

FIRST AMENDMENT LAW FINAL
FALL, 2008

PROFESSORS RUDNICK

DECEMBER 11, 2008

AND BECKER

Do not start until told to do so

YOU HAVE THREE HOURS FOR THIS EXAM

INSTRUCTIONS:

USE ONLY SOCIAL SECURITY NUMBERS TO IDENTIFY YOURSELF ON THE BLUEBOOKS.

The examination is comprised of three questions worth a total of 90 pts. (the remaining 10 are from the Summum exercise). ***Each question is worth 30 points.***

In discussing the issues consider the arguments and counter-arguments and the likelihood that any particular claim will succeed. ***If you think additional information is required to analyze the issue, or you are making factual assumptions, state the information required and/or the fact(s) assumed, and what bearing this has on your answer to the question.***

If the same argument is applicable to more than one issue or answer, you do not need to repeat the entire analysis, but you may make reference back to the question and page on which the analysis you wish to repeat can be found. Be careful with this procedure, make sure that the prior analysis is sufficiently similar to warrant such a reference!

You do not need to use case names. If the fact pattern reminds you of or is controlled by a case we considered in class, feel free to refer to it by facts or name, but YOU MUST STATE WHY THAT CASE IS RELEVANT TO THIS FACT PATTERN. If you use a case name only, and it's wrong, you will lose points.

THIS IS AN OPEN BOOK EXAM-This means you are allowed to use any source whatsoever, except another person.

THERE IS A TWO-BLUEBOOK MAXIMUM FOR THIS EXAM- Do not use more than 2 bluebooks or 16 pages. Outline your answers in a scrap bluebook so that you do not needlessly waste space. Write on ***only one side of the page*** and leave some margin on at least the left hand side. ***No credit will be given for illegible writing or for answers which exceed the page restrictions.***

IF YOU USE MORE THAN ONE BLUE BOOK, NUMBER THEM IN THE FOLLOWING MANNER: 1 of 2; 2 of 2.

Question I

The School Committee ("Committee") of the Town of Despair ("Despair") has noticed a recent precipitous rise in violent crime among students in grades 6-8, who generally range in age from 12-14. Of particular concern is the rise of "hate crimes," that is, crimes committed against persons because of the actual or perceived characteristic(s) of the victim. The members of the Committee have determined that this rise in violence likely results from a variety of things, most notably, the failure of the family and other community institutions to instill proper values in children, particularly respect and tolerance for persons of diverse races, religions and cultures. Additionally, the members are aware that children in this age range are particularly susceptible to external forces, including peer pressure, problems at home and substance abuse, some or all of which color their ability to exercise appropriate judgment in decision-making. The Committee, in conjunction with the Superintendent of the Despair Public Schools and the Principal of the Despair Middle School (Grades 6, 7 and 8) decided to establish a "Clergy in the Schools" program, in which members of local clergy were invited to come into the Middle School once a month at pre-appointed times, and hold discussions with the students regarding (1) civic values and morality including tolerance and respect for diversity; (2) maintaining a safe school atmosphere; and (3) volunteer opportunities in the community. Attendance at the sessions was voluntary, although no parental consent was necessary. Those children not choosing to participate were assigned to a study hall during the period when the clergy members were conducting the discussions.

Participants were recruited by way of written invitations sent to all local clergy. Of those who agreed to participate, 70% (7) were of various Protestant denominations, 20% (2) were Catholic, and 10% (1) Jewish. That ratio approximates the division of organized religious faiths in Despair. Participants were instructed not to quote from the bible or other scripture during the sessions, not to advocate a particular religious sect, philosophy or practice, but they were permitted to give their contact information to any student who requested additional or private discussions, or who, in the mind of the clergyperson, was "in need" or "at risk."

Despair Middle School does have a general "School Volunteer Program," in which various persons from the community, including police, fire, parents and health care workers, visit the school on about a monthly basis, and address the students concerning their vocations or other areas of

interest and expertise. Attendance at these sessions is mandatory. Substantive tutoring in academic subjects by qualified, trained community members on an individual basis is available free of charge to qualified students.

Assume a group of parents with standing challenge the “Clergy in the Schools” program in federal court, alleging that it violates the First Amendment. Based upon cases we read this semester and hypotheticals we discussed, evaluate the constitutionality of the program.

Question 2

The Commissioner of the Department of Motor Vehicles of the State of Euphoria ("DMV") is authorized by statute to issue license plates to individuals who register their cars in Euphoria ("registrants"). For an additional fee of \$35.00, registrants may request a special plate, known colloquially as a "vanity plate." The registrant may choose, in order of preference, up to three letter or number combinations for his vanity plate.

On April 20, 2008, Henry Ford, still driving slowly at age 112 and having recently found religion, applied for a vanity plate for his recently "tricked-out" 1929 Model T.. His first, second, and third choices for a vanity plate were "John316," "JN316," and "JN36TN" respectively. He stated on his application that "all three represented a Bible passage" which reads: "For God so loved the world that he gave his one and only Son, that whoever believed in him shall not perish but have eternal life." The DMV rejected Ford's application on May 14, 2008 because it referred to a deity in violation of the Euphoria statutes.

The current Euphoria statute and Euphoria Code of Regulations explicitly prohibit seven categories of letter/number combinations. The category at issue here prohibits in pertinent part:

"Combinations of letters or numbers that refer, in any language, to a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status, or political affiliation; provided, however, the commissioner shall not refuse a combination of letters or numbers that is a generally accepted reference to a race or ethnic heritage (for example, IRISH)."

Registrants must also provide a meaning for each proposed vanity plate selection on their applications, which are signed under oath. Plates are denied if the meaning supplied falls within one of the prohibited subject matter areas. Nevertheless, proposed vanity plates that could have a dual meaning or reference both a permissible and prohibited subject matter may be allowed if the stated meaning is a permissible subject matter. For example, the term FAITH may be allowed if the supplied meaning was someone's name but if the same application had "faith in God" as the meaning for FAITH, it would be denied as an impermissible religious

reference. In addition, even incomprehensible proposed plates will be denied if the supplied meaning falls into one of the prohibited categories of the statute.

In determining whether to approve or deny a plate based on its reference to a religion or a deity, the DMV relies on common knowledge, the registrant's supplied meaning, and, at times, advice of the department's general counsel. The DMV takes many factors into account when granting or denying vanity plates, including the specificity of the religious term and whether or not the term has become secularized. For example, GODSAVES would be denied, but PEACE or GRACE might be allowed because they are not necessarily associated with a religion. Similarly, general terms such as HOPE and PEACE may be allowed, but specific references to religion or deities such as YAHWEH or JESUS would be denied.

Under the current statutory scheme the DMV has denied 25 requests, including Ford's, for vanity plates because they made reference to religion or a deity. The plates denied were: ODHINN, SHIVA, REV B, SEEKGOD, ROMANS8, SHJ BVM, REV3 20, JMJ1, PSALM48, TORAH, ATMAN, HESTIA, KRISHNA, STBRUNO, PRAY, BVM 22, VTWITCH, GODSON, ONEGOD, 1GOD, FEDEDIO, THE REV, UM REV, GESU.

Applications for plates GEMINI and LIBRA were granted where the registrants gave astrological and zodiac signs as the plates' intended meanings. Similarly plates FAERIES and 13WIZRD were issued where the supplied meanings were "the love of mystical characters" and "wizard plus a lucky number" respectively. Several variations of the reference to angels were also issued including, ANGEL1, ANGEL21, ANGEL23, ANGELL, and ANGELSC. The meanings supplied for those plates ranged from children's names to nicknames.

Ford has filed suit in Federal District Court, alleging that the Euphoria vanity statute is unconstitutional arguing that his rights under the First and Fourteenth Amendments are violated by the DMV rejecting his application for vanity plate "JN36TN." Based upon cases we read this semester and hypotheticals we discussed, evaluate the constitutionality of the program.

Question 3



The Centralia County Courthouse was built in 1910 and is owned and operated by Centralia County, Dispepsia, a political subdivision of the State of Dispepsia. The Courthouse is located in an area of downtown Center City containing many other county government buildings. The Courthouse is an imposing, six-story, granite building that occupies the center of an

entire city block. The Courthouse originally housed all county and state courts and county government offices. Over the years as other county courthouses and county buildings were erected the building was designated as a Civil Courthouse and currently houses 18 courts, as well as the county and district clerks' offices.

In 1953 the Monumentally Hopeful Mission, ("MHM"), a local Christian charity that provides food and shelter to indigents, decided to build a memorial to Jimmy Swaggert, a prominent Center City businessman and philanthropist who died in 1948. Swaggert had been a long-time, active supporter of the MHM. Billy Graham, the president of the MHM, approached the Centralia County Commissioners Court and secured permission to erect a memorial to Swaggert on the County Courthouse property. Graham testified that the MHM selected a location in front of the Courthouse because of the permanence and prominence of its location.

The MHM designed and paid for the Swaggert monument. It was erected in 1956 in a plaza 21 feet from the main entrance to the Courthouse. The monument measures two-feet-six-inches by three feet and is four-feet-five-inches high. Engraved on the front surface of the monument, and occupying most of the area of the front surface, is the following inscription:

**MONUMENTALLY HOPEFUL MISSION
ERECTED IN LOVING MEMORY
OF
HUSBAND & FATHER
JIMMY SWAGGERT
A.D.1956**

The top part of the monument is an open Bible intended to memorialize Swaggert's Christian faith. The sloping top of the monument with the Bible has the appearance of a lectern. There is no written explanation on the monument as to why the Bible is there. A public ceremony, which included Christian prayers, was held in 1956 to dedicate the Swaggert monument.

Graham testified that one of the MHM's purposes for depicting the open Bible was to convey to the public that Swaggert was a "godly man" who had helped others. The Bible is intended to represent Swaggert's Christianity. Graham also testified that the presence of the Bible on the monument conveys to people that this is a Christian government.

Because the Swaggert monument faces the main entrance to the Courthouse, it is readily visible to attorneys, litigants, jurors, witnesses, and other visitors to the Courthouse. However, a passerby would have to walk up to the monument to observe that it is a Bible and would have to stand in front of it to read the Bible. The open Bible as displayed measures twelve-by-sixteen inches.

There are two wall plaques and two free-standing historical markers in the same area as the Swaggert monument. Neither the plaques nor the historical markers contain any religious message. No other open books are displayed in or near the Courthouse. There are other monuments, markers, and plaques in and near other county buildings, but none of them contain a religious message.

The MHM maintained the monument from 1956 until 1995. The monument was vandalized several times and the Bible made to appear to be the centerfold of a copy of Hustler Magazine. Each time that happened the MHM repaired the Bible. In 1988 atheists complained about the Bible to the Centralia County Commissioners Court and asked that it be removed. Although the evidence on this point is not entirely clear, it appears that the MHM decided either to remove the Bible or not to repair it again, rather than face potentially costly litigation. From 1988 until 1995 the Bible was hidden by a granite bowl placed on top of the Bible. The bowl was often used as a trash bin.

In 1995 Pat Robertson was elected a state district judge. Robertson campaigned on a platform of putting Christianity back into government. As a judge he initially officed in a county building near the Civil Courthouse and later moved to the Courthouse. His official court reporter was Tammy

Faye Bakker. In 1995 Robertson and Bakker embarked on a project to solicit private donations to refurbish the Swaggert monument, which had fallen into a state of disrepair, to restore the Bible, and to add neon lighting so that the monument was perpetually bathed in light day or night.

Robertson sought and obtained approval from Centralia County to make the improvements. Centralia County did not pay for any of the improvements to the. A ceremony was held in November of 1995 to commemorate the refurbishing of the. A number of Christian ministers led prayers at the rededication ceremony. Spectators and participants sang "The Battle Hymn of the Republic," a patriotic hymn that extols Christ's glory.

In 1996 and again in 1998 Bakker paid to repair the lights and for repairs to the Bible from migrating birds. Since 1995 Centralia County has paid for electricity to illuminate the neon lights that were installed in 1995. The cost of providing this electricity is \$93.16 per year. For a few years after the monument was refurbished Bakker cleaned the Bibles face every day while on her lunch hour. Since 1997 the MHM has maintained the monument. Although Centralia County does not maintain the Swaggert monument, it retains the authority to move or alter it.

Margaret Sanger is a resident and taxpayer of Centralia County. She is also an attorney who passes by the monument going to and from the Courthouse in the course of her profession. She claims that she is offended by the Bible display in the Swaggert memorial because it advances Christianity and it sends a message to her and to non-Christians that they are not full members of the Center City political community.

Sanger has filed an action in United States District Court asking that the County be ordered to remove the Bible display. Supporters of the Bible display have held a large rally on September 4, 2008, in the Courthouse plaza next to the Swaggert monument. Several hundred rally participants prayed and stressed that the Bible was a foundation of the Christian faith. County Judge Jim Jones, Judge Robertson, and Centralia County Attorney David Koresch spoke at the rally and participated in prayers led by Christian ministers. Jones and Robertson stated that the County would strongly oppose the lawsuit. The County Judge is the chief executive officer of Centralia County. He presides over meetings of the Centralia County Commissioners Court, the legislative body that establishes County policy.

Assume that you are the Law Clerk to the Justice who has been assigned the

job of authoring the opinion in this matter. Using the cases and hypotheticals that we read and discussed during the semester, please write a draft opinion.

[Any similarities between characters in this question and real persons, living or dead, are purely coincidental.]