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MISSOURI BILL ON VIOLENT VIDEO GAMES

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You asked about the constitutionality of a Missouri bill which would impose an excise tax on the sale of violent video games. Please note that the Office of Legislative Research is not authorized to provide legal opinions and this report should not be construed as such.

SUMMARY

A recent bill in Missouri (House Bill 157) would impose a 1% excise tax on violent video games. This would be in addition to other applicable sales taxes. The revenue generated by the tax, minus certain reductions, would be used for the treatment of mental health conditions associated with exposure to violent video games. The bill defines a "violent video game" as a video or computer game that the Entertainment Software Rating Board (ESRB) has rated as Teen, Mature, or Adult Only. For the full text of the bill and information on its status, see the Missouri House of Representatives website: http://www.house.mo.gov/billsummary.aspx?bill=HB157&year=2013&code=R.

There have been a few similar bills in other states in recent years which would impose additional taxes on violent video games or all video games, although none have become law (e.g., Oklahoma HB 2696 in 2012 (violent games); New Mexico HB 583 in 2008 (all)).

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We were unable to find any case law specifically addressing the constitutionality of legislation imposing additional taxation on violent video games. The most likely constitutional challenge to such legislation would be that by imposing a tax based on the game's content, it violates the free speech protection of the First Amendment.

In 2011, the U.S. Supreme Court held that a California statute prohibiting the sale of violent video games to minors was unconstitutional under the First Amendment. The majority concluded that the statute was a content-based restriction on speech, and thus would be subjected to strict scrutiny review — meaning that for the statute to be upheld, the state would have to show that the statute was narrowly drawn to serve a compelling government interest. The majority concluded that the statute failed to meet that standard and was thus unconstitutional. The opinion made clear that such a prohibition would have also been invalid had it applied to all purchasers rather than just minors (*Brown v. Entertainment Merchants Ass'n*, 564 U.S. ____, 131 S. Ct. 2729 (2011)).

The U.S. Supreme Court has also held that content-based financial burdens (including taxation), like content-based restrictions on activity, are generally subject to strict scrutiny.

Thus, it is likely that a court would apply strict scrutiny to a law imposing an added tax on violent video games. But because no court has ruled on such a law, it is unclear whether a court would uphold such a statute or declare it unconstitutional.

Below, we briefly summarize (1) the majority opinion in *Brown* and (2) case law concerning content-based taxation or other financial burdens.

BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION

In *Brown*, a video game and software industry trade association challenged a California statute that barred the sale of violent video games to minors. The statute detailed the attributes that would classify a game as violent, including that the game allow players the option of "killing, maiming, dismembering, or sexually assaulting an image of a human being" if those acts were depicted in certain specified ways (e.g., in such a manner that the game was patently offensive to prevailing community standards as to what is suitable for minors). The statute prohibited the sale or rental of such games to minors, unless the seller was the minor's parent, grandparent, aunt, uncle, or legal guardian. Violations were punishable by a civil fine of up to $1,000.

The case reached the U.S. Supreme Court after both the federal district and appellate courts ruled the statute unconstitutional under the First Amendment. Justice Scalia wrote the majority opinion.

Violent Video Games As Protected Category of Speech

As the majority opinion explained, video games, like other forms of entertainment (e.g., books, music, and film), generally are entitled to protection under the free speech clause of the First Amendment.

The First Amendment generally prohibits the government from restricting expression because of its subject matter or content. There are certain categories of speech which have long been held to be outside of First Amendment protection, such as obscenity, incitement to violence, and "fighting words." Outside of these categories, however, attempts to restrict speech based on its content are subject to strict scrutiny by courts. Under strict scrutiny analysis, a restriction on speech will be invalidated unless it is narrowly tailored to serve a compelling government interest.

The Court held that legislatures cannot determine that a new category of speech falls outside of First Amendment protection due to its harmful nature. The majority opinion relied on a 2010 case in which the Court invalidated a statute that prohibited the creation, sale, or possession of videos depicting animal cruelty (*United States v. Stevens*, 559 U.S. ____, 130 S. Ct. 1577 (2010)).

As the *Brown* court explained, the statute in *Stevens* was an impermissible content-based restriction on speech, as "there was no American tradition of forbidding the depiction of animal cruelty-- though states have long had laws against *committing* it" (*Brown*, 131 S. Ct. at 2734) (emphasis in original). The *Stevens* court rejected the argument that states could apply a balancing test to determine whether the social costs of a given category of speech outweighed its value.

According to the *Brown* majority, the same reasoning applied to violent video games. Earlier cases made clear that violent entertainment is not considered obscene or otherwise outside of First Amendment protection. There is also no longstanding tradition of restricting children's access to depictions of violence — the majority opinion cited several examples of violent speech aimed at minors (such as fairy tales, novels, and movies). The opinion rejected the argument that video games' interactive nature made them unique, as other forms of speech can have similar features (e.g., choose-your-own-adventure stories).

Strict Scrutiny Analysis

After concluding that the California statute restricted a category of speech that is generally entitled to First Amendment protection, the majority opinion then analyzed whether the restriction was valid under strict scrutiny review.

The majority concluded that the statute did not serve a compelling government interest. The opinion noted that the evidence did not support a direct causal link between violent video games and harm to minors. The opinion also found that (1) the state's evidence that violent video games harmed children was based mostly on correlation rather than causation and (2) any such harmful effects were small and indistinguishable from effects due to other forms of media and entertainment.

The majority also concluded that the statute was not narrowly tailored, as it was both over- and underinclusive to address the stated aim of reducing the harmful effect of violent speech on children. The statute was underinclusive because it would prohibit only violent video games and not other forms of violent speech (e.g., movies) without a sufficient justification. It was also underinclusive due to the exception for games provided by parents or other specified family members.

The opinion noted that the state "cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so," due to the voluntary rating system adopted by the ESRB that indicates appropriate age ranges for video games (131 S. Ct. at 2740). The Court further noted that the state's "purported aid to parental authority is vastly overinclusive" because not all parents care whether their children play violent video games (*Id.* at 2741).

The Court affirmed the judgment below, which permanently enjoined enforcement of the act.

FREE SPEECH AND CONTENT-BASED FINANCIAL BURDENS

In general, case law supports states' authority to impose generally applicable financial burdens such as the sales tax on the press or on books, video games, or similar forms of entertainment, without violating the First Amendment. However, taxes or other financial disincentives that are based on the content of speech (as opposed to generally applicable taxes) are subjected to strict scrutiny analysis under the First Amendment. Below, we highlight two examples of U.S. Supreme Court

Cases addressing these issues. Please note that this list is not exhaustive, and the selected cases do not address all the possible issues that could arise in litigation involving an excise tax on violent video games.

In a 1987 case, the Court held that a state sales tax that taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals, infringed upon the freedom of the press under the First Amendment (*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)).

The majority opinion noted that "[i]n order to determine whether a magazine is subject to sales tax, Arkansas' enforcement authorities must necessarily examine the content of the message that is conveyed . . . Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press" (481 U.S. at 230) (internal quotations and citation omitted).

The Court found that the strict scrutiny standard applied and the state did not meet this burden. For example, it noted that "[e]ven assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption . . . of religious, professional, trade, and sports journals narrowly tailored to achieve that end" (*Id.* at 231). The Court determined the exemption to be both over- and underinclusive — it would apply to even lucrative and well-established specialty magazines, but not to struggling general interest magazines.

For another example, in 1991 the Court held that New York's "Son of Sam" statute was an invalid content-based restriction under the First Amendment (*Simon & Schuster, Inc. v Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991)). The statute required an accused or convicted criminal's income from books, films, or other works describing the crime to be deposited in escrow and made available to the victim and the criminal's creditors.

The majority opinion noted that "a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech" (502 U.S. at 115). The Court found that the Son of Sam law was a content-based statute because it "single[d] out income derived from expressive activity for a burden the State places on no other income, and it is directed only at

works with a specified content" (*Id.* at 116). As the statute "establishe[d] a financial disincentive to create or publish works with a particular content," it could only be permissible if it were narrowly drawn to achieve a compelling state interest (*Id.* at 118).

The Court concluded that the statute violated the First Amendment. The state had a compelling interest in compensating victims from the profits of the crime. However, the statute was overinclusive, as it applied to works on any subject as long as the work expressed the author's recollections about the crime, even tangentially. It also applied to any author who admitted in a book or other work to having committed a crime, whether or not he or she had ever been accused or convicted. Thus, the statute was not narrowly tailored to serve the state's compelling interest.

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