

CONSTITUTIONAL LAW II
FINAL EXAMINATION

SPRING 2024

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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 four short answer 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.

*****1*****

CONSTITUTIONAL LAW

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Final Examination Spring 2024

Question No. 1

Suncity School District maintained a policy of allowing use of its public school facilities by student clubs and activities during non-school hours provided that the club or organization comply with the District's Policy prohibiting use by any club or organization that denies membership or discriminates against any student or adult participant on the basis of race, national origin, religion, disability, sex, sexual orientation, gender, or gender identity. Several clubs regularly use school facilities including several athletics clubs, a chess club, a puzzle club, a robotics club and an environmental club. All clubs recruit members throughout the school year. A religious club applied for use of school facilities. The club requires all members to profess a belief in God, and to commit to evangelism by recruiting at least 2 students each week to attend the club's on-campus worship services, except that gay, lesbian, or self-identified "LGBTQIA" students, who are considered immoral under the religion's doctrine, are ineligible for membership. The School District denied the club's application to use school facilities, citing the club's violations of the District's nondiscrimination policy and concern that the recruitment of students for worship on campus violates the Establishment Clause of the U.S. Constitution. A student organizer of the religious club and their parents sued the school District asserting that their fundamental rights as parents, and the student's free speech rights, free exercise rights and association rights were violated by the denial of use of school facilities by the religious club.

1. Assuming justiciability and standing, analyze the Constitutional issues presented in the student's challenge to the School District's denial of use of school facilities by the religious club. State how the U.S. Supreme Court is likely to rule on each issue raised by the student, and why.
2. Assuming justiciability and standing, analyze the issues presented in the Parents' challenge to the denial of use of school facilities by the religious club. State how the U.S. Supreme Court is likely to rule on each issue raised by the Parents in this case, and why.

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Final Examination Spring 2024

Question 2

The “Holy Rollers,” a local group of avid bowlers and like-minded Christians, were looking to recruit members in hopes of joining local tournaments sanctioned by the City Parks & Recreation Department. It had been a few years since the Holy Rollers had competed in tournaments and they were looking to boost their membership and they figured that the Christmas and New Year season would be the optimal time to recruit. Holy Rollers received permission from City’s Parks & Recreation Department to temporarily display a bronze statue in the perfect form of a bowler in motion delivering a ball down the lane. The statue was placed in the lobby. In a makeshift pocket of the statue, flyers were inserted with the message, “Holy Rollers Bowling Team Beckons You” followed by a contact phone number and the email address holierthanthou.com.

Last year the director of City Parks & Recreation adopted a new “Policy on Symbols and Seasonal Displays,” which states: “Displays and symbols that depict or promote religion are not permitted in any City Parks & Recreation facilities.”

Prior to the adoption of the new policy, City Parks & Recreation had allowed access to a wide variety of public and private speakers and artists who were allowed to feature displays in the lobby. Based on the new policy, however, it denied Holy Rollers a permit for the placement of the statue without any explanation.

After it was informed by the City Attorney that the courts treat Christmas trees as secular symbols, rather than religious symbols, Parks & Recreation decided to erect a Christmas tree in the lobby of all their facilities, while continuing to prohibit Holy Rollers to display their statue.

Holy Rollers has filed suit claiming violation of the First Amendment to the United States Constitution

What arguments may Holy Rollers reasonably raise in support of its claim and what is the likely result or ruling? Discuss.

*****3*****

CONSTITUTIONAL LAW

Profs. Welsh, Somers, Wagner, Ruskell, King
Final Examination Spring 2024

Question 3

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

- A. A popular candidate for the office of Mayor was prosecuted for accepting bribes in violation of state law. After the second day of his trial on the bribery charges he held a press conference on the sidewalk in front of the courthouse where he told a large crowd of his supporters his prosecution was a political “witch-hunt” and that the District Attorney prosecuting the case is a “known embezzler and crook and should be removed from office immediately”. This statement was false and there was no evidence that the District Attorney had ever been an “embezzler” or charged with any theft. The District Attorney filed a suit for defamation against the candidate. What burden of proof will apply in the District Attorney’s case and why? How is the court likely to analyze and rule on the issues raised in the District Attorney’s lawsuit?
- B. A gardener doing business in Sunstate advertised that her services included design and implementation of gardens and landscaping to enhance the unique environment of each customer. A newly-wed African American couple contacted the gardener to design a garden for their new home in Sunstate. The gardener refused, stating that her rights and religious beliefs would be violated by designing a garden for an African American couple. The couple sued the gardener for violating Sunstate law prohibiting discrimination in public accommodations on the basis of race. How is the court likely to analyze and rule on the issues raised by the couple’s lawsuit?

CONSTITUTIONAL LAW

Professors Welsh, Somers, Wagner, Ruskell, King
Final Examination Spring 2024

C. A small Public Water District changed its voting procedures for electing members of the Water District Board to allow only property owners in the Water District to vote. This resulted in eliminating the voting rights of 70% of the Latino/Hispanic voters who do not own property but who live in the Water District. Two Mexican-American voters who rent a residence in the District filed a lawsuit alleging violation of their voting rights and their rights to equal protection of the laws. How is the court likely to analyze and rule on the issues raised by the voters' lawsuit?

D. The Starburst City Water District board, a government body with duly elected board members, has for 50 years since its creation begun each of its annual water policymaking sessions with the following invocation:

“Oh Lord, bless and watch over these proceedings and everyone in this room, lest we turn wayward and sinful and fall into damnation.”

The annual sessions are open to the public and the chairperson of the board invites any and all attendees to join the board in the prayer prior to beginning the invocation. Two local adherents of the Wiccan religion attend the board's latest session and thereafter file suit complaining that the board's prayer violates the establishment clause of the U.S. Constitution. How would a court likely analyze and rule on the issues raised by the Wiccans?

*****5*****

Constitutional Law Final Exam Answer Outline Spring 2024

Question 1

Question 1 raises issues about:

1. free exercise of religion and the proper analysis under *Empl. Division v. Smith* (if nondiscrimination Policy is a neutral Law generally applicable) or *Sherbert v. Verner* (if a fundamental right of Parent is being violated, or if the policy is not neutral or generally applicable);
2. Establishment clause and whether evangelizing recruitment of students to worship in public schools violates the establishment clause and secondly whether that is a compelling reason for the District to impose a Policy prohibiting it (*Kennedy v. Bremerton S.D.* case, among others, says avoiding Establishment clause violations is not a compelling gov't interest);
3. Fundamental right to parental upbringing of children : does it extend to compelling public schools to accommodate their religion by granting exemptions from nondiscrimination Policies and laws?
4. Freedom of association: can school district deny a benefit to a religious club that refuses to associate with unwanted members who disagree with its doctrine because it violates a nondiscrimination policy? (*Boy Scouts v. Dale*, etc.)
5. Free speech: does denial of use to a religious club constitute unconstitutional violation of free speech based on content and viewpoint? (*Good News Club v. Milford Central*; *Christian Legal Society v. Hastings*).

Question 2

Issue outline / comments

Students would be expected to briefly cite to the “state action” requirement as a threshold issue and note that “parks & rec” is part of city’s municipal government.

Next, the action turns to first amendment / freedom of speech and a discussion of “content-based” restrictions. It would be noted that the setting is a “public forum” (open to the public).

Content-based restrictions in a public forum setting would trigger strict scrutiny. Is this in fact a “content-based” regulation? Holy rollers position will be that this is a form of “symbolic speech” and that the regulation has the net effect of stifling their speech and viewpoint/expression. City will counter that their goal is to avoid the appearance of endorsing religion.

There is also room for a “prior restraint” challenge that holy rollers would advance. This may be coupled with a procedural due process argument.

A facial attack re overbreadth or vagueness would also be advanced by holy rollers

Students would be expected to introduce “free exercise” as an issue. This would be followed by the application of the “lemon” test in connection to the argument that the regulation does in fact promote/establish religion. Students may also cite to *Kennedy v. Bremerton S.D.*: is the “lemon test” or factors still considered, post *Bremerton*?

Question 3:

Q 3 A , 3 A asks for analysis of tort of defamation under *NY Times v. Sullivan* rule for 1st amendment as applied to the DA. Is DA a Public figure or private person? Depending on their analysis NY Times applies or not; also note NY Times public official analysis has been criticized by Justice Thomas and other members of current Supreme Court and may be overruled at some point.

Q 3 B is based on the *303 Creative v. Elenis* case re 1st amendment free speech analysis finding an exemption to the state's nondiscrimination laws for a website designer who refused to do work for a gay couple because it would compel her to engage in expression contrary to her moral or religious views. This question bases the refusal on race, a challenging question left open by *303 Creative*.

Q 3 C. Voting rights: requiring property ownership as a condition of voting violates fundamental rights so analyze under strict scrutiny applies, unless denial is analyzed as not a substantial burden on voting rights; equal protection analysis requires strict scrutiny for voting system that discriminates on the basis of race and national origin;

Q 3.D: This tests the exception to the general rule that official-led prayer prior to government-run events violates the establishment clause that applies to legislative sessions. Is a water district board policymaking meeting enough like a City board meeting to meet the *Town of Greece* rule? Students will also be expected to catch the "damnation" language as falling outside of what the Court in *Town of Greece* defined as the limits of the content of legislative sessions prayers. Specifically, the court noted that "threatening damnation" falls outside of what would be permitted. Does the prayer "threaten damnation?"

1)

Students v. School District

Freedom of Speech

The First Amendment mandates that Congress shall pass no law restricting the freedom of speech. This is known as the Freedom of Speech Clause (FSC). This has been incorporated to apply to the states, which means that state and local governments are also not allowed to pass laws restricting freedom of speech. The general rule is that if a government restriction of speech is based on the content of the speech, then that restriction must pass strict scrutiny, meaning the restriction is narrowly tailored to meet a compelling government interest. If the restriction is not based on the content of the speech, the restriction is considered "content neutral" and must meet intermediate scrutiny. Intermediate scrutiny means the restriction must be substantially related to an important government interest. However, this general rule does not apply to so-called "authoritarian environments", and those settings have less protections against the freedom of speech. *Good intro & rule statement*

Authoritarian Environments

Authoritarian environments offer less protections for freedom of speech. These environments include military bases, prisons, jails, and schools. In *Morse* the Supreme Court held that these lower protections that students have can extend outside of school grounds and the classroom so long as these students are engaging in an activity that is governed by the school's policies. Here, the students are attempting to be recognized by the school as a student club so the club can use the school's facilities during non-school hours. All student clubs must comply with the Suncity School District's (the District) Policy that prohibits clubs from denying membership based on race, national origin, religion, disability, sex, sexual orientation, gender, or gender identity. Because the club is

seeking recognition by the school and this means they would be subject to the District's policy, the student's freedom of speech has the protections associated with being in a school. OK

Freedom of Speech protections in schools

Students do not leave their constitutional rights at the schoolhouse gate. However, a public school's restrictions must only be rationally related to a legitimate pedagogical interest. That interest, however, must be more than simply avoiding discomfort of unpopular opinions. Here, the District will argue that ensuring student's are not discriminated against is a legitimate pedagogical interest, and that the policy prohibiting student clubs from denying membership or discriminating against students on the basis of several categories (the relevant ones here being sexual orientation and gender identity) is rationally related to that goal. A court would hold that the interest in question is a legitimate pedagogical interest. The students would have no persuasive argument that the District policy is rationally related to that interest, so a court would find that the District satisfied its burden. *Good Analysis*

Expand: "The Policy's effects on club content/viewpoint based? Discuss (This argument presented on several cases)"

Freedom of Association

The First Amendment guarantees the freedom of association (FoA). Associations fall into two categories. The first are intimate associations, which are the associations of families and close friends. Intimate associations cannot be regulated by the government. The second category are expressive associations. Expressive associations are groups of people that are furthering a specific viewpoint or goal. The club the students are attempting to form would be an expressive association, as it requires members to believe in God and commit to evangelism. Furthermore, the club considers LGBTQIA students immoral. Expressive association are subject to government regulation, though this power to regulate is subject to certain limitations.

Compelling expressive associations to admit members

good analysis
An expressive association can be forced to comply with anti-discrimination laws and be compelled to admit members the group may wish to discriminate against. However, if the admission of these members would undermine the message being advocated by the group, the group's can not be compelled to add these members. Here, the student group will argue that the club considers people that identify as LGBTQIA to be immoral under their religious doctrine, and that compelling the group to admit LGBTQIA students would undermine the group's goal of recruiting members to a club that views these LGBTQIA students as immoral. A court would likely agree with the students, and the District would not be compelled to add these students.

Free Exercise Clause

The First Amendment guarantees that the government cannot interfere with the freedom of people to freely exercise their chosen religion. This right is known as the Free Exercise Clause (FEC). When examining a FEC question, one must start with whether the belief in question is a religion.

Definition of Religion *

good analysis
The best attempt by the Court to define religion is found in *Seeger*, which says that to be considered a religion the (1) belief must be sincerely held, and (2) it must fill the role that is traditionally filled by a belief in a god. Here, the student club expressly says they mandate members believe in God and that members must commit to evangelism and recruit students to the club, satisfying the second element. Nothing in the facts suggests the students do not sincerely hold this beliefs, which would satisfy the first element. Therefore, a Court would find that the club's beliefs qualify as a religion for purposes of the FEC.

Smith test vs. strict scrutiny

Once it has been established that a belief system is a religion, it must be determined what burden the government's law that restricts the free exercise of this religion must meet. In *Smith*, the Supreme Court said that if a law is neutral and generally applicable, the government must only meet rational basis, meaning the law must only be rationally related to a conceivable government interest. However, if the law is not neutral and generally applicable, the government must meet strict scrutiny, and the law must be narrowly tailored to meet a compelling government interest. Furthermore, federal laws are automatically held to strict scrutiny due to RFRA, but because this is a local school district, RFRA does not apply.

good
rule
start.

Here, the District will argue that the prohibition on discrimination of LGBTQIA (and other) students is neutral and generally applicable in that it applies to all clubs, not just religious clubs, and not just specifically this club. The club will argue that the law is not neutral, as it disproportionately affects any club that views LGBTQIA people as immoral, and those will clubs will probably disproportionately be religious. The District will argue that the rule is not just seeking to limit LGBTQIA discrimination and applies to a broad range of protected classes. A court would likely agree with the District and find the law to be neutral and generally applicable. This would mean rational basis would be applied. The District would argue that the rule is rationally related to a government interest in limiting discrimination. The students would have no persuasive argument against this, and a Court would side with the District. *Good Analysis & Conclusion statement*

Conclusion of students claims

A court would not allow the club to be compelled to admit LGBTQIA students due to the FoA clause. However, this would not force the school to recognize the club and allow it access to school facilities. Because the District's rule meets rational basis and is neutral and generally applicable, it does not violate the FEC. Because the District's rule is rationally related to a pedagogical interest it satisfies its burden for FEC under the Tinker test.

Good Conclusion statement

Parents v District

Fundamental Rights

The Supreme Court has held that any law denying or directly and substantially infringing on a fundamental right of someone must meet strict scrutiny (see above for rule). When analyzing whether a law violates a fundamental right, we must first look at whether a right exists.

Right to raise a child as a parent sees fit

The Supreme Court has recognized that parents have a fundamental right to raise a child how they chose to. Here, the parents are suing the District for violating their fundamental rights as parents. Because this has been expressly articulated by the Court, the Court would find that the parents are asserting a fundamental right.

Balancing Denial or substantial infringement of right vs government interest

good
issue
stat.

Once a fundamental right is identified, the court must look to see if that right is being denied or substantially infringed. If it is, the Court balances that against the interest of the government. Here, the parents are arguing that their rights as parents are being denied by forcing their children to be in a group with LGBTQIA students. The District's interest is in preventing discrimination. A court would likely find the district's interest a compelling, and find it outweighs the parent's interests here, as the club is free to exist and be comprised completely of students; it would just not be able to use school facilities.

But is parents' rights infringed Substantially?
Strict Scrutiny

See above for rule. As discussed above, the state has a compelling interest. Because the rule only relates to student groups that wish to use school facilities, a court would likely find the rule is sufficiently narrowly tailored and pass strict scrutiny. *Good point.*

Conclusion

The parent's lawsuit would fail.

Good job overall! Your organization is excellent and you cite correct & applicable rules. Your analysis is complete, with exception analyzing if policy is applied to religious club is content-based or viewpoint based. Free Association and Free Exercise Analysis are very well done.

85

2)

Freedom of Speech

Rules
The First Amendment states that Congress shall pass no law restricting the freedom of speech. This is the source of the Freedom of Speech Clause (FSC). The 14th Amendment incorporated this right to the states, meaning no governmental entity can pass a law restricting freedom of speech. If a law restricts speech based on the content of the speech, that law must meet strict scrutiny, meaning it must be narrowly tailored to meet a compelling government interest. If a law restricts speech regardless of the content of the speech, the restriction is said to be content-neutral, and must meet intermediate scrutiny. Intermediate scrutiny means a law must be substantially related to an important government interest.

Content-based

good. begin
Here, the City Parks & Recreation Department (the City) adopted a policy that said "Displays and symbols that depict or promote religion are not permitted in any City Parks & Recreation facilities". This restriction expressly only bans displays and symbols that depict or promote religion, meaning the law ^{*is content based and*} must meet strict scrutiny. Because the Supreme Court has held that avoiding a violation of the Establishment Clause is not a compelling interest, this law would definitionally fail strict scrutiny. *Since this is the city's stated implied reason. (see facts)*

good issue start
The City would argue that the Holly Rollers (H) display can be restricted without meeting strict scrutiny, as it is located in a non-public forum.

Public Forum vs Non-public forum

A public forum is an area that is one typically used for speech; common examples are parks and sidewalks. A non-public forum is a government building whose primary purpose is not speech-related activities. Here, H will argue that the restriction applies to

all Parks and Recreations facilities, which would necessarily include parks. Parks have consistently been held to be public forums. The City will argue that this restriction can be applied to H's statue because it deals with the lobby of the Parks & Recreation Department (the lobby), and the lobby is a non-public forum. When determining whether a forum is public or non-public courts will often look at the primary purpose of the forum, and whether that primary purpose is speech related activities. H will argue that the lobby exists so people can come in and speak to staff. The City will argue that the lobby only serves a very limited purpose that is not primarily about speech, and is rather a place that is passed through by people on their way to other places. A court would likely agree with the city and find the lobby to be a non-public forum. *But for state a wide variety of speakers were allowed in lobby prior to policy change: Any effect? City withdraw access?*

However, the restriction would still need to pass rational basis review. Rational basis means a restriction must be rationally related to a conceivable government interest. Here, H will argue that the City until very recently had a long standing tradition of allowing a wide variety of public and private speakers to temporarily feature displays in the lobby, and that denying H the ability to temporarily feature a statue whose primary purpose was to recruit bowlers simply does not even serve a rational basis considering the City seems to allow just about anybody to display a statue. The city will argue that they do not want to violate the Establishment Clause, and while that may not be a compelling government interest, it is a rational one. *very good Analysis!*

The Court would then need to analyze this claim based on whether the display of the statute would actually violate the Establishment Clause.

Establishment Clause

The First Amendment states that the government can not mandate people adhere to a particular religion. This is referred to as the Establishment Clause (EC). The court has used many different theories to analyze whether the EC has been violated. One such theory is strict separation. Justices following this theory used the Lemon test to analyze

potential violations. The *Lemon* test would analyze whether the law had a secular purpose, whether the law discriminated against or promoted a religion, and whether the law unduly entangled the government with religion. However, the *Lemon* test has fallen out of favor in the courts, and so it is unlikely the *Lemon* test would be applied here. However, if it were, it is very unlikely a court would find the law passes the *Lemon* test, as it is hard to see how H's statue would entangle the City with religion; in fact the Christmas tree the City displays would be more likely to fail the *Lemon* test. *Good point*

John
Angela
The second theory is the neutrality theory. This theory uses the reasonable observer test, which asks whether a reasonable observer would consider something to be the government ^{*endorsing*} promoting a religion, and looks at whether the government is promoting or infringing on religion or non-religion. This test has also become less popular modernly. However, if applied it is unlikely a reasonable observer would look at H's statue and believe the City was promoting any religion, as the statue is of a person bowling. Furthermore, the the flyers on the statue do not even mention religion and only invite people to go to the website. A reasonable observer may not even realize H is a group of religious bowlers and may just think the name "Holly Rollers" is a play on words, and the "holierthanthou" website name is more of a tongue-in-cheek joke. Finally, a court would likely not find that this statue promotes or infringes upon religion or non-religion. Again, the Christmas Tree the City has chosen to display would be more likely to fail this test.

Accommodation Theory

Very recently, the Court has rapidly become much more favorable to the accommodation theory. This theory says the courts should accept the important role religion has played and continues to play in the U.S. and accommodate religious expression unless the government is actually attempting to establish a government religion, or is coercing people to join a religion. Here, no court would find H's statue is an attempt at establishing a government religion. The Court defines coercion narrowly, and the government must actually impose some sort of fine or punishment for the actions to be considered

coercive. Here, the City is not fining or punishing people if they do not subscribe to H's religion. Therefore, a Court following the accommodation theory would find H's statue is not establishing an official government religion nor is it coercing people to join H's religion, and therefore does not violate the EC. *Good Analogy & Conclusion STAT.*

Conclusion of Public Forum and Establishment Clause

While a Court would likely find the lobby to be a non-public forum and the City's restriction as it relates to H's statue only subject to rational basis review, the City would likely fail rational basis as the display of the statue does not violate the EC, meaning there is no rational basis for denying the display of H's statue. *Good general Conclusion*

Expressive Conduct

Restrictions on expressive conduct, per O'Brien, are subject to intermediate scrutiny, and those restrictions must not be designed to suppress expression, and must not be more restrictive than necessary. Here, H will argue that their statue is expressive conduct, and is therefore subject to the O'Brien test. First, H will have to prove the statue is expressive conduct. Per the Spence test, expressive conduct is conduct meant to communicate that a reasonable person would perceive as communication. Here, H will argue that the flyers located on the statue that clearly are there to direct interested people to H's website to join them would be understood as communication to a reasonable person. The presence of the flyers would keep the City from having a persuasive argument against this.

Therefore, the O'Brien test would apply. *Is placing the flyers expressive conduct? Flyers themselves are speech?*

Intermediate Scrutiny

See above for rule. As argued above, the rule as applied to H would likely fail rational basis review. This would mean it would also fail the higher standard of intermediate scrutiny. However, if a Court did find the rule met rational basis, it would not pass intermediate scrutiny, as not displaying H's statue would not serve an important

government interest since the display of the statue clearly does not violate the EC, especially when the City chooses to display a widely understood religious symbol in a Christmas Tree. *Good analysis*

Primarily targets expression

The express purpose of the rule is to ban displays and symbols that depict or promote religion. A court would find this is clearly targeting expression.

No more restrictive than necessary

Good point
H will argue that a blanket ban on all displays and symbols that depict or promote religion is more restrictive than necessary, as it encompasses symbols that may depict a religion but also have clearly secular purposes. The Star of David comes to mind, as it is religious but also prominently displayed on the flag of a nation-state in Israel. While this is a closer call, because the law would fail intermediate scrutiny and primarily targets expression, the law would fail the O'Brien test and H would prevail.

Free Exercise

Rule
The First Amendment guarantees people the right to exercise their religion of choice.

This is called the Free Exercise Clause (FEC). To pass a law that infringes on the right to free exercise, the law must be neutral and generally applicable and pass rational basis review. If the law is not neutral and generally applicable, the law must pass strict scrutiny. Here, the law in question directly targets religious displays and is therefore not neutral and generally applicable. Therefore the law must meet strict scrutiny (see above for rule). As mentioned above, attempting to avoid an EC violation is not a compelling government interest per the Supreme Court.

However, the City would argue that H themselves is arguing that the statue is about recruiting bowlers and has nothing to do with religion. A court would most likely find that

H's statue is not related to the free exercise of their religion, and therefore the City's rule does not infringe on their free exercise. *Good point*

Vague

A law must provide minimum guidelines to law enforcement, and communicate to a reasonable person what speech is allowed. As discussed above, a person may be unclear as to what is a religious symbol (especially considering the Christmas Tree displayed), and therefore the rule would be considered vague. *and unenforceable as violating Free speech & Due Process.*

Good job! You organize well and cover the issues raised in the question, citing correct legal rules.

Note: If you argue that a non-public forum exists & there is a speech issue (like Xmas tree) analyze whether it is government speech which is not within 1st Am. protection.

Good & Thorough Analysis - But see notes for improvement suggestions.

87

3)

A

Defamation against Public figures

Defamation involves communicating a false statement about a person to another person. If the plaintiff is a public figure, they must prove that the person making the false claim did so with actual malice, and the plaintiff must prove this by clear and convincing evidence. Actual malice means the speaker either had actual knowledge the claim was false, or they had a ^{reckless} conscious disregard for whether the claim was true.

Expand: e.g. significant public activity, elected, etc.
In this case, the defendant (D) is a popular candidate for mayor. The plaintiff is the District Attorney (DA). Due to DA's office, DA is a public figure. D claimed DA was a "known embezzler and crook", which is false, DA must prove by that either D knew this claim was false or made the claim with a conscious disregard as to whether the claim was true.

Court's analysis

The Court would first look at whether the claim was true, as truth is an absolute defense for defamation. Here, the facts state the claim was false and not supported by any evidence. *Good point*

Next the Court would look to whether D knew the claim was false. There are no facts that say D knew the claim was false.

Finally, the Court would look at whether D acted with a ^{reckless} conscious disregard of whether the claim was true. Here, the facts state that there was absolutely ^{no} know evidence that DA had ever been an embezzler or been charged with theft. D stated that not only was DA an embezzler and crook, but he was a "known" embezzler and crook and should be

good Answer

"removed from office immediately". Considering there is no evidence, it is hard to see how D could make the claim that DA committed crimes sufficient to have him removed from office and that these crimes were "known". *Good point*

23 While actual malice is a very high bar, a court would likely find that the claims were specific enough that D would be found liable for defamation. *Good conclusion following your analysis*

B.

Free Exercise

The free exercise of religion is guaranteed in the First Amendment. This guarantee is called the Free Exercise Clause (FEC). The FEC both protects people from practicing their religion, and protects people from being compelled to do things that go against their religious beliefs. In analyzing a potential FEC violation, the court would first apply the *Seeger* test to determine if the person actually is following a religion. First, the court would look to whether the belief is sincerely held. Here, the facts are silent as to whether the beliefs are sincerely held, but nothing in the facts implies they are not sincerely held. Second, the court looks at whether the belief system occupies a role similar to a traditional belief in God. Here, the facts are again silent as to what religious beliefs the gardener (G) hold, so it is impossible to know if they occupy a similar role as a traditional belief in God. In the real world, G would have to prove these, but analysis will continue as if the *Seeger* test is passed. *OK - good Transition*

Compelled Speech

23 The FEC protects people from being compelled to speak in a way that contradicts their religious beliefs. Here, G will argue that his designs are unique and therefore expressive, making the designs speech. In recent years the Supreme Court has held that both designing unique cakes for couples getting married and designing websites for couples getting married are expressive conduct, and that compelling people to do either would

good citation to cases

violate the FEC if it would go against their religious beliefs. Based on this modern precedent, it is likely the Court would find that designing unique gardens and landscaping for a newly-wed couple would also be expressive conduct. In this case it would mean that if designing such things for an African-American couple would violate G's sincerely held religious beliefs, compelling him to do so would violate the FEC. Therefore, the Court would find that compelling G to design a garden for the plaintiffs would violate the FEC.

Equal Protection Clause

The 14th Amendment demands all people equal protection under the law and gives governments the right to pass appropriate legislation to enforce this. Plaintiffs will argue that Sunshine State's (S) anti-discrimination law ensures them equal protection under the law and must be upheld in this case. Anti-discriminations have been found by the court to be serve a compelling government interest. Furthermore, state discrimination based on race is also held to strict scrutiny. Sotomayor pointed out in a dissent in a recent case that ignoring tension between two clauses necessarily favors one over the other. Here, there would be tension between G's right to free exercise and P's right to not be discriminated against. *But the state is not discriminating; the garden is. State is trying to prevent it.*

Neutral and Generally applicable

Generally, laws that are neutral and generally applicable must only survive rational basis review. However, the modern Court has not allowed anti-discrimination laws to be enforced when they compel speech. Therefore, P likely would not rely on this argument. *But might win it.*

Conclusion

The Court would likely differentiate between the plaintiffs in Masterpiece Cakes and 303 Creative as the plaintiffs there were discriminated against based because they were homosexual couples, where as the plaintiffs here are being discriminated against based on race. The Court would likely rule that even though forcing G to provide services for P

24 would violate the FEC, public policy would better be served by not providing a religious exception to all anti-discrimination laws. Therefore, the Court would likely issue a narrow ruling that EPC takes priority over the FEC in cases of public accommodations when it involves racial discrimination, even if the accommodations involve expressive conduct that goes against the speaker's sincerely held religious beliefs. *Interesting result - not consistent with 303 overture but could happen w/o race as issue*

C. Voting as a fundamental right

The Supreme Court has held that voting is a fundamental right. As such, and law restricting voting rights must pass strict scrutiny. Strict scrutiny means a law must be narrowly tailored to serve a compelling government interest. Here, Public Water District (the District) will argue that restricting voting for members of the District's Board to property owners is a compelling government interest, as the District's scope is extremely limited which makes the policy sufficiently narrow, and property owners have far more at stake than renters. The Supreme Court has said it is possible for things like Water Districts can impose a property-owner requirement, so a court would likely find this to be constitutional. *Are there any special reasons for limiting P/owners? Expand Analysis.*

Equal Protection Clause (EPC)

The EPC mandates every citizen have equal protection under the law. The plaintiffs will argue that because the District's policy will disparately affect Latino voters by removing the voting rights of 70% of the Latino voters, this change violates the EPC. The EPC mandates that if the class of people treated differently is based on race, the rule must meet strict scrutiny. Here, the plaintiffs will argue that while in a vacuum the property owner requirement can meet strict scrutiny, it cannot meet strict scrutiny when it also discriminates based on race. However, generally if a law discriminates on race by a disparate impact theory, it must be proven that the law has a disparate impact and it was

passed with a discriminatory intent. The facts do not state that there was a discriminatory intent here. *can this be inferred? Expand Analysis.*

However, the "one person, one vote" doctrine the Court uses means the Court will be skeptical of any voting laws that disproportionately lower the voting power of a group of people, especially if it is a "suspect" group, such as the case here. So while the land owning requirement may be found to be constitutional by itself, and the facts do not state the law had a discriminatory intent, the sheer percentage of Latino voters it would disenfranchise would likely lead the Court to strike this rule down in *this* case. *Good point.*

22
D.

The Establishment Claus (EC)

The First Amendment ensures that the government cannot mandate people follow one particular religion. This is known as the EC. Modernly, when analyzing whether something violates the EC the courts use the Accommodation theory.

Accommodation Theory

The accomodation theory recognizes the important role religion has played and continues to play in the U.S. It therefore calls for religion to be accomodated, unless the government actually attempts to establish an official religion, or the government attempts to coerce people into following one particular religion. A Court will find a government's actions to be coercive if they impose fines or actual punishment if a person does not adhere to a specific religion. Furthermore, the Court will look at the histories and traditions of the U.S. dating back to the founding of the country when analyzing whether a government aciton violates the EC.

Here, Starburst City Water District Board (SC) recites a prayer before annual policymaking sessions. The facts do not say SC is attempting to establish any sort of

official religion, and SC is not fining or punishing people for not participating in the prayer. Therefore, SC is not establishing a religion nor are they coercing anybody into adhering to a religion. The Supreme Court has also said that there is a tradition among some legislative bodies of opening with a prayer that dates back to the founding of the country, and as such have held that it is constitutional for a legislative body today to recite a prayer. Therefore, the current Supreme Court would almost assuredly find SC's prayer to not violate the EC.

Good Analysis - Expanded Analysis of coercion: e.g. reference to "damnation"

23

END OF EXAM