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CONSTITUTIONAL LAW I(D)

Practice Question II: Model Answer

You shouldn't take this Model Answer too literally. Good answers might emphasize somewhat different things; be structured differently; or raise somewhat different issues. Also, it takes a position on the issues, because the Question asked you to. It certainly doesn't mean the particular position taken is the "correct" one or that you'd be graded down for taking a different position.

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Akhil and DWI say that the CLPA violates the First Amendment. Thus this is a case arising under the Constitution, and so within the federal judicial power under Art. III § 2 cl. 1.

By enacting § 666, Congress intended to deprive the district court and appeals court (below the Supreme Court) of jurisdiction over cases challenging the constitutionality of any state law concerning "the use of the National Motto on license plates." The district court is "created by Congress" – it's one of the inferior courts that Art. III § 1 gives Congress the power to create.

The head of the CMVD would argue that § 666 is constitutional. Art. III doesn't compel Congress to create the lower federal courts, so it could abolish them entirely. Consequently, it could in effect abolish them in part by eliminating their jurisdiction over certain issues.

The CMVD head could also say § 666 is part of the power of Congress to act as a counter to the federal courts' power, through judicial review, to set aside decisions made by elected representatives. Akhil and DWI should take their complaints to the political process. Or they could take them to *state* courts, which are bound under the supremacy clause to apply the First Amendment. And since § 666 doesn't apply to the Supreme Court (it's not "created by Act of Congress" but by Art. III), they can still get federal review of the state courts' determination.

Akhil and DWI would counter that Congress doesn't have the power to abolish the lower federal courts. The framers left the details to Congress, but they clearly expected Congress to create lower federal courts; the first Congress, which had many of the framers in it, immediately set them up. Since Congress doesn't have the power to abolish the lower federal courts, the whole idea that there's a "lesser included" power to limit their jurisdiction fails.

Akhil and DWI could also argue that even a power to abolish the lower courts entirely power doesn't include selectively eliminating their jurisdiction in a way that specially burdens constitutional rights like First Amendment rights. Sending people with constitutional claims to the state courts isn't a good enough alternative. Even with the supremacy clause, state courts may not be as sympathetic to constitutional claims as the federal courts would. Plus as a practical matter the Supreme Court can't review every state court judgment.

Given that the political process may not handle minority viewpoints very well, and that freedom of speech and religion are important to keeping democracy working, I would recommend that the court find that § 666 exceeds Congress's power.

Even if § 666 is unconstitutional, Akhil still has to show standing, including an injury. Standing ensures that plaintiffs will litigate vigorously to protect their personal stake in the claim. He'll have that incentive, because making him display the Motto goes directly against his religious non-beliefs. Further, Akhil can point to the CLPA as the cause of his injury. It

gives him no alternative but to display the license plate or give up driving. And the relief he's seeking would directly redress that injury. The injunction would prevent Cania from forcing Akhil to display a motto that is counter to his religious beliefs. Finally, even though his injury hasn't happened yet, it's imminent –basically bound to happen within a year when he's sent a new license plate.

Akhil could also assert that losing sleep over the terrible choice he'll be put to is an injury – current, not just impending. That, too, would be redressed by a favorable ruling.

The CMVD head might claim that Akhil's injury fails on prudential grounds. When an injury is shared by a widespread group of people, they can seek relief through the political process. But this is probably an injury to a minority of people – Akhil is an atheist – so the political process might not be very responsive. The CMVD head might also claim that Akhil's injury is manufactured by himself – there's no reason why he has to lose sleep.

In my view, Akhil should be found to have standing because his injury meets the core Article III requirements; there's no good prudential reason to decline the case; and the loss of sleep is caused by the (allegedly) unconstitutional standing – it's not something he's choosing to impose on himself.

DWI would have a harder time on standing. It could argue that the CLPA may trigger organized boycotts of Cania tourist destinations and hurt its profits. The retweeted tweet and the cancellations so far show this is a real prospect. This injury is caused by Cania's statute. Enjoining its enforcement would eliminate the threat to its profits.

But the CMVD head will respond that DWI hasn't actually suffered any loss of profits yet. The allegation that the CLPA "may trigger" boycotts that may negatively impact DWI's profits seems speculative. A lot of people might like Cania's new statute, and atheists aren't very popular. Twitter storms don't always have an actual real world impact. The few cancellations DWI has suffered so far could just be routine or, even if boycott-motivated, a sign that most people aren't going to make their vacation plans based on a license plate. Plus it's hard to know what would happen to DWI's profits no matter what happens to the CLPA. There might be a recession or an economic boom, either of which could make a big difference. CMVD might also say DWI's real concern is profits, not free speech, which is not what the First Amendment is about.

DWI could respond by pointing to cases like *Bakke* or *Gratz*. The injury isn't the loss of profits per se. It shouldn't have to show that it would in fact make more money if the CLPA were struck down, any more than *Bakke* or *Gratz* were required to show that they'd have been admitted in the absence of the affirmative action policy. The injury to DWI is to its opportunity to compete for business; it's wrong that DWI must compete in an environment marred by the effects of an (allegedly) unconstitutional statute. Since it affects DWI's opportunity to compete, it also means the injury to DWI is current, not some speculative situation in the future. And DWI may be profit-making, but it has an incentive to present strong First Amendment arguments, because that's what has the best chance of protecting its interests.

In my view, DWI does not, because its injury is too speculative. The Court has been willing to take the "opportunity to compete" approach in cases alleging racial discrimination because that injury is so fundamental, but shouldn't generally adopt it because it would weaken standing's role in controlling the floodgates of potential litigation.