

## Administrative Process

Fall 2021

Prof. Ford

### OPTIONAL TAKE-HOME MIDTERM

This optional take-home midterm is due on **Friday, October 29, at 11:59 pm**. You must not spend more than four hours total completing this exam (unless you have been granted an accommodation by the University under which you have more time), and you must not use more than **1,200 words total** for your responses.

*Materials:* You may consult any existing material you wish while completing this exam, though answers discussing cases, doctrine, or principles that were not included in the first ten reading assignments will not receive credit. You must write your entire response, yourself, during the exam period. You may not discuss the exam with anyone until everyone has finished taking it.

*Answer submission:* Prepare your answers in whatever word processor or text editor you want; you will submit your responses to a web form once you have finished the exam. To submit your answers, go to <https://rogerford.org/admin21f/midterm/> and paste your responses to each question into the form. Note that because the form doesn't preserve formatting, you won't be able to use bold or italic type in your responses; if you want to use bullet points or headers, you will need to do so manually, for instance by using a bullet character or putting header text on its own line. The form will also ask you for a secret word and for the total word count for your responses. For the secret word, pick whatever word you want. Be sure to write down your secret word and word count; you will need them to get your graded midterm.

As in legal practice, writing counts, so take time to outline your responses and leave some time for editing. Follow standard practices of good writing: use topic sentences; break up your text into paragraphs, each focused on a single idea; use short, complete, grammatically correct sentences.

If any questions are unclear or missing information, draw reasonable inferences from the available information and explain why you draw those inferences or, if no such information is available, state any assumptions you make and explain how your answer depends on those assumptions.

Good luck!

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## The PEASE Act.

In early 2023, after a spate of accidents at circuses, amusement parks, state fairs, and other attractions, Congress enacts, and the president signs, the Parks, Entertainment Activities, and Safe Environments (PEASE) Act. The Act charges the Consumer Product Safety Commission, an existing federal agency, with regulating the safety of these sorts of attractions. Specifically, the Act provides, in relevant part:

**Section 4.** The Commission shall enact regulations to promote the safety of amusements.<sup>[\*]</sup> In enacting regulations pursuant to this section, the Commission shall consider the need to protect the public safety, the costs of the regulations imposed in relation to the expected benefits, and the need for fair notice and time for compliance. Regulations enacted pursuant to this authority shall be stated in clear, practicable terms and shall be published in the Federal Register.

**Section 5.** The Commission shall have the authority to enforce regulations enacted pursuant to section 4 by making findings of violations and issuing fines and injunctive orders as appropriate. A person subject to a final decision issued pursuant to this section may seek judicial review by filing a petition for review with the court of appeals within 90 days of the final agency action.

After the PEASE Act goes into effect, the Commission enacts a rule through notice-and-comment rulemaking implementing ride-safety standards and providing for periodic safety inspections of rides operated at attractions subject to the Act (“covered amusements”). Some of the details of the ride-safety rule include:

- The rule requires the designs for all rides to be certified as safe by an independent licensed mechanical engineer.
- The rule sets a mandatory maximum speed for all rides of 15 miles per hour unless the ride’s operator has a permit from the Commission, and sets up a process for issuing such permits.
- The rule requires the ride operator to maintain maintenance and repair logs for each ride and to inform the Commission any time an employee or guest is injured on a ride.
- The rule sets up an inspection program by which Commission inspectors periodically make unannounced inspection visits.
- The rule sets up a process for public complaints about ride safety and charges Commission inspectors with investigating those complaints.

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\* “Amusement” is defined in an earlier section of the Act to mean “any recreational facility featuring an assortment of rides, games, vendors, and similar attractions that is open to the public with or without the payment of an admission fee, including any amusement park, circus, traveling fair, petting zoo, or similar facility operating in interstate or foreign commerce.”

At the same time it issues the ride-safety rule, the Commission also issues two more notices of proposed rulemaking:

- The first notice announces a draft food-safety rule, which would regulate the handling, storage, and treatment of prepared foods sold at covered amusements. It would require, among other things, that any food cooked on the site of the amusement must be prepared the same day it is served and that, in particular, any fried food prepared on the site of the amusement must be disposed of within one hour of cooking if unsold.
- The second notice announces a draft animal-welfare rule, which would regulate the treatment of animals used in circuses and shows at covered amusements. It would require that any animals featured in a show or attraction open to the public be treated in a safe and humane manner. It would also impose generous minimum-space requirements for any animals housed on site and would require that any amusement featuring animals must employ an on-site veterinarian and file periodic health reports with the Commission.

You are a lawyer at a law firm representing Waystar-Royco, a company that operates several parks and attractions subject to the Act. Greg Hirsch, the company's head of parks and amusements, comes to you seeking advice. He tells you that the company just got a notice of enforcement issued pursuant to the ride-safety rule, which purports to order the company to shut down certain rides effective immediately until the Commission can send inspectors to verify that the rides are being safely operated. Hirsch is baffled by the order, since it doesn't seem to be based on any inspections or violations, or even significant safety concerns. Sure, some of the company's rides may go a little faster than the speed limits, and sure, the company hasn't had all of its rides inspected by licensed engineers yet, but the rule just went into effect and it hasn't had time to come into compliance yet. The best guess Hirsch can offer is that maybe some customers, upset by an unrelated controversy involving Waystar-Royco's news division, complained to the Commission about the rides. He notes that the hashtag #CancelWaystar had trended on Twitter a few weeks ago, but he doesn't see any reason to think the Commission was involved.

Hirsch is also concerned about the pending rulemakings, though they aren't as immediately pressing. When you ask about how the company would be affected by the food-safety and animal-welfare rules, Hirsch tells you the following:

- Waystar-Royco's parks feature both sit-down and buffet restaurants, along with walk-up food carts and stands. Though the sit-down restaurants prepare everything to order, the buffets generally operate all day, and having to replace fried foods on the buffet line every hour would be a significant administrative hassle and waste of food. The company also thinks it is unnecessary, since it hasn't had any problems with food safety that it knows of. In any event, its restaurants comply with all applicable state and local food-safety laws, so he doesn't see why it should be subject to these new burdens.

- Waystar-Royco's parks do not feature animal shows or attractions, but they do have bomb-sniffing dogs that periodically patrol the parks with their handlers. To avoid scaring customers, the dogs and their handlers wear costumes of Waystar-Royco characters, and park guests regularly pet the dogs and ask to take photos with the dogs and their handlers. On two occasions in the last three years, dogs bit children who were unusually rough in their petting. In both cases the children were treated for minor injuries and given coupons for free ice cream; nothing else came of either incident. The parks do not have housing for the dogs or employ on-site veterinarians. Instead, the handlers take the dogs home at night and take them to private veterinarians as needed.

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**QUESTION 1.** Waystar-Royco needs to figure out how to respond to the notice of enforcement. Advise Hirsch of the company's potential options. Since you just got the case, you haven't had a chance to investigate all the relevant facts, so there will be some parts of the analysis you cannot address definitively. But where those gaps exist, advise Hirsch of the potential arguments, the kinds of facts that you would need to develop in order to prevail, and your likelihood of success.

**QUESTION 2.** Waystar-Royco would also like to kill the food-safety and animal-welfare rules, or at least ensure that they don't create problems for the company. Advise Hirsch of the company's potential options, with the same caveats as above about incomplete facts.

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