

CONSTITUTIONAL LAW I  
MIDTERM EXAMINATION  
Fall 2022

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EXAM INSTRUCTIONS

You will have three hours to complete this exam. There are two essay questions to be answered in Questions 1 and 2; Question 3 consists of two short answer questions and 15 Multistate Bar Exam-type (MBE) questions. Each question will count for 1/3 of your exam grade.

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

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Constitutional Law (MCL-KCCL-HYB-SLO)  
Professors Welsh, Zulfa, Schrier, Wagner, Miranda  
Midterm Examination Fall 2022

Question No. 1

After extensive hearings, the State X legislature passed the Protect Puppies Act, which bans the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. According to the legislative findings, pet stores across State X sell thousands of puppies each year from these so-called “puppy mills.” Puppy mills typically treat adult female dogs as breeding machines and their puppies as mere products to be shipped and sold. Many puppy mills have deplorable animal welfare records, which impacts the health of both the mother dogs and the puppies. Puppies bred in mills can also have health issues, which can lead to large veterinary bills and premature death. What’s also true is that there are no puppy mills based in State X. And while there is no federal law on point, the Federal Occupational Safety and Health Act does set workplace safety standards that apply to commercial breeding operations.

A pet store in State X that specializes in the sale of puppy mill puppies has brought suit in State X Superior Court seeking to block enforcement of the law. While that case was pending, a large-scale commercial breeder in State Y brought an action seeking declaratory and injunctive relief in Federal District Court in State X. Both the pet store and the commercial breeder have sued the Governor of State X.

1. Analyze the Constitutional issues present – including justiciability – with regard to the pet store’s case.
2. Analyze the Constitutional issues present – including justiciability – with regard to the civil action brought by the large-scale commercial breeder.

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## Question 2

Congress authorized federal funds for Colleges and Universities on condition that they enact and enforce a policy prohibiting all consideration of race in the application and admissions process. Sunstate University, a public university, enacted a policy complying with the funding condition and received federal funds.

Anna, an 18 year-old high school student living in Sunstate, applied for admission to Sunstate University. Her application included an essay in which she emphasized her African American heritage as a direct descendent of African enslaved people, and her community service as president of a national African American Youth organization working to eliminate racism. Barbara, a white high school student, also applied to Sunstate University and submitted an essay emphasizing her heritage as the third generation in her family to attend Sunstate University and her leadership of the political action committee of her church's youth group working for "Pro-life" issues. Both young women were first in their high school graduating class. The University refused to consider Anna's essay because of their federal funding requirement Policy prohibiting consideration of race, and rejected Anna's application; the University considered Barbara's essay and accepted her application giving her extra points after considering her family history and community service.

Anna filed a lawsuit against Sunstate University alleging violation of the 14<sup>th</sup> Amendment by discriminating against her based on her race.

1. Analyze the Constitutional issues in Anna's race discrimination case; how is the Court likely to rule on them and why? (Assume Anna has standing to sue on this issue).
2. Does Anna have standing to challenge the Constitutionality of the federal funding condition on which the University's policy on consideration of race was based? How is the Court likely to rule and why?

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### Question 3

Write a short answer to the questions A and B; Each question is worth 25 points.

- A. A Committee of the U.S. House of Representatives issued a subpoena to a former president of the United States to appear before the House committee in its investigation of evidence relating to an attempted insurrection at the U.S. capitol. The former President asserted an executive privilege and refused to comply with the Congressional subpoena. In a lawsuit by the former President to Quash the subpoena how is the court likely to analyze the issues and to rule on the motion?
  
- B. Owners bought a residence in the City with a plan to use it as a short term vacation rental unit. The City issued Owners a permit for use as short term rental property with a term of 5 years. Owners used the property as a short term rental unit. However, after 1 year the City Council passed an ordinance revoking all short term rental permits and prohibiting all short term rentals of less than 30 days in the City. The ordinance also authorized the City Building Official to enforce the ordinance and to enter upon any property suspected of being used as a short term rental by giving the owner 10 days prior notice. The Owners sued the city alleging that the ordinance effected an unconstitutional taking of their property without compensation. How is the Court likely to analyze the issues and rule in Owner's lawsuit?
  
- C. Please answer the 15 Multistate Bar Exam (MBE) questions posted in Examsoft.

## Constitutional Law Midterm Exam 2022 Answer Outline

### Question 1:

1. Pet store's action:
  1. Ripeness and standing – has the law been enforced? If not, is it likely to be enforced? Or is this like *Poe v. Ullman*? If the law *has* been enforced, can the pet store demonstrate standing even though it has not yet been prosecuted? Can they show injury, causation, and redressability? And have they chosen the proper defendant?
  1. Is this law preempted (definitely not express; probably not implied)
  1. Dormant Commerce Clause analysis: is the law discriminatory? If so, does the state have a legitimate interest, and is there no other way to accomplish that interest? If it's not discriminatory, do the benefits to State X outweigh the burdens on interstate commerce?
  1. Privileges and Immunity Clause analysis: plaintiff is not an out-of-state citizen; no applicability
  1. Due Process analysis: Rational review – it's economic legislation so legitimate interest and rationally related. Can look to legislative findings for State's interests.
  
0. Puppy mill's action:
  1. Ripeness and standing (see above);
  2. Preemption (little more involved analysis since OSHA does apply to breeding operations; not express; not implied: no conflict in adhering to both the Protect Puppies Act and OSHA regs. No indication Congress intended to occupy the field).
  3. DCC (see above)
  4. P&I: is the owner of the puppy mill a citizen of State Y? Is he the plaintiff, or is it a corporation? If he's the plaintiff, does the law prevent him from enjoying a constitutional right or from accessing his livelihood? If so, does State X have a substantial interest and is there a substantial relationship between the law and that interest?
  5. Due Process (see above)

## Question 2:

### I. Anna v. Sunstate University: Race Discrimination

- A. Intro: Policy Prohibiting University from considering Anna's racial heritage and community service while considering others discriminates against her based on her race in violation of the 14<sup>th</sup> Amendment
- B. What is the classification? Race
- C. What level of scrutiny applies? Strict: compelling state interest, narrowly tailored to the least restrictive alternative necessary to address that interest
- D. Does the University meet the requirements of Strict Scrutiny?
  - 1. Compelling interest?

YES: state has a compelling interest in complying with condition required to receive essential federal funds for education programs, and in not discriminating in favor of any student based on race by giving extra credit denied to white students; or

NO: University's compliance with the unconstitutional funding condition is not a compelling interest, and in any case compliance is voluntary and funding should be declined since it requires the University to discriminate based on race; University had a compelling interest in achieving a diverse student body (per *Grutter v. Bollinger* and *Fisher v. U. Of Tx*) which cannot be met by refusing to consider race-related criteria thereby discriminating against African Americans in admissions.

#### 2. Narrowly Tailored?

YES: State cannot comply with funding condition without enacting and enforcing its policy against all consideration of race, whether it is to benefit minorities or to their detriment, and University no other means are available for the University to meet its compelling interest in total nondiscrimination. Or

NO: The university's Policy and practice of not considering race-related heritage and service while considering other types of heritage and service is overbroad even to meet the nondiscrimination

criteria of the funding condition and results in violation of the State's duty under the Equal Protection clause.

- E. Conclusion: The court's likely ruling and why.
- II. Anna's Standing to challenge the Constitutionality of the Federal Funding Condition
- A. Intro: The Court will likely find that Anna (has/does not have) standing to raise the challenge to the constitutionality of the funding condition.
  - B. Rule: Standing requires proof of Injury to plaintiff, Traceable to Government, and redressable by the court.
  - C. Injury: Direct? YES, application was rejected based on the policy; or NO University revised its Policy and voluntarily accepted federal funds so injury is not caused directly from the policy but rather by the University itself and Anna lacks standing.
  - D. Causation: YES injury was caused by coercing the University to accept the policy, etc. or NO University enacted the policy, not the federal government and only the University can have standing to challenge the funding condition, etc.
  - E. Conclusion: Court's likely ruling and why.

(Note: Federal Preemption is NOT an issue here because it is a funding condition and not a regulation; the issue in the challenge is whether or not the funding condition was coercive, citing *South Dakota v. Dole*, *Sibelius*)

### Question 3 Short Answer outline

- A. Analyze *Trump v. Mazars* (2022 Supp. p. 83) criteria for Congressional Subpoena: Legislative purpose, Subpoena is no broader than necessary to achieve legislative purpose, Subpoena advances legislative purpose by nature of the evidence sought, and Asses the burdens on the President of complying with the subpoena.
  
- B. Analyze possessory taking under *Cedar Point Nursery v. Hassid* (temporary intermittent physical taking?); Analyze regulatory taking under Penn Central criteria: economic impact, Interference with investment-backed expectations, and character of the government's action. Also, *Lucas v. S. Carolina Coastal Council* is all economic use denied
  
- c. MBE Answers are not available.

1)

1) Pet store's case *breeder*

Justiciability -

Standing:

*Intro says Pet Store: be clear*

*Good Analysis*  
The large commercial breeder (P) must show 1) a particularized and actual injury, 2) caused by State X, that is 3) redressable by the court. Here, State X is passing the Protect Puppies Act which bans the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. P will lose substantial business by not being able to sell dogs to pet stores in State X. This injury is directly caused by State X's act. If the court were to reject State X's act, this would redress P's injury. However, the state will argue that the act does not prohibit P from selling dogs from in-state breeders and therefore, P has not suffered any injury. However, there are no in-state breeders, so that is a stretch to rule out P's case on standing. Therefore, P has standing.

Ripeness:

Courts will not grant a pre-enforcement ruling of a statute or regulation unless plaintiff has suffered harm or is under immediate threat of injury. Here, P has not yet suffered harm, but should the act be enforced, P is certain to suffer major loss of profits due to the fact that P sells thousands of these puppies in their stores across State X. Therefore, this case is ripe and the court can hear it based on its merits.

Eleventh Amendment:

The eleventh amendment prohibits citizens from suing states without the state's express consent. However, if the plaintiff sues the appropriate state officers then the suit is not barred by the eleventh amendment. Here, P is suing State X and the governor. There are no facts to support that State X has expressly consented to being sued. Unless State X has

expressly consented to be sued by a citizen, then P's suit will be barred by the eleventh amendment. P has also sued the governor of State X. The governor is not the appropriate state officer to sue for this case. Therefore, it is likely P's suit would be barred based on the eleventh amendment.

Why not? Explain - I think gov. is officer

Assuming P has standing and the suit is not barred by the eleventh amendment, the court will hear the case on its merits. *Good Transition*

### Preemption/Supremacy Clause:

While it is possible for both the federal government and state government to pass legislation on the same subject, the supremacy clause provides that the constitution and federal laws are the supreme laws of the land and preempt any conflicting state or local laws. Preemption can be express, implied, or impeding a federal objective or intent. Here, there are no federal laws on point. However, the Federal Occupational Safety and Health Act does set workplace safety standards that apply to commercial breeding operations. Therefore, the court must evaluate if that federal act preempts this State X act.

good

### Express Preemption:

If a federal statute expressly says that federal law is exclusive, then federal law preempts state or local laws. Here, there are no facts to support that the federal act expressly says it is the exclusive law on the issue, Therefore, there is no express preemption.

good analysis

### Implied Preemption:

If it is impossible to comply with both federal and state laws, the federal law preempts state laws. Here, there are no facts to support that a citizen could not comply with both the federal act and the state act. We only know that the federal act sets standards for workplace safety for commercial breeding operations, but not if this has language to suggest contrary to what the state act bans. Therefore, there is no implied preemption.

good analysis

### Federal Objective:

If a state law impedes a "federal objective" the federal law preempts state law. Here, it appears that the federal act's objective is to create safety and health standards for commercial breeders. We do not know however, if this objective is impaired by the State X act. Therefore, it is likely the State X act is not preempted by the federal act.

Also: OSHA regulates safety for workers, not for puppies & dogs. (not conflicting or even impeding)

### Congressional Intent:

If congress evidences a clear intent to preempt state laws, then federal law preempts state laws. Here, there is not enough evidence that congress intended to occupy the entire industry of commercial breeders. Therefore, State X's act has not been preempted through congressional intent.

### Foreign Commerce:

Regulation of foreign commerce is exclusively a federal power. Here, we are dealing with interstate commerce and not foreign commerce. Therefore no preemption.

### Tenth Amendment:

good  
All powers not granted to the federal government nor prohibited from the states, is reserved to the states or the people. States have police power to enact laws for the health, safety, and welfare of its citizens so long as they do not conflict with federal laws and interstate commerce. Congress can induce state action by putting strings on grants, so long as the conditions are stated, unambiguous, non-coercive, and related to the spending program. Here, there is no federal law on point. However, State X's act clearly impacts interstate commerce because it is regulating the sell of dogs from out of state commercial breeders in their state. Therefore, it is possible congress could step in on this issue as it affects interstate commerce.

### Dormant Commerce Clause:

State of local laws that place an undue burden on out of state commerce to protect local

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economic interests is almost always unconstitutional. This is because of the negative implications on the commerce clause. Discrimination can be on the face of the law, or it can be discriminatory in its impact. Here, State X is not prohibiting the sale of dogs from "puppy mills" within State X, but is only excluding out of state commercial breeders.

law bans all puppy mills puppy sales

as a fact

There are no puppy mills based in State X. P will argue that although the act does not discriminate against their store specifically, that it does impact their business economically because they will not have dogs to sell. The State will argue that they are not discriminating against P. However, because the act discriminates against out of state commerce, it is likely unconstitutional.

### Facial Discrimination:

If a state law discriminates against out of state competition on its face, then the law is unconstitutional unless it furthers an important non-economic government interest and there is no less-discriminatory alternative. There is also a narrow exception if: 1) the state is acting as a market participant, 2) congressional approval. Here, State X will argue that the act is not intended to promote in-state economic interests, but instead is meant to promote a non-economic interest. They want to reduce the safety and health issues for the dogs. However, P will argue that State X does have economic interest because they are trying to reduce veterinary bills and also potentially increase the likelihood of in-state breeders. The fact that State X's act only references out of state breeders leads one to believe the act is facially discriminatory against out of stater. There could also be less discriminatory alternatives such as aligning a law with the federal act.

Act bans sale from anywhere

NOT SO

True if it did so, but reread the question.

### Non-Facial Discrimination:

Laws that do not facially discriminate against out of state competitors, still violate the dormant commerce clause if 1) the law burdens interstate commerce and 2) the burden on commerce exceeds the benefits. Here, if it is determined that the act does not discriminate against out of stater [on its face], it is possible it will still violate the dormant

discriminate does not have to be on face: his applies

arg. discriminate

or in effect

to non-discriminatory laws

commerce clause because it does burden interstate commerce. With thousands of puppies being sold in state X the burden on interstate commerce is immense. Therefore, it is likely this act violates the dormant commerce clause. *Analyze & weigh benefits to state before you conclude.*

Privileges and Immunities Clause of Article IV:

States cannot deny citizens of different states the privileges and immunities it affords its own citizens. If a state law discriminates against out of staters regarding their ability to earn a livelihood, the law is unconstitutional, unless it is necessary to achieve an important government interest. Here, State X is denying citizens from other states the right to sell dogs within its state. However, the law does not deny citizens/commercial breeders from its own state the right to do so. Therefore, this law is likely unconstitutional. *Does it affect livelihood? Is breeder a corporation?*

*NOT correct*

Conclusion:

State X's act is likely unconstitutional as it violates the dormant commerce clause by facially or at least non-facially discriminating against out of state commerce. The law is also in violation of the privileges and immunities clause of Article IV. Congress should step in and use its commerce clause power to pass legislation that could help create a healthier and safer breeding industry. *Good conclusion (based on your analysis)*

2) ~~Large-scale commercial breeder~~ *Pet store (reversed again)*

Justiciability -

Standing:

The pet store must show 1) a particularized and actual injury, 2) caused by State X, that is 3) redressable by the court. Here, State X is passing the Protect Puppies Act which bans the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. The Pet Store (P) has stores across State X and sells thousands of puppies each year from the "puppy mills." There are no facts that P sells their puppies in state X. If

*Facts say they sell or by inference they buy from all mills*

*good answer*

P does sell puppies in state X (which is plausible) then P will definitely suffer injury if the act is to be enforced. State X is the defendant and it is their passage of this act that is causing P's injury/loss of profits. If the court were to grant a pre-enforcement ruling, this would redress the issue and stop P's injury/damages. Therefore, P has standing to bring this case against State X.

#### Ripeness:

Courts will not grant a pre-enforcement ruling of a statute or regulation unless plaintiff has suffered harm or is under immediate threat of injury. Here, P has not yet suffered harm, but should the act be enforced, if P sells puppies to pet stores in State X is under immediate threat of injury. Therefore, this case is ripe and the court can hear it based on its merits.

#### Eleventh Amendment:

*Same as above? Incorporate, Don't repeat.*

The eleventh amendment prohibits citizens from suing states without the state's express consent. However, if the plaintiff sues the appropriate state officers then the suit is not barred by the eleventh amendment. Here, P is suing State X and the governor. There are no facts to support that State X has expressly consented to being sued. Unless State X has expressly consented to be sued by a citizen, then P's suit will be barred by the eleventh amendment. P has also sued the governor of State X. The governor is not the appropriate state officer to sue for this case. Therefore, it is likely P's suit would be barred based on the eleventh amendment.

Assuming P has standing and the suit is not barred by the eleventh amendment, the court will hear the case on its merits.

#### Preemption/Supremacy Clause:

While it is possible for both the federal government and state government to pass legislation on the same subject, the supremacy clause provides that the constitution and

federal laws are the supreme laws of the land and preempt any conflicting state or local laws. Preemption can be express, implied, or impeding a federal objective or intent. Here, there are no federal laws on point. However, the Federal Occupational Safety and Health Act does set workplace safety standards that apply to commercial breeding operations.

Therefore, the court must evaluate if that federal act preempts this State X act.

*Again - incorporate prior analysis rather than repeat it*

Express Preemption:

If a federal statute expressly says that federal law is exclusive, then federal law preempts state or local laws. Here, there are no facts to support that the federal act expressly says it is the exclusive law on the issue, Therefore, there is no express preemption.

Implied Preemption:

If it is impossible to comply with both federal and state laws, the federal law preempts state laws. Here, there are no facts to support that a citizen could not comply with both the federal act and the state act. We only know that the federal act sets standards for workplace safety for commercial breeding operations, but not if this has language to suggest contrary to what the state act bans. Therefore, there is no implied preemption.

Federal Objective:

If a state law impedes a "federal objective" the federal law preempts state law. Here, it appears that the federal act's objective is to create safety and health standards for commercial breeders. We do not know however, if this objective is impaired by the State X act. Therefore, it is likely the State X act is not preempted by the federal act.

Congressional Intent:

If congress evidences a clear intent to preempt state laws, then federal law preempts state laws. Here, there is not enough evidence that congress intended to occupy the entire industry of commercial breeders. Therefore, State X's act has not been preempted through congressional intent.

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### Foreign Commerce:

Regulation of foreign commerce is exclusively a federal power. Here, we are dealing with interstate commerce and not foreign commerce. Therefore no preemption.

Tenth Amendment: *Incorporate prior analysis*

All powers not granted to the federal government nor prohibited from the states, is reserved to the states or the people. States have police power to enact laws for the health, safety, and welfare of its citizens so long as they do not conflict with federal laws and interstate commerce. Congress can induce state action by putting strings on grants, so long as the conditions are stated, unambiguous, non-coercive, and related to the spending program. Here, there is no federal law on point. However, State X's act clearly impacts interstate commerce because it is regulating the sell of dogs from out of state commercial breeders in their state. Therefore, it is possible congress could step in on this issue as it affects interstate commerce.

*Rational basis?*

*good point*

Dormant Commerce Clause: *Incorporate*

State of local laws that place an undue burden on out of state commerce to protect local economic interests is almost always unconstitutional. This is because of the negative implications on the commerce clause. Discrimination can be on the face of the law, or it can be discriminatory in its impact. Here, State X is not prohibiting the sale of dogs from "puppy mills" within State X, but is only excluding out of state commercial breeders. There are no puppy mills based in State X. P will argue that State X is discriminating against out of state commerce, but State X will argue that because there are no in-state puppy mills, they are only referencing out of state breeders. It is likely that State X's law does discriminate against out of state commerce.

*(see prior notes)*

### Facial Discrimination:

If a state law discriminates against out of state competition on its face, then the law is unconstitutional unless it furthers an important non-economic government interest and

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there is no less-discriminatory alternative. There is also a narrow exception if: 1) the state is acting as a market participant, 2) congressional approval. Here, State X will argue that the act is not intended to promote in-state economic interests, but instead is meant to promote a non-economic interest. They want to reduce the safety and health issues for the dogs. However, P will argue that State X does have economic interest because they are trying to reduce veterinary bills and also potentially increase the likelihood of in-state breeders. The fact that State X's act only references out of state breeders leads one to believe the act is facially discriminatory against out of staters. There could also be less discriminatory alternatives such as aligning a law with the federal act.

#### Non-Facial Discrimination:

Laws that do not ~~facially~~ discriminate against out of state competitors, still violate the dormant commerce clause if 1) the law burdens interstate commerce and 2) the burden on commerce exceeds the benefits. Here, if it is determined that the act does not discriminate against out of staters on its face, it is possible it will still violate the dormant commerce clause because it does burden interstate commerce. With thousands of puppies being sold in state X the burden on interstate commerce is immense. Therefore, it is likely this act violates the dormant commerce clause. *benefits? Argue + weigh: balance*

#### Privileges and Immunities Clause of Article IV:

States cannot deny citizens of different states the privileges and immunities it affords its own citizens. If a state law discriminates against out of staters regarding their ability to earn a livelihood, the law is unconstitutional, unless it is necessary to achieve an important government interest. Here, State X is denying citizens from other states the right to sell dogs within its state. However, the law does not deny citizens/commercial breeders from its own state the right to do so. Therefore, this law is likely unconstitutional.

*but state owner is state resident so no P&I issue raised*

#### Conclusion:

State X's act is likely unconstitutional as it violates the dormant commerce clause by

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facially or at least non-facially discriminating against out of state commerce. The law is also in violation of the privileges and immunities clause of Article IV. Congress should step in and use its commerce clause power to pass legislation that could help create a healthier and safer breeding industry.

Conclusion:

The Protect Puppies Act violates the dormant commerce clause because it places an undue burden on out of state commerce and places no restrictions on in-state breeders. The commerce clause would be offended because this law has an impact on interstate commerce. Congress <sup>could</sup> should assert their right to regulate interstate commerce and pass legislation to address this matter.

Good job overall! Your organization is good and you clearly identify the issues and rules. Remember: you should refer to an earlier analysis of the same issue rather than repeat it for another party, unless there are differences that require different analyses.

For P & I be sure to address if "citizen" or corporation to determine if it applies (Here it is unknown, but raise it).

Also, DCC - law can be non-discriminatory yet still burden commerce. Law can be neutral on face and still have discriminatory purpose or effect and requires stricter analysis than Pike balancing test. If Pike applies address both burdens and benefits before you conclude.

lots - read facts carefully. Here you misread the state law as applying only to out of states, which affects your analysis.  
Good job overall!

2)

## 1. Anna v. Sunstate University

### Justiciability

In order for a plaintiff's "case or controversy" to be heard the plaintiff must have standing (injury, causation, and redressability), the case is ripe, and the case is not moot.

Here, the facts indicate Anna has standing, her case is ripe because the case has developed and she was not admitted, and the case is not moot because the Sunstate is currently implementing the policy. Therefore Anna has justiciability.

(Also - facts allow you to assume standing)

### Equal Protection Clause (EPC)

Section 5 of the 14 Amendment, protects the equal rights of all citizens. The Court will assess the class of citizen group suspect, quasi-suspect, or general. The level of class will determine the level of scrutiny (strict, intermediate, or rational basis). Race is a suspect class evaluated with strict scrutiny, which requires the government to have a compelling and necessary actual interest that is narrowly tailored. The government has the burden of proof that the act meets the heightened level of scrutiny.

good  
rule  
statement

Here, Anna will contend her equal rights have been discriminated against because she was denied admission based on her race and description of her heritage. Anna will contend there was invidious discrimination based on a similarly situated applicant because both of them were first in their high school graduating class with similar extracurricular and community volunteer work. On the other hand, the University will contend this is an affirmative action case because they are trying to enforce a policy that prohibits consideration of race. Anna's application did not meet the policy requirements prohibiting consideration of race because she emphasized her African American descent.

Anna will counter this argument because affirmative action still requires the same level of scrutiny. Anna will contend even if this is for affirmative action her application essay emphasized the work she did to eliminate racism. Furthermore, policy was enacted to prohibit the consideration of race; however, the school has completely disqualified her because of race. The compelling interest to prohibit race discrimination is not narrowly tailored to meet the interest because it is "overinclusive" and disqualifies applicants based on their heritage and community service for minority organizations working to eliminate racism. The University may contend the policy is narrowly tailored and nondiscriminatory because it does not require applicants to disclose their race or national origin in their application essay. However, the argument will likely fail because the government has the burden of proof and the court will likely rule the policy is not narrow and this is not the least restrictive means for eliminating admissions based on race.

good  
Analysis

excellent!

Therefore, Anna's equal protection rights have been violated and the admission policy is unconstitutional. *Good Conclusion Statement*

## 2. Anna v. Federal Funding

### Justiciability

In order for a plaintiff's "case or controversy" to be heard the plaintiff must have standing (injury, causation, and redressability), the case is ripe, and the case is not moot.

Here Anna, has standing because she was injured by policy prohibition and this could be redressed by injunction of the policy or admission to the school. The case is ripe because it has fully developed, and the case is not moot because the policy is currently in place.

*How! (be specific)*

11 Amendment

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Citizen cannot sue State, but Anna could bring suit against the Governor. If Anna is allowed to file her suit the court will address conditional spending. *Good Point*

### Conditional Spending

Conditional Spending by the federal government is permitted to the states if the spending meets the Dole factors: it is for the general welfare, that is related to purpose of the government spending, the conditions are unambiguous and not coercive.

Here, Anna will contend the policy is ~~un~~ambiguous and coercive. The policy does not allow the University to make considerations for personal history and heritage instead the funding policy prohibit "all" consideration of race. Furthermore, the policy does not promote the general welfare related to the spending conditions. On the other hand the proponents of the federal funding will contend diversity in schools is crucial to the health and welfare of the student body and nation. Prohibition on race consideration furthers this intent to increase diversity. The "all" used in the policy is encourage Colleges and Universities to abstain from racial considerations.

*> Note: The final Dole criteria is that it is not barred by other constitutional provisions: This could include equal protection.*  
The Court is likely to find the conditions of the federal funding are constitutional based on the *Dole* factors.

*Very good organization + Analysis of Equal Protection and Standing/Funding issues.  
"Narrow Tailoring" is a good focus for the Analysis of this complex legal issue.  
Good job!*

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3)

**A. Executive Privilege**

The President has the right exert the executive privilege as a defense to civil and criminal causes of action. However the President's power are not absolutely immune from civil and criminal prosecution if the acts were performed outside of the President's scope of duties to the nation. *or inside especially when out of office.*

Here, the U.S. House of Representatives issued a subpoena to a former president to appear for before the House committee regarding its investigation into an attempted insurrection at the U.S. Capital. The President may contend he is immune from the subpoena because at the time of the insurrection he was still acting as president. *good point*

Furthermore, events concerning the insurrection were within his executive powers and duties related to national security; *not entirely* thus he is immune from subpoena. However the Court will likely apply the Mazer criteria to determine if the subpoena is appropriate which include the legislative purpose of subpoena, the advancement of this purpose through a subpoena, the scope of the subpoena must not be overly broad (no fishing expedition), and the burden on the president. Congress will argue the subpoena is vitally important to our nation's safety and this subpoena advances that purpose by accumulating information regarding insurrection. Also, the subpoena is narrow in scope because it only requires information pertaining the events surrounding the attempted insurrection. Furthermore, the burden on former president is minimal and will not impact his duties to the nation because he is no longer president.

*good Analysis*  
The <sup>Court</sup> President is unlikely to Quash the subpoena because the information is pertinent to the legislative purpose of insurrection of federal building. The Court is likely to find the former President has an <sup>no?</sup> undue burden and the subpoena is narrow in achieving the purpose of the insurrection litigation.

*Good job!*

## B. The Owners v. City

### Justiciability

OK  
In order for a plaintiff's "case or controversy" to be heard the plaintiff must have standing (injury, causation, and redressability), the case is ripe, and the case is not moot.

Here, the Owners have justiciability because they have standing (economic harm, caused by the ordinance, and relief would redress injury), the case is ripe because it is currently being enacted, and the case is not moot because the harm from the ordinance is on-going.

### Takings Clause

The government may not take private property for public use without just compensation.

Good  
Rule  
Statement  
A possessory taking occurs when the government occupies an owner's property permanently or temporarily. A regulatory taking occurs when the government imposes a regulation that makes the property economically infeasible, the *Penn Central* factors are assessed to determine level of economic taking (economic benefit v. burden, investment backed expectations, and economic impact on owner).

Here, the Owners will assert there is a regulatory unconstitutional taking because the City ordinance takes away their economic right to use the property for short-term vacation rentals. The burden on owner is huge because without short-term rental income the rental units will not be available for vacationers, business travelers, and people looking for short-term living accommodations. The burden on the city is minimal because the city does not gain economically by having long-term renters in the units. Additionally, the Owners were under the financial expectation of having the short term permit for 5 years. A long-term renter will produce significantly less cash flow to the Owners. On the other hand the City

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good Analysis!  
will contend the economic impact of having so many short-term visitors has increased the need for long-term residential units. The residential housing requirements of the City far outweigh the burden on the Owners to get long-term renters. Furthermore, the economic backed expectations have not been diminished to the point of zero economic return (a per se taking); thus long-term renters are still a viable option.

The Owners will also contend the condition does not meet the Nolan/Dolan nexus of economic interest vs. rough proportionality. However this argument will likely fail, if the City has a rational and legitimate reason for the ordinance, such as increasing residential housing for the City. The court will use rational basis scrutiny to when assessing the economic interests of the Owners and the City and this will not be a regulatory taking.

good Analysis!  
The Owners may also assert a possessory taking because the City Building Official is allowed to enter their property for enforcement. The City will argue the Official will only be there temporarily; thus it is not a taking. However, this argument will fail because a possessory taking can be temporary. Therefore, if the Court will likely find this is a possessory taking and the Owners are due compensation for the time the Official is on the premises.

24 Great Job!  
**END OF EXAM**