GWid:_____

EXAMINATION
ADMINISTRATIVE LAW – LAW 6400
Section 12 – Siegel
Fall 2018

INSTRUCTIONS

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 5 exam pages numbered 1 through 5.

4. There are FOUR QUESTIONS. All students must answer all questions. The weight of the questions is proportional to the recommended time allocations, which are:

   Question 1: 1 hour 15 minutes
   Question 2: 45 minutes
   Question 3: 30 minutes
   Question 4: 30 minutes

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 answers by hand, remember to *write legibly*.

7. If, with regard to any 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 questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.

9. Unless otherwise specified, assume all events described in the questions occurred within the United States and answer all questions on the basis of current law.

10. Good luck.

QUESTION ONE
(1 hour 15 minutes)

The Fourteenth Amendment to the U.S. Constitution, adopted in 1868, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. citizenship acquired by being born in the U.S. is called "birthright citizenship." In *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court interpreted the Fourteenth Amendment as mandating that a child born in the U.S. is a U.S. citizen even if both of the child's parents are aliens (that is, not U.S. citizens). The Court said that the meaning of the words "and subject to the jurisdiction thereof" in the Fourteenth Amendment is only that children born in the U.S. are not birthright citizens if their parents are foreign diplomats or enemy occupying soldiers. No subsequent case has questioned the rule of *Wong Kim Ark*, and ever since that case all children born in the U.S. (with the exceptions just noted) have been treated as birthright citizens.

The Supreme Court has never had occasion to explicitly consider the case of a child born in the U.S. to alien parents who were *illegally* present in the U.S. (the parents in the *Wong Kim Ark* case, although aliens, were lawful, permanent U.S. residents). However, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment, which provides that a state may not deny equal protection of the laws to "any person within its jurisdiction," applies to an alien who is illegally present in the U.S.

8 U.S.C. § 1401, a federal statute passed in 1952, provides: "The following shall be citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof . . . ." 8 U.S.C. § 1103 provides that the Secretary of State may make rules and regulations to implement 8 U.S.C. § 1401. The Secretary of State, who is the head of the Department of State, serves at the pleasure of the President.

On January 2, 2019, President Trump issues Executive Order ("E.O.") 14000, which states:

> *Preamble*. The United States is the only country in the world where a person comes in and has a baby, and the baby is a citizen and is entitled to government benefits. It's ridiculous. And it has to end. Therefore, by virtue of the authority vested in me as President of the United States:
>
> § 1. I hereby determine that the Fourteenth Amendment to the Constitution of the United States does not provide birthright citizenship to a child born in the United States to parents who are both aliens illegally present in the United States, because such children are not "subject to the jurisdiction" of the United States.
>
> § 2. I hereby direct the Secretary of State to promulgate a rule determining that 8 U.S.C. § 1401 does not provide birthright citizenship to such a child.

In fact, about 30 other countries in the world follow the rule that a child born in the country to alien parents is a birthright citizen of the country.

On January 15, 2019, the Secretary of State publishes the following notice:

> *"Birthright Citizenship Interpretative Rule"*: I hereby determine that a child born in the U.S. is not "subject to the jurisdiction" of the U.S., as that phrase is used in 8 U.S.C. § 1401, if both of the child's parents are aliens illegally present in the U.S. Accordingly, the Department of State shall, in all cases, treat such a child as not being a birthright citizen of the United States.
>
> The reasons for adopting this rule are: (1) The President has ordered me to do so, (2) the reasons stated by the President in the Preamble to E.O. 14000, and (3) this is the correct interpretation of the words "subject to the jurisdiction," or, at least, this is a reasonable interpretation of those words, deserving of judicial deference.

On January 17, 2019, Manuel Gonzales, a 25-year-old man who was born in Texas and who has lived in the United States all his life, files an application with the State Department for a U.S. passport. Information submitted by Gonzales with his application shows that at the time of his birth his parents were both aliens who were illegally present in the United States.

On February 1, 2019, the State Department sends Gonzales the following letter: "Dear Mr. Gonzales: Your passport application is denied. Reason: Although you meet all other requirements for the issuance of a U.S. passport, the information you supplied shows that, in light of E.O. 14000 and the Birthright Citizenship Interpretative Rule, you are not a citizen of the United States."

After exhausting his administrative remedies within the agency, Gonzales seeks judicial review of the denial of his passport application in an appropriate U.S. District Court. He makes all claims and arguments that might be expected on the above facts, including the claim that he is a U.S. citizen by virtue of the Fourteenth Amendment and, independently, by virtue of 8 U.S.C. § 1401. The government raises all defenses and makes all arguments that might be expected, except that the government does ***not*** raise any threshold issues (e.g., standing, ripeness, reviewability, exhaustion).

You are the law clerk to the district judge considering the case. Your judge asks you to write a memorandum considering the issues raised by the case and making a recommendation as to how to rule on each issue. Your judge asks you to conclude your memorandum with a clear recommendation as to whether Gonzales is ultimately entitled to relief, and, if so, what relief.

Write the memorandum.

QUESTION TWO

(45 minutes)

Under Georgia state law, any eligible voter may vote in any election by absentee ballot. The state's absentee ballot procedure requires a voter to mail in a completed ballot with a signed affidavit, which must be received by Election Day. Upon receipt, an election official checks whether the signature on the affidavit matches the signature on the voter's voter registration card. If, in the official's opinion, the signatures do not match, the official must reject the absentee ballot. Georgia law does not require election officials to have any training in determining whether two signatures match. About ½ of 1% of absentee ballots are rejected on this basis.

Georgia law provides that if an election official rejects an absentee ballot based on the signature match requirement, the official must "promptly" mail notice to the voter whose ballot was rejected. There is no statutory definition of "promptly." There is no procedure by which a voter may try to get a rejected absentee ballot accepted, but if a voter learns of a rejection sufficiently before Election Day, the voter may apply for, obtain, and mail in another absentee ballot (which would be subject to the same signature match requirement) or may vote in person. If the voter does not learn of the rejection in time, the voter has no remedy under Georgia law.

On March 1, 2020, Fair Vote Georgia (FVG), a public interest organization, sues Georgia election officials in federal district court. FVG alleges that hundreds of its members are Georgia voters who desire to vote by absentee ballot in Georgia's 2020 elections. FVG does not allege that any such member has had an absentee ballot rejected in the past. FVG alleges that election officials who have no training in handwriting analysis may err in determining whether a voter's signature on an affidavit matches the signature on the voter's voter registration card. FVG observes (correctly) that trained handwriting experts believe that to reliably determine whether a given signature comes from a given person requires having at least ten samples of that person's genuine signature.

FVG alleges that Georgia's signature matching procedure is unlawful. FVG raises such claims and arguments as might be expected on the above facts, although FVG raises only claims related to matters we studied in this course in Administrative Law. FVG observes that Georgia law provides that a voter whose absentee ballot is rejected on the ground that the voter is not eligible to vote is entitled to notice and to a hearing, which may take place up to 14 days after Election Day, at which the voter may present evidence regarding the voter's eligibility. FVG asks the court to order Georgia to allow a similar procedure for voters whose absentee ballots are rejected based on the signature match requirement. Such a voter, FVG says, should be entitled to a hearing, to be held up to 14 days after Election Day, at which the voter may show that the rejected ballot came from the voter and should be counted. The defendant elections officials raise all defenses and make all arguments that one might expect in response to FVG's claims.

How should the court rule on FVG's claims? Explain. If you think the court needs more facts to rule on the claims, explain what facts are needed and why, make reasonable assumptions about the missing facts, and answer the question based on your assumptions.

QUESTION THREE

(30 minutes)

The Congressional Review Act ("CRA"), a federal statute, provides that when any federal agency promulgates a "major rule" (defined as a rule that will have an impact on the economy of $100 million or more), the agency must notify Congress of the rule by sending a copy to the Clerk of the House of Representatives and the Secretary of the Senate. The CRA provides that when Congress receives such a notice it may, within 60 days, adopt a "Joint Resolution of Disapproval" ("JRD") with regard to the rule involved. The CRA provides that, to be effective, a JRD must be passed by both houses of Congress and presented to the President. Moreover, the CRA provides, the JRD, to be effective, must either be signed by the President, or, if the President does not sign it, be re-passed by a 2/3 vote of both houses of Congress. The CRA provides that if Congress adopts an effective JRD with regard to a rule, then the rule shall be of no force or effect, and the agency involved shall not in the future have power to re-promulgate the rule.

On June 1, 2019, the Federal Communications Commission ("FCC") adopts a "net neutrality" rule. The rule provides that every Internet Service Provider ("ISP") must provide its customers with access to all matter on the Internet at the same speed and for the same price. No ISP, the rule provides, may give any customer favored or disfavored access to any part of the Internet. The rule provides that if any customer believes that any ISP is violating the rule, the customer may bring a charge against the ISP before the FCC. An ALJ will hold a hearing on the charge and, if the ALJ determines that the ISP is violating the rule, the ALJ will order the ISP to comply. The rule also provides that when an ALJ issues a ruling on such a charge, "any losing party may, within 30 days, take an appeal from the ALJ's ruling to the five Commissioners of the FCC. During the pendency of such an appeal, the ALJ's ruling shall be inoperative."

The FCC determines that its net neutrality rule is a "major rule" as defined in the CRA and notifies Congress of the rule on June 1, 2019. On June 15, 2019, both houses of Congress adopt a JRD with regard to the net neutrality rule. On June 16, 2019, the President signs the JRD.

Thereafter, Comcast, an ISP, announces that Comcast customers who stream any video over the Internet will be charged an additional 10 cents per hour of such video streaming. Alice, a Comcast customer, brings a charge against Comcast before the FCC for violation of the FCC's net neutrality rule. An ALJ at the FCC rules against Alice on the ground that, because Congress adopted a JRD with regard to the net neutrality rule, the rule is not in effect.

Without seeking any further review within the agency, Alice seeks judicial review of the ALJ's ruling in federal district court (the FCC's statutes say nothing about judicial review). Alice claims that the ALJ's ruling is incorrect because the CRA is unconstitutional and, therefore, the FCC's net neutrality rule *is* in effect. The FCC appears as the defendant in district court. Both sides make all arguments that might be expected on the above facts.

How should the district court decide the case? Explain.

QUESTION FOUR
(30 minutes)

You are the Legislative Director for U.S. Senator Valerie Virtue. Another Senator introduces a bill that proposes the "Presidential Power Act." The proposed act would provide:

> **§ 1. The President shall have the power to fire any officer in the executive branch at any time for any reason.**
>
> **§ 2. Any provision of any previously passed law that conflicts with § 1 of this Act shall henceforth have no force or effect.**

Senator Virtue asks you to write her 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 Virtue could offer to it, you should mention those, or you may recommend that she support it as is or that she just oppose the whole thing. Senator Virtue 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.

END OF EXAM