

**First Amendment**

**Final Exam**

**May 1, 2024**

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**Instructions:**

You will have **two hours** to complete the final examination. There is one essay question, with a 1,000-word limit. Anything you write past 1,000 words will not be read. Please use the word-count feature to check the length of each answer.

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!

**Instructions:** The date is May 1, 2024. In the wake of *Dobbs v. Jackson Women’s Health Organization* (2022), the states are grappling with issues relating to abortion. The Indiana Supreme Court has been asked to decide several issues that affect the freedom of speech, the free exercise of religion, the establishment of religion, and the freedom of association. You are a law clerk for the Chief Justice of the Indiana Supreme Court. He has asked you to write a memorandum of no more than 1,000 words addressing the following five issues.

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### **Question #1**

The Indiana legislature enacted the *Protecting Life for All New people Act*. The PLAN Act, as it is known, prohibits abortions after six weeks. The purpose of the law was to “protect the sanctity of life at all stages.” The law included several exceptions: (i) rape, (ii) incest, (iii) when it is “necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman’s life,” and (iv) if there is a “lethal fetal anomaly.”

Norma McKagan, a Jewish woman, is seven weeks pregnant. McKagan’s doctor tells her that if she carries the pregnancy to term, she will likely develop high blood pressure that could force her to deliver early. Moreover, due to her medical history, McKagan is at risk of post-partum depression after giving birth. Neither health condition is considered a “serious health risk” or would lead to a “lethal fetal anomaly.”

McKagan seeks a temporary restraining order in the Indiana Supreme Court that would allow her to obtain an abortion. McKagan contends that under her Jewish faith, she has an obligation to preserve her own health, and a seven-week old fetus is not yet a person. McKagan’s Rabbi provided an affidavit that McKagan regularly attends religious services, and that she accurately described the tenets of her faith. McKagan asserts that her religion imposes an obligation to have an abortion to avoid likely negative health conditions.

McKagan argues that the state’s denial of her abortion violates Indiana’s Religious Freedom Restoration Act (“RFRA”). McKagan does not bring a claim under the Free Exercise Clause of the Indiana Constitution or the Federal Constitution. The Indiana RFRA is identical to the federal RFRA. The Indiana RFRA provides:

The Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

1. How should the Court resolve McKagan’s RFRA claim?

## **Question #2**

The Indiana House of Representatives has a longstanding practice of inviting different local members of the clergy to recite a prayer before each legislative session begins. However, on the day when the PLAN Act was to be voted on, the practice was altered. The Speaker of the House invited the priest from the Speaker's Catholic church. The Speaker asked his priest to lead a prayer *after* the legislative session had already begun, and immediately *before* the PLAN Act was to be voted on. The priest, who organizes a pro-life group that opposes abortion, recited the following prayer:

Dear Heavenly Father, let us pray. Grant the members of this House the wisdom and strength to protect all life. To quote from the Book of Jeremiah in the Old Testament, the Hebrew bible, God spoke to the Prophet Jeremiah and said, "Before I formed you in the womb I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations." The PLAN Act will follow and fulfill the Lord's will. Vote yes on the PLAN Act. Amen.

After the priest said "Amen," Ninety-nine members of the House rose and gave the priest a standing ovation. As well, hundreds of guests in the gallery who supported the PLAN Act rose in a standing ovation. Only Representative Ernie Lime, an atheist, remained seated. After the applause subsided, the roll was called. The PLAN Act passed by a vote of 99-1. Representative Lime was the only no vote. The Governor signed the bill into the law the next day.

Representative Lime sued the Speaker of the House. Lime claimed that the selection of the priest, and the delivery of the speech before the vote was cast, violated the Establishment Clause of the Federal Constitution. The case is appealed to the Indiana Supreme Court.

2. How should the Court resolve the Establishment Clause claim?

## **Question #3**

After *Dobbs*, an Indiana non-profit formed called "Hoosier Mommy." The group provides a range of services to expecting mothers, including transporting women to out-of-state medical facilities. It turns out that some of those facilities were abortion clinics in Chicago.

The Indiana legislature passed the Travel Restrictions to Abortion Providers Act. The TRAP Act, as it is known, created civil liability for any person or organization that "aids or abets the performance or inducement of an abortion."

Immediately after the Governor signs the TRAP Act into law, the Indiana Attorney General brings a civil enforcement action against Hoosier Mommy to prevent the transportation of pregnant women to out-of-state abortion clinics. The Attorney General also seeks through discovery a list of all Indiana citizens who made donations in excess of \$1 million that will be used to aid or abet the performance or inducement of an abortion. The Attorney General argues that this information is necessary to determine if past donors may violate the TRAP Act in the future. Hoosier Mommy

refuses to comply with the discovery request. The organization argues that the request violates the rights of free speech and freedom of association of the organization, and of the organization's members. This discovery dispute is appealed to the Indiana Supreme Court.

3. How should the Court resolve this discovery dispute?

#### **Question #4**

The Indiana Legislature learns that many minors under the age of eighteen are traveling to other states to obtain abortions. These minors are learning about out-of-state abortion providers on social media. In response, the Indiana Legislature passes the Traveling Interstate for Children To receive Abortion Care Act. The TICTAC Act, as it is known, requires a parent or guardian to provide consent before a minor who resides in Indiana can receive messages on social media about how to travel out of state to obtain an abortion. TICTAC is challenged by several social media companies as a violation of the Free Speech Clause of the First Amendment. The social media companies argue that their choice to curate certain content for users is a form of free expression. Indiana counters that providing this information to minors is facilitating unlawful conduct under the TRAP Act. The case is appealed to the Indiana Supreme Court.

4. How should the Court resolve this dispute?

#### **Question #5**

First Amendment cases often arise in disputes about important social issues, such as national security, racial equality, abortion access, LGBT rights, and more. Discuss how the Supreme Court has factored these social issues into First Amendment doctrine.