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QUESTION ONE

Generally, the first question one asks when Congress is attempting to act is whether it has valid authority to act as it is. In this case, we are to assume that these laws are pursuant to a valid exercise of Congress's Commerce and Immigration Powers. If so, the Court will likely defer to Congress in choosing the methods under the Necessary and Proper clause which it will use to carry out the goal.

Congress has a statute that creates civil and criminal penalties for companies who do not verify the work status of aliens. Mapleton passed a law requiring landlords to verify that their lessees are authorized to be in the United States, unless the lessee had been in Arizona for the past 12 months. Violators will lose the rent collected, and must evict their lessee, or let them live there for free.

The Romeros entered in 2000 without documentation. They bore two children in California and moved to Mapleton in January 2008, renting an apartment from Warbucks. There is a two-year lease. After a hearing, Warbucks' license was revoked and he was ordered to evict the Romeros. The landlord is challenging the law because of his loss of rent, and the Romeros are challenging it on behalf of their children, who are legal citizens.

A state is deemed to retain all powers not denied to it by the Constitution. Localities within the state are considered a state for purposes of analyzing many of their actions. If there were a state constitution, it could determine the relationship between the

state and its cities and counties. Instead, we will proceed from an analysis of the locality as though it had all of the rights that the state has under the Constitution.

PREEMPTION

The first step of the analysis is to look at the possible preemption of state and local laws by a federal law. Federal law is controlling, due to the Supremacy Clause. Therefore, where Federal and state or local laws are in conflict, the Federal law will prevail.

There are multiple ways to be preempted – the first being express preemption, where the Federal law states specifically that it will supersede certain areas of state and local laws. Here, the Federal law is silent as to its effect on state and local laws. Therefore, we look to the category of implied preemption.

There are multiple ways to be preempted impliedly. One is where there is a direct conflict between areas of the statutes. Here, the Federal law covers only areas of employment, whereas the local law covers the area of housing. The Federal law does not even come close to touching on the issue of housing, and appears to be strictly limited to the employment arena. Note that a person can therefore easily comply with both the Federal and local law, and therefore there is no conflict. Another way to conflict is where the state creates a stricter rule than the Feds, in which case the question is whether Congress intended to allow a state to create a stricter rule, or whether it intended to be the sole regulator. Here, since Congress did not address housing, it most likely is valid for

the city to address that area, as there is no indication that Congress intended to be the sole regulator.

A similar question is whether Congress is generally the only entity that addresses the issue. That is, where Congress has occupied the field as it regards an issue, it will be deemed to be inappropriate for states and cities to pass laws in that area. These are generally areas of overwhelming national concern, like nuclear power and foreign affairs. Immigration is often thought of as a Congressional area as well, since it has foreign policy implications. However, the city can argue that this type of restriction is less about relations with foreign governments, where it would likely be inappropriate, and instead a valid use of police power intended to create standards that increase the health and welfare of its citizens. Because police powers of this nature are inherent roles of the state, there is likely no preemption based on occupation of the field in this case.

Note also that this is not a case where there is a scheme of regulation that is so pervasive. In the facts here, Congress has a hodge-podge of rules that cover various aspects of this topic, and has left it to states and localities to fill them in. Therefore, it cannot be said that there is a scheme so pervasive that it shuts out the states' role.

There could also be a problem if the state law were to undermine the Federal goal. However, it will be easy for the city to argue that both entities shared the same goal of increasing accountability for those engaging in commerce with aliens. It will be difficult to argue that this law interferes with the goal of the Federal statute.

but what about state law's exception for those who'd lived in state for more than 1 year?

DORMANT COMMERCE

The next step is to analyze the city's action under the dormant, or negative commerce clause. This is the counterpart to Congress' Commerce powers, in that localities may not encroach on that power in a way that burdens interstate commerce.

There are two methods to discriminate against out-of-staters (OOS). The first is where the statute provides different rules for in-staters and out-of-staters. This is termed facial discrimination, and will nearly always be disallowed as it is presumed to be un-Constitutional. Here, there is a different rule for those who have lived in the state for 12 months. This will be discussed further in the P&I analysis. However, those who have lived in state for six months are treated the same as OOS. Therefore, the argument may go either way. The Romeros can argue that the variance for those living in state is facially discriminatory. If so, the next question would be whether there is a legitimate state purpose for that discrimination, and whether there is a less restrictive means. Based on the findings, the City's goal is to prevent harboring of illegal aliens, who may commit crimes, and prevent aliens who may be hesitant about reporting crimes to live in the city. The Romeros have an argument that there is no real purpose for allowing those who have been living in the state to not have to clear the hurdle of verification. In addition, they can argue that there is a less-restrictive way, perhaps some other registration system to keep track of illegal aliens, without requiring them to prove citizenship. By contrast, the City can argue that this is similar to Maine v. Taylor, where these aliens are a risk, like the baitfish were, and there must be strict rules to stop them from living in the city and destroying the way of life. This will be very difficult, as no other facially discriminatory

law has met the dormant commerce clause since Maine, as it is a very high standard to say that there is no less restrictive means.

If the 12-month period were determined not to be discriminatory on its face, the next step would be to balance the local interests against the burden on interstate commerce, the so-called Pike balancing test. Here, the local interest is toward public safety, of not having unknown, illegal immigrants in the city. The Romeros could attack the portion that allows a variance for those who have lived in the city, arguing that there is no reason that they would be treated differently. The city can argue that the purpose is to allow those already living here without incident may stay. Either way, that interest is weighed against the burden on commerce from requiring out-of-staters to register, while in-state residents can bypass the test. This could prevent OOS from deciding to live in the state, even when they are legal, since there are hurdles to go through. It could also make some landlords decide not to rent, due to the burden of validating OOS renters. This is similar to the problems in Heart of Atlanta and the case involving Ollie's restaurant, but in terms of renters instead of travelers. In those cases, the concern was that people would not travel because of the restrictions, whereas here the concern would be that people, including those who would pass the verification test, would not come to live in the city. The city can argue that people who are legally allowed to stay will not avoid the city when talking about such a major life decision, just because they need to be validated before renting. In the end, the need for safety and to know whether renters are allowed to stay may have the edge, since the validation procedure is not terribly

burdensome, and the state interest involved is public safety, which falls squarely within the police power, and the court may defer to the safety concerns.

ARTICLE IV PRIVILEGES AND IMMUNITIES

Under the privileges and immunities clause, a state may not deny OOS residents the ability to obtain a fundamental right, which often involves commerce. Things like commercial license fees and the right to work often implicate the P&I clause. Here, the city is putting restrictions on people coming from other states. Many of these lessees will be citizens of another state, coming in for a short-term lease, for example. There is clear discrimination here based on state citizenship, in that they are treated differently from those who have been in the state for 12 months. ✓

The next question is whether the discrimination involves a fundamental right. This can include ownership in property. The Romeros can argue that renting is similar to owning, and is a fundamental right to obtain housing, and therefore this does involve a fundamental right. The City may have a hard time arguing that this dos not involve a fundamental right. ✓

The analysis then turns to whether the OOS are a particular source of the harm or evil. Here, the City's findings implicate aliens as the particular harm, not OOS. The Romeros can say that there is no difference between OOS aliens and those in state, and that they should not have to face an additional verification procedure. Therefore, they would say that non-residents are not the peculiar source of this evil. Note that where there

is discrimination against OOS, as here, this is a very difficult test to overcome. The City could argue that those living in state have already proved they can live here without incident, but this is likely to fail.

The second prong of the test is whether the discrimination bears a substantial relationship to the problem that the statute is attempting to resolve. Does requiring OOS to verify their citizenship relate to preventing aliens. The city can argue that it does, because it tries to catch anyone coming into the state. But the fact that in-staters are exempt from this provision undercuts the argument.

Because this is discriminatory on its face, and because of the very strict rule requiring that OOS are peculiar source of the harm, it appears the city would lose the P&I test. It is not clear if the entire statute would be deemed unconstitutional, or simply the part allowing in-staters to be exempt.

Warbucks may also have an Article IV P and I claim since he is being denied his ability to collect rents based on discrimination of OOS. A person has a fundamental right to work, and engage in commerce, and discrimination based on state is not allowed. Then again, he is not the person who comes from another state, it is his lessees, which may bear on his claim. The same analysis applies as above, but the requirement that he give up his rents may be an additional burden. However, the City can argue that it is reasonable in its discrimination.

14TH AMENDMENT PRIVILEGES AND IMMUNITIES

The 14th amendment also contains a very limited P&I clause, relating to the rights of national citizenship. Here, the Romeros could argue that their children face the same problem as the plaintiffs in the case of the California welfare, which was struck down for requiring residency to get welfare benefits. Here, the Romeros would argue that as citizens, their children have the right to move in and out of states without being denied the same rights as in-staters, which they could argue includes the right to rent as easily as an in-stater.

CONTRACTS CLAUSE

No state or locality may pass a law that impairs the obligation of contracts. However, this law was in place prior to the forming of the contract between the Romeros and Warbucks, and therefore the law did not affect an existing contract, and there will be no claim in this area.

TAKINGS CLAUSE

Warbucks may want to claim a violation of the takings clause, by claiming that the regulations are impacting him economically. The test will include the nature of the government action and the impact on Warbucks. He will argue that the regulations deny him access to certain renters, but the City will have an easy time showing that he has a wide range of renters, and that the action is promoting general welfare, and therefore there is a clear public purpose behind the law, and its burden is minimal as to his ability to use his property.

QUESTION TWO

PART A

Here, Congress has enacted a law directing the Secretary of DHS (SDHS) to take such actions as may be necessary to construct barriers, lighting, and guards along the Mexican border. Further, in Sec. 102, Congress grants the SDHS the authority to waive all laws, state and federal, that SDHS determines are in the way of the construction of the barrier. SDHS subsequently waived all laws in 30 categories, including environmental laws, pertaining to a 470-mile section of the fence.

First, note that we are told to assume in Question One that these laws are constructed pursuant to valid Commerce and Immigration powers. In addition, we are to assume that the claims by DOW are justiciable.

The Constitution requires a separation of power between the executive and legislative branches. Congress is to create the laws, and the President and his agencies are to carry them out. It is not lawful for Congress to delegate away its lawmaking authority. However, over time, there was a great need to delegate some for practical reasons regarding the burdens of creating laws for the entire nation. Therefore, the creation of various administrative agencies was allowed, as well as the delegation of certain lawmaking duties to those executive branch agencies. Now, some 50 percent of all laws in this country come from these administrative agencies.

In these facts, we see a delegation from Congress to a head of an executive branch department. There are certain guidelines regarding how power may be delegated in this type of situation, and there have been different interpretations of what is allowed, based on formalistic and functionalistic interpretations of what the Constitution will allow.

In a formalistic test, one looks solely at whether the branch is allowed to use this type of power based on the Constitution. It has more rigid, strict lines, and looks to the strict reading of the allowable powers under various sections of the Constitution. Under a functionalist approach, the analysis focuses more on the effects, and whether the delegation of power creates dangers down the road.

Here, the first question is whether this aggrandizes power from Congress and gives it to the executive. It appears that Congress, in allowing SDHS to simply determine which laws are in the way, is a large aggrandizement of power. This recalls the situation in Schechter Poultry, in which the Court said Congress was not permitted to vest a great rule-making authority in an industry. Of course, this is a government branch instead, but the power is sweeping and is placed in one man.

The case of Curtis-Wright could lend support to the government. In that case, Congress passed a law allowing the president to regulate arms sales. The Court held that when it comes to foreign affiars, the president is the leader and sole organ. It may be possible to claim that SDHS is an arm of the president, and since this involves a matter critical to foreign affairs and national security, the executive branch should have control, and that even this expansive control is allowed.

but Youngstown

UK

The analysis can also look to the case of Youngstown, in which the President attempted to seize the steel mills. The Court held that the President was creating law, and that power is reserved to Congress. The Government, however, could find support in Youngstown by claiming that, in this case, the executive is conducting its activities pursuant to the consent of Congress, and therefore his power is at the highest. The problem with this is that there is no specific guidelines in play, which is discussed below.

When Congress attempts to delegate away some of its power, it is critical that there be an intelligible principle. Here, that principle may be clear, in that there is a clear goal of building the fence, and SDHS is to strike down any laws that get in the way of that goal. However, in addition to providing an overarching principle, or goal, of the delegation of power, Congress must also provide enough guidelines so that there is a way to check the power if it goes outside of those lines. In the text here, Congress has allowed the SDHS to use his "sole discretion" in deciding which laws are in the way of the expeditious construction of the barrier. This appears to be an unspecific, and very large grant of power without clear constraints. Therefore, although the purpose is clear for the program as a whole, there are not enough guidelines provided to check the power of SDHS.

Note the similarity here to the problem of the Line-Item Veto, seen in the Clinton case. There, the problem was that a line-item veto could strike down portions of the law, and then put the law into place, without it going back through Congress, and through Presentment, to make sure that both Congress and the President approved of the new law. The goal of the Constitution was to make sure that there are checks and balances. This

circumvented the goal of Congress, and allowed the President to change the substance of the law single-handedly. Our system often intends for two branches to work together before something is done. Similarly, here, allowing SDHS to determine which laws are in the way abrogates the role of Congress, which passed all of the laws to begin with, and appears to be too much power to simply delegate away in this manner, since it creates great risk of future harm.

DOW will likely prevail, since Congress is not permitted to delegate away authority, without clear guidelines that can provide a check on that power and keep the activities within Congressional intent.

PART B

Murdoch bought his ranch long before the Secure Fences law went into place. Therefore, he does not fall within the exception to the Takings clause for land use limitations already in place. Had he purchased land or grown his business after the restrictions were in place, he would not be permitted to claim a taking and seek compensation.

The government is required to show a public use when it takes property, and must pay compensation if a taking has occurred. There are multiple categories of takings, beginning with a literal, physical condemnation or taking of a property. That is not the case here, since there is only an intrusion of light, and not a condemnation.

Another type of taking is a land-use exaction, which is also not discussed here.

This leaves two types of takings, one in which regulations have left the landowner with no commercially viable uses of his land, and another, where regulations have placed burdens on landowners such that they must be compensated as a taking, as seen in Penn Central.

This is a tricky case, because it does not involve regulations actually placed on Murdoch's land, but instead, involves government action that has an effect on his ability to run his business. We will assume that a takings action is allowed for the intrusive effects of the government fence. However, the court could decide that Murdoch had no right to a light-free land, and therefore that he had no cause of action to claim damages anyway.

The government will not have a hard time showing a public purpose for their activity. This is not like Kelo, where the land was being given to a private developer. Instead, this is a clear governmental activity with a clear public purpose, and it will be very difficult for Murdoch to argue any differently. Courts are deferential to the government in terms of how to carry out a project like this, once it is clear that it has solely a public purpose, and not simply a benefit to a private party.

If his right to light-free land has been encroached, he can argue first that he has lost all commercially viable use of the strip of land affected. This is similar to the case in Lucas, where a land purchaser who planned to build houses lost the ability due to government regulations. Here, there are no regulations, and the problem involves only a strip of land, but if he can show that he has lost all use, he may be entitled to compensation for the commercial value lost along that strip of land.

But what's the relevant denominator?

He can also argue that a balancing test should be used, as with Penn Central and Penn Coal cases. This would include the economic impact on him. He can demonstrate the losses to his business caused by the light. There is no mention of investors, but if there are investors, their expectations of unfettered use and profits from that strip could lend support to Murdoch's claim for damages. The government could argue, however, that since the land is along the border, they should expect intrusion of various sorts. On the government's side, this does promote general welfare, and is not a physical taking. The court will weigh the benefit to the community against the burden on the property owner, and the fact that this has a national purpose, and involves only light leakage and not a physical taking will play well in the government's favor. He can argue that in effect, this land has been severed, even though it has not physically been taken, since he is no longer able to use it as part of his farm.

but he can grow other crops?

If it is determined that a taking has occurred, Murdoch will be entitled to the value of his loss, measured by the market value of that land as he used it. However, more likely the court will find that he had no right to a dark strip of land, and that no taking has occurred.

QUESTION III

PART A

The first thing to note about this law is that it was inserted during a House conference committee, and that it was never discussed by the Senate. It appears that the Senate may still have voted to pass the bill, as is required, but there are ambiguities that call into question the possibility of a single-house action. Our scheme requires bicameralism. If the Senate was shut out, this would be similar to a Congressional veto, like the INS case, in which one house acts alone. This is not permitted, and would invalidate the law if something like this took place.

The first question is whether Congress is acting pursuant to a valid enumerated power. It is important to also note, that unless this can be supported under the Commerce power, or some other enumerated area, it will be unconstitutional. There is no general federal police power like there is with the states. Here, the best argument for the government is that drivers licenses involve vehicles, which are clear instrumentalities of interstate commerce, and therefore it would be acting under the Commerce clause. It would then be able to use its findings to support the claim of the economic impacts.

Utah could claim that identification cards have always been issued by the states, and involve state police powers of the safety and health of its citizens. Indeed, in the facts, it is clear that issuance of drivers' licenses has previously been strictly a matter for the state. Utah can attempt to invalidate the use of the Commerce clause, by arguing that there is no jurisdictional hook, and that identification is non-commercial. Where an activity is non-commercial, it is more difficult for Congress to show a link to interstate commerce. Note that Congressional findings are also given little weight in non-economic analyses. However, note that to do this, Utah will need to argue that this law does not

directly concern cars or trucks which will fairly obviously be used for interstate commerce, but instead involves identification cards, which are wholly separate. The scope of the statute does seem to go beyond interstate travel, or perhaps fall short of dealing with it. It is true that identificaiton cards will be used to travel on airplanes interstate. Therefore, Congress may have the power because these cards involve a comprehensive regulatory scheme of identifying U.S. Citizens to access Federal areas and fly on planes, which are under the control of the F.A.A. But the state can say that to arrive at a conclusion that this "involves" interstate commerce or even that there is a substantial effect requires inference upon inference, the "House that Jack Built." The Feds would have had a better argument if these cards were used only to travel across state lines, as that would have created a jurisdictional hook such that it would be valid under the Commerce clause since it would per se involve travel interstate.

The next question regarding this law, as enacted, is whether it violates the 10th Amendment in requiring states to do various activities to comply with this Federal law.

The first prong asks whether this law applies to states as states, or is it a law of general applicability, as seen in Garcia v. San Antonio. Here, it appears to be directed at states as states, since it specifically is instructing states to create various schemes of verification for licenses. Note that there is a chance it could have been formulated to anyone creating identification cards, like the facts in Reno v. Condon, where states were essentially market participants, and the court allowed them to be singled out, since the recipients of information from states also were subject. But here it is quite clear in the

language that this applies to state-issued ID cards, and therefore, the analysis must continue.

Congress may not commandeer the state legislative or executive branch. As seen in NY vs. US, the Feds may not boss around the state legislature, by requiring the passage of laws, or creating a choice between two unconstitutional choices. Here, it may be hard for Utah to prove that it is being commandeered because a state may opt out without direct penalties from the Feds. Instead, it is the state's citizens that bear the burden if their state does not comply. But the language appears to dictate exactly what the state must do, and it is not clear just how optional this is. Also, the statute requires that any identification not complying have a unique design. This appears not to be an optional requirement. Utah should also argue that preventing its citizens from doing a variety of activities, including flying on planes, and entering Federal facilities, is such an incredibly drastic situation that, for all intents and purposes, the Feds are forcing the state to pass laws and implement the Federal scheme. The identification of citizens is also an area generally left to the states.

In addition, this is an affirmative requirement on the states, which is less often permitted than if it were a ban on certain state activities. Another policy argument is that one goal of the 10th Amendment is to put the responsibility for laws where they belong. If this system is seen as burdensome, and does not work properly, Utah citizens will get angry with the state, when it is actually a Federal program that they are angry at.

The Feds may stick to the argument that they are not requiring anything directly, but instead are telling the states that if they do not comply, the citizens will not have

access to certain Federal resources, most of which the Feds can claim a public safety need to protect. However, there are other options available to the Feds, without requiring the states to conduct these activities. Congress could set up a parallel federal program to create a federal identification card, and require individuals to have one before flying, etc. They could also have used monies to entice states into creating such a system under the tax and spend powers.

Instead, this statute appears to commandeer the state legislature into enacting a variety of laws. It also may be commandeering the executive, in that it dictates the specific methods which the verification procedures must be carried out. As seen in Prinz, Congress may not commandeer the state executive either.

Note that some portions of this statute appear to be acceptable. The federal government can likely require certain identifications for entry to federal buildings, and even flying on planes. But it may not necessarily dictate the methods which a state will use to comply. Therefore, a court may strike certain portions, but it may be that the main crux of the statute, that there must be certain identification standards for access to federal buildings and planes, may be upheld. ✓

As written, Utah has a good case that this encroaches on its authority, and is unconstitutional under the 10th Amendment. Despite some language that seems to indicate that states can decide not to do this, other clauses appear to require the states to take action. But, if the program is determined to be voluntary, the Feds could prevail on a claim that the statute does not commandeer the states because it is an optional program, and the penalties for non-compliance fall not on the states, but on citizens, and therefore

states are free to ignore the statute (if they are willing to face a public outcry the likes of which they have never seen, when citizens are unable to board a plane!).

Note that, if it is found that the Federal law is valid, Utah will be free to comply or not. The Utah law, insofar as it simply elects to not follow the Federal law, will not be preempted, per se, as both laws can be complied with.

PART B

Utah's law preventing airlines from serving alcoholic beverages within two hours of landing in Utah brings up questions of state sovereignty, and the ability of states to control their airspace, and restrict certain activities in interstate traffic.

The first point is that this law clearly does bear on interstate activity, since it involves airlines, an instrument of interstate commerce. Since a corporation is suing, the P&I clause is not applicable, as it applies only to citizens. Instead, this issue will be determined in great part, by preemption and the dormant commerce clause.

For preemption, the first question to ask is whether there is a valid federal law in place that allows alcohol to be served on planes. Where there is a valid federal law, a state law that conflicts with it, as this would, would be invalid under the Supremacy Clause. Here, even if there is no explicit preemption, there may be an occupation of the field – a regulatory scheme so pervasive that it leads to the inference that Congress left no room for state regulation, or where Federal interest is so dominant that it precludes state laws. While there is a regulatory scheme in place for air safety, namely the FAA and its

rules, if that it is limited primarily to safety concerns, there may not necessarily be occupation of the field. This can be seen in the PGE case, where safety regs were a Federal matter, but the states were free to regulate in the economic arena. Since this is a law simply regarding alcohol, the court may decide that it is not preempted by the Fed regulatory scheme.

Preemption analysis also looks closely at the Congressional intent behind the law. If Congress does have standards, for example, that alcohol can only be served at certain times or at certain altitudes, intent would determine whether a further restriction is allowed. If Congress intended that as a floor, and states were free to create further restrictions, it would be allowed. However, if Congress intended that it be the only entity creating rules in this arena, the state action could be barred.

If there is no preemption, the next step is a dormant commerce clause analysis. The dormant commerce clause, as discussed above, involves the restriction on states in burdening interstate commerce. Here, 95 percent of the flights landing in Salt Lake City are domestic, and many of them presumably cross state lines. Note that even if this air traffic concerned solely flights inside Utah, there would still be a dormant commerce question, because this involves a channel and/or an instrumentality of interstate commerce, because some of the travelers may be grabbing flights from the nearest airport, which happens to be in Utah, and because of the issues involving the regulatory scheme of the FAA and the potential occupation of the field by the Federal government.

The first question is whether there is discrimination against out-of-staters. Here, there are no airlines registered in the state. The effects are therefore limited to airlines

flying into the state, and airlines flying around the state. But, just because they are flying from point to point in the state does not make them OOS. This law does not explicitly discriminate against OOS. Instead, Utah can argue that it is facially neutral, since it affects all planes equally that fly into the state, regardless of where they are incorporated. The airline could argue that it discriminates against those flights originating out of state, but this distinction is not the concern of the dormant commerce clause.

The next prong is the balance of the burden on interstate commerce with the local interest. Here, the burden on interstate commerce, if anything, would depend on the money that airlines make on the drinks. The effect on the customer must be seen as minimal. There is no pressing need for people to drink on an airplane, and it is unlikely to prevent people from traveling. Instead, it would simply remove a small amount of money from the airlines. On the other hand, the local interest may be great. As seen in New Mexico, there can be a local interest in preventing drunk drivers coming off of airplanes.

Since the local interest appears to outweigh the burden, this would likely not violate the dormant commerce clause.

CONTRACTS

Because there is no "grandfather" clause, this could have an effect on current contracts for liquor purchasing for planes. The state is also not a party to these contracts, so note that the scrutiny will be normal. The primary factor in Utah's favor in this area is that serving alcohol, and indeed flying planes, are both heavily regulated fields.

Therefore, the investors expectations in these areas should include the recognition that the rules could change at any time. In addition, the state will argue that there is a significant public purpose under its police power to protect the health and safety of residents. Since it appears to be a reasonable law, the court will defer to the legislature, and in sum, the state will likely not violate the Contracts clause by passing this law.

TAKINGS

The airline could try to argue that there has been a regulatory taking, but this will be very difficult, since public policy likely outweighs the burden on the airlines caused by the inability to serve alcohol.

SOVEREIGN AIRSPACE

Note also, that Utah does have the rights to the airspace above the state, and therefore may control the serving of alcohol regardless of the plane's final destination. This also demonstrates support for the ability of the state to control the requirements for landing in Salt Lake City.

Exam/Paper No. 288

501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester II, 2007-2008

Examination
UNM School of Law
Three Credits

Professors Kovnat & Bay
May 9, ~~2008~~
1:30 pm – 5:00 pm

INSTRUCTIONS

Examination Format
Essay Answers

1. **Laptops**: Start the Securexam program entering your examination number, course name, professor's name, and date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. Use 12-point or larger type face and double space (but not triple space) your answer. DO NOT WRITE YOUR NAME ON YOUR EXAM ANSWER.

2. **Bluebooks**: Write in ink, on only one side of the page, and skip lines. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Be sure to number your bluebooks in consecutive order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen and close the bluebook immediately. If using a laptop, save and exit the program.

Go to the examination check-in table at the conclusion of the examination and fill out a receipt.

Professor's Instructions

1. This is a three-and-a-half-hour long examination; however, during the first half hour you may only read the examination and prepare an outline of your answer. You may not start writing (either in blue books or on your computer) until 2:00. The examination consists of three questions, two of which have two subparts. We suggest 45 minutes for Question I, 60 minutes for Question II, and 75 minutes for Question III. In general, the points will be allocated in proportion to the time suggested.

2. This is an open book examination, except that you may not use any commercial materials, including commercial outlines, hornbooks, or treatises. You may bring your casebook, class notes, the Constitution, and any outline you helped prepare.

QUESTION I (45 minutes)

In June 2007, Congress failed to enact the Comprehensive Immigration Reform Act that would have increased border enforcement, created a guest-worker program, revised visa requirements for immigrants, and provided a pathway for potential citizenship for the approximately 12 million persons who live in the United States without proper documentation. Left in place were a myriad of federal laws governing immigration and naturalization. These laws regulate who may enter the United States and specify the conditions and procedures required to permit those who legally enter to remain in the United States. Please assume that these laws are based on a valid exercise of Congress's authority to regulate naturalization and commerce.

Specifically, § 1324a of Title 8 of the U.S. Code provides that "[i]t is unlawful for a person to hire an alien knowing that the alien is unauthorized to have entered or remained in the United States." The law (1) establishes requirements and procedures for verifying the legal work status of an alien at the time of hire; (2) authorizes the Attorney-General of the U.S. to issue cease and desist orders to employers who fail to comply; (3) authorizes the imposition of civil penalties of not less than $250.00 and not more than $2000.00 for each violation; and (4) authorizes the imposition of criminal penalties for patterns and practices of knowing violations.

Many States and municipalities expressed frustration at Congress's 2007 failure to enact new tough measures against illegal immigration. Mapleton, Arizona was one such community. In the fall of 2007, after conducting hearings and making findings that undocumented aliens were burdening Mapleton's educational and health systems and that concentration of undocumented aliens contributed to urban blight, its City Council enacted a housing ordinance.

The ordinance was based on findings that the harboring of illegal aliens in dwelling units in the City and crime committed by illegal aliens harm the health, safety and welfare of Mapleton's legal residents. The City Council also found that illegal aliens are less likely to call the attention of the authorities to substandard housing and property maintenance thus contributing to blight. Accordingly, the law prohibits any owner of a dwelling unit in Mapleton from renting, leasing, or letting a dwelling unit without verifying that the lessee was authorized to enter the U.S. and is permitted to remain, unless the lessee had resided in Arizona for the past 12 months. Upon proof of violation, the owner's license to rent shall be rescinded with respect to the unlawfully rented dwelling unit, and the owner of such a dwelling unit is either required to evict the undocumented alien, or is precluded from collecting any rent or other thing of value from the undocumented alien.

Alonzo and Maria Romero entered the United States in 2000 without proper documentation. They lived in California until 2008 and had two children who were born in California. The family moved to Mapleton, Arizona, in January 2008 and rented a two-bedroom apartment from D.A. Warbucks. The Romeros and Warbucks signed a two-

year lease. Mapleton's licensing division received information that Warbucks had violated the housing ordinance. After a hearing in which evidence was produced of the Romeros' undocumented status, Warbucks' rental license was suspended and he was ordered to evict the Romero family. He refused on the grounds that the Romeros still had more than a year to go on their lease and that their small children were citizens of the U.S. Because he is precluded from collecting rent he wishes to challenge the constitutionality of Mapleton's housing ordinance. Alonzo and Maria Romero wish to challenge the ordinance on behalf of their children. They all seek your advice. Evaluate the strengths and weaknesses of each of their constitutional claims. Please assume that the claims are justiciable. Explain how the claims should be resolved and why.

contract

Preemption Dec P/I Reg. Taking? Contracts Already in place

QUESTION II (60 minutes) - 3:45

Another of the federal statutes that was left unaffected by Congress's failure to enact comprehensive immigration reform was the Secure Fences Act which authorizes the construction of a triple-layered fence across 700 miles of the U.S. Mexico border. This law directs the Secretary of the Department of Homeland Security (DHS), an executive branch agency, to take such actions as may be necessary to construct physical and electronic barriers to movements across the border. The Secretary is further directed to employ sufficient lighting in conjunction with the physical and electronic barriers as to enable border guards effectively to patrol the border. In 2005, Congress enacted and the President approved the REAL I.D. Act which provides, among other things, that:

Dect Power

Highest Power?

§ 102(c) Waiver –

Line Item Veto!

(1) IN GENERAL – Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws, whether state or federal, that such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.

Arbitrarize Dangerous

Not intelligible

Exec may waive AND SHALL

Exec Discretion UnCLEAR

purpose

The stated purpose for both the Secure Fences Act and the REAL I.D. Act is to tighten the borders of the United States so as to protect the United States from the threats posed by drug smuggling, illegal immigration, and terrorism.

Dect Power?

In April of 2008, the Secretary of DHS exercised the waiver provision contained in REAL I.D. His waiver covers 470 miles of the border from California to Texas. He waived "all federal, state or other laws, regulations and legal requirements deriving from or relating to the subject of" 30 laws, including the Endangered Species Act and the National Environmental Policy Act. His waiver includes all state and local laws dealing with environmental protection and water rights along the border. Construction of the triple-layered fence has already begun.

Preemption

A. Defenders of Wildlife (DOW) is a membership organization devoted to protecting the environment, particularly endangered species and their habitat. The environmental organization has members who live in California, Arizona, New Mexico

Standing

Cong in passing law.
Exec in Waiving State + Federal / local

and Texas. It wishes to challenge the Secretary's action under the waiver provision. Please assume that the claims are justiciable. Identify and discuss DOW's constitutional claims on the merits. Please explain how the claims should be resolved and why. (30 minutes).

B. In 1975, Murdoch bought a ranch in Arizona on the U.S.–Mexico border. After several years of experimentation, he found that the soil conditions were perfect for growing a rare species of hyacinths, a commercially valuable flower. He purchased sufficient water rights and invested in irrigation systems such that by 1985, he was the largest hyacinth grower in the United States. His business was extremely profitable. Unfortunately, the U.S. Border Patrol has detected numerous illegal border crossings on Murdoch's property. In late 2007, the Secretary of Homeland Security completed construction of the portion of the border fence abutting Murdoch's hyacinth ranch. Floodlights illuminate the fence 24 hours a day. They also illuminate a strip of Murdoch's ranch that measures ¼ mile by 10 miles. Hyacinths cannot grow in this strip of light. Murdoch sues the U.S for compensation. Please assume that his action is justiciable. Please identify and discuss all constitutional issues presented. How should Murdoch's claims be resolved and why? (For purposes of answering this question, please assume that there are devices available to sue the United States for damages despite sovereign immunity.) (30 minutes).

QUESTION III (75 minutes)

In 2005, the REAL I.D. Act was attached as a rider to a bill dealing with emergency appropriations for the Iraq war and Tsunami relief. At the last minute, it was inserted into the bill while the bill was being considered in conference by the House of Representatives. The Senate never discussed REAL I.D. specifically, and no Senate hearings were held on it prior to its passage.

Until its enactment as federal law, issuance of drivers' licenses was strictly a matter for regulation by the States. The REAL I.D. Act of 2005 changed the situation.

REAL I.D. establishes minimum national issuance standards for state-issued drivers' licenses that must be used for "official purposes," defined as including "accessing federal facilities, boarding federally regulated commercial aircraft, and entering nuclear power plants." The penalty for a State's non-compliance with REAL I.D. is borne by the State's citizens, who will be unable to access federal facilities, board federally regulated commercial aircraft, or enter nuclear power plants.

To issue a driver's license that complies with REAL I.D., the State must do the following things:

1. A State may not issue a driver's license unless it requires production of a document and verifies with its issuing agency, the issuance, validity and completeness of (a) a photo identification document or a non-photo document containing the individual's

full legal name and date of birth, (b) date of birth, (c) proof of a Social Security number (SSN) or verification of the individual's ineligibility for a SSN, and (d) name and address of the individual's principal residence.

2. States are required to verify an applicant's legal status in the United States before issuing a driver's license. With respect to non-citizens of the United States, a State may only issue a temporary driver's license with an expiration date equal to the period of time of the applicant's authorized stay in the United States. Undocumented individuals may not receive a driver's license.

Rules

3. States must adopt procedures and practices to (a) employ technology to capture digital images of identity source documents, (b) retain paper copies of source documents for a minimum of 7 years or images of source documents for a minimum of 10 years, (c) establish an effective procedure to confirm or verify a renewing applicant's information, (d) confirm with the Social Security Administration an SSN presented by a person and take appropriate action if a SSN is already registered to or associated with another person to whom any State has issued a driver's license or identification card.

4. REAL I.D. also requires States to maintain a motor vehicle database that contains all data printed on drivers' licenses. If a State elects to issue a driver's license that does not conform with the Act, it must use a unique design to alert officials that the document is not to be accepted for any "official purpose."

Don't have to participate

5. After 2011, a federal agency may not accept for any "official purpose," a driver's license issued by a State to any person, unless the State is meeting the requirements specified in the REAL I.D. Act. All States have been granted an extension until December 2008 to take measures to bring the State into compliance.

10th

A. Utah's legislature has enacted a statute prohibiting its Director of Public Safety from taking any action to implement or plan for implementation of the REAL I.D. Act. In passing the law, the legislature found that REAL I.D. is both beyond the scope of Congress's regulatory powers and is inconsistent with the State's policy of protecting public safety, which is presently fostered by offering driver's licenses to undocumented individuals. Offering such licenses to undocumented individuals who can produce evidence of their identities by showing either a foreign passport or a valid driver's license issued in a foreign country increases the likelihood that such individuals will purchase insurance and thus be financially responsible in case of highway accidents.

Commerce Tax + Spend Immigration Vio Labor race

State reasons

Utah seeks a declaratory judgment that REAL ID is unconstitutional. Please identify and discuss all constitutional claims that Utah could raise. How should they be resolved and why? (50 minutes).

No preemption b/c can still issue non-REAL

50

B. Utah has also enacted a statute prohibiting any airline that flies into a Utah airport from serving alcoholic beverages within two hours of landing in Utah. No national airline is either incorporated in Utah or lists Utah as its principal place of business. However, every national airline flies into and out of Salt Lake City, which is

out of Statutory

BUT applies to all on face

5% int
95% domestic

also an International Airport. Only a small percentage of flights landing in Salt Lake City are international flights (approximately 5%). U.S. Airways, a domestic and international carrier, seeks to enjoin Utah's law on the grounds that it is unconstitutional. Please assume that the case is justiciable. Please identify and discuss all constitutional claims that U.S. Airways could raise. How should they be resolved and why? (25 minutes).