

ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

According to legislative findings, *lex experitis* (LE) has been increasing precipitously in Alaska in recent years. LE is a frequently lethal, infectious disease. Most LE infections are latent, but one in ten latent infections eventually progresses to an active infection. LE is spread through the air when people who have an active LE infection cough, sneeze, or otherwise transmit their saliva through the air. Long-term exposure to a person with an active LE infection in enclosed environments is necessary to transmit the disease.

Treatment of LE is difficult and requires administration of multiple antibiotics for a period of one year. Failure to completely follow treatment frequently results in the development of multiple drug-resistant *lex experitis* (MDR-LE). MDR-LE is extremely difficult and costly to treat, and has dangerous side-effects. Patients who are noncompliant with treatment are also at greater risk for transmission of LE to others. A person with an active LE infection is usually not contagious within 12-14 days of commencing treatment. Untreated, active LE is fatal in more than 50% of cases. There is no known treatment other than the one described above. Once a person has contracted and been cured of LE, that individual is no longer susceptible to the disease.

In light of this, Alaska passed a new law requiring antibiotic treatment of individuals who test positive for active LE. The purpose of the law is to prevent the spread of LE, and to protect the health of the patient. If a patient refuses to comply with a prescribed antibiotic treatment, then Department of Health and Social Services (DHSS) can seek an order permitting it to administer antibiotic medication without the consent of the patient.

30 year-old Polly lives on a homestead in the middle of nowhere in rural Alaska with her son, Charlie, a five year-old child. She homeschools Charlie and does not socialize. She and Charlie rarely interact with other people, except briefly when they travel to Fairbanks to shop.

Polly is deeply committed to opposing overuse of antibiotics. She believes that overuse of antibiotics in humans and animals has resulted in damaging health effects to people and to the environment. She avoids antibiotics, and is politically active in opposing their use in agriculture and medicine. She does not want herself or her child to be exposed to substances that she believes are harmful to them and the environment. Polly's philosophy regarding the harmful effects of antibiotics is so strong that she considers her opposition to it a spiritual matter.

At a doctor's appointment, Charlie and Polly both tested positive for active LE. Polly refused to authorize their doctor to administer the antibiotic treatment that the doctor recommended. They returned to their homestead in rural Alaska. As required by law, their doctor reported them to Department of Health and Human Services (DHSS).

Pursuant to the new law, DHSS filed a petition for an order authorizing it to administer a full year of antibiotic treatment to both Polly and Charlie. Polly opposed the petition, arguing that involuntary antibiotic treatment of both Polly and Charlie violates Polly's right to religious freedom, as well as her liberty and privacy rights.

1. Discuss the merits of Polly's claim that the new law violates her right to religious freedom under the Alaska Constitution.

2. Discuss the merits of Polly's claim that an order authorizing involuntary LE treatment of Polly and Charlie over Polly's objection violates Polly's liberty and privacy rights under the Alaska Constitution.

GRADERS' GUIDE
***** QUESTION NO. 1 *****
CONSTITUTIONAL LAW

I. Discuss the merits of Polly's claim that the new law violates her right to religious freedom under the Alaska Constitution. (40 points)

Polly argues that the LE treatment requirement violates her right to free exercise of her religion. Because Polly's belief regarding the harmful effects of antibiotics is probably not a religion, it is not protected by Alaska's free exercise clause and her claim will likely fail.

A. The federal constitution mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Under federal constitutional law, a valid, neutral, generally applicable law does not violate the free exercise clause of the federal constitution.¹ In certain limited cases the state and federal government may be required to accommodate religious practices by creating exemptions from otherwise general laws that substantially burden a religious practice.² However, such accommodation is generally not required under the federal constitution.³

B. The Alaska constitution commands that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." Alaska Const. art. I, § 4.

C. Alaska applies its free exercise clause differently than the federal right: Similar to the federal test, to find a violation of the right, the claimant must make a threshold showing of a religion, conduct that is religiously based, and sincere belief by the claimant.⁴ If this showing is made, then a court must inquire whether a compelling government interest supports the state's actions, and whether that compelling interest would suffer if a religious accommodation is made.⁵ The burden of proving a compelling state interest that justifies limiting a religious practice rests on the state.

¹ See, Employment Div., Dep't. of Human Res. of OR v. Smith, 494 U.S. 872, 878-82 (1999) (abrogated by 48 U.S.C. § 2000bb et seq. (Religious Freedom Restoration Act)); Huffman v. State, 204 P.3d 339, 344 (Alaska 2009).

² Frank v. State, 604 P.2d 1068, 1070 (Alaska 1979) (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963) (abrogated by 48 U.S.C. § 2000bb et seq. (Religious Freedom Restoration Act)).

³ Employment Div., 494 U.S. at 881-890.

⁴ Frank, 604 P.2d at 1073.

⁵ *Id.*

1. A religion
 - i. Whether a nontraditional belief system constitutes a religion under this test requires an inquiry regarding how broad and fundamental an individual's set of expressed beliefs are. The belief must be connected to a comprehensive belief system, set of practices, or connection to ideas about fundamental matters.⁶ Factors such as whether the premises of the religion relate to ultimate questions and whether there are rituals or other activities associated with it.⁷ A personal philosophy is not enough.⁸ However, it is also important not to define religion too narrowly in terms of content, as this runs the risk of unconstitutionally excluding belief systems that do not contain a particular tenet or conform to a particular orthodoxy.⁹
 - ii. Whether the conduct is religiously based requires a determination whether the practice is deeply rooted in religious belief to bring it within the protection of Alaska's free exercise clause.¹⁰ This test does not require the practice to be absolutely necessary to the religion.
2. In analyzing the sincerity of the asserted belief, a court should confine its inquiry to the subjective sincerity of the claimant, and should not inquire into the orthodoxy of the belief system ¹¹

D. Nevertheless, Polly's opposition to antibiotics is probably not a nontraditional belief system that qualifies as a religion. Her belief regarding the harm of antibiotics may be a strongly held personal philosophy, but it does not rise to the level of religion. It is not connected to a comprehensive belief system and is not connected to fundamental matters. The premises of Polly's belief system relate to her concern that overuse of antibiotics can have harmful individual and environmental effects, not to fundamental matters. Polly does not engage in rituals or other related activities, although as a practice she does avoid antibiotics and she actively opposes their use in agriculture and medicine. Thus, because Polly has not made a threshold showing that her belief system is a religion protected by the free exercise clause, Polly's claim will probably fail.

⁶ Huffman v. State, 204 P.3d 339, 344-45 (Alaska 2009).

⁷ *Id.* (relying on factors articulated in federal cases).

⁸ *Id.* at 344, citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

⁹ Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979) ("The determination of religious orthodoxy is not the business of a secular court.").

¹⁰ *Id.*

¹¹ *Id.*

E. If the examinee determines that Polly's belief system qualifies as a religion, then s/he must analyze the remaining factors. Because a court is likely to determine that her conduct is religiously based (assuming the court has found that her opposition to antibiotics is a religion) and that her belief is sincere, the remaining inquiry is whether a compelling governmental interest supports the state's action and whether that interest would suffer if an accommodation is made.

1. If Polly's opposition to the use of antibiotics qualifies as a religion, then her conduct in refusing to submit to antibiotic treatment is probably religiously based.
2. Polly's belief is sincere, as she is "deeply committed" to opposition to overuse of antibiotics.

F. The Alaska Supreme Court has found that the government has a compelling state interest in preventing the spread of LE.¹² Therefore, a compelling state interest supports the law requiring mandatory treatment of LE. However, that compelling interest probably would not suffer if an accommodation for Polly was made. Polly lives in the middle of nowhere in rural Alaska and does not interact with people other than her son Charlie, who already has LE. Declining to apply the mandatory treatment requirement to Polly.

II. Discuss the merits of Polly's claim that an order authorizing involuntary LE treatment of both Polly and Charlie over Polly's objection violates Polly's liberty and privacy rights under the Alaska Constitution. (60 points)

Polly also argues that the antibiotic treatment requirement interferes with her liberty and privacy interests protected under under article I, sections 1 and 22 of the Alaska Constitution. Because her right to refuse medication for herself and her child impacts her fundamental liberty and privacy rights, the State may not forcibly medicate her or Charlie with antibiotics absent a compelling governmental interest and unless doing so is the least restrictive means to advance that interest. The State has a compelling governmental interest, pursuant to its police power, in preventing the spread of LE, but the law is not narrowly tailored to advance that interest. The State has a compelling governmental interest, pursuant to its *parens patriae* authority, in protecting Charlie's health, and the law is narrowly tailored to advance that interest. Therefore the new law is probably unconstitutional as to Polly, but probably constitutional as to Charlie.

¹² Huffman v. State, 204 P.3d 339, 346 (Alaska 2009).

A. The Alaska Constitution's opening provision, article I, section 1, declares, "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry." Article I then sets out more specific provisions guaranteeing individual liberty and privacy in sections 7 and 22. Section 7 addresses liberty: "No person shall be deprived of life, liberty, or property, without due process of law." Section 22 guarantees privacy: "The right of the people to privacy is recognized and shall not be infringed."

B. The federal constitution sets the minimum protections afforded to individual liberty and privacy interests, The Alaska Constitution often provides more protection.¹³ The Alaska Supreme Court has specifically recognized that Alaska's guarantees of privacy and liberty are broader than the federal constitution's.¹⁴

C. Alaska determines the contours of the individual rights protected by the Alaska Constitution by balancing the importance of the right at issue against the state's interest in imposing the disputed limitation. When a law places substantial burdens on the exercise of a fundamental right, the state must articulate a compelling [state] interest and demonstrate "the absence of a less restrictive means to advance [that] interest."¹⁵ But when the law interferes with an individual's freedom in an area that is not characterized as fundamental, the state is only required to "show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest."¹⁶

D. The initial inquiry must therefore be whether the law interferes with interests impacting fundamental rights. The Alaska Supreme Court has held that the state constitutional rights of privacy and liberty protect an individual's right to control aspects of one's personal appearance,¹⁷ privacy in the home¹⁸, and reproductive rights.¹⁹ The court has written that "few things [are] more personal than one's own body."²⁰ Additionally, Alaska courts have held that Alaska's constitutional right to privacy protects an individual's right to decline ingestion of "food, beverages or other substances."²¹ Due process

¹³ Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 245-54 (Alaska 2006).

¹⁴ *Id.* at 245.

¹⁵ Huffman v. State, 204 P.3d 339, 345-46 (Alaska 2009).

¹⁶ *Id.*

¹⁷ Breese v. Smith, 501 P.2d 159, 170 (Alaska 1972).

¹⁸ Ravin v. State, 537 P.2d 494, 500 (Alaska 1975).

¹⁹ Valley Hospital Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 966-67 (Alaska 1997).

²⁰ Breese, 501 P.2d at 169.

²¹ Myers, 138 P.3d at 246, citing Gray v. State, 525 P.2d 524, 528 (Alaska 1974).

protects the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”²² In Huffman v. State,²³ the Alaska Supreme Court held that the right to make decisions about medical treatments for oneself or one's children is a fundamental liberty and privacy right in Alaska.²⁴ Polly therefore has a fundamental liberty and privacy interest in refusing to allow her child to be medicated with antibiotics, and in refusing to be medicated herself.

E. Because Polly has a fundamental liberty and privacy interest in refusing to allow herself or her child to be medicated with antibiotics, the state may only abridge Polly's rights if it meets the heavy burden of demonstrating that it has a **compelling state interest** and that the means **selected to achieve that interest are the least restrictive**.²⁵

1. The State's police power to prevent the spread of LE: The state has a compelling state interest in preventing the spread of *lex ex peritis* to protect the safety of others, pursuant to its police power.²⁶ LE is a dangerous, contagious, potentially fatal disease that presents a serious threat to human health and rates of infection are increasing precipitously in Alaska. Because this interest applies equally to both adults and minors who could potentially spread LE, the State's police power to act to prevent the spread of LE applies equally to Charlie and Polly. Active LE is contagious, and is fatal in over 50% of cases and therefore represents a serious threat to human health. Additionally, LE has been increasing precipitously recently, so it is a serious health threat in Alaska.

However, although the State does have such a compelling interest, the means selected to advance that interest are not the least restrictive and therefore do not survive constitutional scrutiny. The State's interest in preventing the spread of LE would only justify involuntary administration of treatment in an emergency situation where the State could demonstrate that a person presents a threat of harm to others.²⁷ The State probably will not meet its burden here. First, Polly and Charlie live on a rural homestead in the middle of nowhere and have very little contact with other people. Charlie does not attend school. Although they travel to Fairbanks occasionally to go shopping, this is not enough to establish an imminent threat of harm to others. In order to contract LE from someone suffering from an active LE infection, an individual generally needs to spend a significant amount of time in close proximity, in an enclosed space, with the infected individual. There is no evidence that anyone has this level of contact with Charlie or Polly.

²² Treacy v. Municipality of Anchorage, 91 P.3d 252, 270 (Alaska 2004).

²³ 204 P.3d 339 (Alaska 2009).

²⁴ *Id.* at 346.

²⁵ *See id.* (State has compelling interest in halting spread of tuberculosis).

²⁶ *Id.*

²⁷ Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 249 (Alaska 2006).

Moreover, the law at issue does not require the State to prove that an imminent threat of harm from LE exists. Instead, the State only needs to prove that the person is not compliant with an approved treatment regimen. Thus, the State's police power probably does not empower it to forcibly treat Polly and Charlie.

2. The State's *parens patriae* authority to protect Charlie's health: The State's *parens patriae* authority probably supports finding a compelling government interest in treating Charlie to protect his health.²⁸ The doctrine of *parens patriae* concerns the inherent authority and power of the State to protect the person and property of an individual who lacks legal age or capacity. The State thus has a wide range of power to limit parental freedom and authority in things affecting a child's welfare.²⁹ The Alaska Supreme Court has previously held that the State has a compelling state interest in protecting a child's health.³⁰ Because active LE, fatal in 50% of untreated cases, presents a serious threat to the health of a child, the State does have a compelling governmental interest that would justify medicating Charlie.

3. The State's *parens patriae* authority to protect Polly's Health: However, the State's *parens patriae* authority does not support the policy as applied to Polly. The State's authority under this doctrine extends only to individuals who lack legal age or capacity. Polly is an adult, and there is no evidence that she is incapacitated, nor does the law require that she be shown to be incapacitated. The State therefore does not have any authority pursuant to its *parens patriae* power to involuntarily treat Polly for LE. Because the State does not have a compelling State interest that would permit it to forcibly administer antibiotics to Polly, there is no need to inquire whether the means selected by the State are the least restrictive to protect this interest. The State probably may not forcibly medicate Polly under the circumstances of this case.

4. Least Intrusive Means: However, because the State does have a compelling state interest that justifies administration of antibiotics to Charlie, it may do so, but only if the means selected are the least restrictive. The State will probably prevail here. There is only one known treatment for active LE: a full year of antibiotic treatment. Although Charlie will not be contagious after 12-14 days of treatment, requiring treatment for only this period of time will not protect the State's interest and is therefore not the least restrictive means to do so. First, the State's compelling interest is in protecting Charlie's health, not in protecting others from Charlie, so the fact that Charlie will not be contagious after 12-14 days is not relevant to whether the least restrictive means are being used. Second, failure to complete the full year of treatment

²⁸ Myers, 138 P.3d at 249; *see also State v. Planned Parenthood of Alaska*, 171 P.3d 577, 579 (Alaska 2007) (State has a compelling interest in protecting the health of minors).

²⁹ Treacy v. Municipality of Anchorage, 91 P.3d 252, 269 (Alaska 2004).

³⁰ Planned Parenthood, 171 P.3d at 582 & n. 32.

raises the risk of Charlie developing MDR-LE, which is dangerous to his health (and others), because the treatment of MDR-LE has dangerous side effects. Requiring the full course of antibiotic treatment, an entire year, is the least restrictive means of achieving the State's compelling interest in protecting Charlie's health.

In conclusion, Polly's claim that her liberty and privacy rights are infringed by the State's mandatory treatment law is likely valid as to compelled treatment of Polly. However, it is not likely that she will prevail as to Charlie, given the State's *parens patriae* authority to protect Charlie's health. The State has a compelling interest in protecting Charlie's health, and the mandatory treatment is the least restrictive means to advance that interest.