

**[Note: In addition to the discussion questions, this exam included  
1 hour of multiple-choice questions.]**

I. (1 hour)

The paragraphs below are the opening of a federal district court opinion by Judge Barefoot Sanders (only very slightly edited). Your task is to complete the opinion for Judge Sanders.

Before the Court is Plaintiff's Motion for Preliminary Injunction. Plaintiff Matt Bourgault ("Bourgault") seeks a preliminary injunction enjoining Defendants the Chancellor, Vice-Chancellor, and Chairman of the Board of Regents of the University of Texas System from "applying the speech requirements set out in Board of Regents' Rules and Regulations for the University of Texas System and Campus Policy of the University of Texas at Arlington for off-campus speakers to the individual expression of Matt Bourgault."

Bourgault is "a professing Christian and a traveling evangelist for his religious beliefs." Specifically, Bourgault travels to public universities throughout the country to preach and hand out pamphlets to college students as part of his ministry with Consuming Fire Campus Ministries. Although he does not actively solicit money, he stands next to a box marked "Donations Gratefully Accepted and Appreciated."

On April 22, 2002, Bourgault visited the University of Texas at Arlington ("UTA"), a component institution of the University of Texas System ("UT System"), and began to preach from a pedestrian area near the University Center on the university campus. The parties stipulated that the campus contains streets, sidewalks, parks, and pedestrian malls. Some time after he began to preach, Defendant Sergeant McCord of the UTA police approached Bourgault and informed him that he needed permission from the student governance office to speak on campus. Bourgault went to the student governance office and filled out an application. On the application, Bourgault requested the use of a "free speech forum near Library or University Center; to preach from Bible to students." He identified himself as an off-campus speaker and identified Consuming Fire Campus Ministries as the organization seeking to hold a campus event. He also indicated that there was no student organization cosponsoring the event. Defendant Jeff Sorensen, the Director of Student Governance and Organization for UTA, denied Bourgault's request and wrote "Not approved per Univ. Policy" on the application.

On June 21, 2002, Bourgault's attorney wrote to Defendant Sorensen, explaining the above described events and requesting permission that Bourgault be allowed to speak on campus. Defendant Sorensen forwarded Bourgault's attorney's letter to the Office of General Counsel for the UT System, who replied to Bourgault's attorney in a letter dated July 3, 2002, that because Bourgault is not a student, faculty member, or staff member of UTA, he cannot engage in speech activities on the UTA campus. The letter cited the Board of Regents' Rules and Regulations, "Rule 6.1"<sup>1</sup> and

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<sup>1</sup>Rule 6.1 reads:

The property, buildings, or facilities owned or controlled by the U.T. System or component institutions are not open for assembly, speech, or other activities except as provided herein. The responsibility of the Board of Regents to operate and maintain an effective and efficient system of institutions of higher education requires that the time, place, and manner of assembly, speech, and other activities on the grounds and in the buildings and facilities of the U.T. System or component institutions be regulated as provided below.

“Rule 6.2”<sup>2</sup>. Additionally, the Office of General Counsel informed Bourgault that he “may not engage in the desired speech activity even if he is sponsored by a student organization” and cited “Rule 6.71”<sup>3</sup> of the Regents Rules. Finally, the letter informed Bourgault that if he attempted to engage in speech activities on the UTA campus, the authorities would take “appropriate action in response.”

Bourgault filed the instant case on January 20, 2004, almost 18 months after receiving the letter from the Office of General Counsel. Along with his Verified Complaint, Bourgault also filed the instant Motion for Preliminary Injunction, asking that the Court enjoin any enforcement against him of “the speech requirements set out in Board of Regents' Rules and Regulations for the University of Texas System.”

See *Bourgault v. Yudof*, 2004 U.S. Dist. LEXIS 7720 (ND Tex. 5/4/2004).

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<sup>2</sup>Rule 6.2 reads:

No person, organization, group, association, or corporation may use property, buildings, or facilities owned or controlled by the U.T. System or a component institution for any purpose other than in the course of the regular programs and activities related to the role and mission of the U.T. System or component institution, unless authorized by the Regents' Rules and Regulations.

<sup>3</sup>Rule 6.71 reads:

A student association, a registered student, faculty, or staff organization, or an alumni association may reserve property, buildings, or facilities owned or controlled by the U.T. System for the purpose of a meeting or public presentation subject to the following conditions:

1. Registered student organizations may sponsor a specific candidate for public office. The speaker may not be co-sponsored with an off-campus interest and the audience must be limited to members of the organization or their personally invited guests.
2. No fee may be charged for attendance and no commercial advertising may be presented.
3. Religious speakers are not to engage in evangelism, witnessing, or other religious activities.
4. The speaker represents his/her own views and not those of the University.
5. No person shall be permitted to engage in speech, either orally or in writing, which is directed to incite or produce imminent lawless action and is likely to result in such action.

## II. (30 minutes)

The International Health and Racquet Sports Club Assn takes this position in lobbying for exemptions from nondiscrimination statutes:

Women-only health clubs should be allowed to exclude men from membership and employment because there is a legitimate gender-based privacy interest that needs to be protected, and there is no overriding public policy that necessitates the inclusion of men in these clubs. The privacy issue stems from the unique setting of a health club. Women-only health clubs are not social in nature and are not places where business networking takes place. There is no economic harm in excluding men from women-only health clubs.

Federal statutes currently do not prohibit discrimination on the basis of sex in places of public accommodation. They do, however, prohibit discrimination on the basis of sex in employment by establishments that affect interstate commerce (basically any entity with more than 15 employees). Could the proprietors of a women-only fitness center make an argument that they have a first amendment right to exclude men from employment as fitness instructors? Assume that Congress decides to exempt women-only clubs from the employment nondiscrimination provision but does not exempt men-only clubs. What are the constitutional arguments with regard to that exemption?