

**JULY 1997 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Constitutional Law*

**QUESTION**

A City ordinance enacted several years ago requires payment of an annual tax of \$700 by each household in City with two or more children. The tax applies only to people who have become residents of City since the effective date of the ordinance. Its stated purpose is to reimburse City in part for the additional public school expenses and costs of recreational facilities attributable to the new residents.

Paul and Pat, husband and wife, became residents of City since the effective date of the tax ordinance and live alone with no children. They have filed suit against City in federal court for a judgment declaring that the ordinance violates their rights under the U. S. Constitution to familial privacy, to due process, and to equal protection.

During discovery, Paul and Pat revealed that they are medically unable to conceive a child and have applied to adopt twins. Although the court had ordered that this information remain confidential and all references to it were ordered sealed, City's attorney has disclosed the information in a press release. Paul and Pat have amended their complaint to allege a third claim against City: i.e., that the disclosure by City's attorney violated their privacy rights under the U. S. Constitution, entitling plaintiffs to an injunction prohibiting further disclosures and allowing the court to impose sanctions for violation of its confidentiality order.

City has moved to dismiss the entire complaint on the following grounds: (1) the plaintiffs lack standing to challenge the tax ordinance, and (2) that, in any event, none of the alleged constitutional rights claimed by Paul and Pat were violated by City.

How should the court decide City's motion to dismiss? Discuss.

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**ANSWER A**

[1] JUSTICIABILITY

By moving to dismiss the entire complaint for lack of standing, the City has raised the issue of the justiciability of the dispute in federal court. In addition to standing, justiciability requires ripeness, that the issue is not moot, that circumstances do not require the federal court to abstain, and that no political question exists. Moreover, because suit is being brought against the City in federal court, it is useful to first consider whether the Eleventh Amendment will bar suit.

Eleventh Amendment. The Eleventh Amendment prohibits suits against states in federal court unless the state has waived its sovereign immunity or Congress has conditioned the receipt of a benefit on consent to suit or enacted legislation under §5 of the Fourteenth Amendment that allows suit against the states in federal court. However, the Fourteenth Amendment applies only to the states, and not to local or municipal governments. Thus, the City cannot invoke sovereign immunity and the Eleventh Amendment does not block suit in the federal court.

Standing. In order to judge standing - that is, to determine whether Paul and Pat are proper plaintiffs - the court must find three things: (1) an injury in fact; (2) causation; and (3) redressibility.

Injury in fact - In order to have suffered an injury in fact, Paul and Pat must raise more than a generalized grievance - that is, they cannot assert standing simply as taxpayers or citizens. Here, Paul and Pat have shown that though they are medically unable to have children, they have applied to adopt twins. Because the adoption of twins would bring them within the tax ordinance, and thus they stand to suffer an imminent injury in fact, they will have standing if causation and redressibility are met.

Causation - The tax ordinance is obviously the cause of the injury Pat and Paul will suffer, and any chilling effect they already have suffered, and thus the causation requirement is met.

Redressibility - In order to avoid issuing impermissible advisory opinions, the court must find redressibility. In this case, striking the ordinance will redress the injuries Paul and Pat have and will suffer, and thus the redressibility requirement for standing is met.

Ripeness. Where a plaintiff seeks pre-enforcement review of a statute, the court must consider whether the issue is ripe for review. This requires the court to weigh: (1) the hardship in the absence of pre-enforcement review; and (2) the fitness of the issues and record for review. Because Pat and Paul are already seeking an adoption and the case involves only questions of law for which the record is fit, ripeness will not be a problem.

Mootness, abstention, and political question. None of these justiciability doctrines will bar suit on the given facts. Even if Pat and Paul ultimately do not adopt, and mootness thus

# JULY 1997 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

## *Constitutional Law*

becomes a problem, the issue (if not one capable of repetition and evading review) will surely be raised by another plaintiff.

### [2] CONSTITUTIONAL CHALLENGES TO THE TAX ORDINANCE

The issue is whether the City's tax ordinance that requires a \$500 tax payment from each household with two or more children is constitutional. Paul and Pat have challenged the ordinance as violating their rights to familial privacy, to due process, and to equal protection. Each is considered in turn. There is no challenge based on the privilege and immunities clause of the Fourth Amendment as there is no discrimination against out-of-staters.

Familial privacy: Substantive due process. The challenge to the ordinance based on familial privacy is one which invokes the Fourteenth Amendment due process fundamental right of privacy. The Court has recognized a fundamental right of privacy under the due process clause that reaches the right to use contraception, to have an abortion, to refuse medical treatment, to direct one's children's education, and the like.

If the tax ordinance implicates these same privacy interests, the ordinance will face strict scrutiny review - is the ordinance necessary to serve a compelling government interest - which is strict in name and often fatal in fact. Even if raising funds for education and recreation facilities were a compelling state interest, the ordinance is not necessary to the achievement of that interest. A more narrowly tailored ordinance would tax only those children who attend the public schools (as opposed to private schools) and who use the recreational facilities.

In all likelihood, however, this statute would not be subject to strict scrutiny in the same way as would a statute that prohibited families from having more than two children or required sterilization after having two children. Instead, the Court will probably, at most, apply something akin to the undue burden analysis it has used in abortion cases since Casey to decide whether this tax places an undue burden on a family's decision whether or not to have more than two children.

If subjected to strict scrutiny, the statute will not survive substantive due process analysis. If subjected to undue burden analysis or a lesser level of scrutiny, the statute will likely survive.

Procedural due process. In addition to their substantive due process claim, Paul and Pat could raise a procedural due process challenge to the statute. Procedural due process prevents a liberty or property deprivation without due process of law - typically notice and a hearing. Such a challenge would not succeed in this context, however, where the city is not cutting off an entitlement but is instead imposing a tax. Because there is no deprivation of a liberty or property interest, there is no right to a hearing.

Equal protection. Pat and Paul can identify several classifications within the ordinance that arguably run afoul of the Equal Protection Clause of the Fourteenth Amendment. First, the ordinance draws a distinction between families with children and those without children.

# JULY 1997 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

## *Constitutional Law*

Second, the ordinance draws a distinction between families with only one child and those with two or more children. Third, the statute draws a distinction between families with two or more children who resided in the city before the ordinance was passed and those who have since moved there.

The biggest problem that Pat and Paul face in these equal protection challenges is that none of these classifications - those based on children, number of children, or duration of residency - will be enough to invoke more than rational basis review. Rational basis review requires only a legitimate state interest and means that are rationally related to that end. The City's fiscal interests are legitimate, and the imposition of a tax on families who place the greatest burden on and make the greatest use of the school and recreational facilities is rational. Even the duration of residence classification is rational, as the facilities may have been adequate for existing families but not for the increased strain of new families that require new facilities.

The only hope for an equal protection success is to invoke fundamental rights theory. Though education is not a fundamental right, the Court has recognized fundamental rights to travel and to vote under the Equal Protection Clause. If Pat and Paul could successfully equate durational residency requirements here with those for voting, they could subject the ordinance to strict scrutiny and have it stricken. Of course, durational residency requirements for voting touch more on the fundamental right to vote than the right to domestic travel, and thus strict scrutiny is unlikely in this non-analogous situation. And even if the ordinance were stricken, the City could simply enact a tax on all families, with two or more children and still reach Pat and Paul.

### [3] INJUNCTION AND SANCTIONS FOR PRIVACY ORDER

The final issue involves the constitutional validity of the court's non-disclosure order and of the injunction against further disclosures. At the outset, it is important to note that the press has the same First Amendment rights as ordinary citizens, and that the government has no duty to open itself or its records to the press with the exception of trials, from which the press cannot be excluded.

Non-disclosure order and sanctions. Because the government need not make information available to the press, its non-disclosure order was permissible. However, if the court did not simply keep the information from the press - which it may not even have been able to do - but instead prohibited the press itself from disclosing the information then, the Court's order amounted to a prior restraint on speech. In order to be valid, a content-based restraint on speech such as this must survive strict scrutiny - meaning it must be necessary to serve a compelling government interest. While the government may have a compelling interest in protecting citizens' fundamental privacy interests, the court's ability to order sanctions ultimately does not turn on the validity of its order. Rather, under the collateral bar rule, the City attorney (and the press, if the nondisclosure order included them), may be held in contempt without being able to challenge the validity of the order.

# JULY 1997 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

## *Constitutional Law*

Injunction. If the injunction applies only to the City attorney, it will likely be valid as a prior restraint on speech if the court finds the order necessary to compelling privacy interests. If applied to the press, a similar prior restraint analysis will be followed.

### **ANSWER B**

#### City's Motion to Dismiss

##### 1. Paul and Pat's standing

In order to pursue a claim in federal court, Paul and Pat need to show that they are or imminently will suffer personally an injury which is redressable by the court. This is required for the "cases and controversy" requirements of Article III. Here, Paul and Pat do not currently have children. In fact, they have only applied to adopt twins. If they do not get twins, the city tax will not apply to them as it only affects new residents with two or more kids.

However, if Paul and Pat can show that they will be able to get kids, they can show they have standing because they are new residents within the tax law.

#### Ripeness

In order to pursue a claim, Paul and Pat also need to show that the claim is ripe - that is, a full-fledged controversy is apparent and the record is complete enough for the court to review it. Here, the tax has not been applied to Pat and Paul yet and they are asking for a declaratory judgment. A court will grant a declaratory judgment only if: 1) the record will allow meaningful review, and 2) the hardship without review will be great.

Here, if Paul and Pat can argue that the tax is dissuading them from adopting, then that could be a serious hardship. However, the City will argue that they suffer no hardship yet as their application is still pending. The court will balance these arguments but will likely find they have standing due to the pending adoption, and the case is ripe, as they have enough information to see how the tax would actually work.

Even assuming the court finds no standing, it is still necessary to go through the argument. The court should note that this is not an issue of taxpayer standing - which is generally non-justiciable. Paul and Pat are alleging personal injuries-in-fact.

##### 2. Alleged Constitutional Rights

###### a. Substantive Due Process Right to Procreate or Raise Children

Paul and Pat can argue that the tax violates their fundamental right of privacy to have children. This is fundamental per the U.S. Supreme Court, and as such is subject to

# **JULY 1997 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS**

## ***Constitutional Law***

strict scrutiny. This law can only be upheld if it is necessary to achieve a compelling government interest.

### State Action

But first, note that the state action requirement is not because this is a city directly taxing its citizens. Also, the clause is in issue via the 14th Amendment. As noted, this law must meet strict scrutiny. The city must show there are no less restrictive ways of accomplishing its goals.

Here, the tax only affects new residents with two or more kids. The goal is to raise money for schools and recreation areas. While an important interest, it may not be seen as compelling. Certainly school revenue is compelling but recreation areas may not be. Additionally, it is not clear that the city is using the least restrictive means or that this law is necessary. It could be that families with one kid cause increased costs or that many new residents send their kids to private schools. If so, this law does not meet its goal or affect the right people.

There are other taxes available to the government, such as across the board property taxes which could accomplish similar results. Therefore, it is likely that the law could be struck down and therefore the motion to dismiss should be denied.

### b. Equal Protection - Classifications

The state action requirement is still met as discussed above. The EP clause applies to the states via the 14th Amendment. Paul and Pat can argue that this law denies them the equal protection of the laws. Here, there is a classification on the face of the law - it differentiates between old and new residents. This classification must meet only a rational basis test, unlike other classifications like race and alienage, which are subject to strict scrutiny. Here, Paul and Pat must show that the law is arbitrary and irrational - that it is not reasonably related to a legitimate government interest. However, Paul and Pat will not be successful. Raising money for schools and recreation is a legitimate goal. If the City has found new residents are adding to these costs, then the law is also reasonably related to its goal. Therefore, the law would not be struck down on this ground.

### c. Equal Protection - Right to Travel

The State Action doctrine is the same as discussed above. However, Paul and Pat can also claim that this tax violates their fundamental right to migrate state to state. The right to travel under the E.P. clause is subject to the strict scrutiny clause mentioned above. Usually the right to travel between the states is involved, and here it is the right to migrate between cities that is involved. Thus, the city can argue that this right is not implicated by its terms. Therefore, this would not be a good argument for Paul and Pat to

# **JULY 1997 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS**

## ***Constitutional Law***

raise. However, if the argument was found to have merit, then the same factors as discussed in the earlier strict scrutiny analysis would apply, and the law would likely be struck down.

### d. Due Process - Economic Regulations

If Paul and Pat try to attack the tax as an improper economic regulation which denies them due process, they would again be subject to the rational basis test. It would be their burden to show it is not reasonably related to a legitimate government purpose. For the reasons already stated, they would likely lose this argument, and thus it is not good grounds to challenge the tax.

### e. Procedural Due Process

Paul and Pat can also argue that the tax denies them procedural due process. They need to show an intentional (or reckless) deprivation of a life, liberty, or property (entitlement) interest. Here, the city is not depriving them of their right to have children. They are simply taxing them. Taxes generally do not require much process. Paul and Pat would not be entitled to a hearing because they have not suffered a deprivation due to the tax.

### f. First Amendment Concerns

Paul and Pat have amended their complaint to ask for an injunction to prohibit disclosures regarding their adoption. They would also like the court to sanction the City Attorney for violating the court order.

#### Prior Restraints

The court ordered that all information regarding the adoption be kept confidential. This amounts to a content-based prior restraint on speech. As such, it is subject to a strict scrutiny analysis. Prior restraints are seen as chilling the First Amendment right to free speech. The court needs a compelling interest to have the order be valid. Here, it can be argued that the court was trying to protect Paul and Pat's privacy and to prevent anyone from jeopardizing their ability to adopt twins. As adoptions are becoming more difficult, and babies hard to come by (if they were adopting babies), then the order may be seen as serving a compelling interest.

However, the City can argue that it was not necessary. The court could have ordered redaction of names instead of a complete ban. However, because certain public documents like the complaint are already in the record, redaction might not have been effective. Therefore, a good argument can be made that a ban was necessary. If the order is seen as necessary to achieve a compelling purpose, then the order was appropriate.

**JULY 1997 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

***Constitutional Law***

Violation of the Order

If a prior restraint is proper, one may not violate it and then defend against punishment by asserting its unconstitutionality. This is called the Collateral Bar Rule. The City Attorney should have appealed the order instead of violate it. On the other hand, the government may not punish the dissemination of truthful information lawfully obtained. Here, the City Attorney published truthful information regarding Paul and Pat.

Although it is a close call, the order will most likely be seen as invalid, the injunction will not be issued, and the Attorney not sanctioned because it was the publication of truthful information. Therefore, the Court will likely find that Paul and Pat have standing to challenge the tax, and the City's motion to dismiss will be denied because Paul and Pat have alleged at least one ground for overturning the tax (violation of fundamental right to privacy protected by substantive due process).