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Constitutional Law I
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I.

The State of Ohio, in the Midwest of the U.S., is traversed East and West by three major interstate highways and North and South by two. Two years ago the Ohio Consumer Council, a quasi-governmental organization funded by the state executive, investigated and held hearings concerning potential health problems resulting from interstate truckers carrying chemicals, toxic and potentially toxic or otherwise harmful products in their trailers on one run and food products, particularly produce or animal products, on return runs, or future runs through Ohio. Evidence was presented indicating that as many as 20% of the truckers operating from points outside Ohio to points inside and through Ohio may be engaging in this kind of behavior. The Council also learned from oral sources that probably less than 5% of trucking companies and independent truckers originating in or home-based in Ohio were engaged in this kind of behavior, and that these companies' activities could be monitored by the Ohio Environmental Protection Agency (Ohio E.P.A.) under current Ohio Environmental Commerce Regulations which authorized the Ohio E.P.A. to issue "cease and desist" orders whenever Ohio-based businesses were engaged in business practices that were harmful to the health or environmental safety of Ohio citizens. Because interstate truckers, not originally or home-based in Ohio, were not subject to these regulations and because they were deemed by some to be responsible for up to 98% of the "harmful-to-health" return or multiple load behavior occurring in

Ohio, the Council recommended that the Ohio legislature pass legislation directed at the problem described.

On October 10, 1990, the Ohio legislature enacted the Clean Trailer Act. The Clean Trailer Act required that all trucks carrying trailers in excess of 20' originating or based outside of Ohio provide certification at two weigh stations on all Interstate highways in Ohio, certifying that the trailer has been sterilized under procedures described in the statute before the current trip, or in specific terms that and how the present load is clearly compatible from a health and toxicity standpoint with former loads. Under the law, trucks without certification will be fined \$500 for a first offense, \$1,000 for a second offense and \$5,000 for a third offense. All offending trucks are required to leave Ohio by the route they entered. Trucks showing certification are subject to random checks by Ohio E.P.A. enforcement agents. In cases where a truck is determined to contain toxic or unhealthy contaminants, the driver and owners will be fined as above, and subject to more severe criminal penalties including imprisonment, and the offending truck and trailer will be impounded for thirty days. There is no recorded legislative history for the Ohio Clean Trailer Act.

While it is possible to travel East-West or North-South without driving through Ohio, travel south of Ohio is impeded because one must drive much longer distances on sometimes tortuous routes, and travel north of Ohio requires travel through Canada, including border crossing stoppages and sometimes stringent Canadian regulations.

While trucks originating or home-based and licensed in Ohio are not subject to all of the provisions of the Clean Trailer Act, they may be stopped and, if found to be violating the Act's standards, may be issued "cease and desist" orders. Under Ohio law, individuals and businesses

who violate "cease and desist" orders are subject to fines for contempt of agency orders of from \$100 to \$1000 for each offense.

On November 20, 1990, George Vandivio who drives for Ocean to Ocean Transports from New Joisey to Chicago, Illanoise, based in New Joisey, was stopped by Ohigho E.P.A. agents, fined and returned by Route 80 to Pannsylvania for failure to have a certificate. On November 24, 1990, Elmer Valo also of Ocean to Ocean Transports was stopped at a checkpoint. Valo, who was carrying fresh produce to Chicago, showed a certificate stating that the truck had carried fresh produce on all recent prior trips. Random testing indicated the inside of the truck contained potentially unhealthy substances produced by silage, probably carried with animals, on an earlier trip. The truck and trailer were impounded, the company was fined \$1000, and in a proceeding held in the Ohigho Court of Claims, the president of Ocean to Ocean was given a 60-day jail sentence that was suspended on the condition that Ocean to Ocean transport trucks remain free from Ohigho Clean Trailer Act violations for one year.

Ocean to Ocean's president has come to your law firm for representation. A senior partner thinks that an action in U. S. District Court to declare the law unconstitutional under the U.S. Constitution or on appeal to the Ohigho Supreme Court from the Court of Claims in the president's case for the same reasons might be in order. He asks you, a new lawyer, to write a memorandum of law setting forth the best constitutional bases for challenging the Ohigho Clean Trailer Act.

In your memo, please describe (1) the claim or claims that would have the best potential to succeed and the constitutional provision or provisions that would be implicated; (2) your client's contention or contentions with respect to the provision or provisions and the state's; (3)

the analytical framework or frameworks that the court would likely use in determining the constitutionality of the Act; and then (4) analyze the case in terms of the analytical framework or frameworks, facts and law. Please take care to weigh any counter arguments you should anticipate from Ohio E.P.A. attorneys.

II.

In the Johnson Controls case, the U.S. Supreme Court held that a company policy that excluded fertile women from employment in certain job positions where toxicity or radiation could potentially harm fetal life constituted discrimination on the basis of sex under the Civil Rights Act of 1964. On April 30, 1991, Congress amended the Civil Rights Act by adding that "rules or policies that are designed to protect the physical health of men or women or fetal health from risks peculiar to a gender's biological condition do not constitute discrimination on the basis of sex."

The Report of the House's Judiciary Committee, which reported the Bill to the floor of the House, stated that working conditions in many areas normally involved the use of highly risky chemicals, toxic agents, radiation and other dangers, many of which posed a special problem to pregnant women, some of which posed a special problem to women in general and a few of which posed a peculiar problem only to men. There were also many cases in which the risks to women and pregnant women were possible or uncertain. The Report then cited examples in a number of industries.

The Senate Report stated that women, in particular, had been discriminated against in employment nationally by being forced to work in substandard working conditions, and that it was vital to the health and well-being of women and potential offspring that progressive legislation protective of health and life be enacted. The Report did not set forth illustrations, examples or specific findings. It did state that it was important that the protection be available nationally so as to not adversely impact economic activity.

The day after the Amendment to the Civil Rights Act was amended, Johnson Controls Co. reinstated its policy of excluding pregnant and fertile women from certain positions exposing them to toxic agents and radiation. Sally Sullivan and Harriet Harrier immediately brought suit against Johnson Controls and the U.S. government on, in their view, the best constitutional basis available to them to seeking a Declaratory Judgment that the Amendment is unconstitutional.

You are an attorney with the Justice Department, representing the U.S. You are aware that the Department will likely intervene against Ms. Sullivan and Ms. Harrier. You are preparing a brief to present to the U.S. District Court arguing in favor of the constitutionality of the amendment.

(1) What constitutional provision or provisions are likely to be implicated by the claims of Sullivan and Harrier?

(2) Under what analytical framework or frameworks is the law likely to be evaluated by the federal court?

(3) What is the strongest argument that Sullivan & Harrier are likely to make?

(4) Analyze the facts and law in terms of the appropriate analytical framework or frameworks, and draw

constitutional conclusions that you think a federal court might draw.

III.

The life of the Fishwonker is exciting and adventurous, in story; in reality it is hard and dangerous, though rewarding. In times past, Fishwonkers, people who fish and hunt giant ocean wonkers (marine animals related to walruses), made a great living with their catches, lived in and by the sea, selling their wonkers to wonker canneries and packagers along the shores and harbors of Elegis, a small U.S. state know for its rustic and rugged life. Elegis, though home to most viable wonker canneries and packagers, was home to only a small portion of the Fishwonkers, perhaps 10-15%. Most other Fishwonkers were Native Americans who lived in the neighboring state of Pantheo.

There have been for many years rather hostile relations between Elegians and Native Americans who at one time were not free to go to Elegian schools and often were excluded from public facilities. Native Americans generally and historically have been treated as unwelcome by most Elegians, other than the cannery owners who purchased their wonkers. Recently, in part due to E.P.A. and O.S.H.A. federal regulations and in part due to the general economy, the Fishwonking business has been in a slide. Indeed, there are now only a half dozen cannery/packing houses left in Elegian harbors. These are romantic reminders of better times past when 60 to 70 dotted the shore, but these few remain important to the character of Elegis, which has a

substantial tourist trade.

For the far more limited trade, of course, Fishwonking is much more competitive. The small number of Elegian Fishwonkers, most of whom are not Native Americans, are in the Fishwonking economic fight of their lives. It is also critical these days, that Fishwonkers not violate E.P.A. regulations by catching too many undersized wonkers, or dollfinks, in their nets, or by using improper Fishwonking techniques such as stunning (setting off underwater explosive devices in areas inhabited by wonkers), or by overfishing protected wonker areas.

This past March, shortly before the new Fishwonking season, the Elegian state Environmental Protection Agency issued regulations authorized under state legislation, requiring all Fishwonkers who sold fish to Elegian canneries and packaging houses to be licensed in Elegis. This required taking an exam, which could be taken orally or in writing, that covered competencies and knowledge of pertinent environmental and fishery requirements. It was also required that the fishwonker be a resident of Elegis, or be prepared to become a resident of Elegis within three months of passing the licensing exam.

You are known as an outstanding Elegian constitutional lawyer. Five Native American Fishwonkers from Pantheo come to you to protect their rights under the U.S. Constitution. They claim that the licensing provision particularly the residency requirement will eliminate most Native Americans and all Pantheo residents from Fishwonking, a livelihood vital to their well being. You determine to help them. You need to challenge the validity of the regulation and its virtual exclusion of these five and other non-Elegian Fishwonkers from the limited Fishwonking business. They are as a general matter unwilling and often unable to move their families to Elegis.

Please analyze the constitutionality of the licensing regulations in the context of the facts here.

(1) Determine what constitutional provision or provisions it likely implicates;

(2) What claim or claims could reasonably be asserted in terms of that constitutional provision or provisions;

(3) What analytical framework or frameworks would a court likely and appropriately employ in analyzing this claim or claims; and

(4) Finally, analyze the claims in terms of the applicable facts, law and appropriate analytical framework or frameworks, drawing appropriate and balanced constitutional conclusions.

Be sure to take into consideration the contentions and likely success of the arguments of the ELEGIAN Attorney General's office, which will be defending in the potential case.