GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: CONSTITUTIONAL LAW

I. Free Exercise Clause/ Establishment Clause (45 points)

At the outset applicants should note that Molly and John can pursue claims on their own behalf, or on behalf of Zeb. They should also note that Zeb himself has standing to pursue his own claims as the Alaska Supreme Court has stated: "Children are possessed of fundamental rights under the Alaska Constitution."[1]

Because Molly and John refuse/are unable to obtain a birth certificate for Zeb for religious reasons the government has denied Zeb benefits and services. This denial raises both free exercise clause and to a lesser degree establishment clause issues.

Article I sec. 4 of the Alaska Constitution states that "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

The seminal Alaska case on the free exercise clause is Frank v. State.[2] Frank involved an Athabaskan who was charged with the crime of taking a moose out of season. His defense was that the moose was needed for a funeral potlatch in the native village of Minto and that the Free Exercise Clause of the Alaska Constitution required that the state accommodate his religious beliefs. The Frank court agreed reasoning that moose was a near essential requirement for the potlatch. In Frank the Alaska Supreme Court, established the following three part test: The free exercise clause may be invoked by a person against state action (or inaction) only where: (1) there is a religion involved; (2) the conduct in question is religiously based; and (3) only where the claimant is sincere.[3]

If this test is met, then the state must show a compelling state interest to deny accommodation for religious practices or beliefs. Specifically, the state must show a "substantial threat to public safety, peace or order or where there are competing governmental interests that are of the highest order and are not otherwise served."[4] Further, the fact that there is a compelling state interest

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1 Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972).

2 604 P.2d 1068 (Alaska 1979).

3 Id. at 1071 (internal citations omitted).

4 Id .at 1070 (internal citations omitted).

itself is not enough. The burden is on the state to establish actual harm to the state interest. The Frank court stated: "The question is whether the interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."[5]

Absent such actual harm to a compelling state interest, the Alaska Constitution requires an exemption from the laws at issue to accommodate religious practices.[6]

It should be noted that this very high standard differs from the standard adopted by the Federal Courts in interpreting the Federal Constitution where compliance is required when the law is facially neutral and of general applicability.[7] But, the Alaska Supreme Court has explicitly rejected this lower standard and has reiterated the application of the "compelling state interest" standard with respect to the Alaska Constitution.[8]

Applying the Frank three-part test here: there certainly is religion involved; the conduct in question is religiously based and Molly and John themselves and on behalf of Zeb, seem sincere in their religious beliefs. So the first part of the analysis is satisfied.

So this case turns on the second part of the analysis. The burden shifts to the Fishville District to justify their refusal of a religious accommodation--that is allowing the substitution of an affidavit for a government issued birth certificate. To meet this burden the district must show that such a substitution impacts a compelling state interest and that allowing the accommodation will actually harm that, or another, governmental interest.

Do the school district's stated interests for requiring a birth certificate for enrollment meet the compelling state interest standard? Probably not, even given the tight budget that the school district faces, as it is not as though the school district will be denied state funding for Zeb if the Godchild's do not produce a birth certificate. All that is required for state funding is an accurate headcount. Logically other methods of obtaining an accurate headcount are possible such as counting all of the birth certificates and then adding one to the headcount to account for Zeb. Logistically, the affidavit might create more clerical work, and thus cost the district more in administrative costs.

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[5] Id. at 1073.

[6] See id. at 1070-71.

[7] See Swanner v. Anchorage Equal Rights Com'n, 874 P.2d 274, 279 (Alaska 1994).

[8] See id. at 280-81

Some applicants might argue that by granting an exemption for Zeb the government is violating the Establishment Clause. A similar argument was rejected by the Frank court that held that the establishment clause prevents "sponsorship, financial support, and active involvement of the sovereign in religious activity."[9] The mere granting of an exemption to Zeb does not entangle the government in religion.

II. Constitutional Right to Education (5 points)

Molly and John, on behalf of Zeb, could also argue that by denying Zeb entry into public school the Fishville School District is denying Zeb his explicit constitutional right to a public education. Article VII, section I of Alaska's Constitution states:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public institutions. Schools and institutions shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or private educational institution.

The Alaska Supreme Court has held that this amendment guarantees "all children of Alaska the right to a public education." [10]

The question here is whether the Fishville school district is denying Zeb the right to an education by making a birth certificate an absolute prerequisite for an education. This analysis dovetails into both the Free Exercise argument and the Equal Protection Argument. To be sure, this prerequisite requirement is forcing Molly and John into a Hobson's choice, choose between violating a sincerely held fundamental religious belief or educate their son.

III. Equal Protection (40 points)

Molly and John, on behalf of Zeb, have a claim that the Fishville School District has violated Zeb's right to equal protection. Specifically, that Zeb is being treated differently than other children in Fishville because he is being denied access to public school solely because he does not have a birth certificate and cannot apply for one because of his, or his parent's, religious beliefs. Arguably, the two disparate classes of Fishville children are those with birth

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[9] 604 P.2d 1068, 1074-75 (Alaska 1979).

[10] Breese v. Smith 501 P.2d 159, 167 (Alaska 1972).

certificates who can attend school and those without birth certificates who are denied public schooling.

Article I, section1, of the Alaska Constitution provides that all persons are "entitled to equal rights, opportunities, and protection under the law."

Alaska applies a flexible sliding scale approach to equal protection analysis. Under this approach, the court initially establishes the nature of the right allegedly infringed by state action, increasing the state's burden to justify the action as the right it affects grows more fundamental: at the low end of the sliding scale the state needs only to show that it has a legitimate purpose; but at the high end--when its action directly infringes a fundamental right--the state must prove a compelling governmental interest.[11] Next the court examines the importance of the state purpose served by the challenged action in order to determine whether it meets the requisite standard.[12] The court last considers the particular means that the state selects to further its purpose; a showing of substantial relationship between means and ends will suffice at the low end of the scale, but at the high end the state must demonstrate that no less restrictive alternative exists to accomplish its purpose.[13]

The Alaska Supreme Court has not yet stated exactly where on the sliding scale the right to a public education falls.[14] It certainly seems to be at least "legitimate" and likely significantly higher. It is probably safe to say that at minimum an explicit constitutional right to an education is at least an "important" right that receives "close scrutiny." Such scrutiny requires that the state interest must be more than legitimate but rather "important."[15]

Under "close" scrutiny the question becomes: is the Fishville School District's interest in receiving state funds for each student that attends its schools an "important" interest? It certainly could, given that most of the Fishville School District's funding comes from the state, and that the school district would be significantly burdened by having to educate a child for which it received no state funding, because that child was not included in the student headcount because there was no birth certificate for that child. Indeed, because of the dire financial situation within the school district such an outcome might arguably raise the level of governmental interest to the level of "compelling."

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11 State v. Planned Parenthood, 35 P.3d 30, 42 (Alaska 2001).

12 Id.

13 Id.

14 See Breese v. Smith, 501 P.2d 159 (Alaska 1972); Hootch v. Alaska State Operated School System, 536 P.2d 793 (Alaska 1975; Matanuska Susitna Borough School v. State, 931 P.2d 391 (Alaska 1997).

15 Malabed v. North Slope Borough, 70 P.3d 416, 421 (Alaska 2003).

However, is the means (requiring a birth certificate as opposed to the offered affidavit) of achieving this end narrowly tailored enough to satisfy this goal? Probably not, as examinees can imagine numerous other methods for establishing an accurate headcount.

IV. Substantive due process (10 points)

The argument can be made that requiring a birth certificate to enroll in public school (or receive state funding for a student) violates substantive due process under both the Fifth Amendment of the United States Constitution and its analog, Art. I sec. 7 of the Alaska Constitution. The argument is that there is little or no obvious relationship between being ready, willing and able to attend school and having a birth certificate. This argument is augmented by the explicit constitutional right to such an education.

The counter to this is that the rational relation threshold is exceedingly low. As the Alaska Supreme Court has held regarding the "obvious" or close" connection argument:

> Substantive due process demands no direct connection of this kind; the substantive due process requirement allows a law to pass muster as long as it bears any rational relation to a legitimate legislative goal:
> Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. It is not a court's role to decide where there is a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people. The constitutional guarantee of substantive due process assures only that a legislative body's decision is not arbitrary but instead based upon some rational policy. State v. Niedermeyer, 14 P.3d 264, 267 (Alaska 2000).

Given this low standard and the obvious reasonable relationship between school enrollment and the requirement to have a birth certificate, it is unlikely that a substantive due process claim would prevail.