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Question 2

1. What constitutional challenges can the attorney general make to the Act and are they likely to succeed

Issue: Power of congress to act / General Welfare

Rules: Congress is a federal government with limited power - it may only act within the scope granted by the constitution. It may pass new laws only in so far as necessary to carry out those powers granted by the constitution. Federal Government can delegate any of its powers, unless contrary to public power. Congress has the power to tax and spend for the general welfare of the country. Although congress cannot require states to act, or commandeer state officials to act in a particular way, they can put strings on grants and funding that as part of their right to to tax and spend for the general welfare.

Analysis: Attorney General could try to argue that their power to pass the act is not within their powers as granted by congress. However, the funding here is arguably within the power to tax and spend for general welfare, because it is addressing the significant rise in diabetes by providing funding for additional physical education teachers and equipment. Health of children is certainly a question of general welfare of the population. The Attorney General might want to argue that requiring states to enact legislation setting budgets for school lunches to be allocated to fruit and vegetables is not permitted, because federal government cannot require states to act in particular ways, or commandeer state officials, however, as part of tax and spending for the general welfare, the federal government can put conditions on the funds being provided, and so doing this is ok.

Conclusion: The Attorney General would not be successful in arguing that funding, and the requirements on funding are unconstitutional

Issue: Is there a breach of Equal Protection of Rights by providing additional funds to schools where the majority of the student population is non-caucasian?

Rules: Action affecting fundamental rights by government is subject to strict scrutiny: the action must be necessary to achieve a compelling government interest, and must be narrowly tailored, using the least restrictive means. For all other rights, the regulations must meet a rational basis review: rationally related to a legitimate government interest.

Analysis: Here, the act is seeking to achieve a compelling interest, since it is beneficial to promote health in the young and ensure they have healthy lunches.

Issue: Is there a breach of the commerce clause:

Rules: As part of their powers, federal government can regulate channels and instrumentalities of interstate commerce, and economic activities that place a burden on interstate commerce. This power is not exclusive, States can also regulate local aspects of interstate commerce so long as they are not preempted by federal laws. Regulations which don't discriminate or place an undue burden on interstate commerce will usually be upheld. But if there is any

discrimination, they will be held to a breach of the negative implications of the commerce clause (the dormant commerce clause).

Analysis: this is potentially a burden on economic activity, but doesn't affect interstate commerce

Issue: is there a breach of the Discrimination or Immunities Privilege under Fourth Amendment?

Rules: The D&I Privileges of the Fourth Amendment protects against discrimination between citizens of a state, ie citizens of a state should have the same privileges. Any regulations contrary to this must achieve a necessary government interest.

Analysis: Although there is prima facie discrimination against schools where majority of student population is caucasian, there is reason for this, because research shows that there is rates of diabetes in schools with low income where majority of students are non-caucasian, thus the government is trying to address this problem, so as long as the subsidies are related to addressing this, then they will be ok.

Conclusion: No breach of D&I under 4th

Issue School Funding: Is the funding of schools for physical education constitutional

Rules: Funding may be provided for schools as long as it is not for religious instruction

Analysis: the funding here is to tackle health and physical activity, therefore it is not unconstitutional and this cannot be claimed by the attorney general.

2. Does NASD have standing to intervene

Issue: Does NASD, as an organisation, have standing to intervene?

Rules: A federal court will hear a case where the plaintiff has standing, the case is ripe and the issue is not moot. To have standing, an individual must have a concrete stake in the outcome. They will have a concrete stake in the outcome if they have suffered an injury in fact, caused by the action complained of, and an outcome in their favor will redress the injury. An individual must be representing themselves, unless they are an organisation, or the plaintiff cannot reasonably make the claim themselves. The issue must not be moot, ie it must be ongoing, and not finished. The issue must also be ripe: generally, a court will not make declaratory judgments about acts and regulations not yet in place. An organisation will have standing if: the complaint is directly related to the purpose of the organisation, members of the organisation would have a claim, and members are not required to represent themselves individually.

Analysis: Here, NASD is an organisation which has as its purpose, the promotion of healthy diets for school age children, especially through lunch programs. Therefore, it satisfies this element of the requirement for an organisation to have standing because they are trying to stop an Act which would promote healthy lunches from being declared unconstitutional. Members themselves are not going to be harmed by not being part of the action, and don't need to be part of the claim themselves individually.

Separately, it may be argues that the action is not yet ripe, because Federal Courts hear live controversies, and may prefer to wait and see what happens with whether the Act is deemed to be unconstitutional.

Conclusion: NASD should have standing, but question as to whether the action is ripe.

Question #2 Final Word Count = 1000

END OF EXAM