

## Question 1

A State X statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as “gasohol.” The statute is based on the following legislative findings: (1) the use of gasohol will conserve domestic supplies of petroleum; (2) gasohol burns more cleanly than pure gasoline, thereby reducing atmospheric pollution; and (3) the use of gasohol will expand the market for grains from which ethanol is produced.

State X is the nation’s largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

Oilco is an international petroleum company doing business in State X as a major retailer of gasoline. Oilco does not dispute the legislative findings underlying the statute or the facts concerning State X’s grain production and lack of oil wells and refineries. Oilco, however, has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.

Can Oilco successfully assert that the statute violates any of the following provisions of the United States Constitution: (1) the Commerce Clause, (2) the Equal Protection Clause, (3) the Due Process Clause, and (4) the Privileges and Immunities Clause? Discuss.

## Answer A to Question 1

1)

Oilco is asserting that the State X statute violates the 1) Commerce Clause, 2) the Equal Protection Clause, 3) the Due Process Clause, and 4) the Privileges and Immunities Clause of Article IV.

### Justiciability

#### Standing

In order to successfully bring an action, Oilco must demonstrate that they have standing. A party has standing where there is injury, the injury is caused by the defendant, and the court can provide relief. Here, Oilco will be injured by the legislation because they do business in State X and do not currently meet the State's gasoline regulations. Oilco could lose profits from loss of business. The loss of profits is directly caused by the statute's ban on non-ethanol based gasoline. The court can provide relief for Oilco by invalidating the statute. Thus, Oilco has standing.

#### Eleventh Amendment

The Eleventh Amendment prohibits a party from suing a state without the state's permission. It appears from the facts that Oilco is suing State X and thus would be barred by the Eleventh Amendment. If Oilco sues the appropriate official, the suit will not be barred by the Eleventh Amendment.

#### Ripeness

The courts will not hear a case unless there is some threat of immediate injury caused by the defendant. Here, the statute could result in a significant loss of profits for Oilco, so the State's argument for dismissal based on ripeness will fail.

#### Commerce Clause

The Commerce Clause grants the federal government power to regulate the channels and instrumentalities of commerce, and other activities that affect interstate commerce. If a valid federal law under the commerce clause conflicts with state law, the federal law invalidates the state law because of the Supremacy Clause. Even if the federal law and state law do not conflict, the federal law may preempt the state law by occupying the field. Where Congress is silent on a matter, a state has the power to regulate the local aspects of commerce as long as the regulation is not discriminatory and does not unduly burden interstate commerce.

Here, there are no facts suggesting that there is a federal law that either conflicts with the State X statute or preempts the field. Thus, State X's statute will be valid as long as it does not discriminate against out-of-state interests and does not unduly burden interstate commerce.

### Discrimination against out-of-state interests

The Dormant Commerce Clause prohibits a state from discriminating against out-of-state interests. Discrimination can appear on the face of a regulation, or it can be discriminatory in its impact on interstate commerce. Here, the statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as gasohol. State X will argue that [t]he statute on its face does not discriminate against any out-of-state interests, as any other state meeting these requirements would not be prohibited from selling gasoline inside State X.

However, Oilco's strongest argument will be that the Statute has a discriminatory impact. Here, Oilco will argue that State X is the nation's largest producer of grain used for making ethanol. Oilco will also point out that State X has no oil wells or refineries inside State X. Putting these two facts together, Oilco will argue that by passing the statute, State X is promoting its own interests by encouraging the consumption of ethanol while harming out-of-state oil refineries and wells. Since State X has no oil refineries or wells, they will not be harmed by the statute at all. This, Oilco will argue, is discrimination against out-of-state interests and[,] thus, is violative of the Dormant Commerce Clause. Oilco will also point to the legislative finding that State X's statute will "expand the market for grains from which ethanol is produced", strengthening its argument that this regulation is merely economic protectionism, and violative of the Dormant Commerce Clause.

State X will counter by arguing the important interest exception: a state may discriminate against out-of-state interests where there is an important state interest in the regulation and there are no non-discriminatory options. State X will point to the legislative findings regarding the conservation of petroleum, and the reduction in pollution. These, State X will argue, are important state interests. State X will also argue that achieving these goals cannot be achieved by non-discriminatory means. State X will argue that in order to conserve petroleum and reduce pollution, State X must ban the sale of non-ethanol based gasoline inside the state.

Oilco will argue that there are available non-discriminatory means of meeting the state interests. Oilco can argue that a phaseout of non-ethanol based gasoline is a less discriminatory means of achieving their goals, and would provide time for out-of-state sellers of non-ethanol based gasoline to meet State X's stringent requirements.

State X may attempt to argue the market participant exception which allows a state to discriminate against out-of-state interests where it is a market participant. However, the

facts do not indicate that the regulation only applies when State X is purchasing gasoline. The effect of the regulation is to prohibit sale of all non-ethanol based gasoline to residents, and the State. Thus, the state will not successfully argue the market participant exception.

Because the statute discriminates against out[-]of[-]state interests, the court should find that the statute violates the Dormant Commerce Clause.

### Undue burden on interstate commerce

Even if the court finds that the statute does not discriminate against out[-]of[-]state interests, the statute will be invalidated if it unduly burdens interstate commerce. Here, Oilco will argue that it is a major retailer of gasoline inside State X. The effect of the statute is to prohibit all sales of non-ethanol based gasoline inside the state. Oilco will introduce their evidence showing the reduction in sales and profits, and will argue that if every state enacted similar statutes, the effect would greatly burden interstate commerce.

State X will argue that the statute does not significantly burden interstate commerce, as Oilco is still free to sell their gasoline in other states or comply with State X's regulations. However, since the impact of the statute will burden interstate commerce, a court would likely find that the statute is violative of the Dormant Commerce Clause.

### Equal Protection Clause

In order to assert an equal protection claim, Oilco will need to show some state action. State action exists where the act is an exclusive public function or there is significant state involvement. Here, the State X legislature passed a law. Thus, Oilco will easily be able to show state action.

The Equal Protection Clause of the 14<sup>th</sup> Amendment provides that the state must provide all citizens and organizations in their jurisdiction the equal protection of the laws. Where the regulation does not affect a suspect or quasi-suspect class, and where the regulation does not affect a fundamental right, the regulation must pass the rational basis test – that is, the regulation must be rationally related to a legitimate government interest.

Here, Oilco is an international corporation. The statute does not involve a suspect class – race or alienage – and it does not affect a quasi-suspect class – gender or legitimacy. The statute also does not affect a fundamental right such as 1<sup>st</sup> Amendment protections or the right to privacy. Thus, the rational basis test will be used in scrutinizing the statute. Under the rational basis test, a regulation will generally be upheld as long as it is not arbitrary.

State X will argue that there is a legitimate government interest involved – the conservation of domestic supplies of petroleum, and the reduction in atmospheric pollution. State X will

also argue that the prohibition of non-ethanol based gasoline is rationally related to the government interest, since the prohibition will reduce the amount of petroleum used in producing gasoline, and will also reduce the pollution because ethanol is cleaner than pure gasoline. Thus, the statute will pass rational basis, and the court will find no equal protection violation.

## Due Process Clause

### Substantive Due Process Clause

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The [S]ubstantive Due Process Clause prohibits states from infringing on a fundamental right. If the state infringes on a fundamental right, the action must pass strict scrutiny. Under strict scrutiny, the regulation must be necessary to achieve a compelling government interest. Where no fundamental right is involved, the regulation must pass rational basis – that is, the regulation must be rationally related to a legitimate government interest.

Here, the right to sell gasoline is not a fundamental right. Thus, the statute must pass the rational basis test. As explained above, State X will successfully argue that there is a legitimate interest in conserving petroleum and reducing pollution, and that the regulation passed is rationally related to achieve those goals. Thus, Oilco's claim under the Due Process Clause will also fail.

### Procedural Due Process

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The procedural Due Process prohibits the taking of life, liberty or property without due process of law. Oilco may assert that the statute takes away their right to sell gasoline inside the state without an appropriate hearing. However, the Court will not find a procedural due process violation because the statute was validly passed by the state legislature.

### Privileges and Immunities Clause of Article IV

The Privileges and Immunities Clause of Article IV prohibits states from discriminating against non-residents. The Clause does not protect against aliens or corporations. Here, Oilco is a corporation, and is not afforded protection under the Clause. Thus, any claim under the Privileges and Immunities Clause of Article IV will fail.

## Answer B to Question 1

1)

### Standing and ability to bring suit

The first issue is whether Oilco (“O”) can bring a suit against State X asserting that the statute violates the US Constitution. To bring a lawsuit, O must meet the following requirements: (1) standing, (2) ripeness, and (3) mootness. O has standing because it has suffered present injury that can be redressed by a favorable court decision. In addition, the lawsuit is ripe because O has suffered injury and thus the court would not be rendering an advisory opinion. And finally, the lawsuit is not moot because O is suffering from a live controversy.

### Protection of US citizens only?

While the facts do not clearly indicate whether O is a foreign corporation, assuming that it is a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, it should be allowed to challenge the constitutionality of the statute. The fact that O may not be a US corporation may preclude it from raising certain arguments, but it will not prevent it from bringing a lawsuit.

The following analysis in turn addresses each of the potential arguments.

### **1. The Commerce Clause**

The issue is whether O can assert that State X’s statute violates the Commerce Clause. The Commerce Clause provides Congress the power to regulate interstate commerce. The Dormant Commerce Clause or the negative implications of the Commerce Clause provides that even if Congress has not acted in a certain area, states may not be able to regulate those activities if they place an undue burden on interstate commerce. Under the Dormant Commerce Clause, O can make two separate arguments: (1) that the statute discriminates against out[-]of[-]stater, or (2) that even if the statute doesn’t discriminate against out[-]of[-]stater, it places an undue burden on interstate commerce and is[,] thus, unconstitutional.

#### Statute discriminates out[-]of[-]stater

The first argument O can make is that the statute discriminates out[-]of[-]stater. Where a state statute discriminates against out[-]of[-]stater, the Dormant Commerce Clause requires that the state statute must be necessary to an important state interest. Here, although the state statute does not discriminate out[-]of[-]stater on its face, O can argue that because state X is the nation’s largest producer of grain that is used in making ethanol

and because the use of gasohol will expand the market for grains, the statute in effect favors its in-state companies. Here, it's unlikely that a court will find that the statute discriminates against out-of-staters because it's neutral on its face - it regulates in-state companies the same way it regulates out-of-state companies.

If, however, the court does find that the statute discriminates out-of-staters, State X must meet the intermediate scrutiny test for regulations that discriminate out-of-staters. State X must show that the statute is necessary to meet an important interest. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Moreover, as indicated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of the country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

#### Market participant

State X may also try to argue that it is a market participant, thus has not violated the Dormant Commerce Clause. One of the exceptions of where a state can discriminate against out-of-staters is if it is a market participant. Here, the facts indicate that State X is the largest producer of grain used for making ethanol, but it's not clear on whether the state itself is actually a participant or simply that the companies within the state are the makers of grain. If it's only the companies within State X and State X itself does not produce any grain, it will not prevail in making the argument that it is a market participant.

#### Statute doesn't discriminate out-of-staters - balancing test

Where a state statute doesn't discriminate out-of-staters, in order to meet the constitutional requirements of the Dormant Commerce Clause, it must not place an undue burden on interstate commerce. In determining whether a statute places an undue burden on interstate commerce, courts will look at the state's interest and the cost of compliance. As discussed above, state X can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Moreover, it will argue that since it doesn't discriminate out-of-staters, the cost to all companies to comply will be the same. O can argue that the cost of compliance is great because as indicated in the facts, its sales and profits has [sic] decreased substantially because of the limited capacity to produce gasohol. It's not clear from the facts whether other companies are also affected and to what extent they are affected. But assuming that other producers are able to produce gasohol without a great deal of problems - - that the

cost of compliance is not great - - then the statute will likely meet the requirements under the Dormant Commerce Clause.

## **2. The Equal Protection Clause**

The Equal Protection Clause of the 5<sup>th</sup> amendment applies to the states through the 14<sup>th</sup> amendment. It provides that all citizens must be offered the equal protection of the laws.

As stated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

### State action

The first is whether there is state action. In order to bring a challenge under the Equal Protection Clause, there must be state action. Here, State X has enacted a statute[;] this requirement has been met.

### Classification

The Equal Protection Clause protects against different treatments of classes of persons or corporations. The first issue, therefore, is whether the statute classifies people differently. Here, O can argue that because the statute favors grain producers in State X, the largest producers in grain, it is treating the state companies differently than out[-]of[-]staters. State X, on the other hand, will argue that the statute is neutral on its face, it does not classify different companies[,] and thus the Equal Protection Clause does not apply. Here, because the statute does not treat any company based on a particular classification, a court will likely find for state X.

At best, O can argue that the classification is companies that produce grain vs. companies that, like itself, cannot produce grain for the ethanol. Even if O succeeds on this argument, it will be a rational basis scrutiny because this classification doesn't involve any fundamental right or suspect or quasi-suspect classification. O may argue that because its sales and profits in State X have decreased dramatically, it is impinging on a fundamental right to make a living. O will fail in this argument, however.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.



In sum, O will not be able to assert that State X has violated the Equal Protection Clause.

### **3. The Due Process Clause**

The Due Process Clause also applies to the states through the 14<sup>th</sup> amendment and it also requires state action. As discussed above, State X has enacted a statute[;] this requirement has been met.

State X can advance several arguments under the due process clause - - under the takings clause, the substantive due process clause[,] and the procedural due process clause.

#### Takings Clause

The Takings Clause provides that a state may not take the property of anyone without just compensation. In order to invoke the protection of the takings clause, O must show that the statute impacted its profits and in substance amounted to a takings [sic]. Here, O can show with reliable evidence that since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol. This fact, along [sic], however, is not likely sufficient to show that there has been a taking. It appears that O is still making money. Simply because the profits have decreased, O hasn't satisfied the burden of showing that it amounts to a taking.

Where a state legislation doesn't amount to a taking, the state will not need to provide just compensation so long as it is substantially related to an important interest. As discussed above, State X will likely meet this burden. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

#### Substantive due process

The substantive due process clause, which also applies to states through the 14<sup>th</sup> amendment, provides that the government may not take away life, liberty or property without the due process of law. To meet this requirement, it depends on whether the right infringed upon is a fundamental right. If it is not, then the rational basis test applied and so long as the statute is rationally related to a legitimate interest, it will be upheld.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

Thus, O will not prevail under this argument.

#### **4. The Privilege and Immunities Clause**

The Privilege and Immunities Clause of Art IV offers protections to individuals against state's discrimination of out[-]of[-]stater. It provides that if a state action discriminates out[-]of[-]stater [sic] residents, the statute must be necessary to achieve an important interest. The P&I clause, unlike the Dormant Commerce Clause, however, does not offer protection to corporations. Because O is a corporation and not an individual, it will not be able to prevail under the P& I Clause.