1)

======== Start of Answer #1 (1546 words) ========

1) Sylvia's Equal Protection Claim

The Equal Protection Clause of the 14th Amendment requires that states equally apply the law to all similarly situated persons. While the Constitution does not expressly impose this condition on the Federal government it is implied in the Dur Process Clause of the 5th Amendment and the same criteria is used in assessing the Constitutionality of federal laws under equal protection as is applied in laws passed by states. The level of scrutiny applied to laws which discriminate based on some classification of persons will depend on the basis for the classification and the nature of the right at issue. If the classification is based on race, national origin, or alienage (in the case of state action) then the classification will be considered suspect. In this case strct scrutiny will apply; the governement will bare the burden of showing that the law serves a compelling government purpose and does so in the least restrictive manner. If the classification is based

on gender, illigitamacy or alienage (in the case of federal action) than it will be considered quasi-suspect. The scrutiny applied is inermediate, meaning the burden is on the government to show that the regulation is substantially related to an important government interest. Finally, all other classifications are considered non-suspect. Here the person attacking the law will bare the burder of showing that it is not rationally related to a legitimate government purpose.

In addition to these classifications, strict scrutiny will be applied whenever a fundamental right is being deprived by a government action. Fundamental liberties are those that are deeply rooted in the nations historical fabric. They include rights related to privacy, including the right to marry, to procreate or not procreate, and the right to live together as a family. Also considered fundamental rights are the right to vote, the right to travel between states, and the right to procedural due process.

This Amendment to the Affordable Care Act has created a classification based upon gender, as well as

pregnancy and motherhood of a child under six-months. Sylvia will claim that she is being discriminated against due to her classification as man under federal law. A classification based on gender will receive intermediate scrutiny, thus the government will be required to show that the discriminatory law is substantially related to an important governement interest. Here, the government will surely argue that the law is limited to pregnant women and mothers of infants because they are the ones who would benefit from the education provided by the grants. The government is providing these grants because society as a whole will benefit from having mothers who are better able to care for themselves and their babies during this important time, potentially saving health care dollars in the long run because both the mother and baby are less likely to suffer health problems down the road. The education, in fact, is targetted for the most part specifically to the needs of pregnant mothers, as pre-natal nutrition, breast feeding orientation for new mothers and birthing classes could truly only be utilized by a pregnant women. As such it would be silly to offer these educational services to non-pregnant

persons, who have no ability to become pregnant.

Sylvia will likely point out that the education also entails post-natal care, which she could benefit from (assuming my understanding is correct that post natal care refers to the care of newborn and not to the mother post birth.) This is a valid point, as she as the parent of a newborn would benefit from such education, regardless of her gender. In this manner, limiting the benefit to women does not substantially relate to an important governement interest. It is questionable though this would be sufficient to invalidate the law.

Sylvia will also claim that the amendment discriminates against her because she is trangendered. Transgender would fall into the class of non-suspect so Sylvia would have to show that there was no rational basis for the discrimination. This would be a difficult burden as the law must merely be conceivably related to advancing a legitimate government interest. Surely the government is interested in promoting the health of pregnant women and their newborns.

Sylvia would also have a problem because the law does not facially discrimimate against transgenderd people. When a law is facially neutral, it will not be invalidated on equal protection grounds unless it can be shown that the discrimination was intended (de jure). Here there is nothing to imply that there was any intent to do so, thus the discrimination is merely incidental (de facto).

Sylvia will finally argue that her fundamental rights are being affected, particularly her right to procreate and raise a family. As stated earlier if a fundamental right is affected, strict scrutiny will apply. She will claim that as she will be adopting a child in the near future she entitled to these benefits related to child bearing and child rearing. The government will respond that the right to have children is not being interfered with, merely her entitlement to certain educational services. This is not a curtailment of her right to have children. The government's argument will likely prevail.

Sylvia may also have issues regarding standing and

showing of any damages. The birth mother of her child would be a better candidate to raise these issues.

2) Karen and Dr. Bob may raise several Equal Protection objections regarding §600.10. Karen has standing because she is directly affected because she is unable to receive a procedure which she needs. Dr. Bob has standing both because he is directly affected because he is not receiving income that would be derived from operating on Karen, and as a third party standing in the place of Karen and other potential patients who will not be able to receive care.

Location

First, by defining participating hospitals as only those in "urban" (I think this what the text was supposed to say) the government has created a classification based on location. However, location is a non-suspect class, and it would appear that there is a rational basis for focusing fundin in urban areas; the unique health challenges in those

communities" referred to in the Committee notes. The challenge would fail on these grounds.

Facially, there are no other classifications that would give rise to an equal protection claim. However, it would appear that the section does have a discriminatory affect against those of both higher incomes and against whites. To assert an equal protection claim the court would have to determine that this discriminatory effect was not merely de facto, but was instead de jure. To do so the Court would look to the legislative history. The Committee report indicates that the support for urban hospitals was intended to better serve the poor, non white communities. In regard to s discriminating in a manner that favors the poor, the law would need only to meet the rational basis test, which it likely would. It makes sense to funnel resources to those areas where more medical attention is needed, especially in light of the higher incidents of contagious disease.

However, discrimination based on race, which is specifically discussed in the Committee notes, would have to meet strict scrutiny and therefore would almost certainly

fail because the government would have to prove that there is a compelling interest in giving funding for the treatement of non-whites, and doing so is the least restrictive way of serving this purpose. Of course the least restrictive way would be to allocate the resources based on the highest geographic and economic need, which the law seems to intend to do.The question is whether the mere inclusion of the words "non-white communities" is sufficient to show an actual intent to discriminate based on race. It likely is not.

Is there a compelling gov purpose for racial preference?

Dr. Bob may also claim that his economic rights are affected because he is unable to perform his work and thereby earn his living. However, economic rights are not fundamental and will only recieve rational basis scrutiny. Again, the law is rationally related to the legitimate government interest in focusing funding in areas where medical need is greatest.

Claims against Ramos

Dr. Bob and Karen will claim that Ramos wrongfully discriminated against them in violation of their equal

protection rights based on their race. Ramos will claim that his statement about looking after his people was related to those within his urban community and had nothing to do with race or income. If the statement is interpreted in this manner and he can show that resources at the hospital, such as bed space and operating rooms, are limited then this preference for those within his community is likely rationally related to legitimate interest of serving those in his community.

If however, the Court finds that his statement reflected his intent to discriminate against Bob and Karen because of their race then strict scrutiny would apply and he would be found to have violated their equal protection rights. Given his prior statements regarding Latinos being the superior race and the fact that his staff and patients are almost entirely Latino an argument could definititly be made. However, in the end, there does not seem to be enough evidence to establish a definite intent to discriminate based upon race.

Excellent Answer.

======== End of Answer #1 ========

2)

======== Start of Answer #2 (3310 words) ========

Question 2.1: Where Dr. Bobs First Amendment [Rights] infringed when Dr. Bob was denied a permit to state a counter demonstration?

The First Amendment guarentees freedom of speech. Freedom of speech under the 1st Amendment was selectively incorporated to the states in the 1920s in Gitlow v. NY. The question does not state if this takes place in Washinton DC or a State, but the remaining of this question, and other subparts, will be analyzed on the basis that it takes place in one of the 50 states.

Freedom of speech is not absolute. Governments may impose reasonable time/place/manner restrictions on speech as long as they are content neutral. Here, Dr. Bob applied for a permit for a counter demonstration. The park is a traditional public forum, and the government may restrict access to it on the basis of getting a permit. What the government may not due is deny some permits and grants others based upon speech which it disagrees or disapproves of. Dr. Bob will argue that in a similar case, when the KKK tried to burn a cross in a traditional public forum, the municipality was not allowed to not allow such a demonstration on the basis that it disapproved of the KKK's message. Here, Dr. Bob will argue that his permit was denied because the local municipalty did not approve of his speech. Dr. Bob will argue that even the police, after he told them that the other protext, by Bill W. was unpermitted, did nothing to stop that protest, thus endorsing Bills speech over Bobs.

The municipality may argue that it would have denied Bill a permit as well to demonstrate in that park. Traditional public forum restrictions are analyzed on the basis of intermediate scrutiny and it must be shown that there is an (1) important government

interest, and that (2), the regulation is substantially related to that interest. The facts do not bear out the situation in that park, but there are conceivably government interests which might allow a denial of permits for demonstrations in that area. There are certain areas which have endangered salamanders in Sonoma County, which are near parks, and other things, and it may be found that allowing demonstrations in those areas would be dangerous to that population. There are other examples such as this, but not knowing the facts, it is unclear from the facts where there is a legitamite reason for the denial of the permit or not.

The fact that the police did not respond to Dr. Bob's complaints also may be explained by the government. Perhaps this is a small town and has limited resources which were occupied. Again, there are potential reasons why this might not show that they were endorsing somehow Bill W's message of Dr. Bobs. Though the police arrive at the end of the protest when words are spoke and a fight could have ensued, that does not mean they were there the entire time, or that they knew that Bill W did not have a permit to protest, other than Dr. Bob telling him they didnt have one.

Dr. Bob is still guilty of not getting a permit for his counter protest, however, if it can be shown that he was arbitrarily denied his permit, he may be able to vindicate his actions.

Question 2.2: What First Amendment based defense or defenses to the charges against him for protesting without a permit and "disturbing the peace" can Dr. Bob raise?

As stated above, Dr. Bob will likely argue that the governments denial of his permit constituted viewpoint discrimination by the government. This may or may not be true, as argued above. Non-Neutral Viewpoint discrimination by the government is presumptively invalid (TBS v. FCC) and the government must be wary as the Courts would rather allow speach and punish it later, rather than chill it before it even begins. Here, the denial of the permit to stage a counter protest may have been valid, but there is a strong presumption that the government will have to overcome in order to succeed.

Again, Dr. Bob can vindicate the charges against him by showing such discrimination.

Secondly, in regards to "disturbing the peace" Dr. Bob will argue that this also chilled his speech impermissibly.

First, this statute appears to be criminalizing "fighting words" or an "incitement of unlawful conduct".

Fighting Words:

Fighting words has been a convulted doctrine, and it is unclear its role currently. What is clear is this, in the Chaplinsky case, the court held that Free Speech can be abridged is the words were intended to:

1. provoke an immediate violent response
2. produce an emotional harm

Here, Dr. Bob, quoted the Bible, and said "all who draw the sword wil die by the sword." At this point Bill W. charges Dr. Bob. Bill W. is a seasoned abortion rights activist, and it would be remarkable if he had not heard biblical phrases before. Further, Dr. Bob could not have anticipated that this would produce any emotional harm to Bill W. Bill might even be confused, thinking, no one here has a sword, wait, I dont have a sword, how would I die by one? It would be unreasonable for Dr. Bob to believe that these words would provoke such a violent response from Bill W, or other pro-abortion protestors.

Interestingly as this theoretical argument could prehaps be, the Supreme Court has not upheld a single conviction under such a "Fighting Words" statute since 1942. This pattern would not be reversed in this case.

Incitement of Illegal Activity

The government could argue that Dr. Bob's statements could be an incitement of illegal

activity as well. In order for this to be the case, the government would have to show that it called for immediate and unlawful action. Almost Justice Bork, whom Dr. Bob likely greatly respects, believes that this is not a constitutionally protected area of speech. However, Justice Brandies, and many many other justices recognize that even distasteful speech which advocates illegal action will be consitutionally protected unless it calls for immediate and unlawful action.

Here, Dr. Bobs statements do not rise to the level of incitement of illegal activity. He is not telling his supporters (if there are any), to pick up swords and kill Bill W and his supporters. This could be overcome however, if it was shown that there were swords and Dr. Bob wanted them to pick them up and start hacking at people. In the end, the government, if it chose to attempt to prosecution on this theory would lose.

Question 2.3 In an action for defamation brought by Dr. Bob, what First Amendment defense or defenses can be raised by Bill W.?

Defamation is not protected under the First Amendment. However, there are cases which analyze when a tort cause of action is allowed or not. Notably, in Ny Times v. Sullivan, SCOTUS fashioned the actual malice test for public figures. That standard states that there can be no recovery in a defamation cause of action by a public figure unless they show that the person knew, or should have known what they were saying was false.

Here, Bill W. said that Dr. Bob was a "terrorist" and his "hate filled crusade against freedom must end." First, is Bill W. a public figure? Did he weild his access to the media in order to defam Dr. Bob? Since Bill W. is a nationally known abortion rights activist, it is likely that he is indeed a public figure. As such, Dr. Bob will have to show that his statements were made with actual malice. That may be difficult here. Bill W. will argue that his statement of "terrorist" was an opinon, and as such, was protected by the First Amendment. In Bill W's opinion, Dr. Bob is a terrorist, actual malice due to that fact. Dr. Bob will attempt to challenge that definition of terrorist cannot apply to him, and

as such, his reputation has been damaged by Bill W's words. However, In the context of Bill W's other words, that Dr. Bob is on a "hate filled crusade against freedom", Bill W is likely to succeed in his defense against a defamation cause of action. Based upon the fact that is his lawful opinion, or that it is the truth [at least relatively]. The truth is, that Bill W. sincerely believes that Dr. Bob should not be restricting access to abortions. As such, his opinion that hes on a crusade, which corresponds nicely with the fact that Dr. Bob is making statements about swords, constitutionally protected.

Funny

Question 2.4 In the action brought by Jane Roe, what First Amendment based arguments or defenses can be raised by Dr. Bob? Please discuss, *among other things*, commmerical and symbolic speech.

The First Amendment to the U.S. Constitution starts with two clauses, which state that the government shall not restrict the free exercise of religion, nor establish it. These two clauses are known as the establishment and the free exercise clauses. If taken to their logical absolutes, they are in conflict with each other. To remedy this issue, SCOTUS has come up with various tests in order to determine what conduct falls within acceptable bounds of each. Dr. Bob will use the Free Exercise Clause to defend himself against the Establishment Clause claim of Jane Roe.

Dr. Bob is also likely to argue that he is not impairing any right of Jane Roe, and that any ruling that he has to remove his signs and preform the abortion would be unconstitional as they would constitute forced symbolic speech and forced commercial speech.

Fundamental Rights

Jane Roe will argue she is allowed to sue Dr. Bob because he is impairing her ability to get an abortion. The right to an abortion has taken a tortorous path legally, through Griswold, to Eisenbardt, then exploding with Justice Blackmuns medical opinion in Roe

v. Wade in 1973, through Justice O'Connors refinement in Planned Parenthood v. Casey, and even after Justice Altio replaced Justice O'Conner, the Supreme Court is unlikely to reverse Roe and has not stated that states cannot "unduly burden" abortions in Sternberg (2003). The right to an abortion is here to stay.

However, just because Jane Roes is allowed an abortion, does not mean that Dr. Bob has to perform it for her. Dr. Bob has rights as well. Dr. Bob has been taking Federal Grant money, but that Grant Money was specifically for non abortion, prenatal care. It did not cover abortions. Dr. Bob has the right to his convictions, and his convictions, which state that he should not perform an abortion. He will argue that being forced to perform the abortion violates his Free Excercise of Religion RIghts.

Free Exercise Clause

Dr. Bob will likely argue that his free exercise rights allow him to hold his opinion that abortions are wrong and not perform them. The free exercise clause states that the government will not interfere with an individuals religious beliefs. Chief Justice Warren once remarked that 'the allowance of religious beliefs is absolute." Though they may not really be absolute, they are still strongly protected.

President Clinton passed what is known as the Religious Freedom Restoration Act, which allows individuals free exercise claims to be handled under a strict scrutiny analysis ("The Sherbert Test"), unlike in states when it is under a lesser test established in Smith. Post Smith, there was concern about RFRA's constitutionality, when it was held that it was an unlawful extension of Congressional power to force it on the states. However, the constitutionality of RFRA against the federal governement was cleared up in Hobby Lobby v. Burwell, which held that closely held for-profit corporations can exercise religious views and not cover certain contraceptives for their employees under the ACA.

The Sherbert Test states that when a plaintiff has a sincerely held belief, which is infringed by governement action, then the government must show that it has a

compelling interest and that its restriction of free exercise is the least restrictive way to accomplish that goal.

Dr. Bob will assert that a similar analysis should govern here. Dr. Bob has a sincerely held belief that abortion is murder, evidenced by his signage and passionate counter demonstration against Bob. W. However, this is where the analysis will get confusing. The government would be forcing him, through a court order to perform the abortion for Jane Roe. This would be a huge infringment, and as such, would be forced to show a compelling interest and that this is the least restrictive way of accomplishing that goal.

This situation appears similar to states which are currently passing laws highly restricting abortions. Oklahoma and other midwest and southern bible belt states are making it difficult to get an abortion due to limited availablilty. If Dr. Bob is in one of those states, and there is no where else for Jane Roe to get this abortion, she may have a cause of action. However, this would be a drastic departure from that situation, as this would be the Federal Government ordering a doctor to perform the abortion. The governemnt would likely have to show that there are no other abortion clinics anywhere that could accomplish this in order to succeed. Its difficult to contemplate that the government or a judge would go that far, but there could be circumstances where it could come up in a distant extreme future.

Emotional Distress Damages

Jane Roe is going to claim emotional distress for the pictures hung in Dr. Bob's Office. The analysis above for Dr. Bob's free exercise claims would apply here too. Dr. Bob would contend that Jane Roe cannot sue him for emotional distress for his free exercise of his religion. Further, emotional distress is not within Jane Roe's standing under the limited standing granted by the term of the grant, and is likely to be dismissed on those grounds.

Grant as Support for Religion

Jane Roe is going to argue that by the government giving Dr. Bob a grant, and him using it to put up the signs, there is an establishment clause violation. This may be the case, especially with the one which has a bible verse.

Establishment Clause

Even Justice Thomas Agrees that the Establishment Clause applies to the Federal Government (Elk Grove School District [arguing perhaps its not incorporated to states however.]) The Establishment Clause merely states that there shall be no establishment of religion, but the definition modernly of this clause and what it meant to Adams at the signing of the Constitution are greatly different. At the time of the signing, many states had established churches, though they all died out before the Civil War. What is clear, is that Jeffersons ideas of strict seperation are seemingly advancing. Along with the strict seperation analysis for the Establishment clause, there are two other ways which is is analyzed, first, on a neutrality approach, and secondly on accomodation approach. Most Justices currenly on the bench prefer the neutrality approach, however, Justice Kennedy has hinted that he might prefer a different approach, involving the Lee Coercion Test, which has so far only been applied to some school prayer cases. Here, it is likely the neutrality approach would be used to analyze whether Dr. Bobs actions violated the Establishment Clause somehow. The seminal case for this approach used to be the Lemon Test, which states that the governments actions must have a (1) secular purpose, (2) do not advance or inhibit religion, and (3), there is no excessive entanglement.

Here, the government grant clearly has a secular purpose. To provide for pre-natal, non-abortion related care.

The governments actions do not advance or inhibit religion, it is Dr. Bob's actions which are doing so by him buying the signs and putting them up.

Lastly, it is unclear that there is excessive entanglement here. Dr. Bobs surgery center is not a governement establishment, and it is unclear that any individual going there would see the signs and believe that the government was behind them. This is not the

government posting the 10 commandments in a courthouse, this is an indivdual doctor posting signs in his doctors office. As such, there is likely no excessive entanglement.

If there was to be some issue here, it is likely related to the sign with the bible verse on it, as that would produce more entanglement than merely "Choose Life, Choose Bob."

Commercial Speech

An area of the First Amendment that is special in terms of its restrictions on speech is commerical speech. Dr. Bob's signs could be held to be commercial speech in this situation. Though slightly changed in 1989, the Central Hudson test states that in order for this area to be regulated, it must be in regards to an (1) unlawful or misleading speech, (2) important government interest, (3) substantially related to that government interest. Clearly unlawful or misleading speech is not protected by the First Amendment. Here, the speech is neither misleading or unlawful. Its not misleading to show a premature baby and state a bible verse. Its clearly stating Dr. Bob's position. Again, its not illegal to chose life. Thus, the signs are allowed under the first prong. Next, is there an important government interest which is being addressed here by not allowing such speech? Jane Roe will argue that the government should not allow Dr. Bob's signs as they are infringing her important governmental interest to an abortion, to liberty, etc. This likely would not pass constitutional muster, and if it did, an order to remove the signs would be grossly overreaching. A judge would not order that the signs be taken down because they are impermissible commercial speech.

Symbolic Speech

Forcing Dr. Bob to perform the abortion would in essence be forcing him to speak. Just as one has the right to free speech, they also have the right to say nothing as well. Here, a court order to perform an abortion would be symbolic speech that Dr. Bob endorsed abortion. The O'Brien Test for symbolic speech states that, like burning a draft card, certain symbolic speech is protected by the first amendment. The O'Brien test states that the government must show that not only is its restriction related to an

important state interest, but that it also does not infringe on the right to speech, and if it incidentally does, that it only as much as necessary to realize the governments goal. If the government was to order that Dr. Bob perform the abortion, it would be forcing him out of his outspoken speech against it, into symbolic support. This would be unreasonble, unless it was a grossly extreme situation. There could be a potential situation, as previously stated, where no one is performing any abortions in a given area. Then possibly the court could order that Dr. Bob perform such an abortion, but that would be extreme and the judge would have to show that there was no other alternative. Perhaps the mothers life was in danger (which the facts are unclear if Dr. Bob is against abortion in this situation), but assuming he was, it might be ordered that Dr. Bob save her life at the expense of the childs. This would be a horrible situation for all involved, and I imagine that a judge would have a difficult time doing so.

Also under this analysis, an order removing the signs from Dr. Bob's building would be forced symbolic speech. Essentially he would be acquiesing to a different viewpoint than his own. There are likely no scenarios where Dr. Bob's right to his opinion, his liberty, would be allowed to be infringed like that. Perhaps as before the government would take away his funding, but its unlikely a judge would order him to be a shill for the governments position on abortion.

======== End of Answer #2 ========
END OF EXAM

Another Fine Answer.

Q 2 = 90