

CONSTITUTIONAL LAW  
FINAL EXAMINATION  
Spring 2023

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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 10 Multistate Bar Exam-type (MBE) questions. Each question will count for 1/3 of your exam grade.

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

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

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

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

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

Question No. 1

In its 2021-2022 term the United States Supreme Court held in *Dobbs v. Jackson Women's Health Organization* that there is no fundamental right to an abortion under the U.S. Constitution and that *Roe v. Wade* and *Casey v. Planned Parenthood*, which confirmed that a Constitutional right to privacy includes abortion, should be overruled. Immediately after that decision, the Sunstate legislature enacted and the Governor signed a statute:

- a) Prohibiting all abortions, with no exceptions.
- b) Prohibiting the use, possession or sale of any abortion medications, devices, or methods.
- c) Prohibiting any person from leaving Sunstate with the intent to obtain an abortion or to procure abortion medications or devices.

The constitutionality of the statute was challenged by Doctor Anton, the Director of a Planned Parenthood clinic in Sunstate which performs abortions, dispenses medication for abortions and uses devices, and by her patient Betty who is seeking an abortion because she suffers from a condition in which a pregnancy endangers her life and there is no chance that her fetus will be born alive. If she cannot obtain services in Sunstate, Betty would leave Sunstate to obtain an abortion, but she is prohibited by the statute from doing so. The court determined that Betty has standing, but Sunstate has challenged the standing of Dr. Anton.

1. Analyze the Constitutional arguments that Dr. Anton will make in her lawsuit, including her standing, and Sunstate's arguments in response. How is the U.S. Supreme Court likely to rule and why?
2. Analyze the Constitutional arguments Betty will make in her lawsuit and Sunstate's response. How is the U.S. Supreme Court likely to rule and why?

\*\*\*\*\*2\*\*\*\*\*

Question No. 2

School Board meetings have become contentious affairs, and a recent school board meeting in Anytown proves the point. During “public comments” (this is the portion of the meeting in which the public may address the Board) Dan, an angry parent, called the Board President, Paul, a “pedophile” for approving a sex education curriculum for middle school students. There is no evidence that Paul is, or has ever been, a pedophile.

In response, Paul sued Dan for defamation under a recently amended State law, which provides the following:

“In an action for defamation, the fact finder shall presume actual malice when the defamatory allegation is inherently improbable or implausible on its face. Truth is an affirmative defense, and the burden shall be on the defendant to prove the truth of the allegation by clear and convincing evidence.”

Dan has moved to dismiss the complaint by challenging the law on First Amendment grounds. How should the judge rule?

\*\*\*\*\*3\*\*\*\*\*

Question No. 3

Please write a short answer to questions A and B. Each question is worth 25 points.

A. Columbia Public High School sponsors a Mock Trial team as one of its regular school activities. Before each trial in the Mock Trial competition the Mock Trial Coach gathered the students in the Courthouse Hallway for final instructions and preparation. At the end of the gathering the Coach knelt beside the Courtroom Door and offered a prayer for the team, inviting students to hold hands and bow their heads. One student objected to the prayer and left the gathering in protest, but the others remained. The Mock Trial then went forward as scheduled. When the school superintendent learned that the Coach had offered a prayer before the Mock Trial, the coach was suspended. The coach sued the School District for violating his First Amendment rights to free exercise of religion and freedom of speech. How should the court rule in the lawsuit and why?

B. State X passes a law prohibiting holding a parade, assembly or demonstration without a permit. A permit application must be approved by the county Review Board, made up of the local sheriff, district attorney and chief of police of each city or law enforcement jurisdiction. Each permit application is presumed valid, unless good cause is found to deny it. Good cause is not defined in the law, being left to the decision of each local board. Mr. Jones applies for a permit, saying he is organizing a protest of gun violence after the latest school shooting. The Board denies his application based on his ten-year-old arrest for resisting a police officer who was breaking up a demonstration in protest of a Police shooting which Jones had also organized. That charge was filed against him, but ultimately dismissed with no conviction. The Board states that it considers him a threat to law enforcement because of that arrest. What constitutional issues will Jones likely raise in a lawsuit challenging the denial of a permit, and how do you believe the court should rule? Briefly discuss.

C. Please answer the Multistate Bar Exam (MBE) embedded in Exemplify. Read each question carefully and choose the best answer even though more than one answer may be “correct”. Review your answers for accuracy before you finish.

Constitutional Law – ALL CAMPUSES

ANSWER OUTLINE

SPRING 2023

Professors Welsh/Zulfa/Schrier/Sommers/Miranda/Wagner/Ruskell

A full outline answer will be prepared, but in summary here are the issues raised:

Question 1: Requires analyzing abortion bans under the rational basis test after Dobbs (is it rational to have no exceptions to the ban, even when mother's health and safety are at risk and the fetus cannot survive? What is the state's legitimate interest?), and the right to travel as a fundamental right using Dobbs analysis;

Question 2: Requires students to address challenging the New York Times v. Sullivan rule for 1st amendment analysis of a public official's defamation claim. Justice Thomas and other conservative justices have advocated for overruling NY Times to allow greater liability and many states are legislating broader liability. Also, Should an enumerated right (free speech) be analyzed based on "original meaning" as the Court ruled in the NY Rifle v. Bruen case? (see Prof. Schrier's more complete Outline attached).

Question 3: (A) tracks Kennedy v. Bremerton School District re public employee's free exercise and free speech rights to pray at official school settings and events.

(B) Requires analysis of a licensing system requiring a permit to engage in free speech activities, applying the test for prior restraints and unconstitutional burdens on free speech.

1)

## DR. ANTON

### *Standing*

Dr. Anton may assert standing under the recognized theory of 3rd party standing. Under 3rd party standing, courts have found that doctors may sue on behalf of their patients when their patients' may have difficulty asserting their own rights. This also allows for the patients to retain their privacy, when the action being sought involves a private matter. This form of standing is similar to association standing and class action suits because it allows a doctor to represent multiple people's interests in court.

Here, Anton, who directs a clinic that routinely performs abortion services, and has a particular client in mind, will be found to have standing in the form of 3rd party standing. Anton also has a legitimate case and controversy, as her patients' rights are having restrictions placed on them. Because the case is based on a state's interpretation of new federal precedent, and it lacks any issues of non justiciability, it is justiciable. It is either ripe, or could be seen as capable of repetition but evading review (as Roe was), and for this reason, it is also not moot. It does not involve a political question.

Dr. Anton may also assert that this impacts her ability to work, however, as there is no fundamental right to hold a particular type of job, especially one that includes an illegal act, this argument will fail.

Nevertheless, Dr. Anton does have 3rd party standing.

### *Abortion Law*

Under the now overturned Roe, abortion was considered a fundamental right through the substantive due process doctrine of privacy, which comes from the 14th amendment. This limited states' ability to regulate abortion. Under the now overturned Casey, the court found that states court regulate abortion, so long as the regulations did not constitute an undue burden to a woman seeking an abortion. Regulations under both Roe and Casey were held to strict scrutiny. Strict scrutiny requires the government show that the law or regulation is narrowly tailored to serve a compelling government purpose, and this is the highest form of scrutiny.

App.  
to  
States

In the recent Dobbs decision, the court held that there is no fundamental right to abortion. The court looked to several factors, including the lack of reference to abortion being a right in the constitution, and the lack of a historical tradition of abortion in America. Following Dobbs, regulations relating to abortion are only held to rational basis scrutiny. Under rational basis, the plaintiff must show that the law or regulation is not rationally related to a legitimate government interest. This is the lowest level of scrutiny. Flowing from this, states' are recognized to have a legitimate interest in the life of fetuses.

*Dr. Anton's Argument*

Dr. Anton's argument is likely to be restricted to the abortion within the state issue, and not the travel issue. This is because it would be challenging for Dr. Anton to argue that she can represent the interest of someone who is not actually receiving treatment from her, but is leaving the state to do so, and receiving treatment from someone else.

Dr. Anton does not have much of a case if she attempts to challenge the Dobbs precedent directly, as this was recently decided, and the supreme court makeup is the same. Instead she will likely challenge the lack of a life of the mother exception. Many states that outlaw abortion have an exception for when the mother's life is in danger (there are also other common exceptions, such as rape and incest, but these do not appear

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to be relevant here). Because Dobbs is so recent, there is no set precedent on the necessity of these exceptions. However, there are several cases pending that will likely resolve this issue eventually, as here, Dr. Anton's may.

Dr. Anton's argument will have to face the onerous task of defeating rational basis scrutiny (explained above). She will have to successfully assert that the state's law is not rationally related to a legitimate state interest. Here, the life of a fetus will be found to be a legitimate state interest, and this will be the state's argument. Dr. Anton may argue that a law that has the effect of causing women to die isn't rationally related to the state's legitimate interest in fetal life.

### *Conclusion*

The most likely outcome is that the court finds the state law to meet strict scrutiny. It is possible that the court will carve out a narrow exception that balances the life of the patient with the state's interest in extreme cases of danger to the mother. ✓

## **BETTY**

### *Abortion Law*

Under the now overturned Roe, abortion was considered a fundamental right through the substantive due process doctrine of privacy, which comes from the 14th amendment. This limited states' ability to regulate abortion. Under the now overturned Casey, the court found that states court regulate abortion, so long as the regulations did not constitute an undue burden to a woman seeking an abortion. Regulations under both Roe and Casey were held to strict scrutiny. Strict scrutiny requires the government show that the law or regulation is narrowly tailored to serve a compelling government purpose, and this is the highest form of scrutiny.

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In the recent Dobbs decision, the court held that there is no fundamental right to abortion. The court looked to several factors, including the lack of reference to abortion being a right in the constitution, and the lack of a historical tradition of abortion in America. Following Dobbs, regulations relating to abortion are only held to rational basis scrutiny. Under rational basis, the plaintiff must show that the law or regulation is not rationally related to a legitimate government interest. This is the lowest level of scrutiny. Flowing from this, states' are recognized to have a legitimate interest in the life of fetuses.

### *Betty's Argument*

Betty will likely attempt to challenge the first two parts of the law much in the same way as Dr. Anton. However, her argument will also likely fail due to the hurdle of rational basis review. If this argument does fail (as explained in the Dr. Anton section), and the court does not carve out an exception, Betty will be able to attack the third part of the law, an option that Dr. Anton likely did not have.

### *Fundamental Right to Travel*

As part of the doctrine of substantive due process, stemming from the 14th amendment, there is a fundamental right to travel between states (although there is no fundamental right to international travel). This right holds any law that attempts to regulate travel between states to strict scrutiny. This fundamental right covers one's right to enter and exit states.

Betty will likely argue that she her fundamental right to travel will invalidates this part of the law. She will argue that the state has the ability to ban abortions from taking place in the state, but has no jurisdiction over abortions in other states, and no jurisdiction over her activity in other states. Therefore, this is more of a direct attack on her right to travel, than it is on abortion. Held to strict scrutiny, the state will have to show that this law is

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narrowly tailored to serve a compelling state interest. If Betty successfully argues that the law is attacking her right to travel, the state will not be able to assert an interest in preventing her travel.

The state will argue that it is not restricting her right to travel, it is restricting her right to abortion, and any method of getting one. This argument will fail because they are  
✓ regulating abortion *by* regulating her right to travel, which is not even a legitimate state interest, let alone a compelling one, which is the proper standard here.

Conclusion

The US Supreme Court will strike down the section of the law that prevents Betty from leaving the state for the purpose of obtaining an abortion.

**END OF EXAM**

2)

Case and Controversy

✓ Article 3, section 2, of the United States Constitution grants the Supreme Court jurisdiction over matters in which there is case and controversy. This has been interpreted to show that the Plaintiff have standing to have their case litigated, meaning that they demonstrate that they, the aggrieved party, have suffered **injury in fact**, that the Defendant has **caused** their injury, and that the court can fashion some **redress (redressibility)**.

Issue: Can P demonstrate that they have suffered an injury in fact?

✓ Rule: Injury in fact requires a showing that the Plaintiff be harmed in some way by the Defendant's actions.

Here, P will demonstrate that they have suffered some harm by D's tortious defamation, to wit, the lowering of his esteem in the population.

Conclusion: P will be able to demonstrate injury in fact because they have suffered some harm.

Issue: Can P demonstrate that the Defendant has caused their injury?

Rule: Causation demonstrates that there is a logical nexus between the alleged injury and the actions of the defendant.

Here, P will be able to demonstrate that they have suffered some harm (lowered esteem in the community) as a result of D's comments.

Conclusion: P will be able to demonstrate causation.

material harm

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Issue: Can P demonstrate that the court can redress their injury?

Rule: Redressibility refers to the court's ability to fashion some kind of relief for the Plaintiff, that is, put them in a position similar to how they were before the alleged harm.

✓ Here, the court will be able to fashion redress because they will be able to order damages, or fashion some other form of relief.

Conclusion: The Plaintiff will be able to meet this requirement.

✓ **Injury-in-fact, causation, redress conclusion:** The Plaintiff will be able to meet their requirements by demonstrating the above.

### **Mootness/Ripeness**

Issue: Is the matter set for adjudication insufficiently ripe, or is it moot?

Rule: A matter is not available for adjudication if it is insufficiently ripe, or if it is moot. A matter is moot if the actual controversy has resolved, or if redress can not be fashioned as a result of how the parties currently sit. A matter is underripe if the matter is not yet sufficiently at controversy.

✓ Here, the matter is sufficiently ripe because P has suffered some injury, and that injury has not yet been resolved through some adjudication.

### **Government Actor**

Questions of constitutional proportion require that the aggrieved party allege that the government have committed some wrong. This requires actual governmental action, a private party fulfilling a public function, or entwinement between the government and the private party.

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Yes  
Here, the Plaintiff is the government actor, which does not fulfill the government actor rule because typically, the aggrieved party is not the government. However, the instant action revolves around a matter of free speech, and free speech garners additional government protections because of its importance to our national character. Thus, because a ruling against a speaker would involve government enforcement of such an order (and government adjudication for that matter), and the government providing for a private cause of action which lies in defamation, additional protections are warranted in this case.

Conclusion: Although the governmental actor is not met in the traditional sense, this requirement is met.

### First Amendment

The first amendment of the U.S. Constitution states, in part, that Congress shall make no law abridging the freedom of speech...

Issue: Whether the law is facially unconstitutional.

Rule: Facial unconstitutionality for statutes regards their over-breadth, vagueness, unfettered discretion, and prior restraint. Over-breadth regards whether the law is so broad as to limit or chill both speech aimed at by the legislation, and that speech which is outside of the legislation. Vagueness asks whether a reasonable person would be able to discern the purpose and mechanism of the law. Unfettered discretion grants an overbroad mandate to the enforcers of the law, with in adequate guidelines. Prior restraint chills speech before it occurs, and is appropriate only where the purpose of the law is compelling, the law is narrowly drawn, and there is threat of imminent harm. ✓

Here, D will attempt to attack the law on facial grounds. For Over-beadth they will argue that the law captures legally protected speech. The P will argue that the law is specific to

that speech which is defamatory. P will further argue that the law is sufficiently specific and worded in such a way as a reasonable person could interpret it, and that there is no element of unfettered discretion because it provides sufficient guidelines (in this case, the fact-finder's determination of malice). Finally, D may argue that there is prior restraint in this matter, because the law may have an impermissible chilling effect on the public. While there may be *some* chilling effect on the public, P will successfully argue that the chilling effect is only very slight, and will only impact those that utter, or plan to utter, defamatory language.

Conclusion: P will be successful in guarding the law against a facial attack.

### Content-based regulation

Content based regulations are those regulations which regulate the subject matter or the view point of the speech. Subject matter regards the topic of the speech, whereas view point is in relationship to the ideology of the speech. While content based regulations require an application of strict scrutiny, defamation is a class of "less protected speech."

what about the language in the state "improbable" "implausible"

### Defamation

Defamation is a tort which resolves an alleged injury to the Plaintiff, where by spoken or written word, the Defendant has lowered the Plaintiff's respectability within the community. Truth is an absolute defense to the tort of defamation. Under *Sullivan v. New York Times*, where the Plaintiff is a public figure, defamation requires an additional showing of clear and convincing evidence that the defendant knew the falsity of the statement, and that they acted with malice. Malice is the intent to harm, or the reckless disregard for the truth.

Issue: Is P a "public figure."

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Rule: A public figure is one whom is an elected representative, or someone who holds themselves out to be a person of notoriety. Additionally, a limited public figure is one who holds a position in the public's eye as being notorious, within the limited scope in which their notoriety is raised.

F/A!  
⊕

Here, D will argue that P is a public figure, so as to require P to demonstrate the actual malicious standard (articulated more fully below). D will show that P is a public figure because P is the Board President, an elected position on the school board. Further, the school board holds meetings publicly, and is held accountable by the public, serving an important government function in the education system. D may attempt to argue that they are not a public figure because school board meetings formerly were banal, however, this argument will not be successful because the position of school board president inheres as a position of respect, and accountability, and of interest to the general public, a position that he must have won an election for.

Conclusion: D will successfully argue that P is a public figure.

Issue: Can P demonstrate that D acted with actual malice?

Rule: Actual malice, in the context of defamation, is the act of speaking without regard for the truth, with the intent to purposefully harm the reputation of the Plaintiff, or with such reckless disregard for the truth, as to ignore its importance.

Here, P will be able to demonstrate that D acted with actual malice, either with the intent to harm P with his lies, or with such reckless disregard for the truth. D will argue that he was under the impression that P was a pedophile based on his assumptions of P based on his manner or characteristics, however, because these are mere assumptions and bear no weight on the truth of the matter, they will be disregarded. P will argue that the severity of the lie, given the context of his being the school board president, inheres a heightened

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awareness of D that those allegations would be particularly harmful, and would make the utterance of such allegations, without evidence more than an assumption (as claimed by D), rise to the level of reckless disregard.

Conclusion: P will be able to demonstrate that D acted with actual malice.

### Statutory Concerns

Issue: Is the statute under which Plaintiff's claim arises constitutionally defective?

Rule: See defamation, above.

The statute under which the Plaintiff's instant case arises states that "the fact finder shall presume actual malice when the defamatory allegation is inherently improbable or implausible on its face." This statute is violative of the first amendment, and the rule ~~given~~ by *Sullivan* because the statute asks the fact finder to *presume* actual malice. The standard under *Sullivan* (as discussed above) states that actual malice of the speaker be *shown* by clear and convincing evidence. Just as with cross-burning, the intent of the speaker can not be presumed by the fact finder, but must instead be demonstrated by extrinsic evidence to the fact.

Conclusion: The statute is unconstitutional as written.

### Overall conclusion

D's motion to dismiss should be granted because the statute is unconstitutional in this instant action.

**END OF EXAM**

3)

Question 3A.

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Case and Controversy

✓ Article 3, section 2, of the United States Constitution grants the Supreme Court jurisdiction over matters in which there is case and controversy. This has been interpreted to show that the Plaintiff have standing to have their case litigated, meaning that they demonstrate that they, the aggrieved party, have suffered **injury in fact**, that the Defendant has **caused** their injury, and that the court can fashion some **redress (redressibility)**.

Issue: Can P demonstrate that they have suffered an injury in fact?

Rule: Injury in fact requires a showing that the Plaintiff be harmed in some way by the Defendant's actions.

Here, P will demonstrate that they have suffered some harm by D limiting their ability to freely exercise their religion.

Conclusion: P will be able to demonstrate injury in fact because they have suffered some harm.

Issue: Can P demonstrate that the Defendant has caused their injury?

Rule: Causation demonstrates that there is a logical nexus between the alleged injury and the actions of the defendant.

Here, P will be able to demonstrate that they have suffered some harm because Defendant has directly prevented the exercise of their religion.

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Conclusion: P will be able to demonstrate causation.

Issue: Can P demonstrate that the court can redress their injury?

Rule: Redressibility refers to the court's ability to fashion some kind of relief for the Plaintiff, that is, put them in a position similar to how they were before the alleged harm.

Here, the court will be able to fashion redress because they will be able to order damages, equitable relief, or fashion some other form of relief.

Conclusion: The Plaintiff will be able to meet this requirement.

**Injury-in-fact, causation, redress conclusion:** The Plaintiff will be able to meet their requirements by demonstrating the above.

### **Mootness/Ripeness**

Issue: Is the matter set for adjudication insufficiently ripe, or is it moot?

✓ Rule: A matter is not available for adjudication if it is insufficiently ripe, or if it is moot. A matter is moot if the actual controversy has resolved, or if redress can not be fashioned as a result of how the parties currently sit. A matter is underripe if the matter is not yet sufficiently at controversy.

Here, the matter is sufficiently ripe because P has suffered some injury, and that injury has not yet been resolved through some adjudication.

### **Government Actor**

✓ Questions of constitutional proportion require that the aggrieved party allege that the government have committed some wrong. This requires actual governmental action, a

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private party fulfilling a public function, or entwinement between the government and the private party.

Here, the Defendant is a Public High School, and as such, is a governmental actor because it is a governmental entity.

Conclusion: The Governmental Actor requirement is met.

### First Amendment

The first amendment of the U.S. Constitution states, in part, that Congress shall make no law respecting the establishment of a religion, nor preventing the exercise thereof.

Rule: The Government, through the Free Exercise Clause, may not prevent the exercise of religious activity by citizens. The government, through the Establishment clause, may not establish a religion. These two concepts are held in tension with one another, and are potentially in conflict with one another.

Defendant, the school, will argue that it was upholding the constitution by preventing the establishment of a religion. The school will argue that the coach was acting within his official capacity as a representative of the school and as an individual whom the students may have held in regard. Further, the school will argue that these religious actions by the coach would have "pressured" the students into adopting, or acting to adopt, the coach's religious expression, or at least have suffered peer pressure by not conforming to the expectations of a role model. Additionally, the coach practiced inviting the students to join him in prayer during a school event, heightening these concerns that the school's endorsement of these activities would have amounted to being violative of the establishment clause.

FTA  
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Free

*Good balance*

The coach, by contrast, will argue that the school has impermissibly infringed on his rights to freely practice his religion. The coach will argue that this is a small, somewhat private ceremony intended to bring the students luck, or at least to acknowledge the solemnity of their participation in the mock trial team. Further, the coach may have a religious practice which compels him to "thank" a higher power for the coach's position of privilege. Further, the coach will argue that no child is "forced" to participate in the ceremony, and will point to the one child being free to leave in the act of protest, without obvious repercussions to the child later continuing to participate in the activity.

Conclusion: The court will find that the coach was freely expressing his own religious faith, and that no reasonable outsider could view this practice as the school's endorsement or establishment of religion. Further, the Court will find most persuasive the fact that students were not forced to participate in the activity, and apparently, suffered no negative consequences as a result.

Question 3b.

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Case and Controversy

✓ Article 3, section 2, of the United States Constitution grants the Supreme Court jurisdiction over matters in which there is case and controversy. This has been interpreted to show that the Plaintiff have standing to have their case litigated, meaning that they demonstrate that they, the aggrieved party, have suffered **injury in fact**, that the Defendant has **caused** their injury, and that the court can fashion some **redress (redressibility)**.

Issue: Can P demonstrate that they have suffered an injury in fact?

Rule: Injury in fact requires a showing that the Plaintiff be harmed in some way by the Defendant's actions.

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Here, P will demonstrate that they have suffered some harm by being denied the permit because they are unable to freely express themselves.

Conclusion: P will be able to demonstrate injury in fact because they have suffered some harm.

Issue: Can P demonstrate that the Defendant has caused their injury?

Rule: Causation demonstrates that there is a logical nexus between the alleged injury and the actions of the defendant.

Here, P will be able to demonstrate that they have suffered some harm by not being able to express themselves, as a result of the governmental action in creating this permitting system.

Conclusion: P will be able to demonstrate causation.

Issue: Can P demonstrate that the court can redress their injury?

Rule: Redressibility refers to the court's ability to fashion some kind of relief for the Plaintiff, that is, put them in a position similar to how they were before the alleged harm.

Here, the court will be able to fashion redress because they will be able to order the law stricken as unconstitutional, order damages, or fashion some other form of relief.

Conclusion: The Plaintiff will be able to meet this requirement.

**Injury-in-fact, causation, redress conclusion:** The Plaintiff will be able to meet their requirements by demonstrating the above.

**Mootness/Ripeness**

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Issue: Is the matter set for adjudication insufficiently ripe, or is it moot?

Rule: A matter is not available for adjudication if it is insufficiently ripe, or if it is moot. A matter is moot if the actual controversy has resolved, or if redress can not be fashioned as a result of how the parties currently sit. A matter is underripe if the matter is not yet sufficiently at controversy.

✓ Here, the matter is sufficiently ripe because P has suffered some injury, and that injury has not yet been resolved through some adjudication. Chiefly, his rights to protest are continuously being violated because the local government may continuously deny him a permit to hold a protest.

### **Government Actor**

✓ Questions of constitutional proportion require that the aggrieved party allege that the government have committed some wrong. This requires actual governmental action, a private party fulfilling a public function, or entwinement between the government and the private party.

Here, the Defendant is a government actor, and is fulfilling this role by enacting State X's legislation.

Conclusion: The government actor requirement is met.

### **First Amendment**

The first amendment of the U.S. Constitution states, in part, that Congress shall make no law abridging the freedom of speech...

Issue: Whether the law is facially unconstitutional.

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Rule: Facial unconstitutionality for statutes regards their over-breadth, vagueness, unfettered discretion, and prior restraint. Over-breadth regards whether the law is so broad as to limit or chill both speech aimed at by the legislation, and that speech which is outside of the legislation. Vagueness asks whether a reasonable person would be able to discern the purpose and mechanism of the law. Unfettered discretion grants an overbroad mandate to the enforcers of the law, with in adequate guidelines. Prior restraint chills speech before it occurs, and is appropriate only where the purpose of the law is compelling, the law is narrowly drawn, and there is threat of imminent harm.

good

Unfettered discretion pro: Here, the most obvious facial attack available to the Plaintiff is that of "unfettered discretion." Plaintiff will argue that the law impermissibly grants the permitting authority unfettered discretion because it leaves ambiguous a key portion of the law. By not defining the term "good cause" the local government is able to conclude that virtually any party has violated this. In particular, the Plaintiff will be able to demonstrate that the permitting authority has impermissible authority because they have chosen to deny his application because of a very old (10 year) arrest, for a crime that did not result in a conviction. Particularly, the nature of the review board (sheriff, DA, and chief of police) are sensitive to an old arrest surrounding resisting arrest, at a protest regarding a police shooting. This context demonstrates that the review board has exercised a degree of discretion which is inappropriate given the context. Further, the Plaintiff will argue that the law, because it ill-defines terms, allows for this form of discretion in the reviewing agency.

Unfettered discretion con: In contrast, the review board will argue that the law does not grant them "unfettered discretion," but rather a degree of discretion that inheres in their position and by their experience as law enforcement individuals. They will allege that their qualifications to determine what "good cause" is, especially in the context of protests, may consist of such factors as old arrests for the offense of resisting arrest.

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Vagueness pro: The Plaintiff will further argue, in the alternative, that the law is unconstitutionally vague. Vagueness, as discussed above, relies on whether a reasonable person could interpret what the law intends. Here, the Plaintiff will argue that "good cause" will mean different things, to many different people, and that as such, the law will not survive.

Vagueness con: The Defense will argue that the law is not vague, and is specific, because the legislature intended to leave the term "good cause" open for the interpretation of the public servant, in light of the attendant circumstances of the permitting process. This argument, however, will fail because the term is ill-defined in that an average person would not know what constitutes "good cause."

Conclusion: The Plaintiff will successfully argue that the law is facially invalid as a result of unfettered discretion and based on vagueness.

**END OF EXAM**