1)
Equal Protection

The constitution of the US provides for the guaranteed protection of several explicit and implied rights. Among these is the 14th amendments guarantee that no state shall deny their citizens the equal protection of the law. This concept of equally and evenly enforcing the law is rooted in our notions of "fair play and substantial justice," and is also said to be implied by the 5th amendment as it pertains to the federal government. The idea is that all people who are similarly situated should be treated the same. An equal protection violation occurs when a government body takes action that discriminates against a group of people in an unjustifiable way. This can occur either because the discrimination was based on a protected classification, or because the lawful classification infringes on a fundamental right.

In order to establish an equal protection claim, the challenger must show that 1) their is a real disparity in impact that is 2) intentionally created government action. This is called *de jeur* discrimination, or "by design." It occurs when the discriminatory purpose is discernable from the facial language of the law. Where this intent is not clearly evident in the law's language, it can be shown through proof of legislative intent, history of similar unfair laws in the area, a showing of overwhelming and unavoidable unfair impact, or other evidence. Either way, the challenger must show the court that the discrimination was intentional. Otherwise it will be deemed *de facto* "in fact" discrimination and will not be subject to any exacting review.

After establishing a claim for equal protection, the court will look to the classification being used in the law. Suspect classes such as race, national origin, religion, and alienage (for state and municipal gov's) will be treated with *strict scrutiny*, this puts the burden of proof on the government to show that they used the 1) least burdensome means available to 2) substantially further a 3) compelling government interest. Where a non-suspect classification is involved, only a rational basis standard is used. The burden in this case is on the challenger to show that the gov's action is not 1) rationally related to a 2) legitimate state interest. This is most basic standard of constitutional law that all laws must pass in order to be valid. Between the two tests, an intermediate level of scrutiny is used to evaluate discrimination based on *quasi suspect* classes, which again puts the onus on the gov to show that their action was 1) significantly related to a 2) important gov interest, and that 3) the means used was no more restrictive than necessary to accomplish that end.

Finally, even where no suspect class is implicated in the law's discrimination, if the law does have a discriminatory impact on any *fundamental rights* as provided by the due process clause of the 5th amendment or the bill of rights, then the law will be subject to strict scrutiny no matter what classification it draws.

The Save our Cities Act
This law is violative of equal protection principles for many reasons. First, it restricts the right to vote, a fundamental right, but it only does so for a certain classification of people. Second, the law restricts and or impinges on the right to travel, another fundamental right. Lastly the law violates the economics rights associated with the freedom to contract, as it prevents people from obtaining transportation as they see fit. In addition to violating several fundamental rights by way of a discriminatory practice, it also discriminates on the basis of one or more protected classes. First, it discriminates on basis of national origin (anyone not born in the US), it discriminates on the basis of alienage (where you are from, whether or not you are/were a citizen), and it also arguably is intended to discriminate on the basis of race, although the language of the law is facially neutral.

Basis of National Origin

Anyone challenging this law should first argue that the law attempts to discriminate on the basis of national origin. It's very facial language clearly applies it's no-vehicle section to a suspect class of people, those born in nations other than the United States. Omar will say that as a native of Kenya, he falls under the class of people not born in the United States, and that this is a suspect class. The gov will argue that the classification is one of alienage, and not national origin. They will say it is applied evenly to all those born outside the United States, and therefore does not single out any national origin. Omar can argue (if this is indeed true) that he is a citizen of the United States, and that the law does not direct itself toward any citizenship status (alienage) but rather toward the birth place of the individual (national origin.) If he is persuasive enough, the court will recognize this suspect class and put the burden on the state to satisfy the strict scrutiny test defined supra. The state will argue that the influx of immigrants and attendant societal problems created an urgent situation that must be addressed, and that this is a compelling state interest. They will also argue that this law significantly furthers that interest by limiting the amount of cars and preventing people from getting a car until they've decided to really stay here. They will also argue that they've employed the least restrictive means available by allowing vehicles after the time limit, and not banning vehicles for out-of-staters all together. They will probably lose this argument as the strict scrutiny test is nearly impossible to satisfy. Therefore the provision of the law discriminating on basis of national origin would be stricken.

Basis of Alienage

The government will argue that the law is actually discriminating on basis of alienage, which is a different class. They will argue that this type of discrimination is only afforded a rational basis level of scrutiny, because the government has the power to regulate immigration and naturalization. If the state of CA were the federal government, this argument would hold water; the federal government does have that power and that power does trump the suspect classification of alienage for equal protection purposes. However the states themselves, through the 14th amendment, are not allowed this luxury. This is a power reserved to congress, and not given to the states, therefore, states are held to a strict scrutiny level of review when discriminating based on alienage. Again they will argue that they have a compelling interest based on the immigrant influx problem. They will probably lose. Although they may have a compelling interest in their state natural resources, environment, and other concerns mentioned, this law preventing driving rights to those on the basis of alienage is simply not substantially enough related to furthering those ends, and it is not the least restrictive means necessary to accomplish those ends.

Basis of Race

Although the other two classifications were arguably present from the face of the law, this classification is not. It is really just a *de facto* side effect of the law's enaction. Omar happens to be from an area that is a suburb of a large city, and he happens to be black. Susie is from a smaller town that is not a suburb, and happens to be white. The careful observer might note that *most* urban areas and their suburbs tend to have higher populations of blacks, immigrants, and non-English speakers. That observer might also note that *most* non-urban or suburban areas tend to be largely white, English-speaking, generally "easy to assimilate" folks. There appears to be some talk on the record of racist sentiments floating about the assembly floor as the law was debated, and there is even an insinuation that the governor made a racist comment when signing the bill. Of course all this evidence is circumstantial and flawed, but if it is able to coalesced into a solid argument, the challenger may show that the law was in fact designed to discriminate on basis of race, which is a suspect classification and would again trigger strict scrutiny review, supra. The gov would argue first that the governor's comment was not about

race but simply about all the urban undesirables we have flooding into our state, and that Victor's comments are hearsay without further proof. This would be difficult to show, as the law is facially neutral with regard to race. However it isn't necessary because the alienage classification was enough to trigger the highest standard of review.

Basis of Wealth
The law, through section (c), also as the effect of discriminating on the basis of wealth. Although it does not facially say that, it could be argued that the only rational interpretation of the section possible leads to the inescapable conclusion that the effect will be solely to allow those with money to escape the prohibitions of the law. Typically, economic status is not sufficient to warrant a suspect class determination. It is usually treated as non-suspect, and would only be afforded a rational basis level of review. The gov will argue that they don't need "transient" state citizens voting in their process until they've determined that the citizen will be in the state for a while, and that the one year limit is a rational way to achieve this legitimate end. Omar will argue that this is true, but that the law has the effect of infringing on voting rights, which makes the non-suspect discrimination subject to strict scrutiny, and he would be right. The right to vote is discussed infra.

Fundamental Rights
The due process clause of the 5th amendment has been held over the years to imply and include a variety of unenumerated rights, often called the *fundamental rights*. Although not explicitly listed in the const., they have been held to exist since justice Douglas's famous decision in the *Griswold* case where he spoke of the rights "emanating" from the bill of rights and the 5th amendment, and those which hide in it's "penumbras." (that portion of a shadow where the light is not completely eclipsed by the object.) Although controversial (even amongst current sitting members of the high Court), this view of fundamental rights has withstood the test of time and still forms the basis for many of our constitutional protections.

Among these are the right to travel, the right to vote, the right to the courts and legal process, economic rights of contract, livihood, plying one's trade, etc, and the privacy rights; marriage, intimate association, family relations, child-rearing, and reproduction. All of these rights, with the exception of abortion (reproduction) and economic rights, are afforded a strict scrutiny level of review whenever a challenger can show a substantial violation of that right due to government action. They can be brought up in the context of a substantive due process claim, or in the context of equal protection, were the discriminatory impact, although not target at a suspect or quasi-suspect class, is felt upon one's fundamental rights. In either context, the rights warrant strict scrutiny review.

Right to Travel
Omar has a fundamental right to freedom of movement, he is free to move and travel about the country without restriction or undue burden. Omar will argue that his right to travel to California, and about California, is being substantially hindered by the no-auto law. First, the law discourages people from other states from even going to California because once their they will have no reasonable means of travel. Omar will argue that large suburban areas around California have inadequate public transportation (this is true in LA and outside of the immediate Bay Area) and that the discrimination preventing him form getting a car therefore leaves him with little realistic options. The government will argue that there compelling interest in environmental and resource scarcity concerns justify this. They will also argue that the law limits his freedom of travel as little as possible, and will also argue that numerous limitations and regulations stand between Omar and the privilege to drive once he gets here, and that driving is not a right that he would have a vested expectation in. Finally they will argue that the law in no way limits is other means of transportation.

Right to Contract
Omar will also argue that his 5th amendment due process right to contract, or economic rights, are being violated by preventing him from engaging in the transaction of his choice to procure motor vehicle transportation. He would be right, the law is not allowing him to purchase or rent a vehicle for any meaningful length of time. The government will argue that economic rights are only afforded a rational basis level of scrutiny, and that Omar will have to show that the law is not rationally related to any legitimate end. He will lose. The gov is clearly legitimately interested in regulating the amount of cars and new vehicle registrations, and this law does rationally relate to that.

Right to Vote
Lastly, the law infringes on Omar's right to vote. The right to vote is fundamental right afforded strict scrutiny protection. This one is easy. The government will not be able to show any compelling purpose, and this portion of the law would be stricken.

Excellent!

Conclusion
Section A is stricken for being violative of the 14th amendments guarantee of due process rights and equal protection amongst citizens of the several states. It discriminates on an impermissible basis, that of alienage, and is therefore invalid. Section B and C of the law work together to selectively deny a substantive fundamental right, the right to vote, to a non-suspect class, but is still strictly scrutinized and therefore invalid for lack of compelling interest that is substantially furthered by least restrictive means. The entire law is unconstitutional and void.

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2)
The First Amendment
The 1st amendment to the constitution of the united states guarantees that no law shall pass limiting the freedom of speech, the press, or the establishment or free exercise of religion. These rights have been held to be imputed upon the states as well by virtue of the 14th amendment, which through it's due process and equal protection clauses, protects all citizens from any state or municipal as well as federal gov action that is unconstitutional.

1) The Free Exercise Clause
The free exercise clause was intended to prevent the government from limiting the freedom of people to exercise their religious beliefs, traditions, ceremonies, and other religious conduct. Any intentional violation of this clause is facially invalid and void. However modernly challenges under this law tend to arise where people are either indirectly banned from religious activities, or have an incidental burdening on them. The most frequently used test to determine if a law violates the free exercise clause is the Sherbert test, which requires 1) that the person challenging the law have a sincerely held religious belief and 2) that the impairment of the exercise of this belief be substantial. If this test is met, the government is burdened with meeting a strict scrutiny level of review. *Strict scrutiny* requires that the government show they used the 1) least burdensome means possible to 2) substantially further a 3) compelling government interest.

Dr. Josef will argue that he is in fact an observant, faithful Jew, and that the precepts of his religion prevent him from performing abortions. It won't take much; some expert testimony, maybe a passage from the Torah, etc... to show that this action the government is compelling him to take will in fact force him to substantially violate his religious faith. Since this will be easy to show, the government will have to establish that they have a compelling interest in providing

equal and uniform health care to all, and that they have a compelling interest in making sure that women's 5th amendment due process right to abortion is not systematically obstructed by well-intended religious employers and health care practitioners. They will argue that a comprehensive statute is the only remedy, that it substantially furthers this end, and that the unfortunate burden on Dr. Josef is the most minimal burden they could narrowly tailor the law around. They will probably fail. Forcing a doctor to perform an abortion against his religious beliefs is simply to great a religious freedom infringement to be justified by this level of government interest.

2) The Establishment Clause and Religious Accomodation

Sen. Boxer has an interesting point, and one that comes up frequently when debating religious constitutional issues. Do you allow the free exercise, and thereby raise the spector of an establishment clause violation, or do you ignore it, and face a free exercise violation? The well-intended government regulator is damned if they do, damned if the don't, so-to-speak. First, any law that on it's face attempts to patently endorse, establish, or otherwise support a given religion by a government body is facially invalid and void. However, laws like this are never passed anymore, today they are much more subtle, and require some level of close review. The court over the years has settled on the *Lemon* test for deciding this matter. Under the Lemon test, the court will first ask if 1) the law has a secular purpose. Then they ask if 2) the law directly advances or impedes religion in general. Lastly they will examine 3) if the law fosters any excessive entanglement between the gov actor and religion. In this case, Boxer is arguing about what the law *would have been* had it included a religious exception clause, so let's evaluate that hypothetical law under Lemon. First, the law would have had a secular purpose. It would not have been passed for any reason other than to equalize access to abortion and other health care services across employers and providers. Second, the law would not have had the primary effect of advancing nor impeding religion. In fact, as the law stands, it *does* have a secondary effect of impeding religion by incidentally burdening some believers with a command to perform procedures they are religiously opposed to. Had the law included the exception, it would have had zero net impact on current religious practices. Lastly, the law would have fostered no entanglement; those who don't wish to perform abortions would not have to. It is arguable that the law as it stands creates more entanglement than it would with the exception clause; as it stands the gov will have to be sure that no religious organizations are flouting the rule, which involves oversight, enforcement, and punishment. Under the Lemon test, it is hard to see how the proposed law *with* the exception for religious belief would have violated the establishment clause.

The real issue here is one of religious accomodation. The Courts have already noticed that this cyclical, establishment vs. exercise vs. establishment circular argument is likely to arise, and they have derived a specific test for it. First they will 1) check if the accomodation in the law is actually a response to a previous burdening of religion that the law created, and 2) verify that it is viewpoint or denomination neutral. Then if the accomodation section of the law passes those two checks, it will be subject to a more lenient version of the Lemon test designed to allow for the accomodation. In this case Sen. Boxer's advisors should remind her that an accommodative section in the law would meet this test, and Lemon, and therefore bypass any attempts by either side to confound the court with a never-ending circular argument about establishment vs. free exercise.

3) Content-Based Regulation and Fighting Words

A fighting words statute is an example of content-based regulation of speech, which is typically subject to strict scrutiny. However "fighting words" are themselves an excepted category of unprotected speech when they are found to meet certain criteria. First, the speech must be the type that would tend to incite "unthinking violent response" from a reasonable member of the

community, and would create a threat of "serious violence" if uttered. The exception is meant to carve out an exception for the type of incendiary and provocative language that is used to incite another to fight. In this case, the words uttered by Dr. Josef are simply not of the type contemplated by this exception. First of all, the circumstances of the case are taken into consideration. Here, Dr. Josef was not "in somebody's face" when he said what he said, and given the type of extreme situation he was confronted with, they are not unreasonable things to utter. They were not aimed at any one person trying to incite a fight or violence, and they are not the type of thing, that when yelled from some distance, would spontaneously invite an unthinking violent response. Therefore this would not be a fighting words case. The better argument for the state to use is one of *clear and present danger*. This exception, modernly decided under the *Dennis* test, will allow a gov actor to limit speech by it's content when said content is the type that is intended to and would likely cause and "imminent threat" of "immediate serious violence" or disturbance of the peace. The city could argue that by confronting the protestors with such incendiary language, he was intentionally trying to flare them up and start some sort of scene. Under the *Dennis* test, the likelihood of the threatened disturbance is weighed against it's severity. Here, although a serious violent incident could erupt, the facts don't suggest that Dr. Josef's comments were about to send a torch-burning lench-mob storming down main street. It's more likely a minor altercation could have occurred in his driveway. Therefore, under Dennis, because the potential severity of violence was not very great, and the likelihood that the Dr.'s comments would cause it is not high, the clear and present danger test would also fail, and therefore Dr. Josef's arrest does violate his first amendment protected-speech rights. The state will have to show that they have a *compelling* interest in the public peace that was substantially furthered by arresting Dr. Josef, and that this was the least burdensome way to achieve that end. It's hard to think of how they would plausibly frame this argument in a way that could actually succeed. Dr. Josef's first amendment rights are simply too valuable to be trumped by such speculative concerns, therefore his arrest is invalid.

4) Symbolic Speech, Obscenity, and Vague/Overbroad laws

Dr. Josef's graphic displays are an example of *symbolic speech*. The court over the years have been faced with numerous cases that have forced them to decide *what speech actually is.*, and if that form of speech is protected, what level of protection it is entitled too. There are forms of unprotected speech, such as fighting words, criminal or fraudulent speech, and obscenity. However Dr. Josef will argue that this was a form of symbolic speech, and although not directly emanating from his vocal chords, is still a protected form of expression, and he would be right. However symbolic speech, because of it's physical nature and potential attendant consequences, is not afforded the same level of protection as spoken or written speech. The test used is the one from the *O'Brien* case, where the court uses an intermediate scrutiny level of review. First they ask if 1) the law at issue serves an *important* gov interest, then they will decide if 2) the law is *unrelated* to the form of speech that is effectively proscribed, and 3) if the law is no more burdensome than necessary to achieve it's desired end. In this case, the law in question does serve an important government interest. Keeping the streets and building around the city attractive is a valid interest under the aesthetic concerns typically governed by municipalities under their inherited police power. The law however is not "unrelated" to the type of speech, it directly targets a type of speech, so it is in fact a content or viewpoint-based restriction on speech. Lastly the law is more restrictive than necessary, or is being applied that way here; Dr. Josef's home is his private property, and although the images are visible in public, there is no constitutional right to "not be offended." Under the O'Brien test, Dr. Josef's symbolic speech is constitutionally protected and therefore his arrest under this law is invalid as well.

Dr. Josef could (and absolutely should) also argue that the law is *vague* and *overbroad*. Vague

laws are presumptively invalid as a due process violation. One of the fundamental precepts of "fair play and substantial justice" is that the gov has to adequately put the public on notice of any criminal penalty, and adequately describe it so as to give the people at least a reasonable opportunity to avoid violating it. In this case, language like "offensive images" is way to vague. There is no way for a citizen to determine what is "offensive" to all, to some, or to one, so this law should fail for that reason alone. As well, the law is arguably overbroad. Even if it does constitutionally limit unprotected speech, it will also have the effect of outlawing and chilling a wide variety of lawful, protected speech, and therefore is facially unconstitutional and invalid.

If the state wants to outlaw something, they should try using the word "obscene" instead of offensive. This is because obscenity has been held to be an unprotected form of speech. The court in *Miller* set forth a three-prong test to determine if a given expression is obscene. First the court will 1) determine if the expression appeals only or mainly to the prurient interest. Next, the court will determine 2) if the expression contains *patently offensive* sexual depictions, and 3) try to redeem the expression by looking for any social or academic value, of an artistic, scientific, religious, or political nature, or something of the like. The facts here give no indication of anything obscene. First there was simply no sexual images depicted, and the displays by Dr. Josef clearly communicated his political, religious, and social viewpoint on an important issue in the public discourse; that of abortion. Therefore there is no exception to the constitutional ban on content-based restrictions of speech that would justify Dr. Josef's arrest.

5) Permits, Prior Restraint, and Time Place and Manner restrictions In the Public Forum
First, where a government acts to prevent speech from being uttered *prior* to it's utterance, this is called a prior restraint, and is presumptively invalid. Although statutory permitting schemes and the like have been held to be valid so long as they aren't arbitrarily applied, here Dr. Josef could argue that the city's denial of his permit, based solely on his separate viewpoint, is a non-viewpoint neutral, arbitrary application of the permit scheme that amounts to a prior restraint. As such the cities denial could be subject to injunction by a court to grant Dr. Josef his requested permit should he meet all other permitting requirements.

The city will argue that the permitting scheme is a viewpoint-neutral regulation of the *time, place,* and *manner* of speech that Dr. Josef seeks to express. Time, place, and manner restrictions are typically found to be appropriate where cities must balance safety, the public use and enjoyment, and the overall public peace with the right of some to demonstrate, protest, or celebrate. In this case, the permitting scheme is designed solely to regulate the *way* in which people speak, not *what* they speak or *that* they speak; just how they speak. Typically these regulations are subject to a medium level of scrutiny. The government must show that 1) no less restrictive means were available to 2) significantly further this 3) important government interest. The gov will argue that their interest in public safety and use of shared public resources is more than significantly furthered by this permitting scheme, and that no other scheme is available to achieve this end in this way. They are probably right; permitting schemes have been widely upheld so long as they are evenly applied and viewpoint neutral. Here, it's the viewpoint-sensitive application of the permitting scheme that is running afoul, not the law itself, but the refusal is still impermissible under constitutional standards.

To bolster his argument, Dr. Josef should remind the court that the sidewalks and streets are a *traditional public forum.* These include places like parks, city squares, town hall squares, sidewalks, and streets, where since "time immemorial" people have gathered and socialized, engaged each other, debated, and generally furthered the public discourse. Any regulation of such a place is afforded the full protections of the first amendment, and the sidewalks near Dr. Josef's house are no exception.

6) Viewpoint Discrimination

This is an example of *viewpoint discrimination*. Typically, where the gov acts to pass a permissible regulation of speech, it still must be *viewpoint neutral*. Therefore the regulation enhancing the charge against Omri is based on what is arguably an unconstitutional viewpoint-sensitive speech regulation. The gov will argue that the law is a permissible hate-speech ban, based on "fighting words" and "clear and present danger" exceptions. Racial slurs, hate speech, religious slurs, etc. do tend to cause violence and animus in the community, and there are constitutionally permissible ways to limit their use on public property. However, where unprotected speech is divided into *categories* within a law, that invites scrutiny as to the nature of those categories, and whether nor not they are impermissibly viewpoint-based. In this case, the language of the law in question appears to single out hate speech based on race, ethnicity, or religion. The facts aren't clear if these are singled out or are simply included in a much larger list precluded by the language "not limited to...". The court will look to determine if these are just examples, that are the type of speech already targeted by the ordinance anyway, or if they are intended to work as exceptions to the ordinance. The evidence that Omri is also Jewish would help in his defense, as the crime seems to be based on intent, but it is unclear form these facts if the law could withstand 1st amendment scrutiny.

END OF EXAM

Fantastic! 85

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