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**552 FEDERAL JURISDICTION**

Semester II, 2000-2001

UNM School of Law  
Final Examination  
Three Credit Hours

Professor Ruth Kovnat  
Saturday, May 5, 2001  
Monday, May 7, 2001  
9:00 a.m. until 12:30 p.m.

INSTRUCTIONS

1. This examination consists of three questions. You should be able to answer the questions in **three hours**. The extra half-hour is allotted to encourage clarity and lucidity in your answers.
2. This is an open book examination. You may bring the casebook, supplement, class notes, and any outline that you have prepared either alone or together with other students in the class. You may not bring into the examination any nutshells, hornbooks, commercial outlines, or other commercial materials.
3. *Good luck and have an enjoyable summer.*

[END OF INSTRUCTIONS, EXAMINATION BEGINS ON PAGE 2]

552 Federal Jurisdiction Examination

For the last 30 years or so, political clashes in the United States have often focused on the arts. Certain forms of music are attacked because they appear to be sexist or racist. Other forms of art are attacked because they are felt to be deeply offensive to religious beliefs. Since 1996, local and state elected officials have increasingly heard the voices of those offended by these art forms. Mayors of major cities have cut off or threatened to withdraw local tax support from “offensive” exhibitions. State legislatures have also been listening. As a result, many States have enacted laws governing public museums, which prohibit those museums from exhibiting materials that would offend the “sensibilities of the community.” Ohio is one of those states. Surprisingly, up to now these “sensitivity” laws have spawned little litigation. There are no Ohio decisions, state or federal that have construed the state law nor considered whether it violates the first and fourteenth amendment of the U.S. Constitution. However, one federal district court decision from New York holds that Mayor Giuliani’s withholding of funds from the Brooklyn Museum under a similar New York law does violate the first and fourteenth amendments.

Congress has become increasingly alarmed by a rising tide of censorship spurred by these state laws. Therefore, for the last few years, Congress has held hearings about the problem, focusing on the existence and implementation of state “sensitivity” laws, taking testimony from hundreds of artists, religious leaders, state and local officials, and professional museum staff members. In the course of these hearings, Congress has specifically found significant censorship, which a majority of Congress believes violates the first and fourteenth amendments of the U.S. Constitution. Congress acted on those findings in the year 2000, by amending the federal laws which authorize funding for the National Endowment for the Arts and the National Endowment for the Humanities. Congress enacted and the President signed the Freedom Against Discrimination in Art law (FADA).

The FADA amendments added the following provisions to the relevant laws:

1. Museums that receive federal financial assistance from the National Endowment for the Arts or the Humanities shall select art for public exhibition in accordance with best professional curatorial standards. No museum that receives such federal financial assistance or any other federal financial assistance shall discriminate in its selection of art for exhibition to

the public on the basis that the art would offend the sensibilities of the community.

2. Upon the receipt of a complaint that a museum that receives federal financial assistance has engaged in discrimination prohibited by section 1 of these amendments, the Directors of the National Endowments shall conduct a hearing. If the directors find a violation of section 1, they shall withdraw all federal financial assistance to the museum that is found to have discriminated.

Decisions of the Directors to withdraw federal financial assistance may be reviewed by the Secretary of Health and Human Services, but shall not be otherwise reviewable in any state or federal court.

3. Any citizen aggrieved by a museum's violation of section 1 may enforce the section 1 prohibition by a civil action in equity.

At the end of 2000, two museums in Ohio, the State Museum of Ohio (located in Cincinnati) and the Cincinnati City Museum, cooperated to exhibit a show of "Young Terrorist" art. Paintings were to be shown at the State Museum. Videotaped works of art were scheduled to be shown at the more avant-garde city museum. Both museums were recipients of federal financial assistance. Museum curators had selected the paintings and videotapes of ten artists on the basis of best professional curatorial standards. The museums executed a contract with each of the artists. The contract provided that the artist would lend the museums the work of art for public display for six months. It also provided that the museums would be liable for any damage to the work of art while it was in the possession of the museum, that the museum would pay for all shipping and insurance costs, and that the Museum would fully comply with section 1 of the FADA amendments.

The museums opened the "young Terrorist" show on January 2, 2001. An immediate public uproar ensued. Complaints centered on both the paintings and videotaped images produced by Polly Painter, an artist who is a citizen of Ohio. Community leaders as well as a large number of ordinary citizens were enraged by Polly's images because they believed that the images were disrespectful to the religious and cultural beliefs of the community. On January 5, 2001, the regents of the State Museum met in emergency session and summarily ordered the removal of Polly's images from that museum. On January 6, the Director of the City museum learned of the action of the state regents. Even though the city museum is not governed by the state museum regents, but rather by the Cincinnati City Council, she immediately removed Polly's videotaped images from the City museum exhibit. The members of City Council held a regular meeting on January 6 immediately after the Director acted, but did not reconsider the Director's action on the grounds that the museum director "understood" art and they did not.

Polly was notified of these actions and simultaneously learned that a collector, who had previously offered to buy her images for \$250,000 on the condition that her paintings and videotapes would be displayed in the museums for six months, withdrew his offer.

Polly takes three actions:

#### Question I

Polly files a complaint against the museums with the Directors of the National Endowment for the Arts and Humanities. The Directors immediately notify the museums and hold a hearing on January 16, 2001. They find that both museums violated section 1 of FADA, and withdraw all federal financial assistance from the museums. In her last act before she leaves office, the Secretary of Health and Human Services affirms the Directors' decision on the morning of January 20, 2001.

The museums join to file a complaint against the Directors and Secretary (the lawsuit of course names their successors in office as defendants) in federal district court alleging that they received inadequate notice of hearing in violation of the National Endowments hearing rules and that FADA violates the tenth amendment of the U.S. Constitution. They seek to enjoin the withdrawal of federal funds. Defendants move to dismiss this complaint for lack of subject matter jurisdiction.

Rule on this motion, addressing both the defendants' and plaintiffs' jurisdictional arguments. (DO NOT reach the merits of the museums' contentions.)

#### Question II

Polly files a complaint in Ohio state court against both the State Museum of Ohio and the Cincinnati City Museum for breach of their contracts with her. She specifically seeks to recover damages that include her lost \$250,000 sale to collector.

Both museums join to remove the case to federal district court on the grounds that Polly's state complaint is based on federal law, specifically FADA. Polly moves to remand. The museums oppose Polly's motion to remand and also move the federal court to stay exercise of its jurisdiction until the Ohio Supreme Court decides whether Ohio law authorized the museum regents to take the action they took. The federal district court denies Polly's motion to remand, but grants the museums' motion to stay.

Did the federal district court err in denying Polly's motion to remand and in granting defendants' motion to stay exercise of federal jurisdiction? Please support your conclusions by addressing all arguments available to plaintiff and defendants in support of their motions.

### Question III

Polly files a multiple count complaint against multiple defendants in federal court. She alleges jurisdiction on the basis of FADA, 42 U.S.C. section 1983, 28 U.S.C. 1331 (general federal question) and 28 U.S.C. 1367 (supplemental jurisdiction).

a. In her FADA count, Polly sues the individual members of the State Board of Regents seeking to enjoin them from discrimination in violation of FADA. She also seeks compensatory damages from the State of Ohio under FADA. All defendants move to dismiss on eleventh amendment grounds.

b. In her count alleging conduct actionable under 42 U.S.C. section 1983, Polly seeks damages from the individual members of the Ohio State Board of Regents in their individual capacities. She also seeks damages from the Director of the Cincinnati City Museum and the members of City Council in their individual capacities as well as from the city of Cincinnati. The individual defendants move for summary judgment on immunity grounds. Cincinnati also moves to dismiss the complaint.

c. Polly also joins a breach of contract count. (This is the same as the claim she filed in state court.) All defendants move to dismiss this count on the grounds that it is not a proper supplemental claim and it is already the subject of another lawsuit, started in state court, but now in federal court by virtue of defendants' having removed it.

Rule on all of these motions, giving reasons for your rulings.