

FIRST AMENDMENT EXAM
Fall 2017

Directions: This exam is open book and open note. Each question is worth 25 points. You will be awarded points for identifying the First Amendment issues and the quality of the analysis. In other words, good writing and thoughtful discussion count. Good luck.

I enjoyed teaching the class and I hope you enjoyed it too!

1)

A member of the Dallas City Council, Hal Reynolds, recently took his eleven year old granddaughter to see the movie, Coco. Reynolds decided to travel to and from the movie by LYFT, a network ride sharing car. Reynolds requested the LYFT on his cellphone and five minutes later a driver named Darren arrived in a Honda Civic to pick them up.

Reynolds and his granddaughter got into the backseat of Darren's Civic. Strapped to each headrest of the front seat was an IPAD. These IPADS provided Darren with a way to make some additional revenue from his LYFT driving. The IPADS were provided by a company called PADVERTISING. The IPADS showed a stream of advertisements which companies and organizations had purchased from PADVERTISING. The IPADS begin to stream ads automatically as soon as the ride begins. A passenger in the LYFT could stop the ads by hitting the home button on the IPAD. Darren received \$2.00 from PADVERTISING for every ride in which the passenger did not disable the IPAD during the ride. Therefore, Darren did not inform passengers about how to disable the ads.

On Reynolds' ride with his granddaughter, he saw several advertisements that upset him. First, there was an advertisement for wine coolers. The advertisement showed several attractive women in bikinis drinking wine coolers at a pool party surrounded by several handsome men. Reynold's granddaughter remarked to him that it looked like a fun party.

After the wine cooler ad finished, an advertisement attacking Donald Trump appeared. The ad repeated Trump's statement from the Access Hollywood video about grabbing women in the "pussy" and then showed clips from several women accusing Trump of engaging in such behavior. Reynolds was Trump's campaign director in the Dallas-Fort Worth area.

The final advertisement was from Cialis, an erectile disfunction drug. The ad showed a cowboy working in the fields herding cattle. He then came in to a female who kissed him. He then visibly took the Cialis medication. The advertisement ended with the female topless from behind (you could only see her back) on a bed straddling the

male. The female turned toward the camera and said, "Now I can ride my cowboy." Reynolds' granddaughter asked him what it meant "to ride someone."

Reynolds left the LYFT disgusted by the advertising and decided to do something about it. He went right to his computer and drafted an ordinance to propose at the next city council meeting:

It shall be unlawful for any network ride sharing vehicle (such as UBER, LYFT or other similar service) to display internal (inside the vehicle) advertising that:

- (A) promotes the use of alcohol, tobacco or contraceptive products;
- (B) displays defamatory material about elected officials; and
- (C) shows individuals engaging in sexually suggestive conduct or using profane language.

You are the attorney for the Dallas City Council. Under the Council rules, you are responsible for reviewing proposed ordinances before they are submitted to the Council for a vote. Write a letter to Councilor Reynolds discussing whether his ordinance is constitutional under the First Amendment. To the extent you conclude that the ordinance is not constitutional as written, suggest changes that will fix the constitutional problems, if any, that you have identified.

2)

For the past ten years, each Spring, the New Hampshire State Capitol Curator Office sponsors the annual "Spring into the Arts" Contest. Each year, the Curator selects a topic and forwards it to all of the public, middle schools in New Hampshire to solicit artwork related to the topic. Students may then submit a piece of artwork to the office of their State Representative and/or State Senator. Each Representative and Senator may choose one piece as a finalist. The nominated art work is hung throughout the Capitol for a month. On the last day of the Spring session, the members of the Legislature cast ballots for their favorite piece of art. The winner receives a scholarship to a fine arts summer program at the National Gallery in Washington D.C.

For this year, the Curator selected for the contest theme "American Monuments." Noah Aframe, an 11 year old boy in Hopkinton, New Hampshire, submitted a painting to his Representative which showed a series of monuments, the Statue of Liberty, the Washington Monument, and the Liberty Bell, all black and crumbling. In the middle, was a depiction of President Trump, with the caption in gold, "Trump's American Dream." Noah's Representative, one of the most liberal members of the House selected Noah's depiction as a finalist. The

Curator's Office hung the picture on a hallway near the Governor's Office.

One day on his walk into to his office, the Governor noticed Noah's art work. The Governor immediately called the Curator to tell him that the United States Secretary of Transportation was expected for a meeting the next day and that Noah's art work could not be on display because the Secretary might see it and tell President Trump about it.

Under the provisions of the Spring into the Arts contest, the Curator retains the right to disqualify any piece of art nominated by a Representative or Senator if the art is not "consistent with the theme of the competition." Any disqualified piece "must be immediately removed from display." Any decision by the Curator to disqualify a finalist piece on this basis may be appealed to the Governor by the Representative who nominated it.

The Curator determined that Noah's artwork was disqualified. In a letter to Noah's representative, the Curator wrote that "art criticizing the President does not reflect positively on American monuments which was the point of the contest." Noah's Representative appealed to the Governor who quickly affirmed the Curator's decision.

Noah really wanted to go to the art program in D.C. and wanted his art displayed in the Capitol. Therefore, Noah's parents sought an injunction in Superior Court ordering the Curator to return Noah's artwork to the contest. Noah's parents argued that the Curator's action violated the First Amendment because Noah's painting was removed based on its anti-Trump content. You are an Assistant Attorney General for New Hampshire. Write a response opposing Noah's parents' motion for an injunction.

3)

On July 26, 2017, President Trump, without the knowledge of the Pentagon, sent a tweet telling the public that he was banning transgendered individuals from United States military service. It took the military about a month to catch up to Trump's tweeting, but, on August 25, 2017, the military finally announced the official ban.

A transgender advocacy group called the Gender Equality Movement (GEM) organized a nationwide protest. GEM sent members to several army bases around the United States. GEM Members stood outside base confines and handed military members, who were leaving the base, a pamphlet about GEM's position against the ban. With the letter, GEM provided a small pink bar that looked like a military medal. The GEM protestors asked military members to wear the medal as a sign of protest against the ban.

Out of the thousands of army members who were handed the pink medal, only one, a sergeant at a base in Norfolk, Virginia (whose sister is transgender) was caught wearing it. He was caught by his

commanding officer during an inspection and dishonorably discharged for his conduct. The Washington Post ran a story about the GEM protest and the dishonorably discharged soldier. The article identified by name the soldier and GEM protestor who handed him the medal.

Three days after the article ran, President Trump sent the following tweet:

Justice Department is again asleep at the wheel.
Transgenders are encouraging disobedience by our great military and Justice Department does nothing about it. Sad!
Do your job - PROSECUTE!

Attorney General Jeff Sessions, after reading Trump's tweet, contacted Deputy Attorney General Rod Rosenstein to ask him to look into whether there was some way to prosecute the GEM protestor for giving the pink medal to the discharged soldier.

You are a Department of Justice Attorney working for Deputy Attorney General Rosenstein, who he assigns the task of looking into the Attorney General's request. In doing your research, you found the following statute (18 U.S.C. 2387):

a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

(1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States

shall be fined under this title or imprisoned not more than ten years, or both.

Happy with your discovery, you bring the statute to Deputy Attorney General Rosenstein. He asks you to provide him with the best argument(s) that the GEM protestor can be prosecuted under this statute consistent with the First Amendment. Write the Deputy Attorney General a memorandum explaining the government's best argument(s) and your view on whether a motion to dismiss on First Amendment grounds would succeed, your argument notwithstanding.

4)

Your friend, Jim Jones, works as a paralegal at the United States Attorney's Office in Memphis, Tennessee. Your friend Jim is an avowed atheist.

The Senate recently confirmed the new United States Attorney, Roy Moral, for Jim's office. Before going to law school, Moral was ordained as a Baptist minister. Moral begins each day with a staff meeting. Every day, at the end of the staff meeting, Moral offers a prayer to encourage his staff to have a productive day. In the first week on the job, Moral has referred in these prayers to the "Lord," "the Almighty," "the Great and Glorious God" and "Our Father and Savior."

After the first prayer offered by Moral, Jim decided to protest the prayer by visibly putting his fingers in his ears. He did not, however, make noise or otherwise disrupt the proceeding.

At the end of the first week, Jim received a letter from the Administrative Officer for his Office stating that he was being docked one day of vacation for his misbehavior at the staff meetings by placing his fingers in his ears. The letter said that he had violated a Department of Justice regulation which requires each employee "to act in a professional and dignified manner during work hours."

You have been talking to Jim about your great First Amendment class. He sent you an email telling you what had happened to him at work and asking if these prayers and being punished for objecting to them violated his First Amendment rights. Write Jim an email with your thoughts on his situation.

(N.B., There are certain rules pertaining to the First Amendment rights of public employees. While these cases are in the casebook, we did not study them and I do not expect you to discuss them in your answer. Please assume only the First Amendment doctrine that we studied applies.)