

## QUESTION 4

State X has a valid contract with public school teachers providing a fixed salary schedule. State X recently passed legislation to address its failing public schools. Now, when a school falls below established standards, each teacher at that school has 10% of his or her salary withheld each pay period for a maximum of two years. The withholding ends, and the money is returned with interest, upon the completion of a ten-hour certification program or termination of employment.

City High is a public school in State X where salary withholding has begun.

Bob has been a teacher at City High for the past three years. Paige is a highly-regarded probationary teacher at City High. A probationary teacher may be terminated for any reason upon written notice within the first year of employment.

Bob and Paige have been outspoken opponents of the State X law and its application to City High, appearing at various community and school board meetings throughout the school year.

Shortly before the end of Paige's first year of employment, City High served her with written notice terminating employment, and refunded the money withheld with interest.

Bob and Paige have sued State X, the Attorney General of State X, and City High in federal court seeking damages and injunctive relief. State X and the Attorney General have moved to dismiss the suit based on standing and the Eleventh Amendment.

1. Did City High's termination of Paige without a hearing violate the procedural due process guaranty of the Fourteenth Amendment to the United States Constitution? Discuss.
2. How should the court rule on the State and the Attorney General's motion? Discuss.

## **QUESTION 4: SELECTED ANSWER A**

### **1. WHETHER PAIGE'S TERMINATION VIOLATED HER FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS**

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty or property without due process of law. Due process generally requires a fair procedure, usually notice and a hearing. Under procedural due process analysis, the first inquiry is whether the plaintiff had a constitutionally protected liberty or property interest. If the plaintiff has a protected interest, the court will then balance that interest against the state's interests under *Mathews*. The court will also look to the risk of erroneous deprivation and whether additional procedural safeguards would reduce such risk. The issue for Paige (P) is therefore (1) whether she has a protected liberty or property interest, and (2) whether she was entitled to a fairer process.

### **WHETHER PAIGE HAS A CONSTITUTIONALLY PROTECTED LIBERTY OR PROPERTY INTEREST**

#### **Property Interest**

The issue is whether P's probationary employment at City High is a protected property interest. Traditionally, the Supreme Court differentiated between "rights" and "privileges" and provided that only "rights" are protected under the Due Process Clause. The Court since *Goldberg*, however, has held that a property interest is protected by the Due Process Clause if the plaintiff has a "legitimate claim of entitlement."

Under Supreme Court precedent, a tenured public school teacher has a protected property interest in their employment; however, a teacher does not have a protected interest if she is terminable at will during an initial probationary period. *Kelly*. P is a probationary teacher and may be terminated for any reason upon written notice within the first year of employment. There is also no indication that City High made her any

assurances that she would not be fired during the probationary period. P, therefore, does not have a legitimate claim of entitlement to her job and thus has no protected property interest.

### **Liberty Interest**

The Court has also recognized that when a person's freedom of movement is restrained (e.g., detention) or when a person's constitutional rights are denied, the person has a liberty interest that is protected by the Due Process Clause. P may argue that she was terminated during her first year, not because of poor performance, but rather in retaliation for her exercising her First Amendment rights in speaking out against the State's law that withholds teachers' salaries based on the school's performance. If P can make a showing that her First Amendment rights were violated, she could trigger due process protections and seek additional termination procedures beyond the written notice provided to her before she was fired.

Some speech is not protected under the First Amendment. Generally, the speech of a public employee made in the course of their employment can be regulated by the government employer. Employees' speech outside the scope of their work and regarding public issues, however, is protected by the First Amendment. P will argue that her outspoken criticism of the State law at community and school board meetings was not related to her job duties and therefore is protected. City High may argue that it was related to the job and therefore not protected. A court will likely find her speech protected.

Content-based regulations of speech must meet strict scrutiny; the restriction must be necessary to achieve a compelling government purpose. Content-neutral restrictions must meet intermediate scrutiny; they must be substantially related to and narrowly tailor to achieve an important government purpose. P would need to show that her termination was in relation for her speech, which would constitute a content-based regulation because it is based on her viewpoint. If P can make this showing, the state would have to meet strict scrutiny, and would likely fail. Regardless, P may be able to

show that she had a protected liberty interest in her Free Speech rights under the First Amendment.

### **MATTHEWS BALANCING TEST**

If the court recognizes P's liberty interest, it must apply the *Matthew* balancing test to determine whether she should have been entitled to any additional procedures beyond her pre-termination notice. The court will balance: (1) the private interest affected by the government action, (2) the government's interest including administrative and fiscal burdens, and (3) the risk of erroneous deprive and the value of additional procedural safeguards.

First, P has a relatively strong private interest in her job. Employment is the way individuals earn money to support themselves. Generally courts have viewed employment interests as quite weighty. Second, the state has an interest in not having to provide a full hearing on this type of probationary termination. The state likely saves a lot of money by not having to develop elaborate procedures to ensure that all of its termination decisions are fair. This interest is therefore quite strong. Finally, P will argue that the risk that she was fired because of her First Amendment rights is high, and that a few additional procedures such as allowing her to present countervailing evidence, or a hearing in front of the school board or committee would allow her to challenge the basis of the decision and force City High to justify their actions, or at least show that the basis of the decision was not to silence her.

The outcome of the *Matthews* test is difficult to predict. However, a court may require City High to provide at least minimal additional protections such as a post-termination hearing.

## **2. WHETHER THE COURT SHOULD GRANT THE STATE AND ATTORNEY GENERAL'S MOTION TO DISMISS**

## STANDING

The State and the Attorney General (AG) filed a motion to dismiss for lack of standing and under the Eleventh Amendment. First, standing is the issue of whether the plaintiff is the proper party to bring the claim before a federal court. The plaintiff must have a concrete stake in the outcome of the litigation. The Court has interpreted Article III's conferral of the judicial power over "cases" and "controversies" to require the plaintiff to show (i) that he has suffered an injury in fact (injury in fact), and (ii) that the defendant's conduct was the cause of that injury such that a favorable court decision will remedy the injury (causation and redressability). The issue for Bob (B) and P is therefore whether they can demonstrate injury in fact, causation and redressability.

First, the requirement that the plaintiff prove an injury in fact is generally satisfied if the plaintiff shows that they suffered an injury that was actionable at common law, such as pecuniary loss. However, the Court has also recognized an injury in fact where the plaintiff's constitutional or statutory rights have been violated. Environmental, aesthetic, and stigmatic injuries are also judicially cognizable. However, when a plaintiff is seeking injunctive relief, he must show that there is a concrete, imminent threat of future injury that is neither conjectural nor speculative. *Lyons*.

Here, B and P are challenging the State law seeking damages and injunctive relief. They would argue that they have suffered a pecuniary injury because a portion of their salaries was withheld. This is likely sufficient. City High may argue that because their salaries are refunded with interest if they are terminated or complete a certificate program, that there is no real financial loss. B and P, however, will probably succeed in arguing that even a temporary pay cut is a sufficient financial injury. The extent of the injury is generally de minimus. With regard to the injunction, B and P will likely succeed in arguing that they are presently suffering from the financial injury and that will continue in the future; therefore it is sufficiently imminent and concrete. In conclusion, the court should likely find that B and P have shown an injury in fact based on the loss of income, even if temporary. P may have an additional basis for standing by arguing that she was

terminated based on protected First Amendment activities. Either would likely be sufficient.

Second, causation and redressability are easily met here. B and P can clearly show that lost earnings are directly caused by the pay withholding required by the statute, and that a court order reimbursing them or enjoining enforcement of the statute would remedy this injury. In conclusion, B and P will likely succeed in showing that they have Article III standing, and therefore the court should deny the State and the AG's motion to dismiss.

## **ELEVENTH AMENDMENT**

The State and the AG also seek dismissal of the suit based on the Eleventh Amendment, which provides that a state is immune from suit in federal court. The Eleventh Amendment is similar, if not identical, to the doctrine of state sovereign immunity, which also applies to suits against states in state court. *Alden v. Maine*. A state may waive sovereign immunity under certain conditions, and Congress can override state sovereign immunity by statute using its enforcement powers under Section 5 of the Fourteenth Amendment. In addition, state officers may be sued in their official capacities to enjoin the enforcement of a state law under *Ex Parte Young*. A state officer may also be sued in his or her individual capacity for retroactive damages, and may be indemnified by the state. So the question depends on the party being sued and the basis of the claim.

The State may not be sued in federal court under the Eleventh Amendment. The court will therefore dismiss B and P's claims against the state. The AG, however, may be sued in his individual capacity to enjoin him from enforcing the state law being challenged. If B and P's claims allege that the AG is liable for their financial losses, he may also be sued in his individual capacity for money damages. However, B and P do not appear to have alleged that the AG is personally liable, or liable under a theory of respondeat superior; therefore he is likely not a proper party for the individual damages

action.

In conclusion, the court should grant the motion in part. The claims against the State should be dismissed. The claim for injunctive relief should be upheld against the AG, and potentially also the claim for damages if B and P allege that the AG is liable for damages.

## QUESTION 4: SELECTED ANSWER B

### 1. City High's Termination of Paige

#### 14th Amendment--Due Process

The Due Process clause of the 14th Amendment prevents the government from taking a person's life, liberty, or property without first giving them due process of law. The due process clause has been interpreted to have two sets of rights: substantive due process and procedural due process. Substantive due process prevents the government from arbitrarily denying rights. Procedural due process requires notice and a hearing before (or sometimes after) the government takes a person's life, liberty, or property. Here, Paige is claiming that she was deprived of her right to liberty in her freedom of speech and her right to government employment without procedural due process.

In analyzing a procedural due process claim, the court first determines whether a person's life, liberty, or property has been taken from her. Then, the court determines what process, if any, was due before or after the taking of this right. The Supreme Court laid out this analysis in Matthews v. Eldridge. The court balances three factors: (i) the individual's interest in the right at issue, (ii) the government's interest in efficiency, and (iii) the likely added value of additional protective procedures.

Paige's life has not been taken; thus her claim must be that she was deprived of a liberty interest or a property interest.

A person has a liberty interest in being free from being restricted in movement and in being free to engage in constitutional rights. Paige was not restricted in movement, but she may argue that she was restricted from engaging in a 1st Amendment right, the right to free speech. Sometimes the right to free speech intersects with government employment and the right of the government to control its employees. This is the case here because Paige is a government employee, but she also has been engaging in free speech as an outspoken opponent at various community and school board meetings of



a State X law that affects teacher pay. Generally, a government employee has a right to free speech on matters not connected with her employment, and any government restriction of this right is subject to strict scrutiny; it will only be upheld if the government action is necessary to achieve a compelling government purpose. This is a very high burden to satisfy and the government will usually lose. Here, Paige was engaged in speech not associated with her employment because she spoke out against a State X law in her individual capacity as a citizen, not as an employee. Thus, a court could find that if her firing was based on her speech (as she was a "highly regarded" probationary teacher) then she was denied her right to liberty without due process. To determine the amount of process that was due, the court will balance the Matthews factors and likely find that she was entitled to a hearing before termination. The right to speech is great and highly regarded in society and a hearing would be likely to remedy the wrongful termination to great process is added. Moreover, the government interest in efficiency would not overcome these other two factors.

Alternatively, Paige will argue that she has a property interest in her employment. For a person to have a property interest, the Supreme Court has explained that the person must have an entitlement to the property. This entitlement must come from something concrete such as a state law. Generally, employment is at will. In other words, either an employee or an employer can terminate a contract at any time without notice and for any reason (except an illegal reason). Such an employee does not have an entitlement to property because there is no promise of future employment. A tenured employee who can only be fired for cause, on the other hand, has an entitlement to continued employment and is entitled to notice and a hearing before her employment is terminated by the government.

Here, Paige was a probationary teacher at City High, a public school. As a probationary teacher, she could be terminated for any reason upon written notice within the first year of employment. While still in this probationary period, City High notified Paige of her termination. City High is a government actor because it is a public school. Thus the only issue is whether Paige had a property interest that could give rise to a right to due process before her termination. A court will likely find that because Paige's employment

was essentially at will during the probationary period, she had no right to continued employment. She was not entitled to future employment because as a probationary employee her contract clearly stated that she could be terminated for any reason. Thus, when City High terminated her employment, it did not deny Paige any property interest and no process was due.

If a court were to find that Paige had a property interest in continued employment at City High, then the next step the court would engage in is determining what process is due before the government can lawfully take the person's property.

Here, the individual's interest is great. Employment is an important aspect of a person's life because it is generally a person's greatest (if not their only) source of income. Being deprived of an income can have serious consequences on a person's life as they may be unable to pay their bills, put food on the table, etc. Thus, a person has a strong interest in continued employment. The government too has a strong interest here, though. The government would incur a significant cost by having to hold a hearing every time that it discharges a government employee. This could have a number of negative consequences. For one thing, it may result in ossification in government hiring because the government would be weary of entering into employment contracts if terminating such contracts would require a hearing. It would also place a financial burden on the state as it would have to pay for the procedures necessary for the hearing, which would be due every time the government seeks to fire an employee. Finally, as to the last factor--the value of the added protections to the individual's rights--a court would likely find this to be relatively little. There are many reasons for which the government may choose to discharge an employee, particularly a probationary employee, and most of these would be legal because employment is presumed at will. Thus, the hearing would probably provide little use, as the government would only need to show that it sought to discontinue the employment relationship.

In conclusion, a court may find that termination of Paige without a hearing violated the procedural due process guarantee of her liberty. However a court is unlikely to find that City High's termination of Paige without a hearing violated the procedural due process

guarantee of the 14th Amendment on the grounds of denial of a right to property.

## 2. State's and Attorney General's motion

The State and the Attorney General have moved to dismiss on standing grounds and the 11th Amendment. Each will be handled in turn.

### Standing

A plaintiff must have standing to assert a claim in federal court. Standing is a judicial doctrine developed from interpretation of Article III of the United States Constitution, which requires that courts can only hear "cases and controversies." The Supreme Court has interpreted this to mean that courts cannot give advisory opinions. For a case or controversy to exist, the plaintiff must have an injury in fact, caused by the action which the plaintiff is challenging, and the injury must be capable of being remedied by a judgment in his favor. An injury in fact occurs when a plaintiff has a concrete stake in the litigation that is not generally held by all other people. The injury is typically an economic injury, but need not necessarily be.

Here, Bob has standing because he can show injury in fact, causation and redressability. He is a teacher at a school that withholds 10% of his salary each period. This injury was caused by the State X legislation which Bob is challenging and it will be redressed by a judgment in his favor because such a judgment would rescind the legislation resulting in Bob receiving his full salary.

Paige too has standing. She can show injury in fact because she lost her job so she lost the income stream associated with that job. This job loss was caused by the fact that City High terminated her employment. And this injury can be redressed by an injunction requiring City High to rehire her and damages for her lost wages.

### 11th Amendment

The 11th Amendment to the United States Constitution has been interpreted by the U.S. Supreme Court to provide state governments with immunity from suit by private citizens

or foreign countries suing in federal court. There are a number of exceptions to the 11th Amendment's bar on private individual suits against the State, including when the State waives its sovereign immunity, and when Congress authorizes suit within its 14th Amendment powers. Moreover, even though the 11th Amendment bars federal courts from hearing suits brought by individuals against States, it does not prevent courts from hearing cases brought by individuals against State officers in their individual capacity or in their official capacity. However, the Amendment does bar suits brought against State officers in their official capacity if the suit seeks damages to be paid out of the State's treasury.

### Suit Against the State

Here, the suit against State X will be prohibited by the 11th Amendment. This is a suit by private individuals, Bob and Paige, against a State, State X, brought in federal court. As such, it falls within the 11th Amendment's immunity. Moreover, there is no evidence that the State has waived its sovereign immunity. Nor is there any evidence that Congress has abrogated sovereign immunity in accordance with its 14th Amendment powers for cases brought by teachers against the State for termination or withholding of wages. Thus, the case against State X should be dismissed.

### Suit Against the Attorney General

Bob and Paige have also named the Attorney General of State X in their suit. Whether this claim will be barred by 11th Amendment sovereign immunity will depend on whether Bob and Paige are suing the Attorney General in his individual capacity or his official capacity. If they are suing him as an individual, the suit, both for injunctive relief and damages, will not be barred and the Attorney General's motion to dismiss will be denied. The reason is that the 11th Amendment does not protect officials from suit in their individual capacity.

If Bob and Paige have sued the Attorney General in his official capacity, the 11th Amendment will have different effects on the suit for an injunction than on the suit for damages. The suit for an injunction will not be dismissed under the 11th Amendment because it does not prevent individuals from suing officials for injunctive relief. The 11th

Amendment will, however, bar the suit if the suit is for damages to be taken out of the State's coffers. Such a suit is barred by the 11th Amendment and the Attorney General's motion to dismiss should therefore be granted.