

**Constitutional Law Examination**

**December 14, 2015**

**6:00 p.m. - 9:00 p.m.**

**Josh Blackman**

**Instructions:**

You will have three hours to complete this exam. There are two essay questions. Each question is worth 50% of the final score. Each question has a 1,000-word limit. Anything you write past 1,000 words will not be read. Both answers combined should not total more than 2,000 words. Please use the word-count feature to check the length of each answer. (Be sure to do a **word** count, and not a **character** count). If you hand-write the exam, please do a manual word count.

The exam is completely open-book. You can use anything you wish, so long as that it was printed *before* the distribution of this exam. Obtaining any new information from anyone or anything *after* the exam is prohibited.

**Please don't turn the page until the proctor signals that the exam has begun.**

Good luck!

## **Question 1 (50%)**

**Instructions:** You are a law clerk for the Chief Justice of the Supreme Court of Kentucky. In the wake of the Supreme Court’s surprise decision in *Obergefell* finding that there was *no right* to same-sex marriage, the situation has quickly unraveled in Kentucky. Several cases have been appealed to the Supreme Court of Kentucky. In a memorandum of no more than 1,000 words, please address five questions concerning these consolidated cases.

--

It is June 26, 2015. In a stunning surprise, the Supreme Court affirmed the Sixth Circuit’s decision in *Obergefell v. Hodges*. Writing for a divided 5-4 Court, Justice Kennedy held that while the 14th Amendment’s Due Process Clause protects private intimate conduct, *see Lawrence v. Texas*, it does not extend to providing a positive government benefit such as a marriage license. Further, classifications based on sexual orientation were only quasi-suspect under the 14th Amendment’s equal protection clause, and the state had an important interest in encouraging opposite-sex couples who procreate to stay together for the benefit of their children. Such laws were not passed out of animus for gays and lesbians, but as a means to preserve this millennia-old social institution. As a result, Kentucky’s law limiting marriage to one man and one woman remains constitutional, and on the books.

In her vigorous dissent, Justice Ginsburg charged that the decision will be remembered alongside *Dred Scott* as one of the greatest injustices from the Supreme Court. She anticipated that the people would not accept this ruling. As usual, RBG’s notorious prediction quickly proved to be accurate.

Shortly after the decision was published, Davis Kim, the county clerk of Jefferson County, Kentucky announced that he would begin to issue marriage licenses to same-sex couples. In a detailed letter, Kim explained that the Supreme Court’s decision in *Obergefell* was illegitimate—citing Justice Ginsburg’s reference to *Dred Scott*—and an incorrect interpretation of the Fourteenth Amendment. Kim noted that based on his study of the Constitution, the Fourteenth Amendment guarantees same-sex couples the “dignity” of marriage equality. Kim stated bluntly, “The Supreme Court does not have a monopoly on interpreting the Constitution.” As a result, Kim disregarded Kentucky’s law limiting marriage to opposite-sex couples, and issued a marriage license to James and Arthur.

The Governor of Kentucky was furious with Kim and ordered him to stop issuing marriage licenses to same-sex couples. The Governor tells Kim to “Follow the law or resign.” Kim replies that he is following the law as he understands it—the U.S. Constitution—and as an elected official, he will not resign. He serves the people of Jefferson County, who support him. The Governor files suit in state court, seeking an injunction to halt the issuance of same-sex marriage licenses, and to force Kim to comply with the Kentucky law limiting marriage to opposite-sex couples. The trial court issues the injunction. Kim promptly appeals the case directly to the Supreme Court of Kentucky.

The Jefferson County Council supports Kim, and enacts the Jefferson Equal Rights Ordinance (JERO). The law prohibits discrimination against people on the basis of their sexual orientation or gender identity. James and Arthur apply as a married couple for public housing in Jefferson County. Even though their marriage license is void under Kentucky law, adhering to

JERO, the County approves the application, and grants them a benefit reserved for married couples.

The people of Kentucky were very distraught by Kim's actions, as well as JERO. Citizens collected enough signatures to place on the ballot a repeal of JERO. A massive advertising blitz begins urging people to vote "No," and repeal JERO. Some commercials charged that JERO would allow men to enter women's bathrooms. Other commercials charged that JERO and Kim's decisions are contrary to valid state law, which clearly prohibits the recognition of any same-sex marriages. By a vote of 61%-39%, JERO is repealed. As a result, James and Arthur—no longer considered married—are evicted from their public housing. The couple files suit in state court, charging that the repeal of JERO violates the Fourteenth Amendment. (They do not bring any other claims under state or federal law). The trial court rules against the couple, finding that with JERO repealed, the eviction was required under Kentucky law. James and Arthur promptly appeal to the Supreme Court of Kentucky.

The repeal of JERO is felt strongly at the University of Louisville, a public university in Jefferson County. Members of the LGBT community on campus felt threatened by recent events. They request from the administration a "safe space" on campus where only lesbian, gay, bisexual, and transgender students can congregate—all others would be excluded. In this space, the students can talk amongst themselves to heal and discuss issues of concern to the LGBT community, without worrying that outsiders may marginalize their message. The President of the University grants their request, and designates a room in the Student Union as a "safe space." He orders the Dean to stand outside the room, and exclude anyone who does not meet the criteria for admission.

Nino, a student who does not identify as LGBT, attempts to enter the "safe space." The Dean refuses his entry. Nino exclaims that his request to enter was a "modest attempt to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores." Students who overhear Nino become very upset and offended.irate, the Dean immediately expels Nino from the University for engaging in "hate speech."

Nino files suit in state court with two claims. First, he argues that his exclusion from a place of public accommodation at the public university violates the Fourteenth Amendment's equal protection clause. Second, Nino argues that his expulsion from the public university for "hate speech" violates his right to free speech under the First Amendment. (Nino does not bring any claims under state or federal law).

The trial court rules in Nino's favor for the first count, finding that excluding him from the "safe space" was an unconstitutional classification in violation of the Fourteenth Amendment. However, for the latter count, the court upholds the suspension, finding that Nino's outburst caused a substantial disruption in the student union. Nino and the University of Louisville promptly cross-appeal to the Supreme Court of Kentucky.

--

The Supreme Court of Kentucky has consolidated each of the appeals into a single case. In a memorandum of no more than 1,000 words, address the following five questions for the Chief Justice. Please keep in mind the Supreme Court's recent decision in *Obergefell*, finding that bans on same-sex marriage violate neither the Due Process Clause nor the Equal Protection Clause of the 14th Amendment.

1. Address whether the repeal of JERO by the voters violated the 14<sup>th</sup> Amendment.
2. Address whether the University's exclusion of Nino from the "safe space" violated the 14th Amendment's guarantee of equal protection.
3. Address whether the University's expulsion of Nino for his "hate speech" violated the 1st Amendment's guarantee of freedom of speech.
4. The Chief Justice (your boss) was deeply disappointed by the Supreme Court's decision in *Obergefell*, and deeply believes that the 14<sup>th</sup> Amendment guarantees a right to same-sex marriage. Further, the Chief admires Abraham Lincoln, a native son of Kentucky, and his views towards the Supreme Court's finality about the Constitution. Offer the strongest arguments in favor of Kim's position that he is not bound by the Supreme Court's decision in *Obergefell*.
5. The Chief Justices poses an additional question to you, separate and apart from the previous question of why Davis is not bound by the Supreme Court's ruling. He asks you, "Why do people obey courts?" Address that question, and keep in mind the separation of powers and the rule of law.

## **Question 2 (50%)**

**Instructions:** Recent terrorist attacks in Europe by members of a group known as ISIS have raised fears that terrorists could sneak into the United States by posing as refugees fleeing from Syria. The Governor of Texas has taken a series of actions in response to this perceived threat. You are a law clerk in the Texas Attorney General’s Office, and are asked to prepare a memorandum of no more than 1,000 words addressing five questions concerning this timely issue.

--

It is January 2016. Hundreds of thousands of refugees are fleeing from Syria to escape oppression by a terrorist group known as ISIS. The President of the United States has already promised to accept many of these refugees, including one thousand who were to be resettled throughout Texas. The Governor of Texas, fearing that terrorists may enter the state while posing as refugees, issues **Executive Order #1**:

“No funding shall be available for local officials that facilitate the resettlement of any Syrian refugees in Texas.”

The impact of the executive order is clear—state officials at all levels of Texas government were denied any money to assist the federal government with integrating Syrian refugees into communities in Texas. Under state law, it is illegal for an official to spend money where there has not been a valid appropriation of funds.

The United States Congress strongly opposes Executive Order #1 and enacts the **Syrian Refugee Act**:

“In jurisdictions that receive Federal financial assistance, the chief law enforcement officer (CLEO) shall cooperate with federal agents for the resettlement of Syrian refugees in their jurisdiction. Jurisdictions that refuse to cooperate with reasonable requests from federal agents shall lose 10% of all federal financial assistance.”

The President promptly signs the Act into law.

Every jurisdiction in Texas receives at least some Federal financial assistance. The Sheriff of Harris County, Texas announces that he and his officers will disregard Executive Order #1, and comply with the Syrian Refugee Act. The Governor files suit in state court, seeking an injunction to force the Sheriff to comply with Executive Order #1. The Governor contends that the Sheriff lacks the funding to assist federal agents, and is violating state law. The Sheriff counterclaims that Executive Order #1 is unconstitutional in light of the Syrian Refugee Act.

The following week, the FBI makes a series of arrests of Syrian refugees in Garland, Texas, who were planning a terrorist attack on behalf of ISIS. Fortunately, the arrests were made before anyone was hurt, but the people of Texas were shaken. The FBI warns that there may be other refugees planning such attacks.

The Governor, fearing that refugees from certain countries may engage in terroristic activities, issues **Executive Order #2**:

“As Governor, I find that refugees from certain nations are more likely to pose a terroristic threat to the people of Texas. As Governor, I have a solemn duty to protect the safety of the people of Texas. All refugees from Afghanistan, Algeria, Egypt, Iran, Iraq, Kuwait, Lebanon, Libya, Morocco, Syria, or Turkey, who apply for state public assistance, shall be required to take a loyalty oath to the U.S. Constitution and renounce allegiance to the terrorist organization ISIS.”

A Syrian refugee, recently resettled in Bastrop County, Texas, applies for public housing. The clerk insists that he first take the loyalty oath and renounce allegiance to ISIS before being offered this form of state public assistance. The refugee refuses, so the clerk denies his application.

The refugee then files suit, charging that the oath requirement violates his rights under the equal protection clause and the free exercise clause. (He does not bring any other claims under federal or state law).

--

In a memorandum for the Attorney General of no more than 1,000 words, please address the following five questions.

1. Was Executive Order #1 constitutional? Specifically, can a state prohibit its officials from assisting federal officials who are resettling refugees. (For purposes of this question, do not consider the impact of the Syrian Refugee Act).
2. Was the Syrian Refugee Act a valid exercise of Congress’s enumerated powers?
3. Did Executive Order #2 violate the Fourteenth Amendment’s equal protection clause?
4. Did Executive Order #2 violate the First Amendment’s free exercise clause?
5. It is often said that in times of war, the laws fall silent. But the counter-argument is that in times of war, the laws may not keep us safe. Discuss whether racial or religious classifications can be constitutionally justified when there is a credible threat that certain groups may pose a significant threat to public safety.