

**FINAL EXAMINATION  
ADMINISTRATIVE LAW  
PROFS. HELMLINGER AND LIEBEN  
SPRING 2005**

**INSTRUCTIONS**

1. You have a total of **three (3) hours** to complete this examination. Though it is not required, you may allocate 1-½ hours (90 minutes) to each question.
2. This is a **closed book** exam with the exception of ONE 8-1/2" by 11" PIECE OF PAPER with notes. Other than this, no outside materials are allowed.
3. The exam consists of two (2) essay questions, each of which is divided into two or three subparts. Each entire question is worth 50% of the total grade.
4. Please answer these questions in the blue books provided to you. Write only on the right hand side of the page (skipping a page each time) and double-space your work. Please write legibly.
5. Write your exam number on your exam envelope. Put your student exam number at the top of this page, each page of questions, and each blue book. Do not use your name, student ID number or Social Security Number on any exam materials.
6. At the conclusion of the exam, return all exam materials to the exam envelope and submit it to the proctor. Do not seal the envelope. Students who do not return all exam materials at the end of the exam may not be graded.

**GOOD LUCK!**

**Question #1**

Hoping to create a new training facility that simulates the weather and terrain of central Afghanistan, Congress through the Black Rock Administration Act (Act) locates a military base, the Black Rock Military Post, in Nevada. The Act also creates the Administration of Black Rock Infrastructure Development (ABRID), which is statutorily obligated to manage the federal lands surrounding the Post and to issue licenses for businesses operating just outside of the Post if they are helping to meet the “central consumer needs” of Post personnel. The Act also has the stated goal of regulating potential monopolies. Congress authorizes the Post Commander to terminate the ABRID business licenses when he “deems such termination necessary or advisable in the interests of the Black Rock Military Post or the United States.”

In a properly promulgated rule, ABRID indicates that it will grant a business license to any business that “reasonably serves the central consumer needs of Black Rock Military Post personnel.” The rule also defines “central consumer needs” to include restaurants, laundry, grocers and consumer electronics providers.

### **Part I**

A desert festival, Der Feuer Mensch, convenes annually on federal lands adjacent to the Post grounds. The mission of the festival is to promote world unity through free speech and spiritual and artistic expression. With the festival are many retail booths, including some that provide food, clothing and camping supplies. Other retail booths offer art, literature and assorted philosophical or spiritual services. The festival includes many free displays of art and opinion as well. Post personnel enjoy the diversion offered by Der Feuer Mensch, and many of the retail booths related to Der Feuer Mensch remain open after the festival.

In 2005, for its twentieth anniversary, Mr. Brandes, the producer of Der Feuer Mensch, gives his annual notice to ABRID of his planned schedule, as required by his business license from ABRID. The notice is consistent with previous years in terms of the festival's location, size and timing. By letter, ABRID asks for demographic information, seeking a response within 30 days. Brandes submits a response after 45 days. ABRID subsequently issues a written denial of the planned schedule. The denial does not include any alternate schedule and notes that Brandes did not reply to the request for additional information. The denial also cites concern over the number of Islamic transcendentalists that typically attend the art festival. There is no written ABRID policy regarding Islamic transcendentalists, but ABRID cites to instances of violence by Islamic transcendentalists in Nepal. Brandes wants to challenge the denial.

- A. Does Brandes have a constitutional interest on which to base his claim and why or why not?
- B. What arguments should Brandes make to support his challenge to ABRID's denial?

### **Part II**

One retail operator outside the Post is Sheik "Carl" Le Freak. Carl is an Islamic transcendentalist from Detroit who has operated a successful guided meditation business outside the Post. Carl has expanded to five outlets with licenses from ABRID and has submitted an application for a sixth. ABRID has not yet acted on the application. This year, citing concerns of monopolization, ABRID issued a "minute" statement (which did not undergo public notice and comment) that it would not grant any business license for any owner or operator that had more than five businesses subject to ABRID jurisdiction. Carl wants to immediately challenge ABRID's "minute" and seek action on his permit application.

- A. What defenses might ABRID raise, and how successful will they likely be?
- B. Will the court give deference to ABRID's interpretation contained in the "minute" statement and why or why not?

### **Part III**

Palma Pilot operates a business selling electronics outside the Post. Along with car stereos and cell phones, Ms. Pilot sells electronic "spy" gadgets of dubious effectiveness. This year, Pilot receives a notice from the Post Commander that he will be terminating

her business license because it is “necessary or advisable in the interests of the Black Rock Military Post or the United States.” Pilot has petitioned the federal district court to restore her license. She alleges, among other things, that the Post Commander is constitutionally unable to adjudicate her interests and terminate her license. The Post Commander stands by his action and alleges that the court is without authority to review it.

A. How should the court consider these specific claims?

### **Question #2**

Due to intensifying pressure, the Federal Communications Commission (FCC) attempts to regulate public access to sexually explicit materials on the Internet. As its authority, the FCC exclusively relies upon a statute, the Communications Act of 1934 (Act), allowing it to regulate “cable services,” which are defined as “one-way transmission[s] to subscribers of video programming or other programming service, and subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service.” Congress added the words “*or use*” in 1996. Congress also stated in the Act a broad goal of encouraging the free flow of information and ideas through “cable services.” The FCC claims that, under canons of construction, Congress’ addition of the “*or use*” language gave it authority to regulate Internet content. Regardless, Congress had twice passed legislation (in 1996 and 1998) explicitly authorizing the FCC to regulate indecent and obscene Internet material, but federal courts found each of these unconstitutional due to freedom of speech concerns.

The FCC proposed the regulation early 2005. The rule requires Internet providers with publicly accessible websites to limit access by minors to content containing “provocative nudity.” The proposed rule contains no further details. During the comment period, Mother’s Against Insuper Deviants (MAID) commented that the regulations should be as expansive as possible. In the final rule, as its response to MAID’s comment, the FCC for the first time defined “provocative nudity” to mean “pornography, obscene educational nudity, and suggestive nudity in advertisements.” The Merriam-Webster’s dictionary defines *provocative* as “serving or tending to provoke, excite, or stimulate” and use as “the act or practice of employing something.” In subsequent guidance on the new rule, the FCC explains that in the case of “obscene educational nudity, any display of nudity is a violation of the rule, with no exceptions.” The guidance also says that \$100,000 penalty will be assessed for the first violation, regardless of circumstances.

To enforce its regulations, a statute authorizes the FCC to issue a “notice of apparent liability” that sets forth a penalty, which may be followed by an order to the respondent to pay the penalty. If respondent does not voluntarily pay the penalty, the FCC must enforce the order in federal district court subject to de novo review. The statute states that “no federal court shall have jurisdiction to review” an FCC penalty action unless the FCC has filed a civil complaint to enforce its order.

## **Part I**

About 6 months after the new anti-nudity regulation was promulgated, the As the World Turns Foundation (“Foundation”), a non-profit educational foundation, published on the internet without any restriction of access a piece about the Yanomamo Indian Tribe in Venezuela, which included images of nude Yanomamo women.

MAID complained to the FCC about the website, and the FCC issued a “notice of apparent liability” to the Foundation seeking injunctive relief and a penalty of \$100,000. Despite protest from the Foundation, the FCC issued a subsequent order seeking payment by the Foundation of the full \$100,000 penalty because, it stated, it could not veer from its penalty policy.

Before the FCC could file a lawsuit seeking compliance by the Foundation with the order, the Foundation sued the FCC in federal district court claiming that the regulation was improperly promulgated and that it was unconstitutional. Please respond to the following questions:

- A. Assuming that the FCC’s authorizing statute does not contain any specific provision allowing judicial review, on what basis can the Foundation maintain a lawsuit in federal district court against the FCC?
- B. What standard or review should apply to the Foundation’s challenge to the FCC rulemaking, and what legal arguments can the Foundation make to support its claim?
- C. What defenses might the FCC raise against the Foundation’s lawsuit?

## **Part II**

MAID complained to the FCC that advertisements for the upcoming World Bungee Jumping championship violated the anti-nudity regulation since they showed partially clad women bungee jumping. The FCC responded to MAID in writing that it did not believe that these advertisements were in violation of the rule. MAID then sued the World Bungee Association, seeking cessation of the publication of the supposed violating advertisement and payment of civil penalties to the FCC. In its pleadings, MAID claims that members of its organization will suffer irreparable distress if they are forced to view the advertisement.

- A. Does MAID have standing to maintain this lawsuit and why or why not?
- B. How would you recommend MAID to draft its pleading to best ensure standing, and why?

**END OF EXAM**