

**FEBRUARY 2010 MPT SUMMARY
QUESTION #1**

State of Franklin v. McLain (February 2010, MPT-1)

The client, Brian McLain, has been charged with violating various sections of the Franklin Criminal Code dealing with methamphetamine, a controlled substance. The charges are based on evidence seized from McLain after police stopped him for investigatory purposes, acting on an anonymous tip that an individual matching McLain's description had been seen purchasing items at a convenience store that, while entirely legal, are known ingredients of methamphetamine production. The officers searched his car, finding the goods described in the tip, together with a small plastic bag containing what appeared to be a marijuana cigarette. McLain was arrested and booked. After questioning, McLain directed the police to a "meth lab" where they found chemicals and equipment used to manufacture methamphetamine, as well as the drug itself. McLain was charged with possession of methamphetamine with intent to distribute, possession of laboratory equipment and supplies with the intent to manufacture methamphetamine, and manufacture of methamphetamine. He has moved to suppress all evidence seized by police on the ground that the officer lacked reasonable suspicion to stop him. He has also moved to dismiss the charge of possession of equipment with the intent to manufacture methamphetamine on the ground that it is a lesser-included offense of manufacture of methamphetamine. Applicants' task is to draft the arguments in support of both motions. The File consists of a memorandum from the supervising attorney describing the assignment, the criminal complaint, the motion to suppress evidence and to dismiss Count 2, the transcript of the anonymous call to the crime hotline, and excerpts from the transcript of the evidentiary hearing. The Library contains the relevant Franklin statutes and three cases—two relating to investigatory stops and one dealing with lesser-included offenses.

**MINNESOTA BAR EXAMINATION
FEBRUARY 23, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 1**

TO: Marcia Pierce
FROM: Applicant
DATE: February 23, 2010
RE: *State v. Brian McLain*

Lack of Police Reasonable Suspicion

Officer Simon had no reasonable suspicion that would justify the stop of McLain's vehicle on the night in question.

"*Terry stops*," named after the U.S. Supreme Court case *Terry v. Ohio*, 392 U.S. 1 (1968), allow a police officer the right to stop and interrogate persons reasonably suspected of criminal conduct if the officer has a reasonable suspicion that criminal activity may be afoot. *State v. Montel*, (Franklin Ct. App. 2003). The test here is whether the officers have "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity." *Terry*. To determine whether the suspicion is reasonable, courts will look at the totality of the circumstances. *Montel*. An anonymous tip from a source not known to police is not in and of itself sufficient to warrant a *Terry* stop. *Id.* To be sufficient, the tip must be corroborated by investigation or independent police observation of unusually suspicious conduct, and must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Montel*, quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000). There is no reasonable suspicion where officers based their stop solely on information received from an informant without having that information verified by independent investigation or police observation. *Montel*, citing *State v. Sneed*, (Franklin Ct. App. 1999). Not every detail of a tipster's story needs verification to indicate sufficient reliability, as long as the important facts were sufficiently corroborated. *State v. Grayson* (Franklin Ct. App. 2007).

Here, Officer Simon made a *Terry* stop when he searched defendant's car and arrested defendant. Officer Simon was acting in reliance of a tip as to defendant's activities. The tip received by the police was anonymous. It indicated with sufficient detail the description and activities of the defendant at the time the call was made. Under the Franklin Supreme Court's ruling in *State v. Grayson*, this may constitute enough reliability of the tip to give the police sufficient reasonable suspicion grounds to conduct a *Terry* stop of defendant in certain circumstances. However, the facts here differ significantly from the facts in *Grayson*. In *Grayson*, the defendant had a broken taillight.

This in and of itself would give the officer authorization to pull the defendant's car over. Moreover, the anonymous tip in *Grayson* implicated the defendant in actual criminal activity (possession of cocaine). There is no such fact here. Defendant here was merely engaged in lawful purchasing of convenience store items. While the activity *may* be construed as a precursor to the manufacture of methamphetamines, such an assertion is far too attenuated to give the police reasonable suspicion based on the tip alone.

Therefore, such a tip would require corroboration by the police conducting investigation or independent police observation of unusually suspicious conduct. No such investigation was done here. Officer Simon merely followed defendant around for a short period of time, during which time he observed no suspicious conduct. Officer Simon is a self-professed expert in narcotics investigation. He would have immediately recognized and noted something suspicious had he observed it. Moreover, although the area has a high crime rate, such a fact was not enough to establish reasonable suspicion. *Montel*. Furthermore, Officer Simon misidentified a marijuana cigarette in the defendant's possession, the officer's sole grounds for arrest, further corroborating the hasteness of the arrest.

Because the officer, acting on an anonymous tip that did not have independent reliability to establish reasonable suspicion, did not do an independent police investigation to establish such suspicion, the stop of defendant's vehicle was unjustified and evidence gained from it should be suppressed.

Motion to Dismiss Count Two

If Count Two is a lesser-included offense of Count Three, then Count Two should be dismissed to prevent a constitutional violation of double jeopardy. Thus, Count Two should be dismissed.

This assertion is well-grounded in Franklin law. The Supreme Court of the United States has held that "[i]f the elements of the 'greater' crime necessarily include the elements of the 'lesser' crime, then the latter offense is a lesser-included offense and prosecution of both crimes violates double jeopardy." *Blockburger v. United States*, 284 U.S. 299 (1932). This is known as the "strict elements" test. The State of Franklin has codified this principle in Franklin Criminal Code Section 5(2). Additionally, the Franklin Supreme court has further elaborated on the rule: "a lesser-included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser offense." *State v. Decker*, (Franklin 2005). The court explained this to mean that if each of the offenses contains at least one element that the other does not, the strict elements test is satisfied and no double jeopardy exists. *Id.* Further, there is no requirement that all the elements of the compared offenses coincide exactly; rather, the offenses can be compared abstractly, and in doing so, if the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are multiplicitous. *Id.*

Here, defendant is charged with violations of Franklin Criminal Code Sections 43 and 51, Counts Two and Three respectively. To apply the “strict elements” test, an analysis of each crime’s elements is necessary. The elements of Section 43 are the defendant must: (1) knowingly, (2) possess equipment or chemicals or both, (3) for the purpose of manufacturing a controlled substance, to wit, methamphetamine. The elements of Section 51 are the defendant must: (1) knowingly, (2) manufacture, (3) methamphetamine. The section explains “manufacture” as to produce, compound, convert, or process methamphetamine, including to package or repackage the substance, either directly or indirectly by extraction from substances of natural origin or by means of chemical synthesis.

Count Two is a lesser-included offense of Count Three, the greater-included offense. Consequently, Count Two should be dismissed to prevent a violation of double jeopardy. While a strict reading of the two sets of elements may initially lead one to believe that the second element of each offense are different and separate from one another, thereby not passing the strict elements test and finding no double jeopardy violations.

However, the Franklin Supreme court has given guidance in this area. The offenses do not have to coincide exactly. While elements (1) and (3) of both statutes do so, elements (2) of each do not. Rather, as the Supreme Court has ruled, the two offenses can be compared abstractly. That is, they can be looked at on the whole. In doing so, if the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are multiplicitous. Such is the case here. Methamphetamines are generally not a naturally-occurring substance. It is impossible to manufacture methamphetamine, as Section 51 requires, without first possession of the requisite equipment or chemicals to do so, as is required by Section 43, the lesser-included offense.

Thus, because a violation of Section 43 is the only means to violating Section 51, Count Two should be dismissed as a lesser-included offense of Count Three.

QUESTION #2

Smith owns 10% of the common shares of Omega, Inc., a closely held corporation. Baker and Jones each own 45% of Omega's common shares. Baker and Jones also serve on Omega's board of directors and are paid corporate officers.

Omega has not paid a dividend on its common shares for several years. Smith, who is not an officer of the corporation and has never received a salary from the corporation, is very unhappy that no dividends are being paid.

When Smith complained to Baker and Jones about nonpayment of dividends, they said that while Omega could legally pay dividends, it has not done so in order to retain the corporation's earnings for expansion of the business. They also pointed to data showing that Omega's business has expanded considerably in the past several years, financed entirely through undistributed earnings, and told Smith that he should "go away and let us run the show." Smith complained that "only you are enjoying the fruits of Omega's success." In response to an inquiry from Smith, Baker and Jones refused to reveal the amounts of their salaries, even though those salaries are within industry range.

Baker and Jones each offered to purchase all of Smith's shares for \$35 per share. Smith suspects that the shares are worth more than \$35 per share. Smith has asked to inspect Omega's corporate books and records in order to determine the value of his shares, but Jones and Baker have refused to give Smith access to any corporate records.

Smith has asked your law firm the following questions:

1. Does Smith have a right to inspect Omega's corporate books and records to determine whether \$35 per share is a fair price for his shares? Explain.
2. If Smith brings a suit to compel the payment of a dividend, must Smith first make a demand on the corporation? Explain.
3. If Smith brings a suit to compel the payment of a dividend, is that suit likely to be successful? Explain.

**MINNESOTA BAR EXAMINATION
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REPRESENTATIVE GOOD ANSWER
QUESTION 2**

Smith has a right to inspect the corporate books.

Shareholders of a corporation have a right to inspect the corporation's books if they have a proper shareholder purpose. To do so, the shareholder must submit a written request to the secretary of the corporation to inspect the books, stating the purpose of the inspection. If the corporation does not provide access, then the shareholder has a right to compel the production of the books. The shareholder's purpose may be against the interests of the board or officers, but this does not matter as long as it involves a proper purpose. For example, if a shareholder is concerned about corporate waste and that the board of directors has breached its duty of loyalty, the shareholder should be allowed access to the books. In this case, Smith is seeking access to the books to determine if \$35 is a fair price for his stocks. Baker and Jones may argue that this is not a proper shareholder purpose because it is a personal right. However, Smith will argue that this falls within the shareholder purview, by arguing that the current value of the stock is directly related to shareholder activity. Shareholders base their decisions about whether to buy or sell based on the value of the stock and whether the books indicate the business is being run well or poorly will affect the stock price. Therefore, Smith should be successful in his argument to have access to the books. However, Baker and Jones may argue that an oral demand to see the books is not proper. Therefore, if Smith would like access to the books he must formally request the books by writing to the corporation's secretary and stating his purpose.

Smith does not need to make demand.

A derivative suit is a suit that is brought by the shareholder on behalf of the corporation. It could occur, for example, if a shareholder thought that the board had acted improperly (i.e. breached the duty of care or the duty of loyalty). If successful, then the judgment and damages goes to the corporation and not to the shareholder who brought the suit. If a shareholder decides to bring a derivative suit, the shareholder must first make demand on the board to bring the suit itself. However, if demand would be futile, then demand is excused. Demand would be considered futile in a case where a shareholder is effectively asking the board to sue themselves (i.e. the members of the board engaged in self dealing and breached the duty of loyalty). If demand is either futile or if it is denied, then the court will initially add the corporation as a defendant to the suit.

If a shareholder is bringing a direct suit and suing the corporation on the shareholder's own behalf, then demand does not need to be brought. This is where a shareholder would be suing to enforce his or her own right. For example, if a minority shareholder in a close corporation is being oppressed by the majority shareholders, he or she would bring a direct suit.

In this case, Smith is bringing a suit to compel the payment of a dividend. This is likely a direct suit because it is enforcing a personal right of the shareholders to receive a dividend. The suit would not be providing a benefit to the corporation. Baker and Jones may argue that it is a derivative suit and demand would need to be brought because it is not just a right to Smith, but to all other shareholders as well. If this were the case, then Smith would need to seek demand if not futile. Smith would then argue that demand would be futile. Baker and Jones have already indicated their opposition. However, this case is most likely a direct suit that Smith would be bringing and therefore, demand would not need to be sought.

Smith has a low likelihood of success in this suit.

The decision to issue dividends is done by the board of directors and would be covered by the duty of care. Directors owe the corporation and the shareholders a duty of care. The duty of care requires that the directors act in good faith and as if a prudent owner would act in their own business. A prudent owner would make decisions after investigating and analyzing the situation. Decisions by the directors are evaluated under the business judgment rule, which requires that decisions are made in good faith, informed and based on a reasonable analysis. The business judgment rule does not require success. The burden is on the plaintiff to show that the directors have not followed the business judgment rule and have violated the duty of care.

In this case, Baker and Jones have indicated that their decision not to issue dividends has been because they have been trying to expand the business. They show data that the business has expanded considerably over the past couple of years and that this expansion has been financed entirely through the undistributed earnings. Based on these facts, it would appear that Smith would have an uphill battle showing that Baker and Jones have breached the duty of care. Baker and Jones appear to be able to show that they are acting as a prudent owner would act – they have looked at data, analyzed the situation and have made an informed business decision. Additionally, based on these facts, they appear to be acting in good faith. The fact that the undistributed funds have been reinvested and that the business is in fact expanding further support the contention that the directors have not breached the duty of care owed to the shareholders. It is very difficult for a shareholder to compel a distribution and generally shareholders do not have a right to a distribution until it is issued. It is not surprising that Smith has a low chance of showing a breach of the duty of care.

Smith may also argue, however, that the directors have breached the duty of loyalty. The duty of loyalty requires that the directors act in good faith and with the reasonable belief that they are acting in the best interest of the corporation. Directors set their own compensation and if it is extreme they may have breached their duty of loyalty by committing waste of the corporation's assets. The burden is on the defendants to show that they have not breached this duty (they would be required to pay back any waste to the corporation). If Baker's and Smith's salaries were extreme and they were taking all of the excess funds that could be used for distribution and putting it towards their own salaries, then Smith would have a good chance of showing that the directors breached their duty of loyalty. He could then compel the distribution. Here, based on the facts of this case, it does not appear to be the case. While Baker and Jones will not reveal their salaries, it states that they are within industry range. Additionally, the facts state that

the excess funds have been reinvested in the corporation and have not gone into bolstering the director/officer salaries. Therefore, it is unlikely that Smith will be able to compel distribution based on the breach of the duty of loyalty.

Finally, Smith may be able to argue oppression. In a close corporation such as this, the shareholders owe each other fiduciary duties. The majority shareholders must not oppress the minority shareholders. This is probably Smith's strongest argument, but is still unlikely to win. Oppression typically involves a majority shareholder selling their interest to a third party who will sell off all the assets or not act in the best interest of the corporation. This situation is not that extreme and the distribution is covered by the business judgment rule. However, because there are only three shareholders and Smith is not receiving any money, he may have an argument.

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QUESTION #3

Based on information received from a known prostitute, the police arrested Julian and subsequently charged him with promotion of prostitution.

Julian appeared with counsel at his arraignment hearing. The judge advised Julian of his constitutional rights. Bail was set, but Julian could not meet it. When Julian got back to his jail cell, he found he had a new cellmate named Bill.

In return for favorable treatment from the prosecutor, Bill had agreed to wear a hidden police microphone while he questioned fellow inmates to obtain incriminating information.

Bill befriended Julian, telling Julian all about his (Bill's) legal troubles. Bill then asked Julian what Julian had been arrested for. Julian told Bill about the prostitution ring and his role in it. In addition to confiding in Bill about his role in the prostitution ring, Julian also described to Bill a robbery in which he (Julian) had taken part.

The prosecutor filed robbery charges against Julian.

Fully analyze and discuss the following questions under the US Constitution:

1. May the tape of Julian's conversation with Bill about the prostitution ring be used against Julian in Julian's trial for promotion of prostitution?
2. Are Julian's statements to Bill about the robbery admissible in Julian's robbery trial?
3. When, if at all, should Julian have been advised of his Miranda rights?

**MINNESOTA BAR EXAMINATION
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REPRESENTATIVE GOOD ANSWER
QUESTION 3**

The Sixth Amendment (and *Massiah*) guarantees U.S. citizens with the right to counsel. This right to counsel becomes effective after a suspect has been charged with a crime. (Conversely, the Fifth Amendment right to counsel under *Miranda* is effective once the suspect has been taken into custody and is interrogated – not necessarily charged.) If a government actor, including the police and prosecution, violate a suspect's Sixth Amendment right to counsel by questioning or interrogating the suspect outside of his attorney's presence any statements or evidence the police obtain through that questioning may be inadmissible at trial.

Julian's Conversation with Bill about the Prostitution Ring

Julian's conversation with Bill about the prostitution ring will likely be inadmissible in Julian's trial for promotion of prostitution. Here, Julian was charged with promotion of prostitution. As a result, Julian had a Sixth Amendment right to have counsel present at any time he was being questioned by the police about the promotion of prostitution charge against him.

Even though it was actually Julian's cellmate Bill who conducted the questioning and not the police directly, a Court may still view this as an interrogation by the government (a government action) in violation of Julian's right to counsel. An interrogation is typically defined as a line of questioning that is likely to illicit a response from the speaker suspect. Here, the facts indicate that the police had asked Bill to wear a hidden police microphone while he questioned fellow inmates to obtain incriminating information. Bill befriended Julian and asked him what he had been arrested for. At this point, Julian told Bill about the prostitution ring and his role in it. The facts indicate that the prosecutor knew that when Bill "befriended" the inmates and asked them about their crimes that this was likely to illicit a response that may incriminate the speaker. If the prosecutor did not believe that Bill would be able to illicit a response from the other inmates, including Julian, they would not have wired him with a hidden police microphone or offered him favorable treatment in return for his services.

As a result, a court is likely to find that the prosecutor (a government actor) violated Julian's Sixth Amendment right to have counsel available during questioning when the prosecutor arranged for Bill to be wired and to question Julian. It should be noted that if Bill had merely asked Julian about his crime without the prosecution offering him favorable treatment and putting a wire on him that Julian's statements to Bill regarding the prostitution ring would likely be admissible. In this scenario, the statements would not have been obtained via the questioning of a government actor (Bill on behalf of the prosecution). Instead, Julian would have been assuming the risk of the information about his involvement in the prostitution ring getting out and even back to the prosecution by just volunteering this information to Bill.

Julian's Statements to Bill about the Robbery are Likely Admissible at Julian's Robbery Trial

Julian's statements about the robbery are likely admissible at Julian's robbery trial. The Sixth Amendment right to counsel is offense specific. This means that a government actor (the police or the prosecution) can question a suspect after they have been charged about any crime *except the crime with which they have been charged*. Here, Julian was charged with promotion of prostitution, not robbery. Therefore his statements regarding the robbery are likely admissible under the Sixth Amendment.

Julian might argue that the prosecution violated his Fourth or Fifth Amendment rights in obtaining the statement about the robbery. His argument regarding the Fourth Amendment is likely to be unpersuasive. His argument regarding the Fifth Amendment may be more persuasive to the court, but he is still unlikely to prevail on it.

The Fourth Amendment protects people from unreasonable searches or seizures in their persons, places, papers and effects. In order to claim a violation under the Fourth Amendment, a suspect must have a reasonable expectation of privacy in the area searched or item seized. Here, Julian might argue that the prosecution conducted an illegal "search" by questioning him in his prison cell or in the prison generally. However, because the prison is controlled by the police (government actors), a court is unlikely to find that Julian had a reasonable expectation of privacy while in prison.

Julian's Fifth Amendment (Miranda) Rights

Julian might further argue that his Fifth Amendment rights were violated when he asked about both the robbery charges and the prostitution ring. Among other protections, the Fifth Amendment gives suspects the right to remain silent and the right to have counsel present while they are being interrogated. The Fifth Amendment applies when a suspect has been taken into custody and is being interrogated. Custody is characterized as police domination and coercion. If a government actor questions a suspect while he or she is in custody without reading Fifth Amendment rights, any statement obtained is inadmissible. Any statements that are voluntarily made *before a person is taken into custody and interrogated* are not within the purview of the Fifth Amendment protections and are admissible in court.

With respect to the prostitution ring statements, because Julian was already charged and in custody, the Sixth Amendment would provide Julian constitutional protections and the Fifth Amendment would not apply.

With respect to the robbery statements, Julian may be able to make an argument that he should have been read his Miranda rights under the Fifth Amendment before he made the statement about the robbery. Certainly, Julian was being interrogated by the prosecution through Bill (as described above). Julian may also be able to argue that because he was in prison he was in custody and in a place of "police domination and coercion" and as such, without the appropriate Miranda warnings, his statement regarding the robbery would be inadmissible. It should be noted, though, that a court could find that since Julian likely didn't know that he was being interrogated and was in

“custody” when Bill questioned him that Julian’s statement to the police about his involvement in the robbery was voluntarily made and should be admissible.

If the Court finds Julian’s argument to be persuasive, then the prosecution should have read Julian his Fifth Amendment Miranda rights prior to Julian making his statement about the robbery.

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QUESTION #4

Tommy is 12 years old and frequently plays baseball with his friends on a vacant lot in his neighborhood.

One day, while Tommy and his friends were playing baseball on the vacant lot, Tommy hit the ball particularly hard and knocked the ball out of the lot onto Nancy's property across the street. This was the first time Tommy or his friends had ever hit the ball hard enough to send it out of the vacant lot. The ball went through Nancy's window and struck her, causing injuries. When Tommy heard the window break and heard a scream, he ran home. Tommy's parents were not aware that Tommy had been playing baseball on this day and Tommy did not mention anything to his parents when he came home.

Upon being hit, Nancy came out of her house onto her porch. She was dazed, bleeding, and calling for help. She stumbled on a broken porch step and fell, receiving further injuries. Nancy's neighbor, George, heard Nancy call for help and saw her fall, but did nothing. Nancy was unconscious for some time before she regained consciousness and was able to call 911 and receive medical assistance. Nancy's doctor told her that her injuries were made more severe due to the delay in getting medical treatment.

Nancy brought an action against Tommy alleging trespass, battery, and negligence. She also named Tommy's parents as defendants claiming that they were responsible for Tommy's acts. Nancy sought damages for her injuries and for the broken window. Nancy brought a separate action against George alleging that he was negligent by failing to assist her.

What is the likelihood that Nancy will succeed on her claims against Tommy, Tommy's parents, and George? Fully analyze and discuss your answers.

**MINNESOTA BAR EXAMINATION
FEBRUARY 23, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 4**

1. Nancy's claims against Tommy

Nancy (N) alleges claims of trespass, battery, and negligence against Tommy (T).

Trespass is defined as an intentional invasion of the property of another. The invasion may be accomplished by the defendant's own physical entry onto the property, or by the defendant intentionally causing an object to enter onto the property. Children may commit intentional torts, but in this case, even if Tommy were an adult, the elements of the tort of trespass would be missing. Although Tommy intended to hit the baseball, he certainly did not intend for the baseball to enter upon N's property. Thus, the trespass claim will fail.

Battery is defined as an intentional offensive contact with another's person (or an object that they're holding). The contact must be of a type that would be offensive to a reasonable person. Here, although Tommy certainly intended to hit the baseball, and although N did suffer personal injury from being hit by the baseball, it was never Tommy's intent that the baseball hit N. Thus again, N cannot make out a prime facie case of battery, and this claim will fail.

The elements of negligence consist of the existence of a duty, breach of that duty, causation (both actual and proximate) of harm to the plaintiff as a result of that breach, and damages. The ordinary standard of care is that of a reasonable person. Children can be negligent, but we generally hold them to a slightly different standard of care – that of a reasonable child of similar age, education, experience, and intelligence. So Tommy was under a general duty to conduct his baseball game with the care expected of a child of his age, education, experience, and intelligence, but it is not clear that he really violated that duty. An ordinary child of Tommy's age would be aware that people could be harmed in a game of baseball, and certainly could be found negligent if, for instance, he jokingly threw a baseball directly at a fellow player's head expecting the other player to catch it, but for some reason ended up hitting the fellow player with the ball instead. However, in Tommy's experience, and that of his friends, none of them had ever been able to hit the ball outside the vacant lot. It is difficult to argue that Tommy breached the standard of care of a child with his experience when his experience gave him no reason to guard against harm to people outside the lot.

However, if N were able to persuade the court that Tommy did breach the duty of care of a child his age, she would be able to show that her injuries were actually caused by Tommy's ball playing. A breach is the actual cause of a harm if "but for" the breach, the harm would not have occurred, and but for T's hit, N would not have been injured in the first place. It would be harder for her to show proximate cause, because proximate cause usually exists for all foreseeable plaintiffs. The facts that bring into question

Tommy's breach of duty of care (i.e., that neither he nor any of the other children had ever hit the ball out of the lot before) also bring into question whether the injuries to N, and the damage to her house, were foreseeable. However, if the court could find that a child of Tommy's age had a duty to protect against harm to people outside the lot, it would then almost certainly find that these types of harms to someone across the street were foreseeable. Moreover, Tommy would be liable to all of N's personal injuries, since later injury, or increased harm due to delay, do not break the chain of proximate cause.

I find it unlikely that the court would find Tommy breached his subjective child's duty of care, so I believe that even this negligence claim will fail. However, if the court found otherwise, N would be able to recover for both her physical injuries and the damage to her house.

2. Nancy's claims against Tommy's parents

Parents are not vicariously liable for the tortious actions of their children. They may be under a duty to control a child who has previously demonstrated propensities to engage in unreasonably dangerous or violent actions, but we have no evidence here of any such history for Tommy. So Tommy's parents will not be vicariously liable for his actions.

Parents may themselves be directly liable for negligent supervision of their children. To show this, N would have to show the existence of the duty, breach of that duty, causation, and damages. She could show existence of the duty fairly easily – parents have some responsibility to supervise their children. However, she would have a hard time showing breach of the duty, because although Tommy's parents appear not to have been keeping tabs on his whereabouts throughout the day, this is a reasonable level of supervision for a 12-year-old. If the court were to decide otherwise, proximate causation would not be difficult to show (it is foreseeable that lack of supervision of a 12-year-old child could result in both property damage and physical injury to other parties), but actual causation would be a bit more of a stretch – is the lack of supervision a "but for" cause of Nancy's injuries and property damage? It is entirely possible that similar harms could have resulted even with supervision at the ball game. For these reasons, I believe N's claims against Tommy's parents will also fail.

3. Nancy's claims against George

To make out a claim of negligence against George, N will again have to show all the elements of a prima facie case of negligence. She will fail early on. Although there is a general duty to act with the "ordinary person" standard of care, that standard does not include a generalized duty to rescue. George was under no obligation, however cold hearted he may have been, to go to N's aid after her injuries, even when she was calling for help. If he had gone to her aid, he would have been liable for any injuries that resulted if he had been negligent in his attempt to rescue her!

The only way that Nancy could support a claim against George based on his lack of action would be if there was a pre-existing relationship between them that imposed a specialized duty upon George. Such specialized duties may arise between a parent

and a child, individuals in a contractual relationship with one another, or if one party is responsible for putting the other party in danger in the first place. Since George is not by any available evidence Nancy's father, nor has she hired him to be on-call to assist her around the house, nor was he responsible for putting her in danger, he cannot be negligent for failing to rescue her.

Although if George owns the house, and Nancy is renting it, and the broken step was something George knew about, but was not obvious through a reasonable inspection, George could've been responsible under a premises liability theory for the injuries Nancy received as a result of her fall, and might have been liable in comparative negligence for some percentage of the injuries due to the delay in treatment. But that is stretching these facts very very far, since we have no evidence that he was anything more than her neighbor.

QUESTION #5

Settlor created a revocable trust naming Bank as trustee. The trust instrument directed Bank, as trustee, to pay all trust income to Settlor and, upon Settlor's death, to distribute all trust assets to "Settlor's surviving children." When Settlor created the trust, he had three living children, Alan, Ben, and Claire.

Settlor died last year. Alan predeceased him. Settlor was survived by three children, Ben, Claire, and Doris (born after Settlor created the trust), and two grandchildren. One of the surviving grandchildren was Claire's child and one was Alan's child. Alan's child was his only heir.

When Settlor created the trust, he funded it with cash. Bank promptly invested the cash in a broad range of stocks and bonds and held this broadly diversified portfolio for just over twenty years. Although the portfolio had by then significantly increased in value, Settlor was dissatisfied with the rate of appreciation. Settlor therefore directed Bank to sell 90% of the trust portfolio and to reinvest the proceeds in the stock of XYZ, a closely held corporation that Settlor believed would substantially appreciate in value.

The investment in XYZ appreciated more than 50% during the first two years after Bank purchased the stock. However, during the five years preceding Settlor's death, the XYZ investment depreciated to about 70% of its initial value. This depreciation was largely due to mismanagement by XYZ's board of directors. Although Settlor was neither a director nor an officer of XYZ, he was fully aware of the management problems. He discussed these problems with Bank and told Bank, "I expect things will turn around soon."

Immediately upon Settlor's death, Bank liquidated the trust's interest in XYZ, thus avoiding further losses from this investment.

One month after Settlor died, Claire wrote to Bank disclaiming all of her interest in the trust.

1. To whom should the trust assets be distributed? Explain.
2. Is Bank liable for losses on the investment in XYZ stock? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 23, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 5**

To whom should the trust assets be distributed?

Is there a valid trust? A trust requires that a settlor transfer legal title to property to a trustee to manage the trust for the benefit of beneficiaries with the intent to create a trust for a valid purpose. A trust requires that the property/res or property interest be transferred to the trustee. In this case, settlor transferred cash to the trustee. This would satisfy the property requirement for valid trust creation. The property was transferred to the trustee, the bank, for the bank to manage for the benefit of settlor. Intent to create a trust requires more than just permissive instructions. It requires the settlor to give instructions that must be followed. Here, the settlor instructed the trustee, the bank, to pay all trust income to the settlor and upon his death to distribute all trust assets to settlor's surviving children. Thus, the intent that the trust be created is pretty clear. There is nothing to indicate there is an invalid purpose for the trust. There are no restrictions of marriage or anything else that would be unreasonable, and therefore, the trust has a valid purpose. Therefore, settlor created a valid trust.

Is the trust a valid private trust? A private trust must have ascertainable beneficiaries. In this case, the beneficiary is the settlor. This is ascertainable. Further, the remaindermen are also ascertainable, the settlor's surviving children.

Is the trust valid even though it's revocable? A trust can be revocable where the settlor has the power to terminate the trust or revoke the trust, or if the settlor retains a veto right or other restraints. Just because the trust is revocable doesn't mean that the trust is invalid.

Can the settlor direct where the principal of the trust, the trust property, is directed upon his death? This is a valid revocable trust and being that the trust was not revoked during settlor's lifetime, it is still in effect on his death. Therefore, the trustee has a duty to carry out the instructions of the trust and distribute the property to settlor's surviving children.

Which of the children should take the trust assets? The trust instructions required that the trust income should be distributed to settlor's surviving children upon his death. Does Alan or Alan's child take in the trust assets because Alan predeceased the settlor? The trust instructions clearly state that the settlor's surviving children are entitled to the trust assets upon the settlor's death. Alan did not survive the settlor, therefore he will not take. If the trust had stated that the trust assets would go to all the settlor's children instead of all the surviving children, Alan's child would have an argument that he should take in place of his father's share. The facts don't indicate whether there is an anti-lapse statute, however it probably wouldn't matter because

Alan was not one of the surviving children and thus not entitled to share in the trust assets.

Should Ben share in the trust assets? Ben was a surviving child at the time of the settlor's death and therefore as a remainderman he will share in the trust assets.

Should Claire or Claire's child share in the distribution of the trust assets? In this case, Claire, as a beneficiary or remainderman of the trust, has disclaimed all of her interest in the trust. She was a surviving child at the time of the settlor's death and she was entitled to share in the assets. The facts don't indicate whether there was an anti-lapse statute. An anti-lapse statute would provide that if the beneficiary predeceased the settlor, his or her interest would pass to his or her issue if the beneficiary was a close relative of the settlor and the beneficiary had issue. In this case, Claire was a close relative of the settlor, his daughter, and was survived by issue. Because she disclaimed her interest, she would be treated as if she pre-deceased and an anti-lapse statute would operate to pass the trust assets to her issue, Claire's child. However, if there were no anti-lapse statute, by disclaiming, she would be treated as pre-deceased and the surviving members of the class would take equally.

Should Doris take even though she was born after the trust was formed. The trust simply required that the trust assets be distributed to settlor's surviving children, it didn't specifically name the children. The conveyance essentially created a class gift that was subject to open, where more children that were surviving at the time of settlor's death would take part even had they not been born when the trust was created. It's not necessary that a beneficiary or remainderman be alive at the time the trust was created in order to take.

In conclusion, Ben, Claire's child and Doris would probably share equally in the trust assets upon distribution if there were some sort of antilapse statute that allowed Claire's share to pass to her issue. However, if there was no anti-lapse statute Claire's child would probably not take and Ben and Doris would be the only two who shared in the trust assets.

Is the Bank liable for losses on the investment of XYZ stock?

A trustee has certain duties that it owes to the beneficiaries. First, the trustee has a duty to properly manage the trust property. This includes following the investments, making prudent investments, balancing the risk of the assets and making other prudent decisions given the economic factors faced. When examining the duty of managing the trust assets properly, it's necessary to look at the whole portfolio and not just how one investment performed. Thus, in this case, the bank would probably argue that it managed the trust successfully for over 20 years and the trust continued to generate an appropriate amount of income. The investment decisions of a trustee can be ratified, or the beneficiary could bring a claim called a surcharge. The beneficiary is able to ratify some transactions and bring a surcharge claim against other transactions. Thus, the beneficiary would probably need to bring a surcharge claim alleging that the specific investment in XYZ was improper.

A trustee also owes a duty not to co-mingle trust assets or benefit from the trust assets. There are no facts indicating that the Bank, as trustee, mismanaged the assets for its own benefit, or traded the assets for other trust assets, or profited from the trust assets itself. Nothing indicates that there was any improper co-mingling of trust assets or that the Bank breached any duty of any of the beneficiaries.

In a revocable trust, beneficiaries can't bring a breach of duty claim against a trustee if the settlor who had the right to revoke approved of the investment in question. Approving of the wrongful transaction requires more than mere knowledge, it requires assent or helping in the transaction. In this case, the settlor approved of investing in XYZ, encouraged investing in XYZ, and continued his approval of the investment even though he knew of XYZ's mismanagement. Because the settlor was the settlor of a revocable trust and he approved the transaction, the beneficiaries won't be able to prevail on a claim that the trustee bank should be liable for the losses.

In conclusion, the Bank is not liable for the losses on the XYZ stock because the trust was revocable and the settlor approved of the investment.

QUESTION #6

Driver was driving an automobile that struck Pedestrian in the crosswalk of a busy street. Pedestrian suffered painful fractures and a concussion that affected her memory of the accident.

Pedestrian filed a negligence action against Driver, who responded with a general denial and an assertion that Pedestrian's negligence caused her injuries. The parties have stipulated to the severity of Pedestrian's injuries, to Pedestrian's pain and suffering, and to the total value of Pedestrian's damages. The parties are scheduled for a jury trial on the issues of both Driver's and Pedestrian's negligence.

Pedestrian plans to call Witness to testify at trial. Witness did not see the collision occur. However, Witness will testify that he walked past Pedestrian no more than five seconds before the collision, at which time Witness saw that Pedestrian was deeply engrossed in a cell phone conversation. Witness will also testify that he saw Driver's distinctive sports car as it approached the intersection in which Pedestrian was hit. Witness, who has no specialized training, experience, or education, will also offer the opinion that the car was speeding just prior to the collision because it was traveling noticeably faster than the cars near it, all of which appeared to be traveling at the same slower speed.

Pedestrian plans to call her Spouse to testify that Pedestrian is very cautious and risk-averse.

Pedestrian also plans to testify at trial. She will not deny having been on the cell phone when Witness walked by, but will claim to have lowered the cell phone and looked for traffic just prior to entering the intersection. In fact, Pedestrian intends to testify that she has used a cell phone for many years, that she talks on it while walking almost every day, and that she invariably ends a call or lowers the cell phone when preparing to cross a street in order to look both ways before entering the intersection.

Driver intends to undermine Pedestrian's credibility by introducing evidence of her memory loss. Pedestrian counters that if the jury hears about some of Pedestrian's injuries, then it must hear about all of them, and so Pedestrian seeks to introduce evidence on the full nature and extent of her other injuries.

At the final pretrial motion hearing, Driver's counsel argued that the court should grant these four motions *in limine*:

- (1) to exclude Witness's opinion that Driver was speeding;
- (2) to exclude Spouse's testimony;
- (3) to exclude evidence of Pedestrian's cell phone use at any time other than the day of the collision;
- (4) to admit evidence of Pedestrian's memory loss, but to exclude evidence of Pedestrian's other injuries.

The evidence rules of this jurisdiction are identical to the Federal Rules of Evidence.

How should the court rule on each of these motions? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 23, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 6**

The Federal Rules of Evidence (FRE) require that all relevant evidence be admitted (Rule 401) unless inadmissible for a specific reason, such as improper character evidence, hearsay, or evidence that is unfairly prejudicial. Sometimes evidence is admitted with instruction to the jury concerning the purpose for which it is admitted in order to cure potential problems with the evidence. Each of the following answers will attempt to adequately address relevance, purpose, and prejudice related issues in the proposed evidence.

Motion to exclude Witness' opinion that Driver was speeding. The court should not exclude the evidence. First, the evidence is relevant to whether Driver was negligent because speeding through an intersection could reasonably be determined to be negligent by a jury. Foundation is proper because Witness is able to identify Driver's distinctive sports car. The evidence is offered for the proper purpose of proving negligence, specifically breach of duty and causation of injury in fact. The evidence is highly probative and would not be unduly prejudicial under Rule 403 (because Witness is not, for example, testifying that Driver was "flying down the street like a wild maniac and must be an idiot to drive that way," etc.)

Witness need not, and doesn't, have any specialized training, education, or skill to offer the opinion that Driver was speeding because it is considered within a lay-person's ability based on common experience to evaluate whether a car is speeding or not. Witness need not be an approved expert witness under that four-factor test. Thus, the court should not exclude the evidence. (Note: Although Witness did not see the collision, Witness' testimony that the car was speeding only moments before is proper circumstantial evidence from which the jury can infer that Driver was speeding moments later at moment of collision).

Motion to exclude spouse's testimony.

The court should not exclude Spouse's testimony that Pedestrian is a "cautious" and "risk averse" person. First, the evidence is relevant because Pedestrian is claimed to have been negligent by acting carelessly or riskily, and thus his character is at issue. Normally, bolstering character evidence is excluded unless challenged or placed at issue. Also, character evidence related to bad acts or bad character is generally not admissible except to attack the truthfulness of the defendant. Here, the evidence is offered to bolster Pedestrian's character, but as discussed, is allowed because his character is at issue AND the character evidence is properly opinion evidence. The impact of bias is for the jury to determine.

Motion to exclude evidence of Pedestrian's cell phone use at any other time than the day of the collision. The court should not exclude the evidence. First, it is relevant to

the issue of breach of duty and causation in the negligence case against Pedestrian. It is being offered to show that it is more likely that Pedestrian was using the cell phone in a certain reasonable way than as described by Witness as “deeply engrossed” in the cell phone. Evidence of habit is expressly admissible under FRE 406 to show that the actor was acting in conformity with the habit. The evidence shows the Pedestrian has the habit of using the cell phone daily and always looking before entering an intersection, despite being on the cell phone, or ending the call. This evidence is highly probative of whether defendant was using the cell phone reasonably on the date of the accident, even though it is circumstantial (drawn from the inference that Pedestrian would act how she always acts). It is not unfairly prejudicial to Driver because it is balanced by Driver’s Witness who will testify that Pedestrian was “deeply engrossed.” A jury instruction may be appropriate under Rule 105.

Motion to admit evidence of Pedestrian’s memory loss, but to exclude evidence of Pedestrian’s other injuries. The court should admit evidence of memory loss and exclude evidence of other injuries unrelated to the memory loss. This is the closest call for the court. First, the evidence of memory loss is admissible for the purpose of showing Pedestrian’s potential lack of truthfulness of veracity based on failure of memory. However, one problem is that it is not standard character evidence based on reputation or opinion with regard to truthfulness, but rather a specific condition. The condition, however, is highly relevant to the jury for purposes of determining truthfulness, and therefore should probably be admitted. The court must also evaluate the prejudicial effect of admitting the evidence. Here, the likelihood of prejudice is high because Pedestrian may be seen as incompetent or untrustworthy. Furthermore, the additional injuries will not be admitted for reasons explained below, thus creating a lack of balance regarding the extent of injuries. This however could be remedied by instructions to the jury, and through the use of methods such as past recollection refreshed and past recollection recorded.

The evidence of other injuries should not be admitted because it is irrelevant. The parties have stipulated to the severity of Pedestrian’s injuries, to Pedestrian’s pain and suffering, and to the total value of Pedestrian’s damages. There is simply not something material at issue for the evidence of the other injuries to be ___probative. Instead, this would likely be highly prejudicial under Rule 403 because they it ___might inflame the passions of the jury and cause an unfair bias against Driver, thus effecting the apportionment of liability.

Pedestrian could argue that the evidence is needed to prove causation in fact, but the facts here do not indicate that the injuries would add anything based on their nature (location, type, etc.) that would be relevant (i.e. as to speed of vehicle, direction vehicle hit Pedestrian from, etc.) If shown to have independent relevance they might need to be admitted if also not unduly prejudicial.

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QUESTION #7

Based on scores achieved on statewide examinations of student performance in grades 4 through 8, Public School District #1 (District) has ranked students in one of the following academic performance ranges:

- Range 1: includes students whose performance is “unacceptable”
- Range 2: includes students whose performance is “acceptable”
- Range 3: includes students whose performance is “exceptional”

District wants to improve student performance and plans to implement a three-year pilot program called Project Improve (PI). PI is designed to decrease the percentage of students in Range 1. District will take the following steps in carrying out PI:

- (1) Create segregated Range 1 Math and Science classes that are 50% smaller than other class sizes and assign only Range 1 students to those classes.
- (2) Assign all of the best Math and Science teachers (based on teacher merit evaluations) to Range 1 classes. Teachers assigned to the Range 2 and 3 classes will be qualified, but will be teachers who received lower merit evaluations.
- (3) Allocate 80% of Math and Science class resources (such as access to science experiments, field trips, or individual tutoring) to Range 1 classes.
- (4) Permit a student in Range 2 or 3 Math and Science classes to transfer to the smaller and better-resourced Range 1 classes only when the student can provide documentation showing that one of the student’s custodial parents (or custodial guardians) had an academic record of underachievement.

District has determined that students in Range 2 and 3 classes will have fewer resources than they enjoyed during previous years. District has also determined that the remaining resources will be sufficient for Ranges 2 and 3 classes.

When Jason was in 5th grade, he scored in Range 1. Jason’s parents worked hard and sacrificed to help him improve. His most recent test scores place him in Range 3, where District plans to assign him for 7th grade. Jason’s parents want him in Range 1 rather than Range 3 classes because they want him to be educated in the smallest classes, with the best teachers, and with the best resources. Jason’s parents object, however, to disclosing their own educational records in order to have Jason placed in the Range 1 classes. They have been told that there is no other way to have Jason assigned to the Range 1 classes. Jason’s parents plan to challenge PI.

Analyze and fully discuss the merits of Jason’s parents’ potential federal constitutional claims and the likelihood of success if a challenge is brought.

**MINNESOTA BAR EXAMINATION
FEBRUARY 23, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 7**

Standing

First, in order to challenge the pilot program (PI), the parents must have standing. In order to have standing, plaintiffs must show that they are bringing an actual case or controversy, that is ripe (i.e., it was not brought too soon), and is not moot (i.e., was not brought too late). The plaintiffs must demonstrate that they have suffered, or will imminently suffer, an actual, concrete, injury-in-fact. There must be causation (i.e., the injury is fairly traceable to the government's action), and redressability (i.e., the court can provide a remedy to the plaintiff's injury). Moreover, in order to bring constitutional challenges, there must be state action.

In this case, the parents can show that there is an actual case or controversy concerning the legitimacy of the PI. The case is not brought too soon and not too late, as the parents and the child will imminently face injury. This is so because if they are not given relief, Jason will be placed in Range 3 classes, where Jason's parents do not believe he will receive as good an education. Also, the parents would have to disclose their own academic records in order to have Jason placed in the Range 1 classes. There is causation because this imminent injury can be traced to the PI, which was created by a public school district. The court can provide a remedy by declaring that Jason should be placed in Range 1 or by declaring the PI unconstitutional and thus voiding the entire program. There is state action because a public school created and is enforcing the PI.

It should also be noted that Jason's parents can assert his rights in court because he is a minor and they are his parents. Also, under third party standing, a third party may bring an action for the first person if: (1) The third party has himself suffered an injury, and (2) the third party and first person share a confidential relationship (such as doctor and patient) and there is something that prevents the first person from asserting his own rights. In this case, the parents will suffer injury themselves if they are forced to disclose their academic records when they do not want to have to, they share a confidential relationship with Jason as his parents, and Jason is a minor and so would not be able to assert a claim as well on his own.

Equal Protection Claim

Jason's parents may attempt to assert that the PI is a violation of their child's equal protection rights. Under the 14th Amendment, applicable to the states and local governments, when the government treats similarly situated persons differently, there is an equal protection issue to analyze. If the government regulation at issue purposefully and intentionally discriminates under race, alienage (unless it is Congress that is discriminating under alienage classifications, then apply rational basis), gender or

illegitimacy, then the regulation will be scrutinized under strict scrutiny. This means that the government must prove that the regulation is necessary to further a compelling state interest and there is no presumption of constitutionality. All other classifications are scrutinized under rational basis review. This means that the plaintiff must show that the regulation is not rationally related to any legitimate government interest. This is a very difficult burden to meet, as the regulation undergoing rational basis review is presumed to be constitutional.

In this case, the PI makes classifications based on test scores. Students are being segregated according to test scores. This is not race, alienage, gender or illegitimacy. Therefore, rational basis will be applied to the PI. Under rational basis, Jason's parents have the burden of showing that the PI is not rationally related to any legitimate government interest. There is a presumption that the PI is constitutional. Jason's parents are not likely to succeed on this claim because this is such a hard burden to overcome.

The PI is rationally related to the legitimate government interest of wanting to improve the educational system and ensure that students who are falling behind in their grades catch up and learn everything that they need to. Also, the requirement that Range 2 and 3 students who want to transfer into the Range 1 classes must provide documentation showing that one of the student's parents had an academic record of underachievement is rationally related to the legitimate government interest of wanting to improve the educational system and ensure that students who are academically at risk do not fall too far behind. That is because a student who might be in an upper range class may continue to be more at risk, especially at higher grade levels, if a parent also struggled academically. A parent at home may not be able to assist the student in home studying, and the student may soon find it difficult to keep up with a higher Range class. Also, in order to not overwhelm the Range 1 class with a large number of students, thus defeating the goal of keeping the classes small, the regulation insures that not just any student at a whim can transfer into the Range 1 class. The requirement for the parent's records will show an objective need for the student to be transferred.

Also, the public school district can point to the fact that remaining resources for the Range 2 and 3 classes will be sufficient, although fewer than what they had enjoyed in prior years. And the district can point to the fact that although teachers for the Range 2 and 3 classes do not have as high of merit evaluations, they are still qualified teachers. Because Range 2 and 3 classes are still receiving sufficient resources and have qualified teachers, the PI is rationally related to the legitimate government interests identified previously.

In summary, due to the heavy burden of overcoming rational basis review and its presumption of constitutionality, Jason's parents are unlikely to succeed on an Equal Protection challenge to the PI.

Fundamental Right Claim

Government regulations that concern a plaintiff's fundamental right must survive strict scrutiny. There is a very limited list of what the Supreme Court has determined to be fundamental rights. These include the right to marriage and divorce, the right to an abortion (with a less restrained right pre-viability and a substantially more restrained right post-viability), the right to vote, the right to interstate travel, the right to engage in private consensual adult sexual activity (but not including adultery or incest), and the right to make medical decisions for yourself (but not including assisted suicide, and states may require certain vaccinations). Regulations concerning all other issues are reviewed under the rational basis review.

There is no fundamental right to education. Thus, regulations concerning education programs will be subject to a rational basis review. Jason's parents therefore have the burden of showing that the PI is not rationally related to any legitimate government interest. There is a presumption that the PI is constitutional. Jason's parents are not likely to succeed on this claim because this is such a hard burden to overcome. The PI is rationally related to the legitimate government interest of wanting to improve the educational system and ensure that students who are falling behind in their grades catch up and learn everything that they need to. Also, the PI's requirement that Range 2 and 3 students who want to transfer into the Range 1 classes must provide documentation showing that one of the student's parents had an academic record of underachievement is rationally related to the legitimate government interest of wanting to improve the educational system and ensure that students who are academically at risk do not fall too far behind. That is because a student who might be in an upper range class may continue to be more at risk, especially at higher grade levels, if a parent also struggled academically – as explained more fully in Part 2.

In summary, due to the heavy burden of overcoming rational basis review and its presumption of constitutionality, Jason's parents are unlikely to succeed on a fundamental right challenge to the PI.