

## INSTRUCTIONS

This exam consists of **TWO main questions, each of which has two sub-parts.** **The exam is open book: you may consult any printed or handwritten materials.** You may not bring into the examination room any electronic devices, including cell phones, blackberries, iPods, etc. You may turn on a laptop only if you are typing the exam, and only with the exam software running. You may not use a laptop to consult your outline or notes.

You will have a total of **three-and-a-half hours** to complete the examination. The time suggestions in the questions roughly reflect the relative weight in grading of the questions, and add up to three hours. The additional half-hour is meant to provide extra time for you to outline and edit your answers, as needed.

**Do not exceed the word limits given for each question. You are free to allocate the words between the two sub-parts of each question as you wish.** I will stop reading your answer at the point at which it reaches the allotted word limit, and you will receive no credit for any part of your answer after that point. In addition, **I will deduct ten points from the raw score of any question that exceeds the word limit.** I have provided some cushion in the word limits, so you should not assume that you have left something out if your answer is short of the word limit. However, if it is *much* shorter than the word limit (e.g. only 50%), this might be a sign that you have missed some issues or failed to fully analyze the issues.

If you believe that further facts are needed to answer any of the questions, please state in your answer what facts you would need or what assumptions you have made. In evaluating your answers, I will be looking especially for correct identification of issues, thorough analysis, facility with the Supreme Court precedent, and logical organization. Your answer should not be in outline form\* nor contain shorthand, abbreviations (except where clearly noted and defined), slang, or bullet points.

**Please write your exam number on every page of your exam.** Under no circumstances may you remove the exam from the room in which the exam is taken. **If you fail to turn in all pages of the exam, you will not receive credit for the course.**

**“I acknowledge that in this, as in all other law school activities, I am bound by the Emory Law School Professional Conduct Code.”**

Exam Number \_\_\_\_\_

**GOOD LUCK!!!**

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\* If you are running out of time to complete your answer you may include an outline for the remainder of the answer. You will receive some – though minimal – credit for doing so.

## **QUESTION I**

**Suggested time: Two Hours (120 minutes)**  
**Total Word Limit for Question I: 2,500 words**

In the 19th century, many Mormons practiced polygamy, but U.S. popular sentiment was against the practice and polygamists were persecuted by federal authorities. A federal statute forbade polygamy in U.S. territories, and the Supreme Court upheld a prosecution under this statute against a freedom-of-religion challenge in *Reynolds v. United States* (1878). Congress admitted Utah to the Union only after it adopted a state constitutional provision that banned polygamy. The Mormon Church repudiated the practice of polygamy around 1900, and as of 2014, plural marriage was practiced only by a tiny splinter minority of Mormons.

In 2020, Taggart “Tagg” Romney, the eldest son of onetime Republican presidential nominee Willard Mitt Romney, was elected President of the United States. Based upon the family’s heritage going back to the first Mormon generation, the Romneys have been called “an LDS\* political dynasty.” In the wake of the election of Romney as the first Mormon President, there were increasing calls among the citizenry, in the media, and by various elected officials for a redefinition of marriage that would include “multiple partner” (MP) marriage by consenting adults. Retired Supreme Court Justice John Paul Stevens, speaking from the ski slopes on the occasion of his 100th birthday, said “I think it is high time for the nation and the Court to repudiate our long and shameful history of discrimination against people who have an MP orientation – people who want to practice Big Love.”

The Governor of Utah, seeing an opportunity to reverse what he considered to be a grave injustice in the State’s history, launched an effort to amend the Utah constitution to remove its provision stating that “polygamous or plural marriages are forever prohibited.” Following a state-wide referendum in which an overwhelming majority voted to remove the provision from the Utah constitution, the constitution was amended and the prohibition was stricken. Thereafter, the Utah legislature enacted, and the Governor signed, the following law:

### **UTAH DOMESTIC RELATIONS LAW: MARRIAGE (DRLM)**

**Section 1.** A lawful marriage under this code may be entered into by at least two and up to twelve adults over the age of consent in Utah, provided that in the case of three or more persons, the proportion of females to males is at least 2:1 (there must be two or more females for every male in the marriage).

**Section 2.** In order to qualify for a marriage license under Section 1, all applicants must submit a signed and notarized document in which they swear or

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\* LDS stands for The Church of Jesus Christ of Latter Day Saints, commonly referred to as the Mormon Church.

affirm that the marriage will be consummated by physical intimate conduct between the affiant and at least one of the other applicants. For purposes of this section, “physical intimate conduct” includes opposite-sex or same-sex sexual intimacy. A false statement on such document shall constitute a class one misdemeanor, punishable by a fine of up to \$1000 and a prison term of up to six months.

When he introduced the bill that became DRLM Section 1, Representative Brigham P. Young VII explained, “We want to make sure that plural marriages have multiple wives for each husband, for a few reasons. First, this is the relationship that has suffered the most discrimination, stigma, and disparagement throughout our history. By validating this type of intimate relationship of one husband and many wives, we want to bring these marriages into the same dignity and high repute as any other lawful marriage in the country. They’ve been suppressed for so long. And second, it is obvious that this arrangement promotes procreation, which is a basic purpose of marriage. A woman can only have one baby at a time, so a wife with many husbands is still going to have the same number of children. But one man can father many children at the same time if he has lots of wives. Finally, it is just the way things were intended to be – the husband should provide for his wives and children, and the wives should keep the home and the children.”

In order to promote the new law and to encourage plural marriage, the Governor’s office decided to fund and produce a series of Public Service Announcements (PSAs). Helen Huntsman, a media liaison with the Governor’s office, settled on the theme “Real People, Real Families, Real Big Love” for the PSAs and instructed the talent agency casting the spots to hire only actors who self-identified as having a plural partner orientation. In an email to the agency, Huntsman wrote “this is important both for authenticity of the spots, and also to give those actors a leg-up in getting some exposure and well-paid work. They can serve as role models for young people with a plural marriage orientation as well. And of course diversity is always important when we hire people for government work.”

After the law went into effect, Polly Andry, a woman who lives in Utah, along with her five male intimate partners, sought a marriage license in Salt Lake City, Utah. They were denied a license because their marriage did not satisfy the requirements of DRLM Section 1. Polly Andry brought suit in federal district court challenging both Sections 1 and 2 of the law under the Fourteenth Amendment.

Thereafter, Marcus Monogamous, an actor and waiter, sought to audition for one of the PSAs. Though he would otherwise have been well-qualified for the position, he was rejected because he does not have a plural partner orientation. He brought suit in federal district court challenging the hiring policy.

In terms of Supreme Court precedent specifically on point, you should assume for purposes of this question that there is none, i.e. the U.S. Supreme Court has not addressed the question whether bans on polygamy or other plural marriage violate the Fourteenth

Amendment. The Supreme Court’s 2017 decision holding State bans on same-sex marriage unconstitutional included the following footnote: “The Dissent’s argument that this decision spells the end of bans against bigamy, polygamy, and incest is noted. At least with respect to the former two categories, we should point out that in *Reynolds v. United States*, 98 U.S. 45 (1879) (upholding the petitioner’s conviction for bigamy in the face of a Free Exercise challenge), this Court was not presented with – nor did it decide – any challenge to the law based on the Fourteenth Amendment. Thus, that case is not relevant to any future Due Process or Equal Protection challenge to such laws.” Aside from the information in this paragraph, you should assume that Supreme Court precedent remains identical to what it was in April 2014.

- A. Analyze the constitutionality of Utah DRLM Sections 1 and 2 under the Equal Protection and Due Process clauses of the Fourteenth Amendment, evaluating the issues raised by Polly Andry’s lawsuit. In your answer, you should NOT consider any potential claims grounded in the First Amendment (free exercise, establishment, or freedom of speech). In addition, you should ignore any possible issues of standing and assume that Polly Andry may challenge both sections of the Utah law.**
- B. Analyze the constitutionality of the hiring policy challenged by Marcus Monogamous under the Fourteenth Amendment. Again, you should ignore any issues of standing as well as claims that might arise under the First Amendment.**

**\*\*QUESTION II BEGINS ON THE NEXT PAGE\*\***

## **QUESTION II**

**Suggested time: One hour (60 minutes)**  
**Total Word Limit for Question II: 2,000 Words**

For the last decade, the state of Gambrell – a fictional state in the United States – has been charging all couples \$100 for marriage licenses. This turned out to be insufficient to finance the administrative business of the state marriage license office, and the people of Gambrell didn't want to dip into the general fund to make up the shortfall. Also, there had recently been a handful of well-publicized instances of food poisoning at weddings catered by out-of-state caterers – perhaps because the food spent too much time riding in the truck from their out-of-state kitchens. Finally, Gambrell legislators were eager to promote Gambrell's new wine industry, including a state-owned winery called Donkey's Tail Vineyard. Therefore, the Gambrell legislature enacted, and the Governor signed, the following law:

### **MARRIAGE REVENUE AND SAFETY ACT OF 2014 (MRSA)**

- Section 1.** The fee for a marriage license shall be \$100 if both parties reside in the state of Gambrell, and \$1000 otherwise. All fees shall go to fund the operations of the state marriage license office.
- Section 2.** No wedding party in the State of Gambrell may be catered by any caterer whose principal place of business is outside the State of Gambrell. All wine served at weddings performed and celebrated within the State of Gambrell must be purchased from wineries within Gambrell, including but not limited to wines from Donkey's Tail Vineyard.
- Section 3.** State marriage license offices shall give out a complimentary bottle of Donkey's Tail cabernet to each couple that receives a Gambrell marriage license.

National reaction to MRSA was quite negative. The New York Times editorial page called the law “an embarrassment” and called on Congress to rectify “this blatant power-grab.” President Obama, asked about the Gambrell law during his weekly radio call-in show, said, “there are no red states or blue states. There are only purple states and blue states. All Americans should be treated with dignity and respect.” Congress thereafter held hearings and heard testimony showing that some states, though not necessarily Gambrell, had historically disfavored their own residents who sought to marry out-of-state residents, and in a few instances this unfair treatment had no rational basis whatsoever. A 600-page record compiled by Congress contained findings that this discrimination distorted some people's marriage and residence decisions and that it had a substantial effect on interstate commerce. In addition, certain industry lobbyists, inspired by Section 3 of the Gambrell MRSA, encouraged Congress to boost their own favored industries through a marriage license give-away provision. Congress thereafter enacted the following legislation:

**DEFENSE UNDER MARRIAGE BIPARTISANSHIP (DUMB) ACT**

- Section A.** State officials shall grant marriage licenses to couples that include an out-of-state resident on the same terms on which they grant marriage licenses to in-state couples.
- Section B.** State officials shall charge no more than \$50 for a marriage license.
- Section C.** State officials shall hand out Chick-fil-A menus and coupons with every marriage license.
- A. Analyze the constitutionality of MRSA under the Dormant Commerce Clause and Article IV's State Privileges and Immunities Clause.**
- B. Analyze whether Congress has the power to enact the DUMB Act.**

**END OF EXAM**

**HAVE A WONDERFUL SUMMER!!!**