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Course / Session S13 Intro Con Law -Sidhu
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Course S13 Intro Con Law -Sidhu

Event NA

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Exam ID

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	1899	9600	11556
Section 2	341	1804	2153
Total	2240	11404	13709

QUESTION 2

1. Caroline's Standing

The State of Caroline probably does have standing. In order to have Constitutional standing as derived from Article III, a plaintiff must meet the following requirements: (1) the plaintiff must have suffered or imminently will suffer an injury; (2) the injury must be fairly traceable to the defendant's conduct; and (3) a favorable court decision will redress the injury.

Under the Mature Video Game Act of 2013 (the Act), the State of Caroline (as the producer of the educational video games in its elementary school classrooms) would be required to keep as a part of a paid staff a child psychologist or psychiatrist that is licensed to practice in the United States. Caroline legislators are concerned about Caroline's modest budget if they must pay not only a licensed professional to look over educational video games that are not violent in nature, but also pay the penalties for not employing a licensed professional. Because of the concern over the budget, legislator's voted against compliance with the Act.

Caroline could argue that the loss of funds from an already small budget could constitute an injury. Although Caroline has not yet hired the licensed professional, nor paid the penalty for not doing so, they have not yet suffered the injury. However, the possibility of having to pay for these things could be an imminent injury. The legislator's of Caroline have voted against compliance with this Act, and yet are being forced to comply although they have grave budget concerns. The Act is supposed to be targeted toward the regulation of violent video games, but the only games in question under Caroline's lawsuit are the educational games used in Caroline elementary schools. Requiring the extra expenditures from an already small budget could cause injury to a state economy, possibly rendering it weaker and less able to be a market participant. An injury will be imminently

suffered if Caroline must pay the penalties and hire a licensed professional.

The defendant is the U.S. Department of Justice, as the enforcers of payment for failure to comply with the Act. If D.O.J. is enforcing payment, then if the State of Caroline has to pay for not hiring a licensed professional, then the injury can be fairly traced back to the D.O.J.

A court decision in favor of the State of Caroline would redress the imminent injury. If the Act is declared unconstitutional, then Caroline will not be required to pay for the staffing of a licensed professional, nor will they be required to pay the penalty for not hiring the professional in a timely fashion.

There is also an issue of Prudential Standing Requirements. A party can only assert its own rights, and cannot raise the claims of third parties. There is also a ban on generalized grievances—a party cannot sue as a taxpayer or citizen who shares a common grievance with other tax payers. Caroline is not raising the claims for a third party, so it is not an issue here. It could be argued by the U.S. DOJ that Caroline does not have standing because they are trying to sue by bringing a generalized grievance which they share with other taxpayers. However, this is not a very strong argument. Because prudential standing requirements are not derived from the Constitution, Congress can still decide to override the prudential standing requirements.

Because Caroline does have an imminent injury which would be redressable by a favorable court decision, and the injury can be fairly traceable back to the defendant, Carolina likely has standing.

2. Congress' Commerce Power

Using its Commerce power, Congress can regulate in three areas: (1) channels of commerce; (2) instrumentalities of commerce; and (3) when something has a substantial effect on

interstate commerce. Under the substantial effect category, there are two different options depending on whether the activity is economic or non-economic.

One and two do not apply to the issue at hand, as "channels of commerce" entails things like roadways and waterways. "Instrumentalities" entails goods or persons affecting commerce, like vehicles on a highway. Congress will have to argue that they have to power to pass the Act pursuant to the third option: that the production and distribution by the State of Caroline within the state of Caroline has a substantial effect on interstate commerce. "Economic" activity, as under the third category are things like production, distribution, and consumption. Since the State of Caroline is involved in the production, distribution and consumption of its educational video games, it falls under the economic activity prong of the substantial effect category.

In *Wickard v. Filburn* (1942), the Supreme Court of the United States (SCOTUS) allowed Congress to regulate wheat that was grown for home consumption, which is a completely internal action (not interstate). This was because of the aggregate effect a purely intrastate action could have if everyone decided to do it. So, economic activities can be regulated if, when aggregated, it substantially effects interstate commerce. In *Heart of Atlanta*

The issue, then, is whether the intrastate production, distribution and consumption of the educational video games could have a substantial economic effect on interstate commerce. Caroline argues that its video games are produced in Caroline, are given free of charge to its public elementary schools, and that the video games are used only the state. The games are designed to help students improve critical skills, such as math, reading, and spelling. Caroline credits its video game technology in the classroom as a reason why the public school students do very well on nationwide exams. With good scores on nationwide exams, it is also likely the students in Caroline are

also getting good grades which in turn can lead to higher graduation rates. With higher rate of high school diplomas being earned, some of which will turn into college degrees, it could be argued that the video games are leading to better educated students who go on to get higher paying jobs. This in turn could lead to a stronger state economy in Caroline, which in turn could help to strengthen the national economy. Plus, not all Caroline students will stay in Caroline, some may cross state lines in order to take jobs elsewhere, furthering the effect on interstate commerce. Further, if other states decided to take similar steps with their own educational video games, then they effect on interstate commerce would be even larger. When taken in the aggregate, Caroline's intrastate economic activities do have a substantial affect on interstate commerce.

Because Caroline's economic activities to substantial affect interstate commerce, Congress has the authority under its Commerce power to pass the Act.

3. Congress' Taxing Power

Congress has the power to tax to pay debts and to provide for the common defense and general welfare of the United States. Under Congress' Taxing power, if Congress can regulate commerce, then Congress can tax it. The next inquiry is if Congress cannot regulate, can Congress still use their Tax power for regulatory penalties? It has to be determined wether the proposed tax is actually a tax, or if it is a sham regulation.

In NFIB (ACA case), the Supreme Court of the United States established that an individual penalty can be construed as a tax where the penalty is paid to and enforced by the IRS and is based on income.

Caroline has a strong argument in the present case because the penalties that must be paid for failing to comply with the Act (hiring a licensed professional and certification of developed video games) are paid to the U.S. Department of Health

and Human Services, not to the IRS. Further, they are enforced by the U.S. Department of Justice, not enforced by the IRS. Under NFIB, the manner in which the penalties are paid and enforced for failure to comply with the Mature Video Game Act are not appropriate. It could be seen as a "sham" regulation because it is more about raising awareness of the dangers of violent video game addiction rather than raising revenues (Bailey v. Drexel Furniture). Caroline has a strong argument that Congress does not have the power to pass the Act under its Taxing power.

Congress could argue, however, that because Congress has the power to collect taxes for the general welfare of the United States, that they do have the power to pass the Act pursuant to their Taxing power. Congress is only trying to protect the welfare of the United States by raising awareness of dangers in light of a terrible tragedy.

The State if Caroline has a strong argument using the case of NFIB. Because the penalty is not paid to or enforced by the IRS, Congress does not have the authority to pass the Act under its Taxing power.

4. Consistency with Tenth Amendment

The U.S. DOJ argues that the Act does not offend the Tenth Amendment. Under the Tenth Amendment, "The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As established by New York v. U.S. (1992) (Congress' Low-Level Radioactive Waste Policy Amendments Act was found unconstitutional because it was commandeering the state's legislature) and by Printz v. U.S. (1997) (the Brady Handgun Violence Protection Act was found unconstitutional because it compelled the states to enact/administer a regulatory program), Congress may incentivize States to regulate, but Congress cannot directly command the States or state officials to regulate. In

NFIB, it was established that Congress must give the states meaningful choices, Congress cannot coerce states into specific actions.

In the present case, the State is the actual entity that will be regulated by Congress because the State of Carolina is the entity that is producing and distributing the video games. Caroline can argue that the Act is not incentivizing the state, but instead commandeering it. Caroline could argue the Act does not give it a meaningful choice, it either has to comply and hire a licensed professional or pay a tax. Further, the Act is to regulate violent video games, while Caroline is being coerced into hiring a professional and paying penalties when it is not a producer of violent video games at all but rather educational games. If it is found that Congress is commandeering or coercing Caroline into compliance with the Act, then the Act offends the Tenth Amendment and is unconstitutional.

In *Reno v. Condon*, the DPPA established penalties for disclosure or resale of personal information contained in DMV records. The court found that this was a valid exercise of Congress' power and did not offend the 10th amendment because: it was a prohibition, not an order; it was applicable to everyone (not just states); and because the state was acting as a market participant.

Congress could argue, using *Condon*, that the Video Game act is applicable to everyone who produces video games, not just states. congress could also argue that the state is acting as a market participant by producing and distributing the games. However, the Act is not merely a prohibition like the Act in *Reno*, but it is still an order to hire a professional and pay penalties for not doing so.

The State of Caroline has the better argument. The Act is not consistent with the 10th Amendment, and even though it is a proper enactment of the Commerce Clause, it could still be found to be unconstitutional.

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QUESTION 3

1. Caroline and Sovereign Immunity

Caroline is not entitled to sovereign immunity. While it is true that Caroline did not consent to the suit, and it is also true that the Act does not abrogate Caroline's sovereign immunity, there is another exception to sovereign immunity. A state may be sued by the federal government or by other states. Here, although it is through the U.S. Department of Justice, it is the United States that has filed the countersuit for the unpaid penalty.

2. Caroline and Preemption

Caroline's preemption argument is incorrect. While it is true that there is no express preemption, express preemption is not the only manner in which a state law can be preempted. There are three types of implied preemption: (1) conflict preemption; (2) field preemption; and (3) frustration preemption. Conflict preemption could possibly apply here if Caroline's state laws regulating advertisements of mature video games makes it impossible for advertisers to comply with both state and federal laws. Field preemption likely doesn't apply, but it is not out of the question. It could apply in an area where Congress intended to preempt state law in that area, or where federal interest is dominant. Frustration preemption could apply if Caroline's state laws impede the achievement of a federal objective. No matter which implied preemption could possibly apply, Caroline's argument is incorrect because express preemption is not the only way for a state law to be preempted.

3. Caroline and DCC

Caroline's argument that the Dormant Commerce Clause does not prohibit non-discriminatory state laws is incorrect. Using the Pike Balancing Test, a non-discriminatory state law can still be prohibited and found unconstitutional when the burden on interstate commerce is clearly excessive in relation to a local benefit.

4. Caroline and P & I

Caroline's argument that the Article IV Privileges and Immunities clause does not prohibit non-discriminatory state laws is correct. P & I deals only with discriminatory state or local laws that discriminate against out of state individuals who are still citizens of the United States.