**Question I**

In addressing the Constitutionality of the policies, actions, and pending suit of WU, the first issue is whether WU is a state actor, since the Constitution only applies to state actors. To be a state actor, WU must be playing a state role, there must be a state rule being enforced, or the state is deeply entangled with WU. Under *Jackson* and *Marsh*, if WU is performing a traditional state role, exclusively provided by the state, then WU is a state actor. After school care is not a traditional state role, nor is it one exclusively provided by the state. So WU would not be a state actor in this context. There is not a state rule at issue. WU may be deemed a state actor because of its entanglement with the state. Under *Burton*, if there is a symbiotic relationship between the state and the private business, the business is a state actor. Here, 90% of WU's funding is from the state, WU follows several policies proscribed by the state and WU is helping to serve the interest of the state in providing child care for low-income families. This suggests deep entanglement, but under *Yaretsky*, a state regulated, subsidized Medicaid program was not considered a state actor. Personnel decisions of private school have been deemed not state action, but a school athletic association was a state actor (*Rundell-Baker*; *Brentwood*). Because of the entanglement, involvement of children, the educational environment, notwithstanding *Yaretsky*, we should prepare for the likelihood that the court will see WU as a state actor. Even if WU is not a deemed state actor, compliance with the Title 888 program may require compliance with the Constitution because of its non-discrimination policy (though sexual orientation is not specifically mentioned) and requirement of compliance with other federal law. Lastly, if there is an anti-discriminatory law that parallels the Civil Rights Act and the WU is seen as a place of public accommodation, then some of the policies may be challenged as violating that law. Thus, the issues are analyzed as though the Constitution applies to WU.

Supposing WU is not a state actor, but the federal government requires Constitutional compliance for Title 888 recipients and so challenges WU's policies for non-compliance. I would counter with a separate argument that the federal government is placing an unconstitutional condition on the Title 888 program. The compelled financial disclosure of WU could be seen as forgoing the constitutional right not to speak in order receive the government benefit.

The no sexually explicit texting policy should be rewritten to have a greater likelihood of being found Constitutional. The act of sending sexually explicit material is expression protected under the First Amendment. There is no obvious viewpoint restriction, but the policy is a content-based restriction specifically targeting sexually explicit images. Content-based restriction is subject to strict scrutiny unless an exception applies. Children sending these images is not government speech or government funded, so these two exceptions do not apply. The aim of the policy is to prevent posting on the internet the sexually explicit images of the children. The policy is also content based, so the secondary effects exception also does not apply. Sexually explicit material is considered indecent speech and is less protected. For indecent material, the court emphasizes the mode of media. Under *Sable* and *Reno*, for telephones and internet, indecent expression must meet strict scrutiny. The interest in protecting the privacy of children, preventing nude images of children from being posted on the internet is compelling; however, the policy as written is overbroad and not narrowly tailored to those means. The policy also prevents the adults and children from sending sexually explicit material that does not involve children, and from sending it privately, without exposure to others. Alternatively, children likely do not have a protected right to engage in sending sexually explicit material at all. The adults may have a less protected interest in engaging in this activity while they are tending

the children. Given Medwed's stated concern, I suggest rewriting the first sentence as follows: The transmission of sexually explicit images *involving minors* via text message is prohibited. ✓ Under *Ferber*, the court has said that child pornography is unprotected speech and so the policy as rewritten would be Constitutional and narrowly tailored to address WU's interest. There is a concern that although a whole category of speech may be banned, singling out certain speech ✓ within that category can be seen as content-based discrimination. See *Ashcroft* and *RAV*. So I would consider making the policy broader to include prohibiting all dissemination of child pornography, including sexually explicit nude photos. Further research may be required.

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The policy addressing head lice also needs to be rewritten. This prompts an equal protection issue singling out the class of people under 15 who had relatives visit from West Africa. This is not a protected class, so rational basis is used. The interest in health is important, and given the evidence, the policy is rationally related to that interest. However, because the policy mentions relatives from West Africa, the court may sense that blacks are being singled out and apply rational basis with bite (*Moreno*; *Cleburne*). If the opposing party shows disparate impact on blacks and discriminatory intent, strict scrutiny would be the standard (*Washington v. Davis*). The policy as written would not even survive rational basis with bite since it is overinclusive (some children who have visiting relatives don't have lice) and underinclusive (some children have lice who do not have visiting relatives). I would suggest rewriting the policy to submit all children to regular lice exams.

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The policy regarding gay teens is likely invalid under Equal Protection. There is a facial classification being made: homosexual teens. Although unsettled by the Supreme Court, homosexuals are either a quasi-suspect class and intermediate scrutiny applies, or they are not a protected class and rational basis is used. The factors considered are that gays have a history of

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discrimination; homosexuality does not affect the ability to contribute to society; and homosexuality is generally considered an immutable characteristic (so central to a person's identity that it would be abhorrent for the government to ask them to change it). The issue tends to turn on whether the court finds gays to be politically powerless. This strongly coincides with the state's stance on gay marriage: if the state is for gay marriage, gays are politically powerless and a quasi-suspect class; if against, they are not politically powerless and not protected. See *Varnum*, *Conway*, and *Kerrigan*. The fundamental right at issue is a bit unclear given the facts. The policy is designed to help gay teens; however, a right to privacy may be implicated. If a gay teen is 'in the closet' then likely he is not being harassed and the policy should *not* implicate that the teen be required to 'come out' to staff member. This would have severe privacy infringement and would not survive rational basis. However, if the teen is openly gay, he or she may still not wish to be singled out because of orientation, treated differently, or be 'open' to the public at large (if the teen is seen with a chaperone of the opposite sex, this signals that he is being treated differently, that he is gay, depending on how widely know the policy is). If rational basis is used, the interest in preventing harassment is important and the policy is rationally related to serve that interest given the fact that gay teens are harassed when seen walking with someone of the same sex. The policy would likely not survive intermediate scrutiny because the policy does not substantially further the interest. Kids often tease each other for many other reasons than sexual orientation. If the interest is stated more broadly for children not being harassed, it is underinclusive. Also, if gay teens are being harassed, likely they will still be harassed regardless if they are with someone of the opposite sex and so it is not well tailored. Also, there is an issue in labeling a teen 'gay' for the purpose of the policy. Perhaps teens are

bisexual or are not yet sure about their orientation and are not comfortable having to be labeled as gay or straight.

Holding the party at the church may violate the Establishment Clause. Under *Allegheny*, if the action of the state is seen as an endorsement of a religion then that action is unconstitutional. Endorsement is 'the government action is likely to be perceived by adherents as an endorsement of a religion or a disapproval of other religious choices.' *Id.* When a single religion is being held out, the court tends to strike the state action down; but when several messages are being conveyed, a more general message is permissible (*Allegheny*; *Van Orden*). Holding the party at the church with no other religious affiliations being represented likely violates the Establishment Clause.

If WU wishes to hold meetings of its church after hours, then it needs to charge its church the same amount as it does other religious groups and open up the opportunity to all organizations. By allowing groups to gather after hours on the premises, WU is opening up a designated public forum and cannot discriminate between groups. In *Rosenberger*, the university funded student papers and was found to be a limited public forum that may content discriminate, but not viewpoint discriminate. WU cannot limit the use to only religious groups because of the secular message this sends (*Santa Fe* and *Weisman*). Charging everyone, and opening up the facility to all would likely be viewed as a non-secular purpose, not promoting religion. If the goal is to promote their church over other churches or over other groups in general, that goal cannot be facially obvious or the policy will be struck down (*Valente*).

In considering the tort claims, they will likely be unaffected by the first amendment since distributing a sexually explicit image of a minor falls under the category of unprotected speech because it is akin to child pornography (*Ferber*). Also, the suit involves private people and

matters of private concern, so there is no core first amendment right at issue and all the Georges would have to show for defamation is falsity (*Dun & Bradstreet*). For intentional infliction of emotional distress, the Davies daughter is not a public figure and she is a minor, so the Georges first amendment rights here probably will not affect the claim.

Words: 1740

**Question 2**

Under the First Amendment Smith is entitled to free speech which includes posting information on the internet. Smith advocates legalization of marijuana which is core political speech and much protected. Shutting down the entire site is inadvisable because this would be a prior restraint and seen as singling out Smith for his viewpoint, Smith cannot avail himself of the collateral bar rule if the injunction is later found unconstitutional, and his speech may be less harmful than supposed (there are variety of sources in existence with the same information). This would not survive the intensive intermediate scrutiny standard required for prior restraint because of the strong presumption of unconstitutionality for the lawful content of his website and this is not the least restrictive alternative.

Next, Smith's content regarding how to grow marijuana should be allowed to remain. Under the *Brandenburg* test, the speech is not likely to cause *imminent* harm, and so would not fall into the category of incitement, which is an exception to the first amendment. Smith's website could be seen as a commercial entity since he charges people and commercial speech is less protected. Under *Central Hudson*, the speech then fails to be protected because it is informing the public about *unlawful* activity. However, if Smith's is a non-commercial, non-profit organization (which he likely will argue), then this is a content-based restriction and strict scrutiny is applied. There is an overbreadth, overinclusive issue in that people residing in a state

where marijuana is legal have a right to this information. This information may be viewed as being tightly linked to his core political speech of legalizing marijuana and may have a chilling effect. Considering the vast resources available regarding how to grow marijuana, including television shows and magazines on hydroponics, it is likely that there is an underlying issue that Smith is being singled out for his viewpoint. Also, Smith lobbies the government, he is active in the democratic process which makes him more sympathetic as a political activist.

Removing the information about advising people on how to evade police would likely survive even strict scrutiny because there is no interest served by advising people how to be better criminals.

Although the website promotes illegal activity, it also promotes a political viewpoint and informs others of this viewpoint as well. Therefore, criminalizing access to such a website is unconstitutional. Rosky has a first amendment right to access information from a website that includes core political speech. By clicking on the support for marijuana button and giving money in support of that political viewpoint, she was exercising her first amendment rights (*Buckley*). Though Smith is not running for office, he does heavily campaign and lobby for a political issue and so *Buckley* should apply. Viewpoint based discrimination is automatically invalid. There is also a chilling effect here: people who wish to be informed about this political issue would be afraid to gather information for fear of prosecution. Lastly, if Rosky wishes to be part of a political group that lobbies for marijuana, then this poses a substantial restraint on her right to freedom of association. Under Strict Scrutiny, there is not a compelling interest in suppressing someone from being part of a group that is trying to change a law, even if the law is well grounded.

In considering Rosky's right to free exercise of her religion, the first question is 'Is Rastafarian a religion?' Under *Seeger*, a religion is a 'sincere and meaningful devotion that occupies a place in your life in a similar way that God occupies in a traditional religious person's life.' Here, Rastafarians worship a God and take sacrament, so likely this will be deemed a religion. Also, the courts are hesitant in saying what is a religion and what isn't. This issue is similar to the peyote use in *Smith*. Using the *Smith* test, the law criminalizing marijuana is neutral and generally applicable, and unless there is another constitutional right at issue, then rational basis is used. Rosky may argue her right to core political speech regarding legalization of marijuana is also at issue. However, this should not be regarded as an exception in the *Smith* test or this would be a slippery slope: anytime someone committed a crime they could claim a religious belief and a political stance regarding the legality of the crime for which they were arrested. Marijuana smokers all over Utah would join the Rastafarian movement and claim this exemption. Thus, rational basis applies and Rosky's criminal charge should stand, at least regarding her free exercise of religion.

Words: 759

Total Words: 2499

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