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Institution **University of New Mexico School of Law**
Course **S13 Intro Con Law -Sidhu**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**1728**	**8791**	**10512**
Section 2	**478**	**2602**	**3075**
Section 3	**8**	**37**	**44**
Total	**2214**	**11430**	**13631**

Answer-to-Question-_2_

This Court has been asked to consider the Constitutionality of the Mature Video Games Act (hereinafter "MVGA") recently passed by Congress. In this opinion, the Court addresses four issues: 1) whether Caroline has standing to contest the constitutionality of the MVGA; 2) whether Congress has the authority under its Commerce power to pass the MVGA; 3) whether Congress has the authority under its Taxing power to pass the MVGA; and 4) whether the MVGA is consistent with the 10th Amendment.

The State of Caroline (hereinafter "Caroline") does not have standing to bring the case. In order to prove standing, a plaintiff must demonstrate that he has "suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. Environmental Protection Agency*. The Federal government has not sought any enforcement action against Caroline for not complying with the Mature Video Game Act (hereinafter "MVGA"), and thus no actual injury has been suffered. In order to prove standing, Caroline would have to prove that such enforcement is imminent, however, there is nothing in the facts to suggest this. It is quite possible that the Federal government will choose not to enforce the MVGA against non-profit and educational video game producers, such as the State of Caroline. If in the future the Federal government does cause injury to Caroline by imposing on Carline the penalty provided for under the MVGA, that injury will certainly be traceable to the Federal government, and a judgment in favor of the Plaintiff could redress the injury by dismissing the penalty and striking down the statute, as applied, if not on its face. However, since Caroline cannot establish the first prong of the test for Constitutional standing, it is unnecessary to reach the second and third prongs at this time.

The lack of existing injury in this case can be attributed

to the lack of "ripeness" to use the terminology of the Court. The Supreme Court addressed a similar fact pattern in *Poe v. Ullman*, where a husband and wife sought a judgment against the State of Connecticut invalidating the State law against contraceptives. The Court in that case held that "the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." The Court found that Connecticut had chosen to follow a policy of non-enforcement of the law against contraceptives, and thus, injury was not imminent. Similarly in this case, the Federal government may choose to follow a policy of non-enforcement against non-profit and educational video game producers, such as Caroline.

Even if the MVGA is unconstitutional, and the Federal government is enforcing it against other parties, one of those parties must bring the suit. Caroline cannot stand-in as a third-party plaintiff. See *Gilmore v. Utah*, in which the mother of a death row inmate sued to stay his execution, when he ad chosen not to pursue habeas corpus. Likewise, there is a prohibition against suits for generalized grievances that prevents Caroline from filing suit without a particularized injury. See *U.S. v. Richardson*, in which the Court denied standing to an individual who was suing to enforce the Art. I, Section 9, cl. 7 of the Constitution, which mandates public accounting of Federal expenditures, and which he believed the CIA was violating. These cases demonstrate that a Constitutional violation does not create standing; standing only arises when a party meets the criteria laid out in *Massachusetts v. EPA*, quoted above.

Congress does have the authority under its Commerce power to pass the MVGA. Congress has been held to have the authority to regulate three categories of activity under the Commerce Clause: 1) the channels of interstate commerce; 2) the instrumentalities of interstate commerce, and persons and goods in interstate

commerce; and 3) activities that, when aggregated, Congress rationally determines have a substantial effect on interstate commerce. *Wickard v. Filburn.* Further, it has been established that Congress may regulate the production of goods that will be traded in interstate commerce. *United States v. Darby.* The production for in-state consumption of goods prohibited by Congress may, in the aggregate, have an effect on interstate commerce, since those goods may be drawn into the interstate market and there have an effect on the supply and demand. *Gonzales v. Raich.* It seems obvious in the modern day that production of video games in one state will have a substantial impact on the national market, even if those video games are originally only intended for distribution in-state. Video games can be uploaded and downloaded from the internet with ease. They can be bought and sold on websites such as Amazon and Ebay, which allow individuals to become merchants. The current market for video games is very much a national and international one. Congress here is seeking to eliminate the availability of violent video games, just as in *Raich*, it sought to eliminate the availability of marijuana. Video games, perhaps even more so than marijuana, are easily transportable across state lines. Therefore, under *Raich*, Congress has the authority to regulate video games and even prohibit violent video games, and under *Darby* Congress has the authority to regulate their production, including requiring video game manufacturers to hire a child psychologist or child psychiatrist.

Caroline has made a good argument as to why the act should not be applied to the State, given it does not produce mature video games, and its video games are not sold but are instead given free of cost to public schools in Caroline. Nonetheless, the Supreme Court stated in *Raich* "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class" (internal quotes and citations ommitted). The vast majority of video games are produced for the national

and international market place, and thus are within the reach of federal power. Even if the application of the statute to Caroline seems unnecessary, it is not the place of this Court to strike it down, in whole, or in part, on that basis.

The MVGA cannot be supported by Congress's power to tax and spend. The Court addressed the issue squarely in *NFIB v. Sebellius*. In that case Congress sought to impose a penalty on individuals above a certain income level who did not purchase a minimum level of health insurance. The Court, after determining that the individual mandate could not be sustained as an exercise of Congress's commerce power, found that it could be sustained as a tax. The Court considered a variety of factors in reaching this conclusion, including: that the penalty was collected by the IRS, and paid into the treasury; that the penalty was based on income level, filing status, and other such factors that are frequently used to determine tax liability; that the penalty would often be significantly less than the cost of purchasing health insurance, and by statute could never be more; and that the statute did not state it would be unlawful for citizens to choose to pay the tax instead of purchasing health insurance. In this case, the situation is quite the opposite. The plain wording of the statute in this case, like *NFIB*, identifies the exaction as a "penalty". However, unlike the penalty in *NFIB*, the penalty in the MVGA is collected by the Justice Department. It is not paid into the treasury like other taxes, but instead is paid into a specific fund managed by the Department of Health and Human Services to finance informational materials regarding violent video games. The section of the statute available does not contain adequate information to determine if the amount of the penalty is truly prohibitive, or if it's more or less costly than complying with the statute, but it does not appear to be based on the typical factors considered when filing taxes. Lastly, one of the provisions which may trigger the penalty specifically describes the sale of games which have been marked as "unfit for use" as unlawful. All of this weighs in favor of considering the penalty

to be exactly that, a penalty, and not a tax. Accordingly, the MVGA cannot be sustained under Congress's power to tax and spend.

The MVGA is consistent with the 10th Amendment. Although the Supreme Court has held that Congress does not have the authority to command state legislatures to enact certain regulations or if they do not enact those regulations to take title to radioactive waste (*New York v. United States*) or to command state law enforcement officers to run background checks on handgun purchasers (*Printz v. United States*), the Court has held that Congress can regulate states as market participants (*Reno v. Condon*). In the case of *Reno v. Condon*, the Court held that an act prohibiting states from selling or disclosing information collected by state DMVs did not violate the 10th Amendment. The Court sad "The DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases." The MVGA similarly does not require the states to act in their sovereign capacity. The state legislature is not commanded to pass regulations, as in *New York*, nor are State officers commanded to do the bidding of the Federal government, as in *Printz*. Instead, Caroline is being regulated as a producer of video games, which is far more similar to the regulation of states as database owners in *Reno*, where the statute was sustained, than in the other two cases, where the statutes were struck down. The MVGA regulates all producers of video games, as such, and is not seeking to commandeer any State sovereignty for Federal purposes. Accordingly, it does not violate the 10th Amendment.

This Court holds: 1) that Caroline does not have standing to contest the constitutionality of the MVGA at this time; 2) that Congress has the authority to pass the MVGA under the Commerce Clause; 3) that Congress's power to tax does not provide sufficient support for the MVGA; and 4) that the MVGA is consistent with the 10th Amendment. Accordingly, the MVGA is upheld as constitutional.

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Answer-to-Question-_3_

The 11th Amendment states "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." However, under *Seminole Tribe of Florida v. Florida*, Congress can authorize such suits when acting under the 14th Amendment. However, no Congressional authorization is alleged here. Therefore, Caroline is entitled to 11th Amendment immunity with regards to the claims brought against it by the individuals from neighboring states. However, the 11th Amendment does not mention, nor protect against, suits brought by other states or the Federal government. Accordingly, Caroline is not entitled to sovereign immunity with regards to those claims.

Caroline's preemption argument is incorrect. In addition to express preemption, state laws may be preempted when they conflict with Federal law (discussed in *Florida Lime & Avocado Growers, Inc. v. Paul*), when they impede federal objectives (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commn.*), or when Congress has passed regulations which occupy the field (*Hines & Industry of Pennsylvania v. Davidowitz*). Caroline's regulation of mature video games in this case falls into the third category, since it regulates a market that Congress is attempting to eliminate completely through MVGA.

Caroline's Dormant Commerce Clause argument is likewise ill-founded. Non-discriminatory state laws may still be struck down under the Dormant Commerce Clause if the burden they impose on interstate commerce outweighs the benefits of the law. The Supreme Court addressed such an issue in *Southern Pacific Co. v.*

Arizona, and held that restrictions on railroad lines should be decided at the national, rather than state level, given the national character of those lines. That is also the case here, since the market for video games is of national and international character. Subjecting video game producers to potentially 50 different labeling requirements for their products would impose an undue burden on them. If such labeling requirements should be made, it should be done by Congress, so that video game producers can print uniform labels for their products nationwide.

Caroline is also entitled to the Privileges and Immunities claims against it. The law at issue is non-discriminatory, and therefore, does not violate the Privileges and Immunities Clause. The cases involving that clause have always related to discrimination against out-of-stater as such. For example, in *Toomer v. Witsell*, the Court held unconstitutional a South Carolina statute that charged people from outside the state $2,500 for a shrimp boat license, and only charged residents of South Carolina $25 for shrimp boat licenses. The statute in this case makes no such distinction between residents of Caroline and residents of other states. It simply requires all video games sold in Caroline to be labeled a certain way, regardless of where they are produced.

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Answer-to-Question-_4_

Mr. Loving responded that he loved his wife.