GENERAL INSTRUCTIONS

THE ATTENTION OF ALL STUDENTS IS CALLED TO THE FOLLOWING INSTRUCTIONS:

1. The answers and the pledge are to be identified by examination number only. DO NOT WRITE OR TYPE YOUR NAME ON ANY BLUEBOOKS, SCANTRON SHEETS, OR ANYWHERE ON THE EXAMINATION; USE YOUR EXAMINATION NUMBER INSTEAD.

2. During the course of the examination, ABSOLUTELY NO EXAMINATION MATERIALS MAY BE REMOVED FROM THE EXAM ROOM. This includes the exam, any Scantron sheets, bluebooks, or examination answers.

3. This examination ends at the expiration of the time indicated, or when the examination is turned in, whichever comes first.

4. The professor will be permitted to grade only answers that have been submitted during the examination, in the method indicated by the professor.

5. At the conclusion of the time prescribed for the examination, students are forbidden from communicating with the professor with reference to the final examination until the grades have been turned in to the Registrar's Office except that students may communicate with the professor at any time concerning matters related to the Code of Student Professionalism and Conduct or the Academic Honor Code.

TIME: THREE (3) HOURS
SPECIAL INSTRUCTIONS

1. This is a LIMITED OPEN BOOK examination. You have previously been advised as to which materials you may use during the examination. You may bring to the exam the required books for the course and any notes or outlines you prepare yourself, but you may not bring any commercial outlines, study aids, or any other non-required materials that are not of your own making, including any past exams and/or exam answers.

2. This examination consists of TEN (10) PAGES. You should check now that you have all the pages. You have THREE (3) HOURS to complete the exam.

3. The point values and suggested times for answering each question are noted at the beginning of each question. Although each question may take you more or less time than suggested to complete, you should be conscious of the overall time allotted for the exam (3 hours) and budget accordingly.

4. The examination is in TWO (2) PARTS:

   - **PART I** of the examination contains TWO (2) QUESTIONS and is worth a combined total of ONE HUNDRED THIRTY FIVE (135) POINTS. QUESTION 1 consists of TWO (2) SUBPARTS and is worth a total of SEVENTY (70) points. QUESTION 2 is worth a total of SIXTY-FIVE (65) points. **YOU MUST ANSWER BOTH QUESTIONS IN PART I.** I suggest you allot approximately 2 hours and 40 minutes to Part I.

   - **PART II** of the examination consists of THREE (3) SHORT ANSWER QUESTIONS. **You must answer ONLY ONE of the three questions in Part II.** Your response is worth FIFTEEN (15) points. I suggest you allot approximately 20 MINUTES to Part II.
5. Please use a blue exam book or books or a computer to answer all of the questions in PARTS I and II. Make sure to write or type your exam number on your answer, including on each blue exam book you use. You may use as many exam books or type as many pages as you would like.

6. If you handwrite your answers in blue books, please write on every other line and only on the front of each page (i.e. do not write on the backs of pages).

7. In forming your essay answers, you should not feel compelled to include case names or citations, but should make clear which doctrine, statutory provision, or rule and which of the given facts you are relying on to support your analysis. Your answers should be limited to the question(s) asked, and should be organized accordingly. Organization is an important factor in the quality of your answer, so take care in structuring your responses.

I suggest outlining your answer (however briefly) before writing. This is not required, and scratch paper will not be considered as part of your answer for grading purposes, but it can be a useful tool in structuring your response.

END OF INSTRUCTIONS

GOOD LUCK AND HAVE A GREAT BREAK!
PART I
TWO (2) QUESTIONS
Suggested Time: 2 hours, 40 minutes
Total Points: 135

QUESTION 1
Suggested Time: 1 hour, 25 minutes
Possible Points: 70

On January 31, 2008, Congress enacted the Youth Discipline and Civility Act (the “Act”). The Act created a new entity within the Department of Education called the Youth Discipline Administration. The Act was promulgated pursuant to Congress’ spending power and conditions federal funding for schools on compliance with the Act and the administrative enforcement thereof. The Act reads, in pertinent part, as follows:

Youth Discipline and Civility Act

§1. Purpose. The Youth Discipline Administration (“YDA”) is hereby created for the purpose of instilling in American school children the values and priorities necessary to participate effectively in a civilized society.

§2. The YDA shall be led by an Administrator appointed by the President with the advice and consent of the Senate. The Administrator shall serve at the pleasure of the President provided the Administrator continues to demonstrate the principles of personal responsibility and discipline fundamental to the mission of the YDA. If at any time the Administrator engages in conduct inconsistent with these principles, the Administrator must be removed from office. The Administrator will be assisted by five (5) Regional Directors, each of which will report directly to the Administrator and may be appointed by either the President or the Administrator.

§3. The Administrator shall enforce this statute consistent with whatever course the Administrator deems appropriate to encourage America’s youth to embody principles of responsibility, civility and discipline. In enforcing this statute, the Administrator is empowered to promulgate rules and issue orders that shall have the force of law. The YDA is tasked with enforcing this statute immediately and to the greatest extent possible.
§4. All rules and orders issued by the YDA shall be made after opportunity for a hearing. Any new disciplinary standards formulated by the YDA pursuant to this statutory authority shall be submitted to the Congress for review. If the Congress chooses to review the standards, it shall notify and consult with the President. If, within 60 days of submission, a majority of both houses of Congress vote to rescind the new standards, the standards shall immediately become invalid.

§5. Judicial review of any agency action by the YDA shall be conducted in accord with the Administrative Procedure Act. Initial review proceedings shall be filed in the U.S. District Court for the District where either the conduct at issue or the agency action occurred.

Pursuant to its mandate to enforce the Act “immediately and to the greatest extent possible,” the YDA acted quickly to publish the following Notice of Proposed Rulemaking:

Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION
Youth Discipline Administration

Action: Notice of proposed rulemaking and request for comments.

Summary: The Youth Discipline Administration (YDA) announces a new rule pursuant to its authority under the Youth Discipline and Civility Act to promote greater responsibility, civility and discipline in American youth.

Dates and Contact: All comments must be submitted in writing by March 1, 2008 to the YDA’s offices at 100 New Hampshire Ave, N.W., Washington, DC 20009.

Background: A complete policy memo is available at the YDA website.
Proposed Rule:

§ 101: All primary and secondary school children over seven (7) years of age shall be disciplined for any use of profane or obscene language on school grounds while school is in session.

§ 102: Disciplinary action taken in response to a violation of § 101 may be pursued for any violation occurring after the beginning of the 2007-2008 school year, and shall be allocated as follows:

(a) For a first offense, the offending student shall have their name and photo posted in a public place on school grounds under the word “Discipline Problem.”

(b) For a second offense, the offending student shall receive an 8 hour detention on school grounds. For purposes of this section, detention means confinement in a fixed location on school grounds without access to other students, books, magazines, television or anything other than basic nutritional and sanitary necessities.

(c) For a third offense, the offending student shall receive a one (1) day suspension. For purposes of this section, suspension means exclusion from school property and all school activities. Every offense after the third shall result in a suspension one (1) day longer than the previous suspension. Any student who earns a five (5) day suspension will be permanently precluded from attending that school upon their next offense.

§ 103: Any initial decision to discipline a student for violation of § 101 must be made by the YDA. Students are entitled to a post-disciplinary hearing before a YDA hearing officer to challenge the validity of any of the disciplinary actions listed in §§ 102(a)-(c). The conduct of that hearing shall be controlled by the YDA hearing officer, but at minimum must include the opportunity for the student or their representative to appear in person, to pursue reasonable discovery, to present witness testimony and, where appropriate, to cross-examine adversarial witnesses. In the event the disciplinary action is deemed unjustified, the student shall be entitled to have their record expunged of the offense and, if appropriate, to receive compensatory damages.
After receiving public comments, the YDA issued its Final Rule on June 1, 2008, which was published at 100 C.F.R. 101 et seq (“Final Rule”). The Final Rule was identical to the proposed rule except that instead of starting with the phrase “All primary and secondary school children over seven (7) years of age shall be disciplined,” § 101 of the final rule began with “All primary and secondary school children over five (5) years of age shall be disciplined.” In its statement accompanying the Final Rule, the YDA explained that during the comment period it retained as consultants a group of child psychologists who submitted to the YDA the results of a study they conducted concluding that the appropriate age group for the regulation is children over five (5) years of age.

Soon after the publication of the Final Rule, a group called Parents for Free Expression in Schools (PFES) contacted a law firm specializing in administrative law about challenging the Final Rule. At their initial meeting with a senior partner from the firm to discuss their case, PFES offered evidence that during the comment period for the Final Rule, high-ranking officials at the YDA had phone conversations with a number of members of Congress supporting the Rule on the grounds that its strict disciplinary standards would help alleviate classroom overcrowding, and that the same YDA officials received a letter from the President encouraging the YDA to lower the threshold age for application of the Final Rule from 7 to 5 years of age. None of this evidence had been made public prior to enactment of the Final Rule.

The senior partner who met with PFES contacted you, her most promising young associate, to identify the potential grounds for challenging the Rule and to analyze their likelihood of success. More specifically, the senior partner asked you to break down the analysis in to the following categories:

A. Any potential constitutional issues associated with §§ 1-4 of the Act; and

B. Any potential issues pertaining to the validity of the Final Rule under the APA.

For purposes of this assignment, you should assume that Congress’ spending power permits it to condition funding on schools’ compliance with disciplinary standards, and that there is no problem with the standing of PFES to challenge either the Act or the Final Rule.

If for some reason you feel that additional factual information is necessary to complete your assignment, please identify that information and explain how it would affect your analysis.
About four months after promulgating the Final Rule, the YDA Administrator received a letter from a group of primary and secondary school superintendents requesting clarification on the definition of “profane or obscene language” in § 101 of the Final Rule. The Administrator responded by publishing the following memorandum in the Federal Register (“YDA Memo”):

To: All Interested Parties  

From: Administrator, Youth Disciplinary Administration  

Re: YDA Final Rule, 100 C.F.R. 101 et seq.  

The phrase “profane or obscene language” in the above-referenced Final Rule includes the well-established definition of “any words or phrases referring to sexual or excretory conduct or anatomy,” as well as any other forms of expression, including non-verbal communication, designed to approximate such words or phrases or to otherwise offend the sensibilities of the listener in a similar manner or to a similar degree.

On November 4, 2008, Davey Moore, a 10-year-old fifth grade student in Tampa, FL called a classmate of his an “a—hole.” Based solely on a report from his principal describing the event, he was found by a YDA hearing officer to have violated § 101 of the Final Rule. Because it was his first offense, his name and photo were placed on a school bulletin board under the heading “Discipline Problem.”

The following day, Davey was caught “thumbing his nose” at a different student. Again based entirely on a report from his principal, he was disciplined by the same YDA hearing officer for violating § 101 as interpreted by the YDA Memo. The report stated that Davey had been involved in a loud argument with his classmate prior to “thumbing” his nose at him. Although Davey was not afforded an opportunity to be heard by the YDA hearing officer prior to their decision, the report did include mention of Davey’s side of the story, namely that he and his classmate were not arguing at all, but were in fact joking around and reenacting a scene from a movie in which one of the characters performs the “thumbing” gesture that Davey was cited for. Based on these facts, Davey argues, his gesture should not have been interpreted as profane or obscene, and certainly not as one intended to offend. The hearing officer nevertheless ruled that Davey had violated § 101 and because this was his second offense, Davey received an 8-hour detention.
In both cases against Davey, the YDA hearing officer’s ruling stated simply that “based on a review of all the evidence before me, I hereby find that Davey Moore has engaged in conduct constituting a violation of § 101.”

Rather than seek a post-disciplinary review within the YDA, Davey instead chose to immediately challenge the validity of the hearing officer’s rulings in the United States District Court for the Middle District of Florida pursuant to § 5 of the Act.

While he was waiting for a hearing date to be set in the Middle District, Davey learned that the YDA hearing officer that heard his cases had recently addressed the annual meeting of a local political group called Values R’ Us in which he spoke about the YDA’s Rule regarding profanity in schools and, in particular, the importance of including non-verbal communications within the definition of profane. At the end of his speech, he took questions and comments from the audience on the topic. In addition to his speaking appearance, the hearing officer recently met with the YDA Regional Director for the Western United States about the purpose and meaning of the YDA Memo.

On recommendation from PFES, Davey came to your firm for advice on seeking review of the YDA’s disciplinary actions against him. Due to their close proximity, Davey has sought review of both disciplinary actions together. The senior partner has again asked you, her promising new associate, to do the initial analysis of Davey’s case.

You must prepare an informal memo to the senior partner identifying any and all potential issues to be raised in Davey’s petition for review and analyzing how the court is likely to resolve those issues, including which standard of review the district court should use in reaching its resolution. (Note: The format of the memo is not important. If for some reason you feel that additional factual information is necessary to complete your assignment, please identify that information and explain how it would affect your analysis.
PART II
SHORT ANSWER QUESTION
Suggested Time: 20 minutes
Possible Points: 15

Please discuss ONLY ONE of the following statements in no more than a few paragraphs:

A. Agencies should not be permitted to apply adjudicatory precedent in future cases against different parties.

B. The development of the delegation doctrine has significantly weakened our constitutional democracy.

C. The Chevron doctrine is an affront to our constitutional system of separation of powers.