1. This is an open book examination. You may use any written materials that you have brought with you (including handwritten, typewritten, printed, or published materials). The use of computers to type answers is permitted.

2. You have THREE HOURS to complete the exam.

3. The exam consists of this cover page plus 13 exam pages numbered 1 through 13.

4. There are FOUR essay questions and FIFTEEN multiple choice questions. All students must answer all questions. The essay questions should take 30 minutes each and the multiple choice questions should take 60 minutes total. The weight of the questions is proportional to the time allocations.

5. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam.

6. If you are writing your essay answers by hand, remember to write legibly.

7. If, with regard to any essay question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts, state your assumption, and answer the question based on your assumption. Do not change the given facts.

8. Using good judgment, address all the issues presented and assigned by the essay questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.

9. Good luck.
ESSAY QUESTION ONE
(30 minutes)

In 2015, Congress, alarmed by an increase in auto accidents involving drivers of commercial vehicles talking on cell phones, passes the Cell Phone Safety Act (the Act). The Act requires the Department of Transportation (DOT or Agency) to promulgate a rule regulating the use of cell phones by commercial drivers. The Act requires the Agency’s rule to “provide an appropriate level of safety while also considering costs and business needs.” The Act provides that “the Agency, in promulgating the rule, shall provide interested parties an opportunity for an appropriate hearing.”

DOT subsequently publishes a notice in the Federal Register that it proposes to adopt a rule that would allow drivers of commercial vehicles to use cell phones while driving, but only phones that allow completely hands-free usage (drivers must be able to make calls, receive calls, and talk on calls, all without taking their hands off the steering wheel). The notice invites written comments within 60 days.

During the comment period, the Association for Highway Safety (AHS), an organization of people who use public highways and are concerned about their safety, submits a comment. The comment calls attention to a study published in the Journal of Safety Research (a highly reputable journal) that shows that drivers are 30% more likely to cause accidents when talking on cell phones, even if the cell phone allows completely hands-free usage. The Association requests that the Agency completely ban cell phone usage by commercial drivers while driving. The Association also requests that the Agency hold an oral hearing at which it could present evidence and argument.

Also during the comment period, the Agency receives a letter from Representative Hilda Heller, Chair of the U.S. House of Representative’s Committee on Transportation and Infrastructure. Representative Heller has great influence over DOT’s budget. Her letter calls attention to the need for commercial drivers to be in continuous contact with their dispatchers and urges the Agency not to adopt a rule stricter than its proposed rule. DOT docketts Heller’s letter with the other comments.

At the end of the comment period, DOT adopts a final rule that is identical to its proposed rule. In the concise statement of basis and purpose, the Agency states that AHS’s request for an oral hearing is denied. The statement makes no other response to AHS’s comment and does not mention the study cited in AHS’s comment.

AHS seeks judicial review of the final rule in federal district court, raising such grounds as might be expected on the above facts. Among other things, AHS requests that the district court hold a trial at which AHS could present evidence about the safety effects of the Agency’s rule. The Agency raises no threshold issues (e.g., standing, ripeness), but defends the rule on its merits.

You are the law clerk to the district judge considering the case. Write a memorandum addressing the issues presented and advising the judge as to how to rule on each issue and on the overall case. (In case you missed them, read instructions 5-8 on the cover page.)
ESSAY QUESTION TWO
(30 minutes)

Paul Pennyfeather is a tenured professor of English at Indiana State University, which is a state school. The University’s employment manual states: “A tenured professor may be discharged only for good cause; provided, that if the University proposes to discharge a tenured professor, the professor’s procedural protections shall be limited to those specified in this manual.”

The manual provides that before discharging a tenured professor, the university must provide the professor with notice of the reasons for the proposed discharge and a hearing before a panel of University administrators, at which each side can present evidence. The manual also states that “In cases where the reason for the proposed discharge is sexual harassment, the University may protect complainants from embarrassment and/or retaliation by not revealing their identities.” The manual defines “sexual harassment” to include both “quid pro quo” harassment (e.g., demanding sex in exchange for grades) and harassment by creating a hostile environment.

In 2015, the University informs Paul that it proposes to discharge him for sexual harassment. The University provides Paul with a written statement explaining that two students identified only as “Student 1” and “Student 2” asserted that Paul, as part of teaching an undergraduate English literature course with 50 students, assigned a novel in which a female student has an affair with a male professor, and Paul remarked during class discussion, “any women in the class who would like to get a deeper understanding of this character’s experience can meet me in my office.” The written statement also states that a female student identified only as “Student 3” asserted that when she was alone with Paul in his office to discuss her performance on the midterm exam, he hinted that she could improve her grade by having sex with him.

The University holds a hearing as required by its manual. The only evidence introduced by the University is the written statement described in the previous paragraph. Paul admits making the in-class statement described by Students 1 and 2, but says that he made it in a joking way and that everyone would have understood that he was kidding. Paul denies the behavior described by Student 3 and says that Student 3 must have completely misunderstood him. Paul says that he discussed the midterm exam with each student individually and he can’t even imagine which student complained. Paul demands to know the identities of Students 1, 2, and 3 so he can cross-examine them. The University refuses to identify the students, citing the University’s manual provision.

The panel concludes that Paul committed sexual harassment and Paul is discharged. Paul sues the University and its trustees in federal district court. Paul asserts that his discharge violated his constitutional rights. He and the defendants each make such arguments as might be expected on the above facts. (Both sides raise only issues we studied in Administrative Law.)

You are the law clerk to the district judge considering the case. Write a memorandum addressing the issues presented by the case and advising the judge as to how to rule on each issue and on the overall case.
ESSAY QUESTION THREE
(30 minutes)

In 2015, Congress is concerned about the high cost of products liability litigation, which, Congress believes, drives up the prices of products for American consumers. Congress believes that the system of products liability litigation causes too much money to be wasted on lawyers and litigation costs and that there is an important national need for a more efficient system of resolving products liability cases.

Congress therefore passes the “Products Liability Reform Act” (PLRA or Act), which creates the “Federal Products Liability Agency” (FPLA or Agency). According to the Act, the FPLA is to consist of five Commissioners appointed by the President, with Senate confirmation, for a five-year term. The Act provides that whenever any person claims to have been injured by a product in the United States, that person may bring an action against the product’s manufacturer before the FPLA. The Act also provides that whenever any products liability action is brought in a state or federal court in the United States, the defendant may remove the case to the FPLA. The Act provides that the FPLA shall resolve all cases brought to it by applying the substantive tort law of the state where the alleged injury occurred. The agency, the Act provides, shall have an ALJ hear each case in a formal adjudication and make an initial decision, with appeal available to the five Commissioners. The Agency shall then enter either a decision for the plaintiff, determining the amount of the plaintiff’s damages, or a decision for the defendant. Either party, the Act provides, may then seek judicial review of, or judicial enforcement of, the agency’s decision in federal district court.

In 2016, the FPLA Commissioners are appointed and the agency begins doing business. Later that year, Penny Pinkerton is injured in Kansas when she receives a severe electric shock from her KitchenAid brand toaster. Pinkerton has a heart attack and suffers $50,000 in medical damages and lost wages. She sues the KitchenAid Corporation in state court in Kansas. Pursuant to the PLRA, KitchenAid removes the case to the FPLA. The Agency sets the case for hearing before an ALJ.

Before the Agency ALJ hearing is held, Pinkerton sues the Agency and KitchenAid in federal district court. Pinkerton claims that it is unconstitutional for her to be required to litigate her case before the Agency rather than before a court, and she asks the district court to enjoin the Agency’s proceedings and allow her case to return to state court. The Agency and KitchenAid raise such defenses as one might expect. Both sides make all appropriate arguments.

You are the law clerk to the federal district judge considering the case. The judge asks for a memorandum addressing the issues raised by the case and providing advice as to how to rule on each issue and on the overall case.

Write the memorandum.
ESSAY QUESTION FOUR
(30 minutes)

You are the Legislative Director for U.S. Senator Gus Goodman. Another Senator introduces a bill that proposes the “Judicial Review Improvement Act,” which provides as follows:

When reviewing agency action, a court shall review all questions of law de novo and shall give no deference to any agency decision with regard to any question of law.

Senator Goodman asks you to write him a memorandum that evaluates this bill. Your memorandum should explain what the likely effects of the bill would be, discuss how courts might respond to it, and evaluate whether the bill is a good or a bad idea. If you think the bill could be improved by any relevant amendments that Senator Goodman could offer to it, you should mention those, or you may recommend that he support it as is or that he just oppose the whole thing. Senator Goodman is not an expert on administrative law and could therefore benefit from a brief explanation of what the bill is all about, but the main focus of your memorandum should be your evaluation of the bill from a policy perspective.

Write the memorandum.
MULTIPLE CHOICE QUESTIONS
(60 minutes)

Instructions:

1. For all multiple choice questions, choose the best answer from the answers provided.

2. Mark your answers on the bubble sheet using a #2 pencil. Do NOT simply mark your answers on the exam itself; that will NOT count.

3. There is no penalty for wrong answers, so answer every question.

[Redacted]

END OF EXAM