unconstitutional. Is State A’s law constitutional?

A. Yes, under the Congressional approval exception to the dormant commerce clause doctrine.
B. Yes, because State A’s corporate income tax scheme does not unduly burden interstate commerce.
C. No, because State A’s corporate income tax scheme facially discriminates against out-of-state business entities.
D. No, because although State A’s corporate income tax scheme does not facially discriminates against out-of-state business entities, it substantially burdens interstate commerce. ?

Question #: 7

Congress approved an act that contained an appropriation of $1 million for a professor at a state university to study the effects of volcanic eruptions on the temperature of sea water. The bill contained a second appropriation of $1 million for a professor at another state university to study the effects of oil drilling on the population of bears in a national forest. The President drew a line through the first appropriation, with the intent of canceling the provision, and then signed the bill. The professor studying volcanic eruptions brought suit alleging that the President's action in striking his appropriation was invalid. Was the President's action constitutional?

A. No, because the President is not constitutionally empowered to make law; that function belongs to Congress.
B. No, because the President may not veto an appropriation passed by Congress.
C. Yes, because the President could have vetoed the appropriation if it were contained in a separate bill.
D. Yes, because the President has the power to refuse to spend funds that have been appropriated unless the spending is specifically mandated.

Question #: 8

A cattle-producing state adopted a statute requiring any food service business operating in the state to serve beef raised in the United States. A licensed hot dog vendor who worked at a football field within the state and who had been buying hot dogs made with foreign beef for the past several years estimated that switching to an all-beef hot dog made from United States beef would reduce his profits by 10%. An attorney hired by the vendor to challenge the statute discovered during research into the case that most of the footballs used at the football field at which the vendor worked were made of foreign leather. Which of the following grounds is the vendor's best argument against the constitutionality of the state statute?

A. The statute burdens foreign commerce.
B. The statute violates equal protection guarantees because it is not rational to prohibit the sale of foreign beef but not foreign leather.
C. The statute substantially interferes with the vendor's right to earn a living under the Privileges or Immunities Clause of the Fourteenth Amendment.
D. The statute constitutes a taking without due process of law. ?

Question #: 9

Congress provided by statute that any state that does not enact a ban on texting while driving on state highways within the next three years shall be denied 10% of federal highway construction funding. What is the best argument that can be made in support of the constitutionality of this federal statute?

A. The states ceded their authority over highways to the national government when the states accepted federal grants to help finance the highways.
B. The federal government can regulate the use of state highways without limitation because the federal government paid for most of their construction costs.
C. The requirement is not unduly coercive and is related to making travel on highways safer.
D. A recent public opinion survey demonstrates that 90% of the people in this country support the ban.

Question #: 10

A town in a rural state facing financial difficulties passed a variety of "sin taxes," including one aimed at electronic game arcades frequented by local juveniles. The tax is a one cent per game tax imposed on the manufacturers of the games based on the estimated number of plays over a machine's lifetime. There are no electronic game manufacturers in the state. Which of the following constitutional provisions would support the best argument against enforcement of the tax?

A. The Equal Protection Clause.
B. Substantive due process.
C. The Privileges and Immunities Clause of Article IV.
D. The Commerce Clause. ?

Question #: 11

A minister of a local church was asked to deliver an interdenominational prayer at a high school graduation ceremony to be held in the school auditorium. Will the minister's delivery of such a prayer at the public high school graduation be constitutional?

A. The outcome depends on whether the students or their guests would be required to pray at the graduation ceremony.
B. The outcome depends on whether the court determines that such interdenominational prayer deliveries at high school graduations are within historical practices and understandings.
C. The outcome depends on whether the idea for the prayer originated with the students or school officials.
D. The outcome depends on whether rotating clergy representing different religions are permitted to deliver such prayers in different years.

Question #: 12

A federal statute imposes an excise tax of $100 on each new computer sold in the United States. It also appropriates the entire proceeds of that tax to a special fund, which is required to be used to purchase licenses for computer software that will be made available for use, free of charge, to any resident of the United States.Is this statute constitutional?

A. No, because the federal government may not impose any direct taxes on citizens of the United States.
B. No, because this statute takes without just compensation the property of persons who hold patents or copyrights on computer software.
C. Yes, because it is a reasonable exercise of the power of Congress to tax and spend for the general welfare.
D. Yes, because the patent power authorizes Congress to impose reasonable charges on the sale of technology and to spend the proceeds of those charges to advance the use of technology in the United States.

Question #: 13

A state supplies U.S. history textbooks to all public high schools located in the state. The state education department has promulgated a rule requiring all high school students studying U.S. history to cover their history books with a state-supplied book cover that has the state motto “Don’t Tread on Me” on the front and a picture of the state governor on the back. A student refused to place this cover on his history book because she did not like the governor and believed the cover to be confrontational and contrary to her religious beliefs. The high school the student attended disciplined her for violating the education department rule. The student challenged the validity of her discipline in a proper court, claiming the requirement violated her constitutional rights. Is the student likely to prevail?

A. Yes, because a state cannot prescribe the type of book cover to be placed on schoolbooks.
B. Yes, because a state cannot force an individual to display a governmental mandated message.
C. No, because the words on the book cover are merely the state motto.
D. No, because the books are furnished at the state’s expense.

Question #: 14

A city zoning ordinance requires that anyone who proposes to operate a group home obtain a special use permit from the city zoning board. The zoning ordinance defines a group home as a residence in which four or more unrelated adults reside. An individual applied for a special use permit to operate a group home for convicts during their transition from serving prison sentences to their release on parole. Although the proposed group home met all of the requirements for the special use permit, the zoning board denied the individual's application because of the nature of the proposed use. The individual sued the zoning board seeking declaratory and injunctive relief on constitutional grounds.Which of the following best states the appropriate burden of persuasion in this action?

A. Because housing is a fundamental right, the zoning board must demonstrate that denial of the permit is necessary to serve a compelling state interest.
B. Because the zoning board's action has the effect of discriminating against a quasi-suspect class in regard to a basic subsistence right, the zoning board must demonstrate that the denial of the permit is substantially related to an important state interest.
C. Because the zoning board's action invidiously discriminates against a suspect class, the zoning board must demonstrate that denial of the permit is necessary to serve a compelling state interest.
D. Because the zoning board's action is in the nature of an economic or social welfare regulation, the individual seeking the permit must demonstrate that the denial of the permit is not rationally related to a legitimate state interest.

Question #: 15

A city passed an ordinance prohibiting persons on a public sidewalk within 100 feet of a health care facility from approaching those seeking access to the facility for purposes of protest, education, or counseling. The day after the city's new ordinance became effective, a person advocating against abortion went to an abortion clinic within the city, stood 25 feet from its entrance, stopped the first woman whom she saw about to enter the clinic, and gave her a leaflet espousing the leafleteer's religious views and discouraging abortion. The leafleteer was promptly arrested for violating the city's ordinance. At trial, the leafleteer challenges the ordinance on First Amendment grounds. How should the court rule on the leafleteer's First Amendment defense?

A. In favor of the leafleteer, because the ordinance violates the Free Exercise Clause.
B. In favor of the city, because the ordinance is reasonable as to time, place, and manner.
C. In favor of the leafleteer, because the ordinance infringes on the freedom of speech.
D. In favor of the city, because patients' and visitors' freedom of association right to be left alone is being infringed upon by the leafleteer.

Question #: 16

A state legislature recently enacted a law authorizing the state's Environmental Control Agency (Agency) to establish five new landfills. The law set forth a procedure that must be followed before sites can be selected and obtained. The procedure required a state agency to do extensive testing and reviewing of the land and environment in order to ensure that the health and safety of the surrounding community would not be unduly jeopardized. The procedure created by the statute and regulations takes about a year from initial identification of a site to the opening of the facility as a landfill.Just as the state agency wrapped up its inspection and testing process of a particular site and had scheduled a press conference to announce approval and commencement of construction, several residents of the surrounding community brought suit in federal court against the state, (not against any individual state officials) seeking monetary damages for the diminution in value of their real estate that will result from the construction of the landfill and requesting injunctive relief to stop the state itself from developing the particular site as a landfill. The state has moved to dismiss the lawsuit. What is the most appropriate basis for the court to ALLOW the motion to dismiss for failure to state a claim?

A. The case presents a non-justiciable political question.
B. The right of the state to exercise its police powers, which includes caring for the health, safety, and welfare of its citizens, is not subject to review by the federal courts.
C. The suit is barred by the Eleventh Amendment.
D. The case is not ripe.?

Question #: 17

A recent law school graduate was offered a job as an aide by a state legislator. The legislator told the graduate that before she could begin working, she had to take the following loyalty oath: “I swear to uphold our state and federal Constitutions; to show respect for the state and federal flags; and to oppose the overthrow of the government by violent, illegal, or unconstitutional means.” The graduate told the legislator that the oath is unconstitutional and refused to take the oath. Is the graduate correct?

A. Yes, as to the promise to uphold the state and federal Constitutions.
B. Yes, as to the promise to respect the flag.
C. Yes, as to the promise to oppose the overthrow of the government.
D. No, as to all three provisions.

Question #: 18

Private organizers of an annual St. Patrick's Day parade were required under a state public accommodations law to include among the marchers even those groups whose message the organizers did not wish to convey. One year, a group representing lesbian, gay, bisexual, and transgender (LGBT) individuals applied for a permit to be included in the St. Patrick's Day parade and display a banner expressing the LGBT members' pride in their sexual orientation. When the parade organizers denied that application, the group brought suit against the parade organizers, alleging violation of the state public accommodations law and resulting discrimination based on sexual orientation. The trial court held that the parade organizers had violated the public accommodations law and ordered the organizers to include the group in the parade despite the fact the organizers did not agree with the LGBT message and did not want parade observers to believe that their parade portrayed agreement with the LGBT message displayed on the banner. The highest state appellate court affirmed the order that the LGBT group and its banner be included in the St. Patrick's Day parade. If the United States Supreme Court grants certiorari, will it affirm the lower courts' rulings?

A. Yes, because the state public accommodations law banned parade organizers from discriminating based on sexual orientation.
B. Yes, because there is no state action involved.
C. No, because sexual orientation is not a suspect classification.
D. No, because the order that the private organizers must allow the LGBT group to participate in the private parade and display its banner violated the organizers' First Amendment free speech rights.
?

Question #: 19

A federal statute is passed giving a cabinet official the power to designate internet websites as "purveyors of false information." According to the statute, a website that receives this designation has 60 days to remove any offending content. After 60 days, the cabinet official may sanction the website, by fining, suspending, or banning it from the internet. Is the statute constitutional?

A. Yes, because Congress may regulate broadcast media.
B. Yes, because Congress may delegate authority to a cabinet official.
C. No, because as stated the law violates the First Amendment.
D. No, because the law violates the principle of bicameralism.

Question #: 20

To show her concern for the "distress caused by gun violence" to which her city has been subjected, a protester carried a United States flag upside down through the streets in a privately organized parade. At the conclusion of the parade, the protester was arrested under a state statute that provides, "Whoever publicly treats the United States flag contemptuously shall be guilty of a misdemeanor." The protester's conviction in the lower courts was appealed to the United States Supreme Court. The statute was not challenged on grounds that it violated the defendant's First Amendment rights. Assuming the statute had already been interpreted by the state supreme court to include the protester's conduct and alleviate any claim the statute was vague, will the Court likely uphold the conviction?

A. Yes, because carrying a flag is an action and therefore is not protected speech.
B. Yes, because the state has a compelling interest in preserving the United States flag as a symbol of the United States.
C. No, because the protester's activity is symbolic speech protected by the First Amendment.
D. No, because the protester's treatment of the flag is not "contemptuous." ?

Question #: 21

The owner of a restaurant and bar has operated under liquor and common victualler's (food service) licenses granted by a city's licensing board for 15 consecutive years. Pursuant to the city's by-laws, both licenses continue for one-year periods and renew automatically upon the payment of an annual fee, unless there is there exist outstanding complaints for alleged violations of licensing laws at the time of renewal, or other "good cause" is demonstrated why the license should not be renewed. Until recently, the owner never had any complaints lodged against the establishment.Last week, however, an altercation outside the restaurant occurred between two patrons who had previously been dining inside. One of the patrons was shot and killed, and a melee broke loose, resulting in injury to several bystanders. The city licensing board immediately revoked the owner's liquor and common victualler's licenses, citing issues of public safety. What would be the strongest basis for constitutional claims if the owner sues the city?

A. Equal Protection.
B. Procedural Due Process.
C. Privileges and Immunities Clause under Article IV.
D. The prohibition on Bills of Attainder.

Question #: 22

Congress passed a statute directing the United States Forest Service, a federal agency, to issue regulations to control campfires on federal public lands and to establish a schedule of penalties for those who violate the new regulations. The statute provided that the Forest Service regulations should "reduce, to the maximum extent feasible, all potential hazards that arise from campfires on Forest Service lands." The Forest Service issued the regulations and the schedule of penalties directed by Congress. The regulations include a rule that provides for the doubling of the fine for any negligent or prohibited use of fire if the user is intoxicated by alcohol or drugs.Which of the following is the best argument for sustaining the constitutionality of the Forest Service's rule providing for the fines?

A. The executive branch of government, of which the Forest Service is part, has inherent rule-making authority over public lands.
B. The rule is issued pursuant to a valid exercise of Congress's power to delegate rule-making authority to federal agencies and the economic and political significance of the delegation suggest no major issues impairing such delegation.
C. The rule is justified by a compelling governmental interest in safeguarding forest resources.
D. The rule relates directly to law enforcement, which is an executive rather than legislative function, and hence it does not need specific congressional authorization.

Question #: 23

Thirty years ago, a man obtained a certification from the Federal Housing Administration ("FHA") as a certified real estate appraiser. At the time, few organizations hiring appraisers required certifications. For the past thirty years, the man has worked for State A, appraising properties for tax purposes. He has a contract providing that he can be dismissed only for cause. Six months ago, State A passed a law requiring anyone appraising real estate in State A to hold a State A license as a real estate appraiser. The man, who is 60 years old and plans to retire in a few years, refuses to spend the time and money necessary to get the State A license. After a hearing, during which the man is given an opportunity to present his case for retaining his position, he is fired, and a much younger employee who has the State A license is hired to replace him. If the man challenges his dismissal in court, who will likely prevail?

A. The man, because the state law is preempted by the federal licensing scheme.
B. The man, because he was deprived of his rights under the Due Process Clause of the Fourteenth Amendment.
C. The man, because he was deprived of his rights under the Equal Protection Clause.
D. State A because, despite the fact that a court may well consider State A's failure to recognize federal licensure to be bad public policy, State A's licensing scheme is supported by a rational basis.

Question #: 24

A state statute permits the state to seize and dispose of real property that was used to commit or facilitate the commission of a felony drug offense. After a drug dealer's arrest for selling cocaine out of his home, a felony, the state instituted an action of forfeiture against the drug dealer's house and property. After notice to the drug dealer and a hearing, a judge granted the order and the state seized the property. Six months later, after the time for any appeals had expired, the property was sold at a public auction to a third party. It was only when the third party brought an action to quiet title that a bank holding a properly recorded mortgage on the drug dealer's property learned of the forfeiture. Because the bank's mortgage payments were automatically deducted from an account the drug dealer had under a different name, no one at the bank was aware that the property had been seized. The only notice provided to parties other than the drug dealer was a public notice published for three weeks in a general circulation newspaper. The bank defends the quiet title action on the ground that it did not receive the notice required under the United States Constitution to protect its interest in the property. If the court rules that the bank's rights under the Due Process Clause of the Fourteenth Amendment were violated by the state's seizure of the property, what is the most likely reason?

A. In any judicial proceeding affecting rights to real property, a claimant is required to provide notice and an evidentiary hearing to all parties with a legal interest in the property before taking actions affecting their rights.
B. The government itself was the party that seized the property, rather than a private party using governmental processes.
C. The notice was not adequate under the circumstances to apprise a party with a properly recorded legal interest in the property.
D. The jurisdiction treats the mortgagee as having title to the property rather than merely a lien. ?

Question #: 25

A state legislature passed a law requiring all employers operating in the state's oil and natural gas fields to give preference in hiring to residents of that state. The law banned the hiring of nonresidents unless no other qualified person could be found to fill an oilfield or natural gas field position. Under prevailing economic conditions, which included a substantial decline in petroleum prices, the statute was tantamount to a total ban on hiring of nonresidents because there were so many unemployed oil and gas workers and little new exploration was taking place. The plaintiff was an experienced oilfield worker who was denied a job in the state because his permanent residence was in another state, even though he had worked in many states and foreign countries and his qualifications were better than anyone else applying for the job. The sole reason given for not hiring the plaintiff was the preferential hiring statute favoring state residents. The plaintiff filed suit in federal district court challenging the statute. Who should prevail?

A. The state, because employment discrimination is only unconstitutional if it involves race, religion, alienage, or sex.
B. The state, because the state's interest in hiring local residents outweighs the interest of nonresidents.
C. The plaintiff, because the law violates the Privileges and Immunities Clause of Article IV.
D. The plaintiff, because the preferential hiring law impairs the plaintiff's rights under the Contract Clause of the federal Constitution.

Question #: 26

A private university is owned and operated by a religious organization. The university is accredited by the department of education of the state in which it is located. This accreditation certifies that the university meets prescribed educational standards. Because it is accredited, the university qualifies for state funding for certain of its operating expenses. Under this funding program, 25 percent of the university's total operating budget comes from state funds.A professor at the university was a part-time columnist for the local newspaper. In one of her published columns, the professor argued that "religion has become a negative force in society." The university subsequently discharged the professor, giving as its sole reason for the dismissal her authorship and publication of this column.The professor sued the university, claiming only that her discharge violated her constitutional right to freedom of speech.The university moved to dismiss the professor's lawsuit on the ground that the U.S. Constitution does not provide the professor with a cause of action in this case.Should the court grant the university's motion to dismiss?

A. Yes, because the First and Fourteenth Amendments protect the right of the university to employ only individuals who share and communicate its views.
B. Yes, because the action of the university in discharging the professor is not attributable to the state for purposes of the Fourteenth Amendment.
C. No, because the accreditation and partial funding of the university by the state are sufficient to justify the conclusion that the state was an active participant in the discharge of the professor.
D. No, because the U.S. Constitution provides a cause of action against any state-accredited institution that restricts freedom of speech as a condition of employment.

Question #: 27

Congress has enacted a statute that requires all companies engaging in business with the federal government to enact certain affirmative action programs in hiring. A small diner has been providing catering services for a local branch office of the United States Department of Agriculture. At lunch one day, a senior enforcement officer of the Department of Agriculture happens to notice the racial makeup of the diner's workforce and informs the diner that it is in violation of the affirmative action statute, and files charges against the diner. If the diner challenges the validity of the federal statute, what is the government 's best response to the argument that Congress has exceeded its legitimate powers?

A. The act is a valid enforcement of the Enabling Clause of the Fourteenth Amendment.
B. The act is a valid exercise of the commerce power.
C. The act is a valid enforcement of the Due Process Clause of the Fifth Amendment.
D. The act is a valid exercise of the federal police power.

Question #: 28

A state statute requires that all new automobiles sold in the state shall be equipped with a certain safety system to protect passengers in the event of a collision. An automobile company that wants to sell automobiles in the state files an action to enjoin enforcement of the statute, arguing that the statute deprives the auto company of its right to contract freely with customers under the Due Process Clause. What is the appropriate burden of proof?

A. The state must demonstrate a compelling state need.
B. The state must demonstrate that the law serves a legitimate government interest.
C. The challenger must demonstrate the lack of a compelling state need.
D. The challenger must demonstrate the lack of a legitimate purpose. ?

Question #: 29

A state Occupational Health and Safety Board recently issued regulations valid under its statutory mandate requiring that all employers in the state provide ionizing air purification systems for all employee work areas. These regulations replaced previous guidelines for employee air quality that were generally not mandatory and did not specify the method of air purification used. The requirements regarding air purification systems are likely to be unconstitutional as applied to which of the following employers?

A. A wholly owned subsidiary of a Japanese corporation with seven retail outlets within the state.
B. The state supreme court, which recently completed construction of its new courthouse with a non-ionizing air purification system which the builder is contractually bound to maintain for the next three years.
C. A United States Armed Forces Recruiting Center located adjacent to the state capitol building.
D. A privately operated community service center funded by donations and constructed through use of a loan provided by the United States Veterans Administration and repayable to that agency.

Question #: 30

A state statute prohibits merchants from selling goods manufactured in a foreign country unless the merchant clearly marks the goods with their country of origin. The United States has a treaty with a foreign country that allows each country to import and sell goods and products from the other country without marking the goods' country of origin. If a person is prosecuted under the state law for refusing to mark goods as being of that foreign country's origin, which of the following statements reflects the most likely outcome of the case?

A. The person should be acquitted because the state statute is preempted by the treaty.
B. The person will be acquitted, but only if the treaty with the foreign country preceded the state statute in point of time.
C. The person will be found guilty because the treaty with the foreign country is no defense to a criminal prosecution in state courts for violating state laws.
D. The person will be found guilty because the treaty is no defense to the criminal prosecution in the absence of effectuating legislation by Congress. ?

Question #: 31

A state law that restricted the ability of persons to withhold medical treatment near the end of life was challenged in state court as a violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and as a violation of a similar due process provision of the state constitution. The case made its way to the state's highest court, which ruled that the law violated the due process provisions of both the U.S. and the state constitutions.If petitioned to do so, may the U.S. Supreme Court exercise jurisdiction to review the state court decision?

A. No, because the state court's decision in this case rests on adequate and independent state law grounds.
B. No, because the U.S. Supreme Court has appellate jurisdiction only over state court decisions that determine the constitutionality of federal laws.
C. Yes, because the U.S. Supreme Court has appellate jurisdiction over any ruling of a state's highest court based on an interpretation of federal law.
D. Yes, because the U.S. Supreme Court has appellate jurisdiction over decisions that find state laws in violation of the federal Constitution.

Question #: 32

A state that is subject to severe winters generally allows the use of studded tires between October 1 and March 31. However, the legislation allows counties to opt out and prohibit the use of studded tires year-round, because studded tires tend to tear up pavement more than non-studded tires, thus necessitating more frequent road repairs. No other state in the region allows use of studded snow tires at all. The state law contains one exception: it excludes "doctors" from any county ban on the use of snow tires because they might have to cross county lines in emergencies. After the passage of the legislation, only one county in the state invoked its right to ban the use of studded snow tires. A lawyer who lives in the state was angered that the legislature had given special privileges to doctors but not to lawyers. One January day, with studded tires on his car, he drove from his home county, which allowed use of studded tires, into the county that banned them. A sheriff's officer noticed the lawyer's studded tires and cited him. After being convicted and fined, the lawyer appealed. What is the lawyer's best argument for getting the ban invalidated?

A. The statute interferes with his fundamental right to practice his profession in violation of the Privileges and Immunities Clause of Article IV.
B. The statute violates his right to travel.
C. The statute violates the Commerce Clause by placing an unreasonable restraint on interstate commerce.
D. The ban on studded snow tires is not rationally related to a legitimate state interest because it will likely result in an increased loss of life. ?

Question #: 33

A man had been a lawful resident alien for several years. He was browsing an online website for government employment opportunities and saw an opening for a position as a state highway patrol officer. He decided to apply for the position and was granted an interview. At the interview, the man was informed that although his application had complied with all the requirements necessary for the position, he was disqualified from service solely because he was not a U.S. citizen. The man brought an action for declaratory relief, claiming that the state has violated his rights under the Fourteenth Amendment. Should the man be successful in his action?

A. Yes, because the state has not shown the classification restricting aliens is necessary to achieve a compelling interest.
B. Yes, because the man's application complied with all the requirements necessary for the position.
C. No, because serving as a highway patrol officer is integral to the self-government process.
D. No, because the state may discriminate against aliens where the justification is rationally related to a legitimate interest.

Question #: 34

The defense attorney in a pending criminal case decided to challenge a search warrant due to inaccuracies he found in the supporting affidavit. He contacted a deputy district attorney who determined the affidavit did in fact contain serious misrepresentations. The deputy district attorney submitted a memorandum of his findings to his superiors and recommended that the case be dismissed. However, the department decided to proceed with the prosecution. The deputy district attorney volunteered to testify for the defense at a hearing to disclose his findings. The trial court upheld the validity of the warrant nonetheless. Following this incident, the deputy district attorney was reassigned to a different position, transferred to another courthouse, and denied a promotion. He filed an employment grievance in federal court, claiming the department's retaliatory actions violated his First Amendment rights. The district court found the deputy district attorney had suffered no retaliation and that the changes in his job had been dictated by legitimate staffing and work-related concerns. This decision was reversed on appeal, based on a finding that the memorandum the deputy district attorney wrote dealt with a matter of public concern and his supervisors "failed even to suggest disruption or inefficiency in the workings of the district attorney's office." The government appealed to the United States Supreme Court, which has granted certiorari. Should the Supreme Court uphold the Court of Appeals decision?

A. No, because the First Amendment protections afforded ordinary private citizens do not apply when a public employee's statements are made pursuant to his official duties.
B. No, because the First Amendment protections afforded ordinary private citizens do not apply to a public employee's statements, regardless of whether they are made pursuant to his official duties.
C. Yes, because the First Amendment protects government employees' right to freedom of speech.
D. Yes, because when matters of public concern are involved, a public employee's right to comment, on balance, outweighs the government's interest in efficient performance of public service.

Question #: 35

A state legislature recently enacted a law authorizing the state's Environmental Control Agency (Agency) to establish five new landfills. The law set forth a procedure that must be followed before sites can be selected and obtained. The procedure required a state agency to do extensive testing and reviewing of the land and environment in order to ensure that the health and safety of the surrounding community would not be unduly jeopardized. The procedure created by the statute and regulations takes about a year from initial identification of a site to the opening of the facility as a landfill.Just as the state agency wrapped up its inspection and testing process of a particular site and had scheduled a press conference to announce approval and commencement of construction, several residents of the surrounding community brought suit in federal court against the state, (not against any individual state officials) seeking monetary damages for the diminution in value of their real estate that will result from the construction of the landfill and requesting injunctive relief to stop the state itself from developing the particular site as a landfill. The state has moved to dismiss the lawsuit. What is the most appropriate basis for the court to ALLOW the motion to dismiss for failure to state a claim?

A. The case presents a non-justiciable political question.
B. The right of the state to exercise its police powers, which includes caring for the health, safety, and welfare of its citizens, is not subject to review by the federal courts.
C. The suit is barred by the Eleventh Amendment.
D. The case is not ripe.

Question #: 36

A state statute required all persons operating a catering business within the state to be licensed by the state board of health. The statute further provided that licenses will be granted only to applicants who have resided in the state for five years and who are citizens of the United States. A long-time resident of the state who was not a United States citizen challenges the requirement that applicants for licenses must be citizens of the United States. This provision is most likely:

A. Constitutional, as an exercise of the state's police power.
B. Constitutional, as an effort to protect the health and welfare of the residents of the state.
C. Unconstitutional, as a denial of equal protection.
D. Unconstitutional, as a bill of attainder.

Question #: 37

A state recently enacted legislation requiring that hiring of all full-time municipal and state police officers and firefighters be significantly based on passing a civil service exam that seeks to ensure they possess sufficient verbal skills to serve as public servants who are required to effectively communicate with members of the public. A group of minority applicants for positions as state police officers and fire fighters, who performed poorly on the civil service exam, but are otherwise qualified to be police or firefighters in the state, brought suit in a federal court against the appropriate state party alleging that the state's law violates the Fourteenth Amendment's equal protection clause. The group challenging the civil service exam have presented extensive evidence from qualified educational experts demonstrating that the law in question will have a disproportionately adverse effect on persons from lower socio-economic classes, as well as racial and ethnic minorities. The group challenging the civil service exam, however, has presented no evidence demonstrating or suggesting that the state's motivation in enacting the statute was to discriminate against particular races or ethnicities. The state has moved for summary judgment. The federal court should:

A. Deny the motion for summary judgment unless the state has demonstrated in its motion papers that the law is rationally related to a legitimate governmental interest.
B. Deny the motion for summary judgment unless the state has demonstrated in its motion papers that the law is necessary to achieve a compelling governmental interest.
C. Allow the motion for summary judgment unless the plaintiffs have demonstrated in their motion papers that the law is not rationally related to a legitimate governmental interest.
D. Allow the motion for summary judgment unless the plaintiffs have demonstrated in their motion papers that the law does not achieve a compelling governmental interest.

Question #: 38

A city passed an ordinance prohibiting all of its police officers and firefighters from “moonlighting” (working a second job). The ordinance was passed to ensure that all police officers and firefighters were readily available in case an emergency should arise and for overtime work when the situation warranted it. Other city employees, including members of the city council and the city manager, had no such restrictions placed on secondary employment. A police officer who wanted to moonlight as a dancer at a nightclub within city limits brought suit in federal court, alleging that the ordinance violated her constitutional rights. Will the court likely find the ordinance constitutional as applied to the police officer?

A. No, because the ordinance restricts the officer’s First Amendment rights to freedom of expression.
B. No, because the singling out of police officers and firefighters violates equal protection.
C. Yes, because the city has a significant interest that it seeks to regulate.
D. Yes, because there is a rational basis for the ordinance.

Question #: 39

A state passed a statute requiring all employers in the state to provide a medical insurance plan for full-time employees. A state trade association representing employers brought suit in federal court seeking a court striking the statute as unconstitutional. Assume that the state statute is not preempted by any federal law. Which of the following best reflects the burden of persuasion in this case?

A. The burden is on the trade association to prove that the statute is not rationally related to a legitimate state interest.
B. The burden is on the trade association to prove that the statute is not necessary to achieve a compelling state interest.
C. The burden is on the state to prove that the statute is rationally related to a legitimate state interest.
D. The burden is on the state to prove that the statute is necessary to achieve a compelling state interest. ?

Question #: 40

A state's highway speed limits were 65 miles per hour in its flat land regions and 55 miles per hour its mountainous regions. To reduce traffic fatalities and combat the fact that most of the vehicles on state highways were exceeding posted speed limits, the state legislature proposed banning the use of radar detectors. Citizens in the mountainous regions of the state, where most of the state's highway fatalities occurred, generally supported the ban, but citizens in the flat regions of the state opposed the ban, so the legislature adopted a law banning use of radar detectors on any road with a speed limit below 60 miles per hour. A driver whose car was equipped with a radar detector lived in the mountainous region of the state but frequently drove to the state's flat region. While on a mountain highway with a posted speed limit of 55 miles per hour, the driver was pulled over by a state trooper for speeding. While approaching the driver 's car, the state trooper noticed that the driver's radar detector was turned on. The trooper ticketed the driver for both speeding and illegal use of a radar detector. The driver challenges his ticket for use of the radar detector, arguing that it is unfair to allow people in the flat lands to use radar detectors while prohibiting residents of the mountainous region from using them. Which of the following statements is correct regarding the burden of proof in such a case?

A. The state will have to prove that the ban serves a compelling state interest.
B. The state will have to prove that the ban is rationally related to a legitimate state interest.
C. The driver will have to prove that the ban does not serve a compelling interest.
D. The driver will have to prove that the ban is not rationally related to a legitimate state interest.

Question #: 41

A state has a retirement system under which a fixed percentage of an employee's pay is deducted each payday. Retirement benefits are paid at age 65 for the life of the employee. The state has obtained reliable actuarial statistics that indicate that those who completely abstain from alcohol have a greater life expectancy than those who use alcohol. Those who abstain, therefore, receive smaller monthly retirement benefits than those who use alcohol. A man who has never had a drop of alcohol in his life challenges the lower benefit standard applicable to persons in his class on constitutional grounds. What would be the appropriate burden of proof?

A. The man is required to show that the benefit standard is not rationally related to a legitimate state purpose.
B. The man is required to show that the benefit standard is not necessary to achieve a compelling state interest.
C. The state is required to show that the benefit standard is necessary to achieve a compelling state interest.
D. The state is required to show that the benefit standard is rationally related to a legitimate state interest. ?

Question #: 42

A state public employee retirement act provided that, while nonmarital children under 18 qualify for survivor benefits, an employee's children born out of wedlock may recover only if they lived with the employee in a regular parent-child relationship. A state employee lived with a woman in the state for 10 years, after which they separated. They had two children, both of whom were the employee's natural children born out of wedlock. The employee supported the children under a state child support decree until he died a year ago. At the time of his death, he was covered by the retirement act. The state retirement commission determined that the children did not qualify because they were living with their mother and not living with the employee at the time of his death. The mother sued in federal court alleging that, if the children were born in wedlock, they would have been entitled to benefits, and that it was discriminatory to treat illegitimate children differently. Is the state provision constitutional?

A. Yes, because a state may allocate survivor benefits to its employees without restriction.
B. Yes, if there was a rational basis for the classification of nonmarital versus marital children.
C. No, unless the classification of marital and nonmarital children is substantially related to an important governmental purpose.
D. No, unless the different treatment of marital and nonmarital children is necessary to promote a compelling governmental interest.

Question #: 43

Because the National Highway Safety Commission has determined that males between the ages of 16 to 18 are 17% more likely to drive under the influence of alcohol or drugs than females between the ages of 16 to 18, a state has raised the age at which males can obtain driver's licenses to 18. The state has left the female age required to obtain a driver's license at 16. A 16-year-old male who has a part time job after school and wants to be able to drive to get to his job, has filed suit (through his parents) in federal court to strike down the state driving age law as unconstitutional. Should the court find the city ordinance constitutional?

A. Yes, because in these situations the government has broad power under the 10th Amendment to fashion laws pertaining to health, safety, and welfare.
B. Yes, if the city can show a rational relationship between the ordinance and maintaining order at the center.
C. No, if the plaintiff can show that the ordinance was not necessary to promote a compelling government interest.
D. No, unless the city can show that the ordinance is substantially related to important government objectives. ?

Question #: 44

A state that otherwise permits abortions up to the 20thth week of pregnancy requires, without exception, that no married woman may have an abortion unless her spouse signs and submits a waiver stating: (1) the nonpregnant spouse has been informed of the pregnancy, (2) the nonpregnant spouse has spent substantial time reflecting on whether then fetus should be aborted or brought to term, and (3) the two spouses have fully discussed the pros and cons of bringing the child to term or having an abortion, and the nonpregnant spouse is satisfied with the comprehensiveness of the discussion(s), and (4) after reflection, the nonpregnant spouse consents to the abortion. A pregnant married woman has brought a proper lawsuit challenging the constitutionality of this state statute.In that suit, should the court uphold the constitutionality of the statute?

A. No, because the requirement of spousal consent imposes an undue burden on a woman's right to procure an abortion.
B. No, because the state law does not provide a bypass procedure that would allow a court to authorize a pregnant woman to obtain an abortion without her spouse’s consent.
C. Yes, because a spouse’s to participation in the decision to bring a fetus to term or abort it outweighs any individual right the pregnant woman may have.
D. Yes, because the right to an abortion involves health, safety, and welfare, morals, and/or aesthetics, and it is within the province of the state legislature to rationally determine what is best for its residents.

Question #: 45

A man committed a particularly brutal series of crimes that, because of their interstate character, were violations of a federal criminal statute. The man was convicted in federal court and sentenced to life imprisonment. Six months after the man was incarcerated, the President pardoned him. There was a great public outcry, amid charges that the President issued the pardon because the man's uncle had made a large contribution to the President's reelection campaign fund. Responding to public opinion, Congress passed a bill limiting the President's power to pardon persons convicted under the specific statute that the man had violated. The President vetoed the bill, but three-quarters of the members of each house voted to override the veto. Is the legislation constitutional?

A. No, because the power to pardon for federal crimes is expressly granted to the President in the Constitution and is an unqualified power (except as to impeachment).
B. No, because the President has the duty to enforce the laws, and therefore has plenary powers.
C. Yes, under Article I, Section 1.
D. Yes, because Congress wrote the federal criminal statutes and has the right to determine who should be convicted under such statutes.

Con Law Fall 2022 Midtterm

Question #: 1

Congress recently enacted the Violence at Work Act (the Act).

Title I of the Act provides that an employee who has been injured in the workplace by the violent act of a coworker has a cause of action for damages against that coworker. The Act specifically states that it applies to both private and government workplaces.

Title II of the Act imposes several duties on employers subject to the Act and creates a cause of action against employers who do not fulfill those duties. Section 201 provides that all employers, "including all States, their agencies and subdivisions," who have more than 50 employees are subject to the Act. Section 202 requires employers subject to the Act to: (i) train employees on certain methods of preventing and responding to workplace violence, (ii) conduct criminal background checks on job applicants, and (iii) establish a hotline to report workplace violence. Section 203 provides that if an employer subject to the Act does not fulfill the duties imposed by Section 202, an employee who has been injured by the violent act of a fellow employee may recover damages from the employer for the harm resulting from that violent act. Section 204 provides that any action brought pursuant to Section 203 may be brought in federal or state court and that "if brought in federal court against a State, its agencies or subdivisions, any defense of immunity under the Eleventh Amendment to the United States Constitution is abrogated."

To support its use of power to enact the bill, Congress found that acts of workplace violence directly interfere with economic activity by causing damage to business property, injury to workers, and lost work time due to the violent acts and their aftermath. The House report estimated that total national economic activity is diminished by $5 to $10 billion per year as a result of losses associated with workplace violence.

After the Act's effective date, an employee of a state agency was injured in the workplace by the violent act of a disgruntled coworker. The state agency, which has over 100 employees, conceded that it had not implemented the measures required by Section 202 of the Act.

Accordingly, the employee has sued the state agency in United States District Court to recover damages for the harm caused by the act of workplace violence. The state agency has moved to dismiss the lawsuit on three grounds: (1) Congress did not have the power to enact the Act, (2) Congress did not have the

power to apply the Act to state agencies, and (3) the state agency is immune from the employee's lawsuit.

1. Is the Act a valid exercise of Congress's power? Explain.
1. Assuming that the Act is a valid exercise of Congress's power, may the Act constitutionally be applied to state agencies as employers? Explain.
1. Is the state agency immunity from the employee's lawsuit in federal court? Explain.

Question #: 2

A particular state has little industry or arable land. Its major source of income was the lease of arid public lands for nuclear waste disposal. Lessees included nuclear power companies from within and outside the state. Over the course of several decades, the state profited from its leasing plan and was able to pour money into improving roadways and public structures throughout the state. However, not all of the state's citizens were pleased with the benefits of the leasing plan. An environmental group lobbied Congress to pass legislation limiting the disposal of nuclear waste on state or federal lands. Congress passed the legislation, which included a regulation requiring states that had acted as lessors to nuclear waste disposers to enact legislation providing for "brownfields" programs under which existing nuclear waste sites were to be cleaned up with state funds.

If the state challenged the federal "brownfields" regulation on federal constitutional grounds, what would be the likely outcome?

1. The state would prevail, because it possesses the sovereign right to regulate its own natural resources without interference from the federal government.
1. The state would prevail, because Congress does not have the authority to require a state to legislate and fund a federal regulatory scheme.
1. The state would not prevail, because the regulation of nuclear waste disposal may have a national economic effect.
1. The state would not prevail, because the state allowed nuclear waste disposers to use public lands.

Correct Answer: _____

Explanation:

Question #: 3

A particular state has little industry or arable land. Its major source of income was the lease of arid public lands for nuclear waste disposal. Lessees included nuclear power companies from within and outside the state. Over the course of several decades, the state profited from its leasing plan and was able to pour money into improving roadways and public structures throughout the state. However, not all of the state's citizens were pleased with the benefits of the leasing plan. An environmental group lobbied Congress to pass legislation limiting the disposal of nuclear waste on state or federal lands. Congress passed the legislation, which included a regulation requiring states that had acted as lessors to nuclear waste disposers to enact legislation providing for "brownfields" programs under which existing nuclear waste sites were to be cleaned up with state funds.

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1. The state would prevail, because Congress does not have the authority to require a state to legislate and fund a federal regulatory scheme.
1. The state would not prevail, because the regulation of nuclear waste disposal may have a national economic effect.
1. The state would not prevail, because the state allowed nuclear waste disposers to use public lands.

Correct Answer: _____

Explanation:

Question #: 4

The federal “No Child Left Behind” law makes federal funds available to states implementing a federally approved uniform testing program for public school students. States that choose not to implement an approved uniform testing program will not receive 5% less of the federal education funding they otherwise would have received. The federal goal is to create uniform standards of educational competence.

A state has adopted a policy to the effect that uniform standardized testing is pedagogically unsound and merely encourages “teaching to the test.” It does not want to employ standardized testing to measure student performance. That state has challenged the federal law in a federal court and has asked the court to order a release of the funds the state would have received if it had implemented the prescribed testing program.

What is the likely outcome for the state’s lawsuit?

1. The federal government will prevail, because the federal government has the power to condition receipt of the funds on the recipient's conformance to Congress’s requirements.
1. The federal government will prevail, because the doctrine of state sovereignty is inapplicable to an action between a state government and the federal government.
1. The state will prevail, because the state is correct that standardized testing is not pedagogically sound.
1. The state will prevail, because federal intervention in implementation of the state's educational policies violates state sovereignty protected by the Tenth Amendment.

Correct Answer: _____

Explanation:

Question #: 5

The President of the United States created the “Office of Faith-Based Initiatives” within the executive branch. The Office allocates funds from the executive branch’s “general revenue” fund to religious groups that run after-school programs for “at-risk” youth. These funds come with no prohibition on teaching or promoting religion as a part of the government-sponsored program.

A group of taxpayers brought suit against the President in federal court, claiming that the Faith-Based Initiative program violated the Establishment Clause of the First Amendment. If the President moves to dismiss to suit, how should the court rule?

(A) The motion should be denied because taxpayers have standing to challenge expenditures allegedly made in violation of the Establishment Clause.

(B) The motion should be denied because there is a live dispute between the parties.

(C) The motion should be allowed because the President has plenary power to spend discretionary otherwise untargeted funds in any way he or she sees fit.

(D) The motion should be allowed because general taxpayer standing is limited to challenges of congressional appropriations alleged to violate the First Amendment, and this suit involves an executive expenditure.

Correct Answer: _____

Explanation:

PART ONE – DIRECTED ESSAYS
Suggested Time: Two Hours (120 Minutes)

Below are ten (10) fact patterns, each of which has a number of questions that follows it and enquires 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. The Directed Essays are similar to those I have used on numerous past exams; you should be quite familiar with the style if you studied from my old exams.

Questions

1. The State of Mississippi believes that the State of Tennessee is stealing Mississippi's groundwater by allowing the Memphis Light, Gas & Water Division to pump large amounts of groundwater from the Memphis Sand Aquifer that straddles the Mississippi-Tennessee border, pulling Mississippi's groundwater across the border and to the surface for use in Memphis. Mississippi filed a complaint in the United States District Court for the Northern District of Mississippi, asking that the court enter a declaratory judgment "establishing Mississippi's sovereign right, title and exclusive interest in the groundwater stored naturally in the Sparta Sand formation" of the aquifer, which lies entirely under Mississippi and would not, according to Mississippi, ever flow into Tennessee absent the pumping in Memphis. Mississippi's complaint also seeks over $600 million in damages.

The State of Mississippi immediately filed a motion to dismiss the complaint.

A. Yes or no, will the motion to dismiss be allowed?

B. In the space provided below, please briefly state and explain why the motion will or will not be allowed.

2. Let's pretend it's March 2022 and consider a hypothetical case that may or may not arise.

The United States Supreme Court is currently comprised of 6 justices appointed by Republican presidents and only 3 appointed by Democratic presidents, with Republican-appointed justices controlling two-thirds of the vote on all cases before the Court. This is so despite the fact that Democratic presidents have been in office 17 of the last 29 years (almost 59% of the last 29 years).

Unhappy with some of the recent SCOTUS decisions, Congress enacted, and the President signed, a law that increases the total number of justices from 9 to 13, giving President Biden an additional 4 appointments immediately. This would change the balance of the Supreme Court so that it is comprised of 7 justices appointed by Democratic presidents and 6 justices appointed by Republican presidents. The new law is to take effect so that the President may appoint the 4 additional justices to be in place when the next Supreme Court term begins in October 2022.

Each Supreme Court term runs from the first Monday in October to (usually) the third week of June.

Two individuals have brought suit against President Biden and the Congress of the United States in the United States District Court for the District of Columbia, seeking: (1) a declaratory judgment that the new law is unconstitutional, and (2) that an injunction issue prohibiting President Biden from appointing any additional justices unless and until a vacancy from the sitting 9 justices arises. The two plaintiffs are: (1) a sitting Senator who voted against the new law, and (2) a individual party who currently has a matter in the Supreme Court that has been argued but not decided.

President Biden and Congress have moved to dismiss the action.

A. In the space provided below, list but do not describe at least two (2) justiciability doctrines that you would consider raising in an effort to have the case dismissed if you were to represent the President and Congress.

B. In the space provided below, please explain whether maintaining the justiciability doctrines you mentioned above will or will not support the motion to dismiss.

C. Assume for this part of the question that the court has deemed the justiciability doctrines you raised in Part A of this question to be insufficient to support a dismissal of the case. Yes or no, upon consideration of the merits of the case, did Congress have the constitutional authority to enact a law allowing the President to appoint 4 additional justices to the Supreme Court by October 2022?

D. In the space provided below, please apply the applicable law to the facts in justification of your answer to Part C of this question.

3. The State of Texas allows capital offenses to be punished by the death penalty. Prior to 2019, the State of Texas had a policy allowing spiritual advisers to be present, to touch the condemned inmate as s/he died, and to pray out loud throughout the execution process. In 2019, claiming concerns about having nongovernment employees in a secure area, the desire to have executions proceed smoothly, and an attempt to abate the prospect of endless last-minute litigation by inmates facing execution, Texas changed that policy. Since 2019, its practice allows spiritual advisers into the death chamber prior to the commencement of the execution by lethal injection but requires the spiritual adviser to leave before the process begins.

A Texas inmate awaiting execution wants his pastor to be present, and be able to touch, pray, and sing to the inmate throughout his execution process, has challenged the practice, alleging that it: (1) deprives him of his rights to freely exercise his religion in violation of the First Amendment,

as applied to the states through the Fourteenth Amendment, and (2) deprives him of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a sister statute to the Religious Freedom Restoration Act (RFRA), that applies to the religious practices of inmates. MLUIPA operates in the same manner as RFRA. The inmate has challenged the post-2019 policy on these grounds and the case has ended up in the Supreme Court.

A. Assume for this Part of the question and the next Part of the question that the execution had already been carried out prior to arguments before the Supreme Court. Based on this fact, Texas has moved to dismiss the matter from the Supreme Court docket. In the space provided below, state the most likely doctrine Texas will raise in support of its motion to dismiss.

B. In the space provided below, please apply the applicable law to the facts in explaining whether or not the Texas motion to dismiss should be allowed.

C. Assume for the remaining parts of this question that the inmate had not been executed prior to final decision of the case by the Supreme Court and that Texas has not brought a motion to dismiss based on those facts. In the space provided below, please apply the applicable law to the facts in explaining whether or not the inmate's Free Exercise claim under the First Amendment should succeed before the Supreme Court.

D. Again, assume for this part of the question that the inmate had not been executed prior to final decision of the case by the Supreme Court and that Texas has not brought a motion to dismiss based on those facts. In the space provided below, please apply the applicable law to the facts in explaining whether or not the inmate's RLUIPA claim should succeed before the Supreme Court. (Again, RLUIPA employs the same analysis and methodology as does RFRA).

4. The City of Austin Texas regulates signs in Chapter 25-10 of the Austin City Code. The Sign Code defines an "off-premise[s] sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The Sign Code does not expressly define "on-premise[s] sign," but it does use the term "on-premise[s] sign" in some of its provisions. The Sign Code allows new on-premises signs to be built, but it does not allow new off-premises signs to be built. The Code further defines a "nonconforming sign" as "a sign that was lawfully installed at its current location but does not comply with the requirements of [the Sign Code.]" Preexisting off-premises signs are deemed "nonconforming signs."

Persons are permitted to "continue or maintain nonconforming signs at [their] existing location," and can even change the face of the nonconforming sign, as long as the change does not "increase the degree of the existing nonconformity." However, persons are not permitted to "change the method or technology used to convey a message" on a nonconforming sign. The

Sign Code permits "on-premise[s] signs" to be "electronically controlled changeable copy signs" (*i.e.*, "digital signs"). Consequently, on-premises non-digital signs can be digitized, but off-premises non-digital signs cannot. The City's stated general purpose in adopting the Sign Code is to protect the aesthetic value of the city and to protect public safety.

Two business entities are in the business of outdoor advertising. The businesses own and operate "off-premise[s]" signs, including billboards that display both commercial and noncommercial messages. In 2017, the two businesses submitted permit applications to digitize their existing "off-premises" sign structures. The City denied the permit applications, stating that "[t]hese applications cannot be approved under Section 25-10-152 (*Nonconforming Signs*) because they would change the existing technology used to convey off-premises commercial messages and increase the degree of nonconformity with current regulations relating to off-premises signs."

The two business have sued the City of Austin, asserting that its Sign Code, as applied to them, violates the Free Speech Clause of the First Amendment, as it applies to the states through the Fourteenth Amendment.

A. To the extent that it allows "on-premises" digitized signs but not "off-premises: digitized signs, is the Sign Code content-based or content-neutral?

B. In the space provided below, please apply the applicable law to the facts in explaining why you chose your answer on whether the Sign Code is content-based or content-neutral. (Do not yet address the appropriate standard of review or whether the Sign Code is unconstitutional.)

C. In the space provided below, please state the standard of review applicable to content-based regulations or laws.

D. In the space provided below, please state the standard of review applicable to content-neutral regulations or laws.

E. In the space provided below, please apply the applicable standard of review to the facts in explaining whether or not Austin's Sign Code violates the Free Speech clause of the First Amendment.

5. Enacted in 1925, the Federal Arbitration Act (FAA) provides for judicial facilitation of private dispute resolution through arbitration. It applies in both state courts and federal courts, and covers all contracts (including employment contracts), except the contracts of seamen, railroad employees, or any other class of workers involved in foreign or interstate commerce.

The FAA was properly authorized under the Commerce Clause powers granted to Congress in Article I § 8 of the United States Constitution.

The FAA provides for contract-based compulsory and binding arbitration, resulting in an arbitration award entered by an arbitrator or arbitration panel as opposed to a judgment entered by a court of law. In fact, under the FAA federal policy favors resolution by arbitration than by litigation in state or federal courts. In an arbitration, the parties give up their right to an appeal on substantive grounds to a court. Once an award is entered by an arbitrator or arbitration panel, it must be "confirmed" in a court of law in an action that does not permit a substantive review of the arbitration decision. Once confirmed, the award is reduced to an enforceable judgment, which may be enforced by the winning party in court, like any other judgment.

Nitro–Lift Technologies, L.L.C. (Nitro-Lift) is in the business of providing services that enhance production with operators of oil and gas wells in Arkansas, Oklahoma and Texas. Two employees of Nitro-Lift, Howard and Schneider, entered a confidentiality and noncompetition employee agreements in their employment contracts with Nitro–Lift that contained the following arbitration clause:

> Any dispute, difference or unresolved question between Nitro–Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association.

The employment contracts also provided that Oklahoma law would apply to the construction of any provisions contained in the contract. After working for Nitro–Lift on wells in Oklahoma, Texas, and Arkansas, Howard and Schneider quit and began working for one of Nitro–Lift's competitors. Claiming that Howard and Schneider had breached their noncompetition agreements, Nitro–Lift served them with a demand for arbitration. Howard and Schneider then filed suit in a state trial court in Oklahoma, asking the court to declare the noncompetition agreements null and void and to enjoin their enforcement. The state trial court dismissed the complaint, finding that the contracts contained valid arbitration clauses under which an arbitrator, and not the court, must settle the parties' disagreement. But the Oklahoma Supreme Court reversed, stating that an Oklahoma state statute, Okla. Stat., Tit. 15, § 219A (West 2011), prevents the enforceability of the noncompetition agreements. The Oklahoma Supreme Court rejected Nitro–Lift's argument that any dispute as to the contracts' enforceability, including whether the Oklahoma statute applied, was a question for an arbitrator, not the courts. It held that the "existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement" under Oklahoma law.

Nitro-Lift has filed an application for certiorari to the United States Supreme Court. It argues that the FAA preempts conflicting Oklahoma law regarding the proper forum for resolving the dispute. Howard and Schneider have opposed the application for certiorari, stating that the United States Supreme Court should apply the adequate and independent state grounds abstention in refusing to entertain any further review under appeal.

A. If the FAA does not preempt state law, SCOTUS will almost certainly deny Nitro-Lift's application for certiorari. In the space provided below please state the elements and other considerations attaching to questions of *express* preemption. (Do not do any analysis in this Part and do not tell me about other forms of preemption.)

B. In the space provided below please state the elements and other considerations attaching to questions involving the various forms of *implied* preemption. (Do not do any analysis in this Part and do not tell me about express preemption.)

C. In the space provided below, please apply the applicable law of preemption to the facts to determine and support your determination about whether the FAA preempts Oklahoma law in this case.

D. If Howard and Schneider are correct that the adequate and independent state grounds abstention doctrine applies, SCOTUS will almost certainly deny Nitro-Lift's application for certiorari. In the space provided below please state the elements and other considerations attaching to the adequate and independent state action abstention doctrine. (Do not do any analysis in this Part.)

E. In the space provided below, please apply the applicable law to the facts to determine and support your determination about whether the adequate and independent state action abstention doctrine precludes the United States Supreme Court from granting certiorari in this case.

F. Extra Credit: How many votes of the 9 SCOTUS justices are required for the court to grant certiorari?

6. Approximately 80,000 K-12 students live in Boston. Almost seventy percent of them attend Boston Public Schools, and the quality of education among the schools is anything but equivalent. The home of the oldest and most prestigious public schools in the country is also home to thirty-four schools that are "among the lowest performing [ten percent] of schools in the state." The so-called "Exam Schools" are the Boston Public Schools system's highest performing and most prestigious schools. These schools serve seventh through twelfth-grade students, and generally present two avenues of admission: students apply while in sixth grade for admission into seventh grade or in eighth grade for admission into ninth grade. Although any resident-student in Boston is eligible to apply for admission, only a fraction of students is admitted to these schools, making application a highly competitive process. Over 4,000 students applied for

admission to the Exam Schools for the 2020-2021 school year, and only about 1,400 (about 35%) were invited to attend.

The Boston Public Schools system uses a unified application process for admission to the Exam Schools. Joint Statement. For many years, this process remained relatively unchanged and involved three factors: a GPA score, a standardized test score, and the applicant's school preference. Each applicant ranked the Exam Schools by preference when he or she sat for the standardized admissions test. Administrators at the Boston Public Schools would average and assign a numeric value to the applicant's grades in English Language Arts and Math. This GPA numeric value was added to the applicant's standardized test score creating a composite score, by which applicants were ranked. Starting with the student with the highest composite score, each student received an invitation to his or her first choice of the Exam Schools. If the student's first choice was full, the student was placed in his or her next choice. This process continued until all seats in the three Exam Schools were filled.

In 2019, the racial and ethnic demographics of Boston were: 44.9% White, 22.2% Black, 19.7% Hispanic or Latinx, 9.6% Asian, and 2.6% two or more races, not including Hispanic or Latinx. The demographics of the school-age population in Boston, however, is significantly more diverse than the City's general population. For the 2020-2021 school year, the racial and ethnic demographics of Boston's school-age population were: 16% White, 7% Asian, 35% Black, 36% Latinx, and 5% mixed race. But historically the student body of the Exam Schools has not represented this same level of diversity. For the 2020-2021 school year, the racial and ethnic demographics of the incoming class of the Exam Schools were: 39% White, 21% Asian, 14% Black, 21% Latinx, and 5% “Multi-Race/Other.”

The Boston School Committee (BSC) decided to change the admissions process for Exam Schools in order to “rectify[ ] historic racial inequities at the Exam Schools.” It appointed a “Working Group” to study and devise a new admissions process for the Exam Schools to achieve this goal. The Working Group wrote the “Working Group's 2021-2022 Admissions Plan” (the Plan), and the Boston School Committee adopted it on October 21, 2020. Under the Plan, applicants were not required to take an admissions exam. Instead, they had to satisfy three criteria to be eligible for admission to an Exam School. First, the student must be a resident of one of Boston's twenty-nine zip codes. Next, the student must hold a minimum B average in English Language Arts and Math during the fall and winter of the 2019-2020 school year or have received a “Meets Expectations” or “Exceeds Expectations” score in English Language Arts and Math on the Massachusetts Comprehensive Assessment System administered in the spring of 2019. Finally, the student must “[p]rovide verification from the school district (or equivalent) that the student is performing at grade level based on the Massachusetts Curriculum standards.” The Plan also required eligible students to submit a list of the Exam Schools according to his or her preference. The Plan has two rounds through which applicants are invited to the Exam Schools. Using the eligible applicants’ English Language Arts and Math GPAs for the first two grading periods of the 2019-2020 school year, students in the first round are invited to the first 20% of seats in each Exam School. Each student within this 20% of GPAs is invited to his or her first-choice Exam School. If, however, 20% of that student's first-choice Exam School is filled, that student moves to the second round of the Plan. The second round again ranks eligible applicants by their English Language Arts and Math GPAs for the first two grading periods of

the 2019-2020 school year. In this round, however, the students are ranked within their zip code according to their GPA. Each zip code is allocated a percentage of the remaining 80% of seats at the Exam Schools according to the proportion of school-age children residing in that zip code. Students are then assigned to the Exam Schools over ten rounds until each Exam School is filled. Ten percent of the Exam Schools' seats allocated to each zip code are assigned per round. Starting with the zip code with the lowest median household income with children under the age of eighteen according to the American Community Survey, the highest ranked applicants are assigned to his or her first-choice Exam School until 10% of that zip code's allocated seats are filled. If an applicant's first-choice Exam School is filled, the applicant is assigned to his or her next choice. Once a zip code fills its ten percent of seats, the next zip code's applicants are assigned. Invitations under both processes will be issued at the same time.

Although the fact of the Plan did not mention race, national origin, or ethnicity, its effect was to lead to more Black, Latinx, and multi-racial student admissions to the Exam Schools and fewer White and Asian student admissions. Many White and Asian students who would have been accepted to the Exam School under the old plan were not admitted under the new Plan.

A number of parents formed a non-profit organization named the "Coalition for Academic Excellence Corp." (the Coalition). The Coalition's stated purposes include "promoting merit-based admissions to Boston Exam Schools (including Boston Latin School, Boston Latin Academy and O'Bryant School of Science and Math) and promoting diversity in Boston high schools by enhancing K-6 education across all schools in Boston." The Coalition represents the interests of 14 students of Asian or White ethnicity and their member-parents. The students reside in four of Boston's twenty-nine zip codes: Chinatown (zip code 02111), Beacon Hill/West End (zip code 02114), Brighton (zip code 02135), and West Roxbury (zip code 02132). Each student "is a sixth-grade student . . . and an applicant to one or more of the Boston Exam Schools for the class entering in the fall of 2021," and each member-parent supports his or her child's application to the Exam Schools. All of the 14 students the Coalition represents would have been admitted to one of the Exam School under the old plan. None of them has been admitted to an Exam School under the new Plan.

The Coalition has sued the City of Boston and BSC, seeking a declaratory judgment and injunction preventing implementation of the new plan. They allege, among other things, that the new Plan violates the Equal Protection Clause of the Fourteenth Amendment.

A. Assume for this Part of the question that the City of Boston and BSC have moved to dismiss the case under the sovereign immunity provisions of the Eleventh Amendment. Yes or no, will the City of Boston and BSC prevail in their efforts to have the case dismissed under the Eleventh Amendment?

B. In the space provided below, please apply the applicable law to the facts to support your answer to Part A directly above.

C. Assume for this part of the question that the City of Boston and BSC have moved to dismiss the case on the ground of prudential standing. In the space provided below, please state the three (3) types of prudential standing and the elements of each. (Do not do any analysis in this Part.)

D. Yes or no, will the City of Boston and BSC prevail in their attempt to get the case dismissed on the ground of prudential standing?

E. In the space provided below, please apply the applicable law to the facts to support your answer to Part D directly above.

F. In the space provided below, please list/identify the three different levels of scrutiny that apply to an Equal Protection claim (without yet describing the three classifications one must consider when assaying an equal protection claim).

i.

ii.

iii.

G. In the space provided below, please describe each of the three different levels of scrutiny you identified directly above in Part F.

i.

ii.

iii.

H. In the space provided below, please make your best argument that the *rational basis* standard of review should apply.

I. Based on what you wrote directly above in Part H, please apply the applicable law to the facts to determine who will win and why.

J. Assume for this Part that the Court has decided that the fact pattern presents the issue of *affirmative action*. What standard of review would the court apply under such a review? (Do not provide any analysis at this time.)

K. Continuing to treat the case as an affirmative action one, please apply the applicable law to the facts to determine who will win and why.

7. On September 5, 2002, Brandon Yates was pled guilty and was convicted of misdemeanor domestic violence in the State of Idaho. In March 2021, Yates was renting a room from his father, Dennis Yates ("Dennis"), in Mountain Home, Idaho. Dennis was on federal felony supervised release as a convicted felon and sex offender. Pursuant to the terms of his supervised release, Dennis was subject to "a search of his person, place of residence, automobile, as well as any objects or materials including computer systems and other types of electronic storage media devices."

On March 9, 2021, United States Probation Officers arrived at Dennis's home to conduct a probationary search. The officers located a Savage Mark II .22 rifle in a soft case in the attic space above the garage of the home. Yates admitted that the rifle was his.

A federal grand jury was convened and indicted Yates on one count of violating 18 U.S.C. § 922(g)(9), which provides:

> (g) [I]t shall be unlawful for any person
>
> > (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The rifle in question was manufactured in Canada before being imported and distributed by Savage Arms, Inc., in Massachusetts, to a retail dealer in Idaho.

Yates has moved to dismiss the indictment against him, asserting that Congress lacked the authority to enact the federal statute upon which the indictment was issued.

A. What three (3) factors will the court consider in determining whether Congress had the power to pass the federal laws used to prosecute these crimes?

i.

ii.

iii.

B. In the space provided below, please apply the factors to the facts to determine whether the federal government has the right to indict Yates for illegally possessing a firearm at his father's home in Mountain Home, Idaho. (Do not address the Tenth Amendment at this time.)

C. In the space provided below, please apply the Tenth Amendment to the result you reached above and explain why it does or does not change the result.

8. Throughout the summer of 2021, the Montoursville Pennsylvania Area School District Board of Directors (the "School Board") held multiple meetings to discuss school policies for the upcoming academic year. On June 4, 2021, the School Board approved a Health and Safety Plan (the "Plan") by a vote of 8 to 0. The Plan included the following health policy statement:

> The district has and will continue to review any recommendations and follow any laws or mandates we receive from the Pennsylvania Department of Education or Pennsylvania Department of Health as well as consider the unique needs of our community and district.

On July 19, 2021, the Superintendent of the School District (the "Superintendent") sent "a district-wide email to parents stating that the district was adopting a "mask optional policy" at that time. By the end of the following month, however, the public health landscape concerning COVID-19 had changed dramatically. Between July and August 2021, Pennsylvania's COVID-19 case count increased "from less than 300 cases per day to more than 3,000 cases per day." In total, "there were 1,300,368 cases and 28,235 deaths in this Commonwealth caused by COVID-19." Particularly troubling for Pennsylvania schools, the number of COVID-19 cases "among school-aged children ... increased by 11,000 in a one-month period and by more than 79,000 since the beginning of the year." This surge in new cases was attributable, at least in part, to a highly transmissible, "more infectious" strand of the virus: the Delta variant.

In response to these developments, on August 31, 2021, the Acting Secretary of Pennsylvania Department of Health (the "Secretary") issued the following mandate to school entities, including public Pre-K–12 grade schools:

> Each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.

After receiving this directive from the Department of Health, the School Board approved, and the Superintendent announced, a new policy for the School District requiring all students and teachers to wear masks on school premises and buses (the "Mask Mandate").

Mark and Brenda Oberheim (the "Oberheims"), parents of children attending the Montoursville public schools, do not want their children wearing masks at school or in busses. They filed a complaint in the Federal District Court against the Superintendent, the President of the School Board, the School Board, and the Secretary, asserting the Mask Mandate violated their children's constitutional rights under the First, Fifth, and Fourteenth Amendments. At the time of filing their complaint, they moved for the issuance of a preliminary injunction that would prohibit the Secretary from implementing the Mask Mandate statewide, and the Superintendent, School Board, and President of the School Board from implementing it in the Montoursville Area School District. As you know, one of the elements for the issuance of a preliminary injunction is that the moving party must demonstrate a reasonable likelihood of success on the merits.

A. One of the Oberheims' claim is that the mask mandate violates their children's fundamental *right to an education*. In the space provided below, please state the standard of review that will apply to the court's analysis of their children's right to an education.

B. In the spaces provided below, please state why you chose the standard of review you identified directly above in Part A.

C. In the spaces provide below, please apply the standard of review you stated in Part A above to the facts to determine whether the Oberheims will prevail on their claim that their children's right to an education has been deprived, and the legal reasons supporting your determination.

D. Another of the Oberheims' claim is that the mask mandate violates their own fundamental *right to raise their children as they see fit*, without undue state interference. In the space provided below, please state the standard of review that will apply to the court's analysis of their right to raise their children as they see fit.

E. In the spaces provided below, please state why you chose the standard of review you identified directly above in Part D.

F. In the spaces provide below, please apply the standard of review you stated in Part D above to the facts to determine whether the Oberheims will prevail on their claim that the School District is interfering with their right to raise their children as they see fit, and the legal reasons supporting your determination.

G. Another of the Oberheims' claim is that the mask mandate violates their children's right of free association protected by the First Amendment of the United States Constitution. In the space provided below, please state the standard of review that will apply to the court's analysis of the Oberheims' children's right of free association.

H. In the spaces provided below, please state why you chose the standard of review you identified directly above in Part G.

I. In the spaces provide below, please apply the standard of review you stated in Part G above to the facts to determine whether the Oberheims will prevail on their claim that the School District is interfering with their children's right of free association, and the legal reasons supporting your determination.

J. Assume for the remaining Parts of this question that the Oberheims' children are all old enough to be vaccinated for COVID-19. Assume further that the School District, which requires live attendance to classes and does not provide a simulcast option for those preferring to attend virtually, has imposed a vaccine mandate for all pupils old enough to receive a vaccine. The Oberheims claim that the vaccine mandate violates their children's fundamental right to refuse unwanted medical treatment protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In the space provided below, please state the standard of review that will apply to the court's analysis of the Oberheims' children's right to refuse unwanted medical treatment.

K. In the spaces provided below, please state why you chose the standard of review you identified directly above in Part J.

L. In the spaces provide below, please apply the standard of review you stated in Part J above to the facts to determine whether the Oberheims will prevail on their claim that the School District is interfering with their children's right to refuse unwanted medical treatment, and the legal reasons supporting your determination.

9. The current iteration of Maine's medical marijuana law – the "Maine Medical Use of Marijuana Act" (the Act) – authorizes qualifies patients who have a certification from a medical provider for the medical use of marijuana to possess, use, and purchase medical marijuana. The Act also authorizes two types of entities: registered dispensaries and registered caregivers. Each is allowed to possess, cultivate, and sell marijuana to qualified patients. While dispensaries and

caregivers can engage in similar activities, by statutory design dispensaries engage in operations that are much larger than caregivers. For example, caregivers are limited in the number of plants that they can grow and sell, whereas dispensaries can grow an unlimited amount. As of February 2021, there were approximately 3,000 caregivers in the State, and seven (7) dispensaries. Caregivers accounted for 76 percent of retail sales as of February 2020, with dispensaries accounting for the remaining 24 percent. Together, the medical marijuana industry generated over $110 million in sales in 2019. Maine's Department of Administrative and Financial Services ("the Department") is in charge of licensing and regulating all marijuana businesses in Maine, including the medical marijuana business. The current Commissioner of the Department is Kirsten Figueroa ("Figueroa"); she is in charge of all licensing decisions and enforcement actions pertaining to the Department.

Although dispensaries can grow more marijuana plants, the Act provides that "[a]ll officers or directors of a dispensary must be residents of this State," (the "Dispensary Residency Requirement").

Northeast Patients Group d/b/a Wellness Connection of Maine ("Wellness Connection") owns and operates three of the seven registered dispensaries in Maine's medical marijuana program. High Times Dispensary ("High Times") is a smaller dispensary in Maine; it owns only one dispensary in the state.

Bleeker Street Capital Partners, LLC ("Bleeker Street") is a Delaware limited liability company entirely owned by residents of states other than Maine. Bleeker Street would purchase all of the equity and assets of Wellness Connection if the Dispensary Residency Requirement did not prohibit it from doing so. Mary Jane Reifer ("Reifer") is a resident of New Hampshire. She wants to get into the medical marijuana business and would purchase all of the equity and assets of High Times if the Dispensary Residency Requirement did not prohibit her from doing so.

Wellness, High Times, Bleeker Street, and Reifer (sometimes collectively called "the plaintiffs") have brought an action against Figueroa, as Commissioner of the Department, seeking a declaratory judgment that the Dispensary Residency Requirement of the Act violates the so-called Dormant Commerce Clause inferred from Article I § 8, clause 3 of the United States Constitution, as well as the so-called Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. They also seek a permanent injunction ordering Figueroa not to enforce the Dispensary Residency Requirement of the Act when they complete their contemplated sales of equity and assets.

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

B. Given the facts presented above, please state the specific standard of review that the court is likely to employ in considering the plaintiff's dormant commerce clause claim.

C. In the spaces provided below please apply the standard of review you identified in your answer to Part B directly above and apply it to the specific facts to determine whether the one or more of the plaintiffs will prevail in overturning the Maine Dispensary Residency Requirement on dormant commerce clause grounds.

D. In the space provided below, please state and describe the standard of review that will be employed when confronting an Article IV Privileges and Immunities Clause issue.

E. In the spaces provided below please apply the standard of review you identified in your answer to Part D directly above and apply it to the specific facts to determine whether one or more of the plaintiffs will prevail in overturning the Maine Dispensary Residency Requirement on Article IV Privileges and Immunities grounds.

10. St. Michael's Media, Inc. ("St. Michael's") is a non-profit organization organized in Michigan. It "is a vocal critic of the mainstream Catholic Church," including the United States Conference of Catholic Bishops ("USCCB"). St. Michael's often uses bombastic language in criticizing the American Roman Catholic Church, particularly with respect to child sexual abuse committed by members of the clergy. Many consider St. Michaels to be a highly controversial advocacy group.

St. Michaels wants to rent the MECU Pavilion (the "Pavilion"), situated in downtown Baltimore on Pier VI, in an area known as the "Inner Harbor" for the purpose of conducting a prayer rally and conference to criticize the Church. The City of Baltimore owns the Pavilion. St. Michael's rented the Pavilion and paid a $3,000 deposit to secure the date of Tuesday, November 16, 2021. It chose that date because it coincides with the USCCB's Fall General Assembly, scheduled to occur from November 15 – 18, 2021 at the Waterfront Marriott Hotel in Baltimore ("Hotel"), a private facility located near Pier VI.

On August 5, 2021, weeks after plaintiff had paid its deposit for use of the Pavilion on November 16th, the City, notified St. Michael's that it could not rent the Pavilion. The City cited safety concerns linked to some of the people who were identified as speakers at the event. St. Michael's sent a demand letter to defendants on August 27, 2021, giving defendants until September 3, 2021, to notify it that it would permit the rally to proceed. When the City did not respond, St. Michaels sued it in the United States District Court for the District of Maryland. St. Michael's asserts that the City of Baltimore has impaired its free speech rights to conduct a rally on public property.

A. The court will have to determine what kind of public property the Pavilion is in assessing the claim. What kind of property is it: a traditional public forum, a limited public forum, or a nonpublic forum?

B. In the space provided below, please explain why you chose that particular type of forum.

C. In five (5) lines or less, please describe the standard of review that applies to the type of forum that you chose directly above.

D. Who is more likely to prevail in the action, the City or St. Michael's?

E. In space provided below, please apply the applicable law to the facts to support the answer you stated directly above in subsection D.

END OF PART ONE
GO ON TO PART TWO

PART TWO – DEFINITIONAL/KNOWLEDGE SECTION
Suggested Time: One Hour (60 Minutes)

Below are twenty (20) short questions that ask for definitions, elements, general rules, or other information that tests your knowledge of Constitutional Law. The answers are supposed to be short and you are expected to adhere to the space limitations stated in the questions.

Questions

1. In no more than five (5) lines, please state and explain the *ripeness* justiciability doctrine.

2. In terms of the different types of power generally recognized under the Constitution, in one line, what kind of power does Congress exercise.

3. There is one provision in Article I, Section 8 that expands the power you identified directly above in Question 2. In no more than five (5) lines, what is it called and how does it operate?

4. In terms of the different types of power generally recognized under the Constitution, in one line, what kind of power do the states exercise.

5. Please explain, in no more than five (5) lines, what the kind of power you identified directly above in Question 4 is sometimes called and how it operates.

6. In the space provided below, please state the three-part test a court will follow when considering the non-delegation doctrine.

   i.

   ii.

   iii.

7. In no more than three (3) lines, please explain what is required under the Constitution for a treaty with a foreign country to become law.

8. Under the Constitution, in no more than five (5) lines, what process must a President follow to appoint so-called "principal officers" to federal positions.

9. Under the Constitution, in no more than five (5) lines, when is a President NOT allowed to appoint "inferior officers" of his own choosing?

10. Under the Constitution, in no more than two (2) lines, what process must a President follow to "remove," i.e., "fire" principal officers from federal positions.

11. Under the Constitution, in no more than five (5) lines, under what circumstances is a President only allowed to remove inferior officers for cause?

12. In no more than five (5) lines, explain the circumstances in which a President is absolutely immune from civil lawsuits.

13. In no more than one (1) line, explain the circumstances in which a President is absolutely immune from criminal actions against him.

14. True or false, a President has no authority to order United States military troops into combat without a declaration of war by the Congress.

15. In no more than ten (10) lines, please explain how the "incorporation" doctrine works.

16. In no more than five (5) lines, please state the general rule of the "state action doctrine."

17. In no more than ten (10) lines, please state and explain the two (2) exceptions to the state action doctrine."

18. In no more than three (3) lines, please state the standard of review that applies to lawsuits challenging government regulations imposed upon businesses or professions.

19. In regard to classifications based on alienage:

    A. What is the general standard of review?

    B. What is the standard of review that applies in cases involving state laws pertaining to the rights of aliens to vote, to hold public elected office, to hold a job as a police officer, or to hold a job as a public school teacher?

20. In no more than six (6) lines, please state the *Lemon v. Kurtzman* test that applies to First Amendment Establishment Clause cases.

END OF EXAM