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## Section 8: Looking Ahead: Abortion and the ACA Contraception Mandate

Institute of Bill of Rights Law at The College of William & Mary School of Law

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## VIII. Looking Ahead: Abortion and the ACA Contraception Mandate

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*Whole Women's Health v. Lakey*

**Ruling Below:** *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014)

Plaintiffs filed this lawsuit seeking declaratory relief and permanent injunctions against the enforcement of two recent amendments to Texas's laws pertaining to the performing of abortions. On August 29, 2014, the last business day before the ambulatory surgical center provision would go into effect, the district court delivered its opinion and issued a final judgment enjoining the admitting privileges requirement and ambulatory surgical center provision of H.B. 2 as to all abortion facilities in Texas. The district court also enjoined other specific applications of H.B. 2. The district court opined that together these requirements "create a brutally effective system of abortion regulation" that is unconstitutional. Appellants (collectively "the State") appealed to the Fifth Circuit and filed an emergency motion to stay the district court's injunctions pending the resolution of their appeal.

**Question Presented:** Whether Texas law places an undue burden before a woman seeking a legal abortion.

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**WHOLE WOMEN'S HEALTH et al.,  
Plaintiffs - Appellees**

**v.**

**David LAKEY, M.D., Commissioner of the Texas Department of State Health Services, in  
his Official Capacity, et al.,  
Defendant – Appellants**

United States Court of Appeals for the Fifth Circuit

Filed on October 2, 2014

[Excerpt; some citations and footnotes omitted]

JENNIFER WALKER ELROD, Circuit  
Judge:

**I.**

On July 12, 2013, the Texas Legislature passed H.B. 2. The proposed legislation for what became H.B. 2 was first filed in the Texas House of Representatives in June 2013. The House considered the bill in two public hearings. After three readings of the bill before the entire House, H.B. 2 passed with a 96-49 vote. The bill was then sent to

the Texas Senate, which also held a public hearing and read the bill three times. The Senate engaged in a debate in which a number of senators gave speeches for and against the bill, and ultimately passed H.B. 2 with a final vote of 19-11.

Two of H.B. 2's provisions are at issue here. The first requires any physician performing an abortion to have active admitting privileges at a hospital within thirty miles of the location where the abortion is performed.

The admitting privileges requirement went into effect on October 31, 2013. The second provision requires that all abortion clinics existing on or after September 1, 2014, comply with the same minimum standards required of ambulatory surgical centers. The regulatory standards for ambulatory surgical centers contain two main categories: (1) physical plant, which includes architectural, electrical, plumbing, and HVAC requirements, and (2) operations, which includes requirements for medical records systems, training, staffing, and cleanliness.

We are familiar with legal challenges to H.B. 2. In 2013, the district court enjoined enforcement of H.B. 2's admitting privileges requirement and medication abortion provision, and the State challenged the injunction on appeal. In that case, we granted in part the State's emergency motion to stay the permanent injunction, and later upheld both the admitting privileges requirement and the medication abortion provision as facially constitutional.

In the instant lawsuit, Plaintiffs challenge the admitting privileges requirement, this time not on its face, but as applied to two specific clinics. Whole Woman's Health and Dr. Sherwood C. Lynn, Jr. challenge the requirement as applied to the clinic operated by Whole Woman's Health in McAllen. Nova Health Systems and Dr. Pamela J. Richter challenge the requirement as applied to the clinic operated by Reproductive Services in El Paso. Plaintiffs also challenge the ambulatory surgical center provision as unconstitutional on its face, and as applied to the clinics in McAllen and El Paso, and as applied to medication abortion.

The district court's judgment extended beyond Plaintiffs' claims and the relief requested. Not only did the district court enjoin the admitting privileges requirement as applied to the McAllen and El Paso clinics, as Plaintiffs sought, the district court determined that the admitting privileges requirement "create[d] an impermissible obstacle as applied to all women seeking a previability abortion."

As to the ambulatory surgical center provision, the district court's opinion and final judgment are unclear. The final judgment declares that the ambulatory surgical center provision is unconstitutional "as to all abortion facilities in the State" with two exceptions: (1) facilities already licensed and meeting the minimum standards; and (2) all future abortion facilities commencing operation after the effective date. Confusingly, the judgment further declares that the ambulatory surgical center provision is unconstitutional and that when considered together with the admitting privileges requirement, "create[s] an impermissible obstacle as applied to all women seeking a previability abortion." In their briefs and at oral argument, the parties expressed uncertainty as to whether the district court intended to invalidate this provision on its face or, according to the earlier language, as applied to some clinics in the state.

It is also unclear whether the district court specifically determined that the provision is unconstitutional as applied to the McAllen and El Paso clinics. While Plaintiffs made these as-applied challenges, the district court did not directly address them in either the declarations section of its final judgment or

the conclusion of its opinion. However, the district court indicated in the introductory parts of its opinion and judgment that it intended to do so. We note that the broad judgment "as applied to all women" logically would include the McAllen and El Paso clinics, even though the district court did not specifically address in its conclusions and judgment Plaintiffs' as-applied claims for these locations.

To alleviate confusion and to fairly address the State's emergency motion and Plaintiffs' response, we consider whether to stay injunctions of both the admitting privileges requirement and the ambulatory surgical center provision on their face—or in the district court's words, "as applied to all women in Texas"—and as applied to the McAllen and El Paso clinics. In addition, we will address the injunction of the ambulatory surgical center provision as applied to medication abortions.

## **II.**

"Factual findings by the district court are typically reviewed for clear error." The district court found, after trial with witness credibility determinations, that Texas had over forty abortion clinics prior to the enactment of H.B. 2, and that after the ambulatory surgical center provision takes effect, only seven or eight clinics will remain, representing more than an 80% reduction in clinics statewide in nearly fourteen months, with a 100% reduction in clinics west and south of San Antonio. The district court further found that there was no credible evidence of medical or health benefit

associated with the ambulatory surgical center provision in the abortion context.

The district court also found: (1) the construction costs of bringing existing clinics into compliance with the minimum standards for ambulatory surgical centers "will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars"; (2) "the cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars" for existing clinics that cannot comply due to physical space limitations; (3) the enforcement of both challenged H.B. 2 provisions will increase women's travel distances to clinics; for example, 1.3 million women of reproductive age in Texas will live more than 100 miles from a clinic, 900,000 women will live more than 150 miles from a clinic, 750,000 women will live more than 200 miles from a clinic, and some women will live as far as 500 miles from a clinic; (4) the burdens of increased travel combine with "practical concerns includ[ing] lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, [and] the time and expense involved in traveling long distances"; and (5) the remaining seven or eight clinics likely will not have the capacity to perform 60,000-72,000 abortions per year in Texas.

## **III.**

We consider four factors in deciding whether to grant a stay pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

A stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant."

The State initially filed a motion to stay in this court and, shortly thereafter, filed the same motion with the district court. The district court denied the motion "for substantially the reasons stated in its memorandum opinion." Plaintiffs do not object to the order in which the State filed its motions and agree that the present motion is properly before us.

#### IV.

"Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy." Nor may a State "impose upon this right an undue burden, which exists if a regulation's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." To determine the constitutionality of a state law, we ask "whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to . . . previability[] abortions."

Following *Carhart* and *Casey*, our circuit conducts a two-step approach, first applying a rational basis test, then independently

determining if the burden on a woman's choice is undue.

#### A.

Though Plaintiffs sought only as-applied relief from the admitting privileges requirement, limited to two abortion clinics—one in El Paso and one in McAllen—the district court, in its final judgment, appears to have facially invalidated the admitting privileges requirement throughout Texas. This was inappropriate because Plaintiffs did not request that relief. Furthermore, the district court's facial invalidation of the admitting privileges requirement is directly contrary to this circuit's precedent. *Abbott II* specifically upheld the facial constitutionality of the admitting privileges requirement.

#### B.

We now turn to the central question presented by this emergency motion: whether the State has shown a likelihood of success regarding whether the ambulatory surgical center provision is unconstitutional on its face. We conclude that it has.

As explained in *Abbott II*, if the State establishes that a law is rationally related to a legitimate state interest, we do not second guess the legislature regarding the law's wisdom or effectiveness. Nor is the State "required to prove that the objective of the law would be fulfilled."

The district court concluded that H.B. 2, including both provisions at issue here, "surmount[ed] the low bar of rational-basis review." We agree with the district court's

conclusion that the ambulatory surgical center provision satisfies rational basis review. In addition, no party challenges the district court's conclusion.

Thus, our review will focus on the second step of this circuit's approach; namely, whether this provision imposes an undue burden. The undue burden inquiry looks to whether the challenged provision has either "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

### 1.

We begin with the purpose inquiry. "[P]laintiffs bore the burden of attacking the State's purpose here," and the State has shown a strong likelihood that Plaintiffs failed to meet that burden.

The district court determined that "the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics." To support its conclusion, the district court determined that H.B. 2 treats abortion facilities in a "disparate and arbitrary" manner by not including an exception to the ambulatory surgical center provision for previously licensed abortion providers. According to the district court, "other types of ambulatory-surgical facilities are frequently granted waivers or are grandfathered due to construction dates that predate the newer construction requirements."

The State argues that the district court misunderstood the relevant provision in the governing Texas regulation. As the State reads the provision, H.B. 2 does not treat

abortion facilities disparately from other ambulatory surgical centers in this respect. According to the State, there is no ambulatory surgical center exemption for any facility within the statutorily-defined subset requiring licensure, regardless of whether it provides abortions. The provision cited by the district court provides an exemption to any facility previously licensed as an ambulatory surgical center that failed to comply with new building code requirements amended in June 2009. Any such facility, regardless of whether it provides abortions, qualifies for the exemption. Based on our review of the relevant provision, we agree with the State that ambulatory surgical centers providing abortions are not treated differently from other ambulatory surgical centers.

Besides its view of the above regulation, the district court cited no record evidence to support its determination that the ambulatory surgical center provision was enacted for the purpose of imposing an undue burden on women seeking abortions, nor did it make any factual finding regarding an improper purpose. The Texas Legislature's stated purpose was to improve patient safety. As we observed in *Abbott I*, the State of Texas has an "interest in protecting the health of women who undergo abortion procedures." Courts are not permitted to second guess a legislature's stated purposes absent clear and compelling evidence to the contrary. Such evidence simply does not appear in the record here.

Alternatively, the district court opined that it was "not required" to find actual evidence of improper purpose because H.B. 2's



ambulatory surgical center provision has the effect of creating an undue burden. To the extent the district court found an improper purpose based on the law's effect, the State is likely to succeed on the merits.

## 2.

We now evaluate whether the State has shown a likelihood of success on the merits of whether the ambulatory surgical center provision "has the effect of imposing an unconstitutional burden" sufficient to justify a facial invalidation. The State has made such a showing.

Facial challenges relying on the effects of a law "impose[] a heavy burden upon the part[y] maintaining the suit." In *Carhart*, the Supreme Court recognized the existence of divergent views as to "[w]hat that burden consists of in the specific context of abortion statutes . . . ." It is well-settled in this circuit that "[a] facial challenge will succeed only where the plaintiff shows that there is no set of circumstances under which the statute would be constitutional." The Supreme Court uses the same "no set of circumstances" rule in general for facial challenges. However, as we noted in *Abbott II*, it is not clear whether the Supreme Court applies this general rule in abortion cases.

In *Casey*, the controlling plurality held that an abortion-regulating statute would fail constitutional muster if, "in a large fraction of the cases in which it is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." In earlier abortion cases, the Court used the "no set of circumstances" approach. The more recent

*Carhart* majority did not choose between "no set of circumstances" and "large fraction," but instead upheld the statute in question on the basis that the facial challenge could not satisfy either standard. We will do the same here, as we did in *Abbott I* and *Abbott II*, and "apply the 'large fraction' nomenclature for the sake of argument only, without casting doubt on the general rule."

The ambulatory surgical center provision applies to all clinics performing abortions. Every woman in Texas who seeks an abortion will be affected to some degree by this requirement because it effectively narrows her options for where to obtain an abortion. As the parties stipulated at trial, six licensed ambulatory surgical centers "will not be prevented by the ambulatory surgical center [provision] of HB 2 from performing abortions." These are located in Austin, Dallas, Fort Worth, Houston, and San Antonio. The parties also stipulated that Planned Parenthood has obtained a license to open a new ambulatory surgical center in Dallas, and announced its intention to open another one in San Antonio. However, the parties further stipulated that all other abortion facilities now licensed by the State of Texas cannot currently comply with the provision. The district court concluded that this reduction in supply of clinics was an undue burden and facially invalidated the ambulatory surgical center provision. In doing so, the district court applied neither the Fifth Circuit's "no set of circumstances" test nor *Casey*'s "large fraction" test. Instead, the district court found that "a significant number of the reproductive-age female population of Texas will need to travel considerably further in order to exercise its right to a legal

previability abortion." The district court "conclude[d] that the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." However, under this circuit's precedent, and *Carhart*, a "significant number" is insufficient unless it amounts to a "large fraction."

The district court also erred when it balanced the efficacy of the ambulatory surgical center provision against the burdens the provision imposed. In the district court's view, "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." As support for this proposition, the court evaluated whether the ambulatory surgical center provision would actually improve women's health and safety. This approach contravenes our precedent. In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.

The district court's weighing of the interests basically boils down to the district court's own view that the facilities are already safe for women and that the ambulatory surgical center provision, when implemented, will not serve to promote women's health. However, *Abbott II* discusses in detail the perils of second-guessing the wisdom of the legislature in a constitutional challenge:

If legislators' predictions about a law fail to serve their purpose, the law can be changed. Once the courts have held a law unconstitutional, however, only a constitutional amendment, or the wisdom of a majority of justices overcoming the strong pull of stare

decisis, will permit that or similar laws to again take effect.

Moreover, the district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State's asserted purpose. Under our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry.

Plaintiffs argue that the district court's balancing approach is used by other circuits. We agree with Plaintiffs that some circuits have used the balancing test to enjoin abortion regulations; other circuits—including ours—have not. We are bound to follow our circuit's approach.

In addition, Plaintiffs argue that *Barnes v. Mississippi*, supports a balancing approach. However, a careful reading of *Barnes* establishes that it does not support Plaintiffs' argument. In *Barnes*, we cited *Casey* for the proposition that "the constitutionality of an abortion regulation . . . turns on an examination of the importance of the state's interests in the regulation and the severity of the burden that regulation imposes on a woman's right to seek an abortion." We then analyzed the importance of the State's interest in parental involvement statutes, without considering the extent to which the challenged law actually advanced that interest. Likewise here, the health of women seeking abortions is an important purpose. Our only remaining task is to analyze the severity of the burden the regulation imposes on women's right to seek abortions.

The district court's failure to apply the "large fraction" test, and its reliance on its own balancing of the State's justifications against the burdens imposed by the law, weigh in favor of the State's strong likelihood of success on the merits. Moreover, application of the "large fraction" test to the evidence before us further supports the State's position that the evidence at the four-day trial is insufficient to show that a "large fraction" of women seeking abortions would face an undue burden on account of the ambulatory surgical center provision.

Plaintiffs' expert, Dr. Daniel Grossman, opined that the ambulatory surgical center provision would increase driving distances for women generally, noting that after the provision becomes effective, 900,000 out of approximately 5.4 million women of reproductive age in Texas would live at least 150 miles from the nearest clinic. He did not testify specifically about how many women seeking abortions would have to drive more than 150 miles or whether that number would amount to a large fraction. Assuming that women seeking abortions are proportionally distributed across the state, Dr. Grossman's evidence suggests that approximately one out of six (16.7%) women seeking an abortion will live more than 150 miles from the nearest clinic.

Even assuming, *arguendo*, that 150 miles is the relevant cut-off, this is nowhere near a "large fraction." As discussed above, the *Casey* plurality, in using the "large fraction" nomenclature, departed from the general standard for facial challenges. The general standard for facial challenges allows courts to facially invalidate a statute only if "no

possible application of the challenged law would be constitutional." In other words, the law must be unconstitutional in 100% of its applications. We decline to interpret *Casey* as changing the threshold for facial challenges from 100% to 17%.

Plaintiffs argue that the appropriate denominator in the large fraction analysis consists only of women "who could have accessed abortion services in Texas prior to implementation of the challenged requirements, but who will face increased obstacles as a result of the law." To narrow the denominator in this way—to essentially only those women who Plaintiffs argue will face an undue burden—ignores precedent. *Casey* itself counsels that the denominator should encompass all women "for whom the law is a restriction." This is also the approach that our circuit used in *Abbott II*. Here, the ambulatory surgical center requirement applies to every abortion clinic in the State, limiting the options for all women in Texas who seek an abortion. The appropriate denominator thus includes all women affected by these limited options. Moreover, Plaintiffs' suggested approach would make the large fraction test merely a tautology, always resulting in a large fraction. The denominator would be women that Plaintiffs claim are unduly burdened by the statute, and the numerator would be the same.

Based on unspecific testimony at trial, the district court also noted "practical concerns" that combine with increased travel distances, particularly for disadvantaged, minority, and immigrant populations. We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the

Supreme Court and this circuit require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women. Plaintiffs have not done so here.

The district court also relied on its own determination that the ambulatory surgical center provision would cause a shortage in capacity for the remaining licensed clinics. The district court found that 60,000-72,000 abortions were performed annually in previous years. After the ambulatory surgical center provision goes into effect, it is undisputed that seven or eight clinics will remain. Based on Dr. Grossman's testimony, the district court then determined that each remaining clinic would have to manage, on average, 7,500-10,000 patients a year, over 1,200 patients per month in some cases. *Id.* The district court found that handling this high a caseload "stretches credulity."

However, the district court did not make any findings of fact to support its conclusion. Nor could it, given that Dr. Grossman's testimony is *ipse dixit* and the record lacks any actual evidence regarding the current or future capacity of the eight clinics. Dr. Grossman simply assumes, without evidence, that these centers are currently operating at full capacity and will be unable to accommodate any increased demand. Likewise, Dr. Grossman did not consider how many physicians with admitting privileges from non-ambulatory surgical centers will begin providing abortions at the ambulatory surgical center clinics, thereby increasing those clinics' capacities. It also does not appear from the record that Dr. Grossman considered the possibility of additional

capacity resulting from new clinics' being built, nor did he consider that the demand for abortion services in Texas may decrease in the future, as it has done nationally over the past several years. Furthermore, the record lacks evidence that the previous closures resulting from the admitting privileges requirement have caused women to be turned away from clinics. Without any evidence on these points, Plaintiffs do not appear to have met their burden to show that the ambulatory surgical center provision will result in insufficient clinic capacity that will impose an undue burden on a large fraction of women.

The evidence does indicate, without specificity, that by requiring all abortion clinics to meet the minimum standards of ambulatory surgical centers, the overall cost of accessing an abortion provider will likely increase. However, as the Supreme Court recognized in *Carhart*, and we observed in *Abbott I*, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."

In sum, the State has met its burden as to the district court's facial invalidation of the admitting privileges requirement and the ambulatory surgical center provision.

## V.

Finally, we address the district court's injunctions of both requirements as applied to clinics in McAllen and El Paso, as well as the ambulatory surgical center provision as

applied to medication abortion, and the State's likelihood of success on the merits of each. We conclude that the State has met its burden as to each, with the exception of the ambulatory surgical center provision as applied to El Paso.

**A.**

The State has shown a strong likelihood of success on the merits of its argument that Plaintiffs' as-applied challenges to the admitting privileges requirement are barred by res judicata. In the interests of efficiency and finality, the doctrine of res judicata bars litigation of claims that have been litigated or could have been raised in a prior lawsuit. In the lawsuit giving rise to *Abbott I* and *Abbott II*, Plaintiffs facially challenged the admitting privileges requirement. They also could have brought, but chose not to bring, as-applied challenges with regard to clinics in El Paso and McAllen. Their choice not to include the as-applied challenges in their previous lawsuit likely precludes them from pursuing that challenge now.

To be sure, res judicata bars a subsequent lawsuit only if, inter alia, the same "claim or cause of action" is involved in both lawsuits. To determine whether two lawsuits involve the same "claim or cause of action" for purposes of res judicata, the Fifth Circuit applies the transactional test of the Restatement (Second) of Judgments, § 24. Under that test, the "critical issue is whether the two actions under consideration are based on 'the same nucleus of operative facts.'" If the facts on which the second lawsuit is based are the same as those prevailing at the time of the first lawsuit, the two lawsuits involve the

same "claim or cause of action" for purposes of res judicata.

Plaintiffs contended, and the district court agreed, that the present lawsuit relies on a different set of operative facts than did the pre-enforcement challenge because the abortion clinics in McAllen and El Paso have now ceased providing abortion services. However, our precedent dictates that changed circumstances prevent the application of res judicata only if the change is "significant" and creates "new legal conditions." The closure of the clinics in McAllen and El Paso does not create "new legal conditions" because, in the pre-enforcement challenge, Plaintiffs alleged that the McAllen and El Paso clinics would shut down upon implementation of H.B. 2. Plaintiffs could have relied on these allegations to bring the very same as-applied challenge they now pursue; they simply chose not to do so.

The district court stated that "it was not known in late October 2013 [i.e., when the district court entered its judgment in *Abbott*] that the McAllen and El Paso clinics' physicians would ultimately be unable to obtain admitting privileges despite efforts to secure them." However, the Complaint in *Abbott*, which was filed in September 2013, expressly alleged that those clinics would close if the admitting privileges requirement took effect. Indeed, the physicians who performed abortions at those two facilities were named plaintiffs in *Abbott*, further undermining any suggestion that the closure of the clinics was a significant or unexpected change of facts. Thus, Plaintiffs' as-applied challenges to the admitting privileges requirement are likely barred by res judicata.

**B.**

Even if Plaintiffs' claims are not barred by res judicata, the State is still likely to succeed on the merits of whether the admitting privileges requirement and the ambulatory surgical center provision, as applied to the McAllen clinic, have the effect of imposing an undue burden on women in the Rio Grande Valley.

The admitting privileges requirement went into effect in October 2013. Since that time, abortion clinics have remained open in all of the major metropolitan areas across the state. The district court found that the number of total clinics in Texas decreased from more than forty clinics to fewer than thirty clinics "leading up to and in the wake of enforcement of the admitting-privileges requirement." Importantly, Dr. Grossman stated in his declaration that he was not "offering any opinion on the cause of the decline in the number of abortion facilities from November 2012 to April 2014." The district court further found that no abortion providers are in operation in a number of cities, including, for example, McAllen, Lubbock, Midland, and Waco. The ambulatory surgical center provision was set to go into effect on September 1, 2014, which the district court found would cause even more closures, leaving only seven or eight licensed providers.

The district court found that the McAllen clinic closed as a result of the admitting privileges requirement. Since that time, the women who would have otherwise been served by the McAllen clinic had to look elsewhere for the procedure. As stated in his trial declaration, Dr. Grossman identified

more than 1,000 women from the Valley who sought abortions between November 2013 and April 2014, and traveled to nearby cities where clinics remained open. During that period, approximately 50% of those women traveled to Corpus Christi, 25% traveled to Houston, 15% percent to San Antonio, and 10% to a location even farther from the Valley.

In *Abbott II*, relying on *Casey*, we held that having to travel 150 miles from the Rio Grande Valley to Corpus Christi is not an undue burden. Indeed, *Casey* permitted even greater travel distances, as it upheld a 24-hour waiting period that doubled driving times, increasing the drive for some women from three hours to six hours.

While the clinic in Corpus Christi remained open after the admitting privileges requirement went into effect, it currently does not comply with the ambulatory surgical center provision. The district court found that once the provision takes effect, the clinic nearest to the Rio Grande Valley will be in San Antonio, between 230 and 250 miles away. Therefore, we must determine whether the State is likely to prevail on its argument that this incremental increase of 100 miles in distance does not constitute an undue burden.

At trial, Plaintiffs had the burden of showing that the additional travel distance to San Antonio constituted an undue burden. As noted above, the record indicates that 50% of the more than 1,000 women in Dr. Grossman's study who resided in the Rio Grande Valley and were seeking abortions traveled to San Antonio and Houston (which is even farther than San Antonio) even when

the Corpus Christi clinic was still in operation. Plaintiffs also had the burden, which they failed to meet, of showing that clinics in San Antonio and other nearby cities would be unable to manage the additional demand for abortions caused by closures. Indeed, women from McAllen have been traveling outside their city for nearly a year and Plaintiffs made no showing that clinics in San Antonio (or any other city) have been deluged. Considering that *Casey* upheld travel times of six hours (increases of three hours) and that women in the Rio Grande Valley traveling to San Antonio have less total travel time than women affected by the Pennsylvania law in *Casey*, the State has a strong likelihood of success on its appeal of the injunctions of both requirements as applied to the McAllen clinic.

### C.

As to the El Paso clinic, we grant, in part, and deny, in part, the State's motion to stay the district court's injunction of the ambulatory surgical center provision. The district court found that the physical plant requirements of the ambulatory surgical center provision would force the El Paso clinic to close. As a result, women in El Paso will be significantly farther from the nearest in-state ambulatory surgical center than women in the Rio Grande Valley. The distance from El Paso to San Antonio, for example, is greater than 500 miles. The Eighth Circuit has held that no travel distance within the state is too far. We have not so held. Our circuit has not identified whether there is a tipping point within the vast State of Texas, but at this early stage, we are hesitant to extend *Casey* to such a large distance.

It is true that approximately half of the women from El Paso seeking abortions travel to Santa Teresa, New Mexico, which is in the same metropolitan area as El Paso and just across the state line. Despite the obvious practical implications of the New Mexico clinic's proximity to El Paso, our circuit's precedent suggests that our focus must remain on clinics within Texas when determining whether travel times create an undue burden. Although the situation in Texas is markedly different from that in Mississippi, the opinion in *Jackson* contains broad language that appears to go beyond the facts presented in that case. The panel majority saw itself as "require[d] . . . to conduct the undue burden inquiry by looking only at the ability of Mississippi women to exercise their right within Mississippi's borders." Given the panel's reliance on *Gaines*, the panel may have meant to apply its limitation only to states where all the abortion clinics would close. However, we are reluctant to construe the panel's broad language so narrowly in this emergency stay proceeding. Because of the long distance between El Paso and the nearest in-state abortion clinic, as well as the doubt that *Jackson* casts on whether we may look to out-of-state clinics, the State has not shown a strong likelihood of success on the merits of the challenge to the physical plant requirements of the ambulatory surgical center provision as applied to El Paso. Thus, the district court's injunction of the physical plant requirements of the ambulatory surgical provision will remain in force for El Paso.

We do, however, stay the injunction as to the operational requirements of the ambulatory surgical center provision because the district

court made no findings about whether the El Paso clinic would be able to comply with those requirements. The district court's conclusion that the ambulatory surgical center provision imposed an undue burden rested solely on the district court's findings regarding the physical plant requirements. In view of H.B. 2's severability provision, as well as the similar provision in the regulations, the district court erred by failing to consider whether the physical plant requirements could be severed from the operational requirements, allowing the operational requirements to take effect. As a result, it does not appear that the district court's injunction of the operational requirements was supported by any evidence. We therefore stay the district court's injunction of the operational requirements.

#### **D.**

The district court also enjoined the ambulatory surgical center provision as applied to medication abortions. To the extent the district court concluded that the ambulatory surgical center provision had an improper purpose as applied to medication abortion, we have already rejected that argument for the reasons stated above. To the extent that the district court determined that the provision's effect as applied to medication abortion was unconstitutional, the record evidence does not support that conclusion. In conducting its own balancing analysis, the district court stated that "any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes." However, as discussed, our circuit does not incorporate a balancing analysis into the undue burden

inquiry. The district court provided no support for its conclusion other than its improper balancing. The district court did not cite to record evidence or make any findings to support its conclusion that the ambulatory surgical center provision imposes an undue burden as applied to medication abortions. Indeed, at oral argument, Plaintiffs could not identify any findings in the district court's opinion supporting the conclusion that the ambulatory surgical center provision imposed an undue burden as applied to medication abortion. Thus, the State has shown a substantial likelihood of success on the merits of the district court's injunction of the ambulatory surgical center provision as applied to medication abortions.

#### **VI.**

As in *Abbott I*, the State has made a strong showing of likelihood of success on the merits of its appeal as to all of the district court's injunctions except for the injunction of the physical plant requirements of the ambulatory surgical center provision as applied to the clinic in El Paso. Regarding the other three factors we must weigh in determining whether to grant a motion to stay pending appeal, the State has also met its burden. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws. The public interest is directly aligned with the State's interest. To the extent the State's interest is at stake, so is the public's. We recognize that Plaintiffs have also made a strong showing that their interests will be injured by a grant of the stay. However, given that the first two factors are the most critical, and the State has made a



strong showing regarding each, a stay is appropriate. We have addressed only the issues necessary to rule on the motion for a stay pending appeal, and our determinations are for that purpose and do not bind the merits panel.

IT IS ORDERED that Appellants' opposed motion for stay pending appeal is GRANTED, in part, and DENIED, in part, and that the district court's injunction orders are STAYED until the final disposition of this appeal, in accordance with this opinion.

**STEPHEN A. HIGGINSON, Circuit Judge, concurring in part and dissenting in part:**

I too would deny the State's motion for a blanket stay of the district court judgment entered on August 29, 2014, pending appeal. I agree with a stay of the district court's facial invalidation of the admitting-privileges requirement because the plaintiffs did not request that relief. Second, I agree with a stay to allow enforcement of the operational requirements of the ambulatory surgical center ("ASC") provision because the district court only evaluated the burdens imposed by the provision's physical plant requirements. Applying H.B. 2's severability provision, however, I would not stay the district court's facial invalidation of the physical plant requirements. Finally, I would narrow the stay so that it does not reach the admission-privileges requirement as applied to the McAllen and El Paso clinics, which the district court found would result in closure of all clinics west and south of San Antonio.

As to the first stay factor, the district court found, after trial with witness credibility determinations, that an undue burden existed because Texas had over forty abortion clinics prior to the enactment of H.B. 2, and that after the ASC provision takes effect, only seven or eight clinics will remain, representing more than an 80% reduction in clinics statewide in nearly fourteen months, with a 100% reduction in clinics west and south of San Antonio. The district court further found that there was no credible evidence of medical or health benefit associated with the ASC requirement in the abortion context. At this emergency stay point, the State does not challenge as clear error either set of factual findings. Weighing lack of medical benefit against the significant reduction in clinic access, the district court found the burden to be "undue."

The majority opinion disagrees, concluding especially that the district court "erred when it balanced the efficacy of the ambulatory surgical center provision against the burdens the provision imposed." For my part, I do not read *Abbott II* to preclude consideration of the relationship between the severity of the obstacle imposed and the weight of the State's interest in determining if the burden is "undue." Although I agree with the majority opinion that *Abbott II* rejected the district court's assessment of empirical data as part of its rational-basis analysis, *Abbott II* did not expressly disclaim such an inquiry for purposes of the undue-burden prong. In *Abbott II*—in contrast to the district court's factual findings in this case—our court concluded that there had been "no showing whatsoever that any woman [would] lack reasonable access to a clinic within Texas."

In light of the minimal or non-existent burden found on that record, the court in *Abbott II* did not need to conduct an in-depth analysis of the State's interest as part of its undue-burden review. Other courts' criticism of *Abbott II* on this ground is therefore inexact.

Consistent with this analysis, the district court considered the weight of the State's interest in its undue-burden review. In doing so, the district court adhered to reasoning that reconciles, rather than divides, circuit authority applying Casey's undue-burden test.

I also do not see a strong likelihood of legal error related to the district court's demographic calculations pertaining to impact on women, relevant both to its facial invalidation of the ASC provision, as well as to our stay factors. First, the district court recognized that there are 5.4 million women of reproductive age in Texas. Next, the district court found that if the ASC provision goes into effect, 900,000 women will live more than 150 miles from an abortion clinic; 750,000 women will live more than 200 miles from a clinic; and some women will live as far as 500 miles or more from a clinic. Furthermore, the district court explicitly considered the financial and other practical obstacles that interact with and compound the burdens imposed by the law, both in its discernment of a substantial obstacle and also in its assessment of impact on women. Finally, the district court also found that the remaining seven or eight abortion ASCs lack sufficient capacity to accommodate all women seeking abortions in the state. Indeed, these remaining clinics would have to increase by at least fourfold the number of

abortions they perform annually. Altogether, although the district court did not use the phrase "large fraction," its findings—which related not only to travel distances but also to other practical obstacles—demonstrate that enforcement of the ASC provision will likely affect a significant number and a large fraction of women across the state of Texas.

As to the remaining stay factors, which reasonable minds may balance differently, and in this case do, it is nonetheless undisputed that the State for decades has not held plaintiffs' clinics to ASC standards—indeed, never until now. Based on the record established at trial, assessed firsthand by the district court, I do not perceive that Texas has demonstrated urgency, medical or otherwise, to immediate enforcement. After hearing conflicting expert testimony, the district court found that "abortion in Texas [is] extremely safe with particularly low rates of serious complications," and further found that "risks are not appreciably lowered for patients who undergo abortion at ambulatory surgical centers." The denial of a stay would preserve this status quo pending our court's ultimate decision on the correctness of the district court's ruling.

On the other hand, the district court found that if the ASC requirement goes into effect plaintiffs likely will suffer substantial injury, notably that enforcement would cause clinics to close in Corpus Christi, San Antonio, Austin, McAllen, El Paso, Houston, and Dallas. The longer these clinics remain closed, the less likely they are to reopen if this court affirms that the law is unconstitutional. The district court further found that only seven or eight clinics will remain open, and

that these clinics alone lack sufficient capacity. Unless shown to be clear error, this circumstance is comparable to the one the Seventh Circuit observed would subject patients "to weeks of delay because of the sudden shortage of eligible [clinics]—and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."

Agreeing not to impose a blanket stay on direct appeal, but not having convinced colleagues whom I respect as to the scope of the stay that is appropriate, I would grant the State's independent request to expedite its appeal of an underlying issue that has complexity which divides courts, as well as profundity which divides convictions deeper than the rules of law courts must apply.

## “Supreme Court Allows Texas Abortion Clinics to Stay Open”

*The New York Times*

Adam Liptak

October 14, 2014

The Supreme Court on Tuesday allowed more than a dozen Texas abortion clinics to reopen, blocking a state law that had imposed strict requirements on abortion providers. Had the law been allowed to stand, it would have caused all but eight of the state’s abortion clinics to close and would have required many women to travel more than 150 miles to the nearest abortion provider.

The Supreme Court’s order — five sentences long and with no explanation of the justices’ reasoning — represents an interim step in a legal fight that is far from over. But abortion rights advocates welcomed what they said was the enormous practical impact of the move. Had the clinics been forced to remain closed while appeals went forward, they said, they might never have reopened.

State officials said the law’s requirements were needed to protect women’s health. Abortion providers said the regulations were expensive, unnecessary and a ruse meant to put many of them out of business.

The justices addressed two parts of the Texas law that the United States Court of Appeals for the Fifth Circuit had provisionally let stand while it considered an appeal.

One of them required all abortion clinics in the state to meet the standards for “ambulatory surgical centers,” including regulations concerning buildings, equipment and staffing. The other required doctors

performing abortions to have admitting privileges at a nearby hospital.

The Supreme Court, in an unsigned order apparently reflecting the views of six justices, blocked the surgical-center requirement entirely and the admitting-privileges requirement as it applied to clinics in McAllen, Tex., and El Paso.

Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. said they would have allowed the law to be enforced.

Abortion rights advocates praised the order.

“Tomorrow, 13 clinics across the state will be allowed to reopen and provide women with safe and legal abortion care in their own communities,” said Nancy Northup, president of the Center for Reproductive Rights, adding that advocates were still pursuing appeals. “This fight against Texas’ sham abortion law is not over.”

The appeals court’s decision had left only eight clinics open in Texas, all clustered in metropolitan regions in the eastern part of the state. No abortion facilities were operating west or south of San Antonio.

“If the stay entered by the Fifth Circuit is not vacated,” lawyers with the Center for Reproductive Rights told the Supreme Court, “the clinics forced to remain closed during the appeals process will likely never reopen.”

The appeals court's ruling, the center's brief said, meant that "over 900,000 Texas women of reproductive age, more than a sixth of all such women in Texas, now reside more than 150 miles from the nearest Texas abortion provider, up from 86,000 prior to the enactment of the challenged act."

In response, Greg Abbott, Texas' attorney general and the Republican candidate for governor, told the justices that "it is undisputed that the vast majority of Texas residents (more than 83 percent) still live within a comfortable driving distance (150 miles)" of an abortion clinic in compliance with the law. Others live in parts of the state, he said, that did not have nearby clinics in the first place.

Those in the El Paso area, Mr. Abbott continued, could obtain abortions across the state line in New Mexico.

The appeals court, drawing on the Supreme Court's last major abortion decision, said the law's challengers had not shown that a "large fraction" of women seeking abortions would face an unconstitutional burden thanks to the law.

The law in question, which includes some of the nation's toughest abortion restrictions, was enacted last year by the Republican-led Legislature. Before it came into force, 41 medical practices were licensed to provide abortions in Texas.

The law was passed after a marathon filibuster that turned a Democratic state senator, Wendy Davis, into a national

political star and set the stage for her campaign for governor against Mr. Abbott.

"The court recognized that these deeply personal decisions should be made by a woman with the guidance of her family and her doctor," Ms. Davis said Tuesday night in a statement. "The actions by Austin politicians like Greg Abbott had closed all but eight Texas reproductive health centers and harmed the health and safety of hundreds of thousands of women throughout the state."

In August, Judge Lee Yeakel of the Federal District Court in Austin ruled that the surgical-center rule imposed an unconstitutional burden on women seeking abortions. The number and location of the clinics it would effectively close, the judge wrote, burdened the exercise of a constitutional right for many women "just as drastically as a complete ban on abortion."

On Tuesday, Yvonne Gutierrez, the executive director of Planned Parenthood's Texas political action committee, said the Supreme Court's action was a rebuke to Mr. Abbott.

"Today the Supreme Court ruled that Greg Abbott cannot force nearly a million Texas women to drive over 300 miles to access their constitutionally protected right to safe and legal abortion," Ms. Gutierrez said, adding that the justices had rejected his contention that the law created a "manageable inconvenience."

A spokeswoman for Mr. Abbott, Lauren Bean, said on Tuesday night, "The attorney general's office will continue to defend the

law, just as we defend all state laws when they are challenged in court.”

Last November, the Supreme Court, in a 5-to-4 ruling, rejected a request to intercede in a separate case challenging the law, one that centered on the admitting-privileges requirement. In dissent, Justice Stephen G. Breyer said he expected the Supreme Court to agree to hear an appeal in that case

regardless of how the Fifth Circuit ultimately ruled.

A three-judge panel of the appeals court upheld the admitting-privileges requirement in March. On Thursday, the full Fifth Circuit refused, 12 to 3, to reconsider that ruling. In light of Justice Breyer’s comment, Supreme Court review of the admitting-privileges case appears likely.

## “Court Upholds Texas Limits on Abortion”

*The New York Times*

Manny Fernandez and Erick Eckholm

June 9, 2015

A federal appellate court upheld some of the toughest provisions of a Texas abortion law on Tuesday, putting about half of the state’s remaining abortion clinics at risk of permanently shutting their doors and leaving the nation’s second-most populous state with fewer than a dozen clinics across its more than 267,000 square miles. There were 41 when the law was passed.

Abortion providers and women’s rights groups vowed a quick appeal to the United States Supreme Court, setting the stage for what could be the most far-reaching ruling in years on when legislative restrictions pose an “undue burden” on the constitutional right to an abortion.

A three-judge panel of the appellate court, the United States Court of Appeals for the Fifth Circuit, in New Orleans, sided for the most part with Texas and the abortion law the Republican-dominated Legislature passed in 2013, known as House Bill 2.

The judges ruled that Texas can require all abortion clinics in the state to meet the same building, equipment and staffing standards that hospital-style surgical centers must meet, which could force numerous clinics to close, abortion rights advocates said.

In addition to the surgical standards, the court upheld a requirement that doctors performing abortions obtain admitting

privileges at a hospital within 30 miles of a clinic. The court said that except as applied to one doctor working in McAllen in South Texas, the provision did not put an unconstitutional burden on women seeking abortions.

Texas lawmakers argued that the provisions were intended to improve safety. But major medical associations say these measures do not improve patient safety, and abortion rights advocates say they are really intended to restrict access to abortion.

Under the 1973 *Roe v Wade* decision and later cases, the Supreme Court has permitted a wide array of abortion regulations, including waiting periods and parental consent for minors, but said states may not impose an “undue burden” on the right to an abortion before a fetus is viable outside the womb.

Throughout the ruling, the Fifth Circuit judges cited the explanations given by the Texas Legislature for what is considered one of the most restrictive abortions laws in the country.

“Texas’ stated purpose for enacting H.B. 2 was to provide the highest quality of care to women seeking abortions and to protect the health and welfare of women seeking abortions,” the Fifth Circuit ruling read. “There is no question that this is a legitimate

purpose that supports regulating physicians and the facilities in which they perform abortions.”

But clinic owners, women’s health groups and the American Civil Liberties Union said that if the Fifth Circuit’s decision were to take effect, the results would be “devastating” for women seeking abortions in Texas.

“Not since before *Roe v. Wade* has a law or court decision had the potential to devastate access to reproductive health care on such a sweeping scale,” said Nancy Northup, the president and chief executive of the Center for Reproductive Rights, whose lawyers were part of the legal team representing the clinics that sued the state. “Once again, women across the state of Texas face the near total elimination of safe and legal options for ending a pregnancy, and the denial of their constitutional rights.”

The decision by the Fifth Circuit, regarded as one of the most conservative federal appellate courts in the country, is expected to take effect in about 22 days. In the meantime, however, the clinics and their lawyers plan to ask the court to stay the decision while they appeal it. If the Fifth Circuit declines, the clinic lawyers said, they will seek an emergency stay from the Supreme Court that would prevent the ruling from taking effect while the Supreme Court considered whether to hear the case.

There are 18 facilities providing abortions in Texas, and if and when the Fifth Circuit’s decision goes into effect, eight clinics will close and 10 facilities are expected to remain

open, largely because they are ambulatory surgery centers or have relationships with such centers, according to Dr. Daniel Grossman, an investigator with the Texas Policy Evaluation Project and one of the experts who testified for the clinics in the case. But the fate of at least one of the facilities expected to stay open, a clinic in McAllen in the Rio Grande Valley, remained uncertain.

Lawyers for the Texas clinics that sued the state said about 900,000 reproductive-age women will live more than 150 miles from the nearest open facility in the state when the surgical-center requirement and admitting-privileges rule take effect.

The Fifth Circuit panel found that the percentage of affected women who would face travel distances of 150 miles or more amounted to 17 percent, a figure that it said was not a “large fraction.” An abortion regulation cannot be invalidated unless it imposes an undue burden on what the Supreme Court has termed “a large fraction of relevant cases.”

Previously, a panel of the same federal appeals court ruled that Mississippi could not force its only remaining abortion clinic to close by arguing that women could always travel to neighboring states for the procedure. But the panel in the Texas case on Tuesday held that the closing of a clinic in El Paso — which left the nearest in-state clinic some 550 miles to the east — was permissible because many women had already been traveling to New Mexico for abortions, and because the



rule did not close all the abortion clinics in Texas.

In the case of the McAllen clinic, the sole abortion provider in the Rio Grande Valley, Tuesday's decision held that the distance of 235 miles or more to the nearest clinic did pose an undue burden. For now, at least, the Fifth Circuit panel exempted that clinic from aspects of the surgical-center and admitting-privileges requirements. But Amy Hagstrom Miller, the chief executive of Whole Woman's Health, which runs the McAllen facility and was one of the abortion providers that sued the state, said the organization was evaluating whether the ruling would permit the clinic to continue operating.

The Texas attorney general, Ken Paxton, called the Fifth Circuit's decision upholding the law a "victory for life and women's health."

"H.B. 2 both protects the unborn and ensures Texas women are not subjected to unsafe and unhealthy conditions," Mr. Paxton said in a statement. "Today's decision by the Fifth Circuit validates that the people of Texas have authority to establish safe, common-sense standards of care necessary to ensure the health of women."

## “Texas Abortion Case Reaches the Court”

*SCOTUSblog*  
Lyle Denniston  
June 19, 2015

Abortion clinics and doctors in Texas asked the Supreme Court on Friday night to delay enforcement of a 2013 state abortion law while an appeal to the Justices is pursued. Without a postponement, the lengthy application said, more than half of the existing nineteen clinics in Texas will have to close on July 1, and some of them might never reopen.

The delay request was filed with Justice Antonin Scalia, who handles emergency legal filings from the geographic region that includes Texas – the Fifth Circuit. He has the option of acting on his own or sharing the issue with his colleagues.

Late Friday afternoon, the U.S. Court of Appeals for the Fifth Circuit refused, by a two-to-one vote, to delay its June 9 ruling upholding most of the Texas law. It did modify slightly a part of that ruling in order to give one clinic — in McAllen, in the Rio Grande Valley — more time to adapt to the new restrictions.

Circuit Judge Edward C. Prado would have put the entire ruling on hold. His two colleagues, Circuit Judges Jennifer Walker Elrod and Catharina Haynes, turned down the challengers’ delay request except for the temporary reprieve for the McAllen clinic.

Because the law is now due to go into effect in twelve days, the Court is likely to act on

the postponement application before then. The clinics and doctors will be filing a formal petition for review later, but the Court probably would not act on that until its next Term, starting in October. The Justices expect to finish their current Term at the end of this month or soon after that.

The Court is currently considering whether to review an appeal by the state of Mississippi to put back into effect a state abortion law that is generally understood will lead to the closing of the last remaining clinic in that state.

The Texas case is entirely separate from that Mississippi dispute. Two provisions of the Texas law are at issue: a requirement that any clinic performing abortions must have facilities equal to those of a surgical center, and a requirement that any doctor performing abortions must have patient-admitting privileges at a nearby hospital.

In asking for a delay of those provisions Friday, the clinics and doctors told the Court that the effect of those limitations would mean a “seventy-five percent reduction in Texas abortion facilities in just a two-year period, creating a severe shortage of safe and legal abortion services in a state that is home to more than five million reproductive-age women.”

Before the new law began taking effect, there were some forty-one abortion clinics throughout Texas. Some clinics were able to reopen after the Supreme Court, in a temporary order last October, put some limits on the state law's scope.

Under the new Fifth Circuit ruling, the application said, nineteen clinics are currently providing abortion services. But, without a delay by the Supreme Court of the lower court decision, it added, ten of those nineteen would have to close as of July 1. An eleventh clinic, in McAllen, it said, would be limited to providing abortions to women in four counties using a single doctor.

It also said that a twelfth facility that has applied for a state license in order to reopen would not be able to do so, under the Fifth Court ruling.

“The fate of a dozen clinics — and the many women who would otherwise obtain abortions at those clinics — will be determined by the outcome” of the postponement request, the application added.

The clinics and doctors have insisted all along that the two provisions they are challenging are not necessary medically at abortion clinics, and will only have the effect of denying access to more women seeking to end their pregnancies, even for medical reasons.

Texas has strongly defended the surgical facilities and admitting privileges requirements, arguing that they are necessary to protect women's health. State officials probably will get a chance to reply to the delay application before Justice Scalia or the full Court acts.

# “Judge Garza Really Disagrees with the Miss. Abortion-Clinic Opinion”

*Find Law*  
William Peacock  
July 31, 2014

A Fifth Circuit panel on Tuesday upheld an injunction against the enforcement of a Mississippi statute requiring physicians providing abortions to have admitting privileges at a nearby hospital as it applied to the state's last remaining clinic. It did so despite binding authority from earlier this year -- a different panel's decision upholding a substantially similar law out of Texas.

The majority justified the split from authority by pointing to a 1938 segregation-in-education case -- an Equal Protection holding, even though this is a Due Process dispute. Circuit Judge Emilio Garza was so dumbfounded by the majority's reasoning that his dissent more than doubles the length of the opinion -- from 18 to 37 pages long.

In his dissent, Garza takes issue with every single premise in the majority's opinion, while saving a few pages' worth of wrath for *Planned Parenthood v. Casey* itself. We'll hold off on reiterating his rant, which echoes many that have come before him (standard-less standard of *Casey* comes from Harlan's sloppy dissent in *Poe v. Ullman*, which has led to decades of sloppy judicial activism based in politics) and instead look at his issues with the case at hand.

## **H.B. 1390 Doesn't Close Clinics (Directly)**

Garza starts by noting that this isn't state action: The law requires physicians to get admitting privileges -- that's it.

Five hospitals in the area around the clinic declined to extend those privileges. Hospitals choosing not to extend privileges is private action, action which may conflict with federal law. ("Federal law, however, prohibits entities receiving certain funding or contracts from discriminating 'in the extension of staff or other privileges to any physician ... because he performed or assisted in the performance of a lawful sterilization procedure or abortion ...'") This case isn't about possibly illegal private action, however -- it's about review of a state law.

"The independent decisions of private hospitals have no place in our review of state action under the Constitution," Judge Garza wrote.

## **How Far of a Drive Is Too Far?**

Our first reaction to the holding in this case was, "What about *Abbot*?" Right or wrong, the Fifth Circuit, just this past March, upheld a similar law out of Texas. Judge Garza is wondering the same thing:

"Applying *Casey*, a panel of this Court recently concluded that 'an increase of travel of less than 150 miles for some women is not an undue burden,'" Garza wrote. "The

majority gives these binding principles a passing nod [...] before setting them aside for the sole reason that this case happens to involve the crossing of state borders to obtain abortion services."

He also took issue with the majority's citation of *Casey* as support for the proposition that crossing state lines is an undue burden on the right to obtain an abortion:

"In the majority's view, the *Casey* Court's failure to 'mention or consider the potential availability of abortions ... in surrounding states' implies that we must confine our undue burden analysis to Mississippi. [...] Such an inference is legally nonsensical: No such rule exists. *Casey* dealt with the constitutionality of a Pennsylvania statute imposing various informed consent and spousal notification requirements on women seeking abortion services in that state, and the Court had no occasion to consider abortion access in nearby states. The lack of a squarely applicable precedent means only that the question remains open."

### ***Gaines* Is Apples and Oranges**

In *Gaines*, the Supreme Court held that a state has an obligation "*to give the protection of equal laws*" regardless of "what another State may do or fail to do." (Emphasis in dissent.)

The key words are "equal" and "protection." *Gaines* "governs each state's obligations solely under the Equal Protection Clause, not under the Constitution at large, much less the substantive component of the Due Process Clause," Judge Garza concluded.

Another significant distinction: In *Gaines*, the state was dealing with a service that it was obligated to provide equally: providing an education to students within its borders.

Here? The state is not, and is not required to, provide abortions.

### **We're Going to Need a Bigger Record**

Despite the lengthy dissent, Judge Garza wasn't ready to hand the case to Mississippi outright. He noted that the correct test would be to follow *Casey* and *Abbott* to see if the distance traveled would amount to an undue burden.

Such a test, of course, would almost certainly come out in Mississippi's favor. As Garza points out, before the Act's passage, nearly 60 percent of Mississippi women seeking an abortion already went out of state. Plus, as Mississippi has been arguing all along, neighboring out-of-state clinics exist within driving distance of Jackson.

## “Judges Block Abortion Curb in Mississippi”

*The New York Times*  
Campbell Robertson & Erik Eckholm  
July 29, 2014

A federal appeals panel on Tuesday blocked a Mississippi law that would have shut the sole abortion clinic in the state by requiring its doctors to obtain admitting privileges at local hospitals, something they had been unable to do.

By a 2-to-1 vote, the panel of the United States Court of Appeals for the Fifth Circuit ruled that by imposing a law that would effectively end abortion in the state, Mississippi would illegally shift its constitutional obligations to neighboring states. The ruling is the latest at a time when states, particularly in the South, are increasingly setting new restrictions that supporters say address safety issues and that critics say are intended to shut clinics.

“A state cannot lean on its sovereign neighbors to provide protection of its citizens’ federal constitutional rights,” Judge E. Grady Jolly wrote.

“Pre-viability, a woman has the constitutional right to end her pregnancy by abortion,” he continued. This law “effectively extinguishes that right within Mississippi’s borders.”

Mississippi officials had argued that women seeking abortions could always drive to neighboring states, such as Louisiana or Tennessee, to obtain the procedure, an argument the panel rejected.

The decision did not overturn the Mississippi law or explore whether the admitting-privilege requirement was justified on safety grounds. Rather, the panel said, the law could not be used to close the sole clinic in the state. The opinion preserved an existing stay while the substantive issues were considered further by a Federal District Court. But it set a clear principle of state responsibility that the lower court must apply to this case.

Laurence H. Tribe, a professor of constitutional law at Harvard, said that the principle of state responsibility enunciated by the circuit court “is deeply established and fully entrenched.”

“It goes not only to the issue of reproductive freedom but to the very character of the federal union,” he said.

Mississippi officials did not say whether the state would appeal.

“We are reviewing the ruling and considering our options,” said Jan Schaefer, a spokeswoman for Jim Hood, Mississippi’s attorney general.

State Representative Sam C. Mims, who was the chief sponsor of the law, expressed disappointment with the ruling, saying that the decision reflected a misinterpretation of its purpose.

“Abortion is still legal throughout the nation and, of course, still legal in Mississippi,” he

said. “This legislation did not deal with that; it only dealt with the regulation of abortion clinics.”

Supporters of abortion rights were pleased but wary.

“The fact that the Mississippi clinic can stay open is good news, but there are a lot of other cases pending in federal courts, and it’s impossible to know if those laws will be upheld or struck down,” said Elizabeth Nash, who analyzes state laws for the Guttmacher Institute, a private research group that supports abortion rights.

Similar laws have been temporarily blocked by federal courts in Alabama, Kansas and Wisconsin while they have taken effect in Missouri, North Dakota, Tennessee, Texas and Utah.

In March, a panel from the same appeals court, composed of different judges, upheld a Texas law requiring admitting privileges, ruling that the closing of some but not all clinics within a state did not present an undue burden to women seeking abortion. About one-third of the abortion clinics in Texas have shut in the last year because of the requirement, leaving 22 open and forcing women in some parts of the state to drive more than 100 miles to obtain an abortion.

On Monday, two affected clinics in Texas are mounting a new legal challenge and clinic operators will also ask a Federal District Court to block enforcement of a more drastic requirement scheduled to take effect on Sept. 1 — that abortion clinics meet the building standards of ambulatory surgery centers.

That rule could reduce the number of centers operating in the state to fewer than 10.

While the Texas and Mississippi laws were nearly identical, the judges found that the effect in Mississippi, with a single clinic, made the law there, passed by a large and bipartisan majority in 2012, constitutionally distinct from the one in Texas.

Nearly everyone involved with the law in Mississippi acknowledged from the outset that it would shutter the Jackson Women’s Health Organization, which is north of downtown Jackson. The clinic’s challenge to the law was argued by the Center for Reproductive Rights, a New York group.

Politicians at the time of the law’s passage, including the governor, welcomed the closing as a likely outcome. The two physicians who perform nearly all abortions at the clinic, neither of whom live full-time in Jackson, tried and failed to obtain admitting privileges at all seven hospitals in the area.

When they appeared before the appeals panel in April, lawyers representing the state did not dispute that the law would force the clinic’s closing, instead echoing arguments made about the Texas law: that it was not an undue burden for women to have to drive a longer distance.

Mississippi is “surrounded by major metropolitan areas where abortion clinics are available,” said Paul E. Barnes of the Mississippi attorney general’s office. The judges at the time pointed out that such options might narrow considerably with the passage of similar laws in Louisiana and

Alabama, a point raised again in a footnote to Tuesday's opinion.

In a dissent, Judge Emilio M. Garza agreed with Mississippi's arguments, saying that the law was a reasonable effort to regulate and add safeguards to abortions. Disputing the central premise of the opinion, he wrote that "no state is obligated to provide or guarantee the provision of abortion services within its borders."

Major medical associations including the American College of Obstetricians and Gynecologists have said that requiring clinic doctors to have admitting privileges has no effect on medical safety. In an emergency,

patients would be sent to local emergency rooms and be treated by specialists in any case.

Many hospitals provide admitting privileges only to doctors who admit a minimum number of patients each year — a threshold many abortion providers cannot meet because serious medical crises are rare and, in the case of the Jackson clinic, because the doctors visit from elsewhere.

Other hospitals, especially in conservative and rural areas, have refused to grant privileges to abortion clinic doctors in order to avoid controversy.



## **“Supreme Court Takes No Action on Mississippi Abortion Law”**

*NBC News*  
Pete Williams  
June 30, 2015

The U.S. Supreme Court today took no action on a dispute over a Mississippi abortion law that requires doctors performing abortions to have admitting privileges at local hospitals.

As a result, the law will remain on hold for several more months — perhaps until the court decides whether to take a similar law from Texas. The Supreme Court Monday blocked enforcement of the Texas law while it's on appeal.

Passed by the state legislature in 2012, the Mississippi law was blocked by lower courts, which found that it would effectively force the state's only licensed abortion clinic to shut down.

The state argued that the law would not unduly burden the right of access to abortion services, because many women in Mississippi could go to nearby clinics in Tennessee, Louisiana, and Alabama. But the Fifth Circuit Court of Appeals ruled that "Mississippi may not shift its obligation with respect to the established constitutional rights of its citizens to another state."

In a more recent ruling, a different panel of the same appeals court said that requiring women to leave Texas for abortion services is not necessarily unconstitutional. That decision came in the separate dispute over the 2013 Texas abortion law.

*MKB Mgmt. Corp. v. Stenehjem*

**Ruling Below:** *MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059 (D.N.D. 2014)

Plaintiff MKB Management Corporation, doing business as the Red River Women's Clinic, is the sole abortion provider in North Dakota. Before North Dakota's H.B. 1456 took effect, the plaintiffs brought suit in the district court, challenging the law's constitutionality and seeking injunctive relief. The district court granted a preliminary injunction enjoining the implementation of H.B. 1456. The plaintiffs then moved for summary judgment, arguing H.B. 1456 violates the Due Process Clause of the United States Constitution.

The district court found that "[a] woman's constitutional right to terminate a pregnancy before viability has consistently been upheld by the United States Supreme Court for more than forty years since *Roe v. Wade*." Concluding that "H.B. 1456 clearly prohibits pre-viability abortions in a very significant percentage of cases in North Dakota, thereby imposing an undue burden on women seeking to obtain an abortion," the district court granted summary judgment to the plaintiffs, permanently enjoining H.B. 1456. The State now appeals.

**Question Presented:** Whether North Dakota could prohibit physicians from aborting unborn children who possessed detectable heartbeats.

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**MKB MANAGEMENT CORP., doing business as Red River Women's Clinic; Kathryn L. Eggleston, M.D.**  
**Plaintiffs – Appellees**  
**v.**  
**Wayne STENEHJEM, in his official capacity as Attorney General for the State of North Dakota, et. al.**  
**Defendants – Appellants**

United States Court of Appeals for the Eighth Circuit  
Filed on July 22, 2015

[Excerpt; some citations and footnotes omitted]

SHEPHERD, Circuit Judge.

This case presents the question whether, given the current state of medical science, a state generally may prohibit physicians from aborting unborn children who possess detectable heartbeats. The district court held

that it may not. Because United States Supreme Court precedent does not permit us to reach a contrary result, we affirm.

**I.**

North Dakota has, for a number of years, prohibited abortion "[a]fter the point in pregnancy when the unborn child may reasonably be expected to have reached viability," except when necessary to preserve the life or health of the mother. North Dakota defines "viable" as "the ability of an unborn child to live outside the mother's womb, albeit with artificial aid."

In 2013, North Dakota passed House Bill 1456, which extends the general prohibition on abortion to the point in pregnancy when the unborn child possesses a detectable heartbeat. H.B. 1456 contains two operative provisions. The first requires a physician performing an abortion to "determin[e], in accordance with standard medical practice, if the unborn child the pregnant woman is carrying has a detectable heartbeat." This requirement does not apply "when a medical emergency exists that prevents compliance." A physician who violates the heartbeat testing requirement is subject to disciplinary action before the state board of medical examiners.

The second operative provision prohibits a physician from performing an abortion on a pregnant woman if the unborn child has a "heartbeat [that] has been detected according to the requirements of section 1." There are exceptions for the life or health of the pregnant woman and for the life of another unborn child. A physician who violates this provision commits a felony. The pregnant woman, however, is not subject to liability.

Plaintiff MKB Management Corporation, doing business as the Red River Women's Clinic, is the sole abortion provider in North

Dakota. Plaintiff Dr. Kathryn Eggeston is a board-certified family medicine physician, licensed to practice in North Dakota, who serves as the Clinic's medical director and provides abortions to the Clinic's patients. The defendants are the State's Attorney for the county in which the Clinic is located, the North Dakota Attorney General, and the members of the North Dakota Board of Medical Examiners, all in their official capacities (collectively, the "State").

Before H.B. 1456 took effect, the plaintiffs brought suit in the district court, challenging the law's constitutionality and seeking injunctive relief. The district court granted a preliminary injunction enjoining the implementation of H.B. 1456. The plaintiffs then moved for summary judgment, arguing H.B. 1456 violates the Due Process Clause of the United States Constitution. The plaintiffs submitted declarations from Dr. Eggeston and Dr. Christie Iverson, a board-certified obstetrician and gynecologist licensed in North Dakota, both stating that fetal cardiac activity is detectable by about 6 weeks and that a fetus is not viable until about 24 weeks. In response, the State submitted the declaration of Dr. Jerry Obritsch, a board-certified obstetrician and gynecologist licensed in North Dakota, that an unborn child's heartbeat is detectable by about 6 to 8 weeks and that an unborn child is viable from conception because in vitro fertilization ("IVF") "allow[s] an embryonic unborn child to live outside the human uterus (womb) for 2 - 6 days after conception."

The district court found that "[a] woman's constitutional right to terminate a pregnancy before viability has consistently been upheld

by the United States Supreme Court for more than forty years since *Roe v. Wade*." It reasoned that "the affidavit of Dr. Obritsch does not create a genuine issue [as to when viability occurs] primarily because Dr. Obritsch uses a different definition of viability than the one used by either the United States Supreme Court or the medical community generally." Concluding that "H.B. 1456 clearly prohibits pre-viability abortions in a very significant percentage of cases in North Dakota, thereby imposing an undue burden on women seeking to obtain an abortion," the district court granted summary judgment to the plaintiffs, permanently enjoining H.B. 1456. The State now appeals.

## II.

We review the district court's grant of summary judgment *de novo* and its permanent injunction for an abuse of discretion.

The State argues that the Supreme Court has called into question the continuing validity of its abortion jurisprudence, and that changes in the facts underlying *Roe* and *Casey* require us to overturn those cases.

The evolution in the Supreme Court's jurisprudence reflects its increasing recognition of states' profound interest in protecting unborn children. In 1973, the Court announced it would regulate abortion according to the trimester framework. Although *Roe* acknowledged there were "important state interests in regulation," it prohibited states from issuing regulations designed to promote their interest in

"protecting potential life" during the first two trimesters of pregnancy.

By 1992, however, a plurality of the Court had rejected the trimester framework because it failed to "fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life." *Casey* recognized "there is a substantial state interest in potential life throughout pregnancy." To give this interest due consideration, *Casey* replaced *Roe*'s trimester framework with the undue burden analysis, under which a state may promote its interest in potential life by regulating abortion before viability so long as the regulation's "purpose or effect is [not] to place a substantial obstacle in the path of a woman seeking an abortion."

Most recently, a majority of the Court, when presented with an opportunity to reaffirm *Casey*, chose instead merely to "assume" *Casey*'s principles for the purposes of its opinion. This mere assumption may, as the State suggests, signal the Court's willingness to reevaluate its abortion jurisprudence.

Even so, the Court has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decisions. Neither *Gonzales*'s signal nor the alleged change of underlying facts empowers us to overrule the Supreme Court.

Accordingly, we have no choice but to follow the majority of the Court in assuming the following principles for the purposes of this opinion:

Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her

pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."

Here, because the parties do not dispute that fetal heartbeats are detectable at about 6 weeks, it is clear that H.B. 1456 generally prohibits abortions after that point in a pregnancy. Whether such a prohibition is permissible under the principles we accept as controlling in this case depends on when viability occurs: if viability occurs at about 24 weeks, as the plaintiffs maintain, then H.B. 1456 impermissibly prohibits women from making the ultimate decision to terminate their pregnancies; but if viability occurs at conception, as the State argues, then no impermissible prohibition ensues.

Just as we are bound by the Supreme Court's assumption of Casey's principles, we are also bound by the Court's statement that viability is the time "when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."

When we recently reviewed an Arkansas statute similar to H.B. 1456, we noted "the

importance of the parties, particularly the state, developing the record in a meaningful way so as to present a real opportunity for the court to examine viability." Here, the plaintiffs' declarations, by Drs. Eggleston and Iverson, state viability occurs at about 24 weeks. Dr. Iverson explained she understands viability to mean "the time when a fetus has a reasonable chance for sustained life outside the womb, albeit with lifesaving medical intervention." Iverson Dec. at 2. This definition is in accordance with the one adopted by the Supreme Court.

The State's declaration, by Dr. Obritsch, contends viability occurs at conception because IVF "allow[s] an embryonic unborn child to live outside the human uterus (womb) for 2 - 6 days after conception." Obritsch Dec. at 8. While this declaration provides some support for the State's argument, we agree with the district court that Dr. Obritsch's definition of viability differs from the Supreme Court's and thus does not create a genuine dispute as to when viability occurs.

Because there is no genuine dispute that H.B. 1456 generally prohibits abortions before viability—as the Supreme Court has defined that concept—and because we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions, we must affirm the district court's grant of summary judgment to the plaintiffs.

### III.

Although controlling Supreme Court precedent dictates the outcome in this case,

good reasons exist for the Court to reevaluate its jurisprudence.

#### **A.**

To begin, the Court's viability standard has proven unsatisfactory because it gives too little consideration to the "substantial state interest in potential life throughout pregnancy." By deeming viability "the point at which the balance of interests tips," the Court has tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn. This leads to troubling consequences for states seeking to protect unborn children. For example, although "states in the 1970s lacked the power to ban an abortion of a 24-week-old-fetus because that fetus would not have satisfied the viability standard of that time, [t]oday . . . that same fetus would be considered viable, and states would have the power to restrict [such] abortions." How it is consistent with a state's interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another is not clear. The Supreme Court has posited there are "logical and biological justifications" for choosing viability as the critical point. But this choice is better left to the states, which might find their interest in protecting unborn children better served by a more consistent and certain marker than viability. Here, the North Dakota legislature has determined that the critical point for asserting its interest in potential life is the point at which an unborn child possesses a detectable heartbeat. "To substitute its own preference to that of the legislature in this area is not the proper role of a court."

By taking this decision away from the states, the Court has also removed the states' ability to account for "advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life," "[B]ecause the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate" medical and scientific advances. Thus the Court's viability standard fails to fulfill *Roe's* "promise that the State has an interest in protecting fetal life or potential life."

Medical and scientific advances further show that the concept of viability is itself subject to change. The Court has already acknowledged that viability continues to occur earlier in pregnancy. When the Court decided *Roe* in 1973, viability generally occurred at 28 weeks. In 1992, viability "sometimes" occurred at 23 to 24 weeks. Today, viability generally occurs at 24 weeks, but it may occur weeks earlier. Dr. Obritsch's declaration, although insufficient to create a genuine dispute of fact in the face of the Supreme Court's current definition of viability, shows the concept of viability may be attacked from the point of conception forward, as well. As IVF and similar technologies improve, we can reasonably expect the amount of time an "embryonic unborn child" may survive outside the womb will only increase. The viability standard will prove even less workable in the future.

#### **B.**

Another reason for the Court to reevaluate its jurisprudence is that the facts underlying *Roe*

and *Casey* may have changed. The State has presented evidence to that effect and the plaintiffs did not contest this evidence at the summary judgment stage. The State's evidence "goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child." First, "*Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by" declarations from women who have had abortions. These declarations state women may receive abortions without consulting the physician beforehand and without receiving follow-up care after, that women may not be given information about the abortion procedure or its possible complications, and that the abortion clinic may function "like a mill." The declaration by Dr. John Thorp, a board-certified obstetrician and gynecologist, further states that "coercion or pressure prior to the termination of pregnancy occurs with frequency." One woman declared her husband threatened to kick her out of the house and take her children away forever if she did not abort a pregnancy that was the product of an affair.

The declarations from women who have had abortions also show abortions may cause adverse consequences for the woman's health and well-being. One woman reported that "[t]he negative effects of my abortion resulted in ten years of mental and emotional torment." Another reported she "suffered for years from depression, anxiety, panic attacks, low self-esteem" and "suicidal ideation." Yet another reported her abortion caused "numerous female health issues, including an ectopic pregnancy, chronic bladder infections, debilitating menstrual cycles,

cervical cancer and early hysterectomy." Dr. Obritsch also explained some studies support a connection between abortion and breast cancer.

We further observe that the pseudonymously named plaintiffs in two of the Supreme Court's foundational abortion cases later advocated against those very decisions. Norma McCorvey, the "Jane Roe" of *Roe v. Wade*, sought relief from the judgment in her case on the ground that changed factual and legal circumstances rendered *Roe* unjust. *Roe*'s companion case, similarly sought relief from the judgment in her case. *Cano* also filed an amicus brief in this case arguing "that abortion is psychologically damaging to the mental and social health of significant numbers of women." *McCorvey*'s and *Cano*'s renunciations call into question the soundness of the factual assumptions of the cases purportedly decided in their favor.

Finally, the State argues that, by enacting a law that permits parents to abandon unwanted infants at hospitals without consequence, it has reduced the burden of child care that the Court identified in *Roe*. In short, the continued application of the Supreme Court's viability standard discounts the legislative branch's recognized interest in protecting unborn children.

#### IV.

For the foregoing reasons, we affirm the district court's grant of summary judgment to the plaintiffs and the permanent injunction of H.B. 1456.

## “Abortion and the Law: The Eighth Circuit Court Embarrasses Itself”

*The Economist*  
August 5, 2015

Last month, Judge Bobby Shepherd of the eighth circuit court in Missouri wrote an opinion reading more like a novice high-school debate speech than a ruling by a federal appellate judge. The topic was abortion—specifically, North Dakota’s highly restrictive law banning the procedure at the first sign of a fetal heartbeat. Since a heartbeat can be heard as early as six weeks into a pregnancy, and the Supreme Court has said that women have a right to an abortion up to the point of viability (i.e., when the fetus is capable of surviving outside the womb, around 24 weeks), Judge Shepherd held, along with two colleagues, that the law is unconstitutional. But the 14-page ruling closed with a five-page lament: North Dakota’s law may be inconsistent with *Roe v Wade* and *Casey v Planned Parenthood*, but the Supreme Court should “re-evaluate its jurisprudence”.

Lower courts are not in the habit of chiding the Supreme Court so brazenly for getting it wrong. But this opinion is most shocking for the tortured logic and dubious claims fueling its final five pages.

The three-judge panel begins by claiming that the viability standard “has proven unsatisfactory because it gives too little consideration to the ‘substantial state interest in potential life throughout pregnancy’”. The quotation is from the *Casey* decision, when

the Supreme Court abandoned *Roe*’s trimester approach and focused squarely on viability as the point at which a state’s interest in fetal life becomes “compelling” and, thus, when abortion bans become permissible. But to say that this tipping point “gives too little consideration” to the state’s interest in potential life is to ignore what’s on the other side of the balance: a right of women to terminate their pregnancies, rooted in the 14th Amendment’s protection of personal liberty in the due-process clause.

Judge Shepherd says the “choice” of when to restrict abortion “is better left to the states, which might find their interest in protecting unborn children better served by a more consistent and certain marker than viability.” He then declares that North Dakota’s marker—“the point at which an unborn child possesses a detectable heartbeat”—is as good a choice as any. A couple of sentences earlier, Judge Shepherd had dismissed viability as “tied” to “developments in obstetrics, not to developments in the unborn.” Now he implies that a woman’s right to an abortion may be made contingent on developments in fetal-heartbeat-detection technology. And he finds no trouble with a national picture where North Dakotans have a handful of weeks to make a decision about their pregnancies—or even less, since it can take a month or more for women to realise they are pregnant—while residents of other states have three or



four times that long to consider their options. The court seems fine with the scope of constitutional rights being defined by where one happens to live.

It gets worse. The opinion then calls into question the very meaning of “viability”, turning to the state’s witness, Dr Jerry Obritsch, who claims that “an unborn child is viable from conception because in vitro fertilization (“IVF”) ‘allow[s] an embryonic unborn child to live outside the human uterus (womb) for 2 - 6 days after conception.’” While the panel notes this view of viability is clearly at odds with the Supreme Court’s conception, it contends that Dr Obritsch “shows the concept of viability may be attacked from the point of conception forward, as well.” But an embryo is not “viable” just because it is able to survive for a few days before being implanted in a uterus. Test-tube babies do not self-gestate in the vial. For the eighth circuit to endorse the state witness's sophistry—even haltingly—is an embarrassment of judicial reasoning.

The strangest string of arguments to win the eighth-circuit panel’s imprimatur concerns the purported reality of abortion in America today. Some women have abortions without adequate medical consultation, Judge Shepherd writes, and some receive no follow-up care after the procedure. The opinion again cites Dr Obritsch—“a board-certified obstetrician and gynecologist”—who reports that “coercion or pressure” often influence a woman’s decision to have an abortion: “One

woman declared her husband threatened to kick her out of the house and take her children away forever if she did not abort a pregnancy that was the product of an affair.”

Leaving aside the dubious I-have-a-single-expert-who-says-this mode of establishing empirical truths—the logic behind these arguments is mystifying. Are women less entitled to their constitutional rights if they happen to be married to an abusive husband? Or if their health provider isn’t as attentive as they may like? Does a constitutional right exercised imperfectly no longer merit protection? By that odd measure, the free exercise of religion is called into serious question when we discover that some Amish youth sell methamphetamines. Free speech should perhaps be abandoned because dogfight videographers and cross burners abuse it. And the second amendment’s right to bear arms should have been shunted to the dustbin right after America’s first mass shooting—or at least well before its 71st.

The eighth circuit's opinion—which Slate's Dahlia Lithwick rightly finds "astonishing"—aims to give the states a free hand in policing abortion however they choose, and may encourage abortion opponents to keep pressing their case to reverse over four decades of abortion jurisprudence. But it is hard to imagine that even the most conservative Supreme Court justices will manage to read the opinion without wincing.

## “Eighth Circuit Calls for Supreme Court to Reconsider Abortion Precedents”

*The National Review*

Ed Whelan

July 23, 2015

In a decision yesterday (*MKB Management Corp. v. Stenehjem*), a unanimous Eighth Circuit panel ruled that a North Dakota law that generally prohibits abortion after the point at which the “unborn child the pregnant woman is carrying has a detectable heartbeat” is inconsistent with the rules imposed by the Supreme Court in *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). Specifically, “fetal heartbeats are detectable at about 6 weeks”—long before “viability,” as the Court has defined that concept. The panel’s reasoning strikes me as clearly correct.

To their great credit, the panel—consisting of Lavenski R. Smith, William Duane Benton, and Bobby E. Shepherd (all Bush 43 appointees)—did not stop there. Instead, they go on, in pages 9 to 13 of the opinion authored by Shepherd, to observe and explain that “good reasons exist for the Court to reevaluate its [abortion] jurisprudence.” Some excerpts:

To begin, the Court’s viability standard has proven unsatisfactory because it gives too little consideration to the “substantial state interest in potential life throughout pregnancy.” By deeming viability “the point at which the balance of interests tips,” the Court has tied a state’s interest in unborn children to developments in obstetrics, not to

developments in the unborn. This leads to troubling consequences for states seeking to protect unborn children. For example, although “states in the 1970s lacked the power to ban an abortion of a 24-week-old-fetus because that fetus would not have satisfied the viability standard of that time, [t]oday . . . that same fetus would be considered viable, and states would have the power to restrict [such] abortions.” How it is consistent with a state’s interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another is not clear. The Supreme Court has posited there are “logical and biological justifications” for choosing viability as the critical point. But this choice is better left to the states, which might find their interest in protecting unborn children better served by a more consistent and certain marker than viability....

Another reason for the Court to reevaluate its jurisprudence is that the facts underlying *Roe* and *Casey* may have changed.... First, “*Roe*’s assumption that the decision to abort a baby will be made in close consultation with a woman’s private physician is called into question by” declarations from women who have had abortions. The declaration by Dr. John Thorp, a board-certified obstetrician and gynecologist, further

states that “coercion or pressure prior to the termination of pregnancy occurs with frequency.” ... The declarations from women who have had abortions also show abortions may cause adverse consequences for the woman’s health and well-being.

Mike Paulsen has compellingly argued that lower-court judges should disregard Supreme Court rulings that they in good faith regard as unconstitutional and instead leave it to the Court “to do its own dirty work” of enforcing its lies about the Constitution. The Eighth Circuit panel doesn’t take that approach, but it does the next best thing.

## “When Will the Supreme Court Stop Avoiding Abortion?”

*Slate*

Dahlia Lithwick

June 17, 2015

On Monday, the U.S. Supreme Court declined to revive a major abortion provision from North Carolina that would have required any woman seeking an abortion to submit to a mandatory ultrasound while doctors or technicians showed the images of the scan while describing the fetus in detail, whether or not the patient wished to hear or see it or the doctor wished to show or say it. The law passed in 2011 over the veto of then-Gov. Bev Perdue. The law contained no exception for rape, incest, serious health risks to the patient, or cases of severe fetal anomalies.

In refusing to hear the appeal, the court left in place the ruling from the U.S. 4<sup>th</sup> Circuit Court of Appeals, which had struck down the provision, finding that it violated the First Amendment rights of physicians who were being “compelled” to speak. That means that, at least in the states covered by the 4<sup>th</sup> Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia), these types of forced “display and describe” provisions are unconstitutional. They remain permissible in other jurisdictions that have upheld these types of requirements. Both the U.S. Courts of Appeals for the 5<sup>th</sup> and 8<sup>th</sup> Circuits have upheld similar laws, relying on language from *Planned Parenthood v. Casey*, requiring a physician to advise her pre-abortion patient of the gestational age of her fetus and provide printed information about the risks of abortion and other services. Courts that

upheld the “display and describe” laws determined that there was little substantial difference between the information provided by physicians in *Casey* and the “display and describe” requirements in the new laws. The 4<sup>th</sup> Circuit disagreed, finding that the requirement had the effect of “transforming the physician into the mouthpiece of the state,” which “undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes.”

As Jessica Mason Pieklo noted, this represents the *second* time that the Supreme Court has refused to hear a mandatory ultrasound case. This suggests that while the court may not yet be ready to wade into the thicket of determining what an “undue burden” truly means, the justices continue to believe that any speech restriction (or compulsion) is a bad thing, full stop.

With the North Carolina provision fully ducked, court-watchers now turn their attention to several other abortion regulations that are poised to be taken up at the high court, perhaps as early as this coming fall. Two challenges still loom large: The court is currently trying to decide whether to take up a case about a Mississippi admitting privileges law, struck down by the 5<sup>th</sup> Circuit, that could have the effect of closing down the only abortion clinic left in the state. As *ThinkProgress* notes, “When the bill was

introduced and passed, politicians in Mississippi openly admitted that the law was specifically designed to close the last clinic in the state.” A question the justices must attempt to answer is whether a state can completely eliminate women’s ability to exercise a constitutional right because they can exercise it in other states. In the Mississippi appeals court, the judges cited the constitutional principle that a state can’t violate a citizen’s rights by claiming she can go out of state to exercise it elsewhere.

The court is also looking down the barrel of a challenge to two parts of HB2, the famous 2013 Texas anti-abortion law *that required* providers to obtain admitting privileges to local hospitals and that forced clinics to be retrofitted to meet surgical center standards. Those provisions were upheld by the 5<sup>th</sup> Circuit last week. Under the ruling, all but seven Texas abortion providers may be forced to shutter—in a state that is home to 27 million people. The federal appeals court made just one exception, for McAllen, Texas, where only one clinic serves a significant portion of South Texas. The court determined that should the clinic in McAllen be forced to close, women would have to drive 235 miles to obtain an abortion, which would prove a substantial obstacle to getting an abortion.

The 5<sup>th</sup> Circuit ruling goes into effect on July 1, unless that court agrees to take another look or the Supreme Court intervenes, which it did last fall, with an earlier decision about the clinic requirements of that same omnibus legislation. Back then, the court put a temporary hold on the law while the litigation played out. Justices Breyer, Ginsburg,

Kagan, and Sotomayor suggested they were ready to hear the Texas appeal.

At this point the “undue burden” test from *Casey* has become something akin to a judicial Rorschach test, and even pro-choice supporters wary of another trip to the high court have become persuaded that absent a definitive ruling from the justices, the standard will continue to mean whatever the reviewing court wants it to mean. The court has been dodging reproductive rights cases for years now, but as the appeals courts continue their judicial multicar pileup, and especially if they continue to arrive at contradictory results, it begins to look more and more likely that the court will simply have to weigh in. As Professor Michael Dorf told the *New York Times* last week, the high court heard about 20 abortion cases from 1973 to 1992. They heard only three abortion cases in the 23 years since. Dorf suggests that the issue has simply been too charged and divisive to persuade the justices to jump in. It may now be inevitable.

For opponents of reproductive rights, the hope is that Justice Anthony Kennedy is finally ready to do what he couldn’t bring himself to do in *Casey*—yank the breathing tube out of *Roe v. Wade* once and for all. For supporters of reproductive rights, the decision of the court to avoid hearing the North Carolina ultrasound case offers a filament of comfort: Maybe the court wants to wait just a little bit longer. As Robin Marty argues here, perhaps the court’s refusal to hear the North Carolina ultrasound case means the justices are content to sit back a little longer and let this whole mess play out in the state and lower federal courts. Still the

reign of confusion and the patchwork of judicial decisions create uncertainty. And the fact that Texas is poised to close almost all of its remaining clinics in the coming weeks creates a new sense of urgency.

There's one more consideration. As Pema Levy argued last week at *Mother Jones*, polls show that public support for basic access to reproductive rights seems to have increased somewhat of late: "Last month, Gallup reported an upswing in pro-choice sentiment in the last year. On the 40th anniversary of *Roe v. Wade* in 2013, a Wall Street Journal/NBC News poll found that a record 70 percent of Americans believed that landmark ruling should stand." That means that if the court agrees to take an abortion case right at the heart of primary season, it

could be setting up the issue as a big fat loser for the GOP. Far be it from me to suggest that the justices take that kind of political calculus into account when planning their election-year dockets, but do the court's conservatives really want to use this fall to force GOP candidates to own the worst anti-choice stereotypes? The Texas case, in which the appeals court judges assumed that women have the time and money to drive their convertibles hundreds of miles across the state to obtain basic reproductive care, promises to be the unholy stepchild of Mitt Romney's greatest hits: a place where "binders full of women" meets the blithe unconcern of the 1 percent.

*Little Sisters of the Poor Home for the Aged v. Burwell*

**Ruling Below:** *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013)

In this case, Catholic religious organizations challenge the regulations implementing the Patient Protection and Affordable Care Act, Pub. L. 111-148, specifically the requirement that group health care plans provide all women coverage for certain preventative contraception services without a co-payment or deductible.

**Question Presented:** Whether (a) the Affordable Care Act (ACA) and its implementing regulations did not substantially burden plaintiffs' religious exercise or violate plaintiffs' First Amendment rights; (b) whether the ACA's accommodation scheme relieved plaintiffs of their obligations under the contraception mandate, and did not substantially burden their religious exercise under the RFRA; (c) whether plaintiffs failed to make out a plausible claim under the Free Exercise Clause.

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**LITTLE SISTERS OF THE POOR HOME FOR THE AGED, Denver, Colorado, a  
Colorado non-profit corporation, et al.,  
Plaintiffs – Appellees**

**v.**

**Sylvia Matthews BURWELL, Secretary of the United States Department of Health and  
Human Services, et al.,  
Defendants - Appellants**

United States Court of Appeals for the Tenth Circuit

Filed on July 14, 2015

[Excerpt; some citations and footnotes omitted]

MATHESON, Circuit Judge

**I. INTRODUCTION**

When Congress passed the Affordable Care Act ("ACA") in 2010, it built upon the widespread use of employer-based health insurance in the United States. The ACA and its implementing regulations require employers who provide health insurance coverage to their employees to include

coverage for certain types of preventive care without cost to the insured. The appeals before us concern the regulations that require group health plans to cover contraceptive services for women as a form of preventive care ("Mandate").

In response to religious concerns, the Departments implementing the ACA—Health and Human Services ("HHS"), Labor, and Treasury—adopted a regulation that

exempts religious employers—churches and their integrated auxiliaries—from covering contraceptives. When religious non-profit organizations complained about their omission from this exemption, the Departments adopted a regulation that allows them to opt out of providing, paying for, or facilitating contraceptive coverage. Under this regulation, a religious non-profit organization can opt out by delivering a form to their group health plan's health insurance issuer or third-party administrator ("TPA") or by sending a notification to HHS.

The Plaintiffs in the cases before us are religious non-profit organizations. They contend that complying with the Mandate or the accommodation scheme imposes a substantial burden on their religious exercise. The Plaintiffs argue the Mandate [12] and the accommodation scheme violate the Religious Freedom Restoration Act ("RFRA") and the Religion and Speech Clauses of the First Amendment.

Although we recognize and respect the sincerity of Plaintiffs' beliefs and arguments, we conclude the accommodation scheme relieves Plaintiffs of their obligations under the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights. Exercising jurisdiction under 28 U.S.C. § 1292(a), we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters of the Poor Home for the Aged v. Sebelius*, and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene University v. Sebelius*, and

*Reaching Souls International, Inc. v. Sebelius*.

## II. HOBBY LOBBY AND THIS CASE

Last year, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, in which closely-held for-profit corporations challenged the Mandate under RFRA. The difference between *Hobby Lobby* and this case is significant and frames the issue here. In *Hobby Lobby*, the plaintiff for-profit corporations objected on religious grounds to providing contraceptive coverage and could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties. In the cases before us, the plaintiff religious non-profit organizations can avail themselves of an accommodation that allows them to opt out of providing contraceptive coverage without penalty. Plaintiffs contend the process to opt out substantially burdens their religious exercise.

In other words, unlike in *Hobby Lobby*, the Plaintiffs do not challenge the general obligation under the ACA to provide contraceptive coverage. They instead challenge the process they must follow to get out of complying with that obligation. The Plaintiffs do not claim the Departments have not tried to accommodate their religious concerns. They claim the Departments' attempt is inadequate because the acts required to opt out of the Mandate substantially burden their religious exercise. As we discuss more fully below, however, the accommodation relieves Plaintiffs of their obligation to provide, pay for, or



facilitate contraceptive coverage, and does so without substantially burdening their religious exercise.

### III. BACKGROUND

[Section detailing the ACA omitted]

#### 1. *Little Sisters of the Poor*

The Little Sisters of the Poor Home for the Aged, Denver, Colorado and Little Sisters of the Poor, Baltimore ("Little Sisters") belong to an order of Catholic nuns who devote their lives to care for the elderly. The Little Sisters provide health insurance coverage to their employees through the Christian Brothers Employee Benefit Trust ("Trust"), a self-insured church plan that is not subject to ERISA. The Trust uses Christian Brothers Services ("Christian Brothers"), another Catholic organization, as its TPA.

The Little Sisters have always excluded coverage of sterilization, contraception, and abortifacients from their health care plan in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral. The Little Sisters "believe that it is wrong for them to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services." They cite "well-established Catholic teaching that prohibits encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion." LS Br. at 9-10. The Little Sisters contend they "cannot provide these things, take actions that directly cause others to provide them, or

otherwise appear to participate in the government's delivery scheme," as the mere appearance of condoning these services "would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public."

The Little Sisters are subject to the Mandate unless they take advantage of the accommodation scheme by delivering the Form to the Christian Brothers, their TPA, or notifying HHS of their religious objection. If they do not take one of these steps and do not provide contraceptive coverage, they estimate a single Little Sisters home could incur penalties of up to \$2.5 million per year, and allege the Trust could lose up to \$130 million in plan contributions. The Little Sisters plaintiffs object that the accommodation scheme violates their sincerely held religious beliefs because they cannot take actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme.

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#### 2. *Procedural History*

The district courts reached different results in the three cases before us, denying a preliminary injunction to the plaintiffs in Little Sisters but granting a preliminary injunction to the plaintiffs in Southern Nazarene and Reaching Souls. Reviewing the reasoning behind their determinations clarifies the claims before us on appeal.

In *Little Sisters*, the district court determined that complying with the accommodation scheme would not impose a substantial burden on the Little Sisters' or Christian Brothers' religious exercise. The court's analysis of the preliminary injunction factors began and ended by examining whether the plaintiffs would suffer irreparable injury if the requested relief were denied. After determining it was the court's duty to determine how the regulations operate as a matter of law, the court concluded the accommodation scheme does not require the Little Sisters to provide contraceptive coverage or to participate in the provision of contraceptive coverage.

The court noted that the Little Sisters—unlike the plaintiffs in *Hobby Lobby*—could be relieved of the obligation to provide coverage by signing and delivering the Form to their TPA, the Christian Brothers. The court underscored that, while the Departments could require the Little Sisters to sign and deliver the Form to their TPA to avoid the Mandate, the Departments lacked enforcement authority under ERISA to levy fines or otherwise force the Christian Brothers to provide contraceptive coverage as the TPA for a self-insured, ERISA-exempt church plan. The court concluded that requiring the Little Sisters to sign and deliver the Form to opt out did not constitute a substantial burden on their religious exercise and declined to issue a preliminary injunction.

The Little Sisters next asked the Tenth Circuit for an injunction pending appeal, which this court denied. The Supreme Court

subsequently granted their request for an injunction pending appeal, allowing the Little Sisters to notify HHS of their religious objection instead of sending the Form to their TPA as the regulations at the time required. The Little Sisters now appeal the district court's denial of a preliminary injunction.

#### **IV. UNUSUAL NATURE OF PLAINTIFFS' CLAIM**

Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs' central claim, which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law.

Most religious liberty claimants allege that a generally applicable law or policy without a religious exception burdens religious exercise, and they ask courts to strike down the law or policy or excuse them from compliance. Our circuit's three most recent RFRA cases fall into this category. In *Hobby Lobby*, the ACA required the plaintiffs to provide their employees with health insurance coverage of contraceptives against their religious beliefs. In *Yellowbear v. Lampert*, a prison policy denied the plaintiff access to a sweat lodge, where he wished to exercise his Native American religion. In *Abdulhaseeb v. Calbone*, a prison policy denied the plaintiff a halal diet, which is necessary to his Muslim religious exercise. In each instance, the law or policy failed to provide an exemption or accommodation to the plaintiff(s).

The Supreme Court's recent ruling in *Holt v. Hobbs*, which concerned a prison ban on inmates' growing beards, is another recent example of the more common RFRA claim. The plaintiff in *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the government defendants insisted on a complete restriction and did not attempt to accommodate the plaintiff's religious exercise. The plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a half-inch beard—which the prison refused. The Court ultimately approved this compromise in its ruling.

In the cases before us, by contrast, the Departments have developed a religious accommodation rather than leaving it for the courts to fashion judicial relief. Plaintiffs not only challenge a law that requires them to provide contraceptive coverage against their religious beliefs, they challenge the exception that the law affords to them. The precedents Plaintiffs cite are instructive in some respects, but none of them involve a situation where the government offers religious objectors an accommodation. The Supreme Court and this circuit have suggested such accommodations might have eliminated or lessened burdens we otherwise deemed substantial. Until now, however, we have not squarely considered a RFRA challenge to a religious accommodation.

The closest Tenth Circuit case we have found is *United States v. Friday*, in which defendant Winslow Friday argued his conviction for shooting a bald eagle without a permit violated RFRA because he shot the eagle for

use in a tribal religious ceremony. The Bald and Golden Eagle Protection Act forbids killing a bald eagle, but an applicant can obtain a permit to "take" a live eagle for a religious ceremony. We recognized the potential question of "whether it substantially burdens Mr. Friday's religion to require him to obtain a permit in advance of taking an eagle." We said we were "skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA," but Mr. Friday did not make that specific argument, and we decided the permit accommodation otherwise met RFRA's strict scrutiny element.

We spoke favorably of the government's accommodation scheme in *Friday*, even though "[t]hat accommodation may be more burdensome than the [religious objectors] would prefer, and may sometimes subordinate their interests to other policies not of their choosing." As we noted in conclusion: "Law accommodates religion; it cannot wholly exempt religion from the reach of the law. We therefore turn to uncharted Tenth Circuit terrain.

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The Plaintiffs in the three cases before us assert claims against the Mandate and accommodation scheme under RFRA and the First Amendment's Free Exercise, Establishment, and Free Speech Clauses. Because we determine the accommodation scheme relieves Plaintiffs from complying with the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment

rights, we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters* and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls*.

## V. RFRA

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Plaintiffs argue the ACA and its implementing regulations violate RFRA because they substantially burden their religious exercise by forcing them to do one of three things: (a) comply with the Mandate and provide contraceptive coverage, (b) take advantage of the accommodation scheme, or (c) pay steep fines for non-compliance. We conclude that the accommodation scheme relieves Plaintiffs of complying with the Mandate or paying fines and does not impose a substantial burden on Plaintiffs' religious exercise for the purposes of RFRA.

To explain why the accommodation is permissible under RFRA, we first review the RFRA framework and consider how religious accommodations may lessen or eliminate the substantiality of a burden on religious exercise. We then apply this framework to the accommodation scheme before us, which exempts religious non-profits from providing

contraceptive coverage and instead assigns that task to health insurance issuers and TPAs.

We conclude the accommodation does not substantially burden Plaintiffs' religious exercise. The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these de minimis administrative tasks do not substantially burden religious exercise for the purposes of RFRA.

The dissent parts ways with our majority opinion on the self-insured plaintiffs' RFRA claims. It stresses that, by opting out, the self-insured plaintiffs would cause the legal responsibility to provide contraceptive coverage to shift to their TPAs. We agree. As we observe below, the regulations are clear on that point. But shifting legal responsibility to provide coverage away from the plaintiffs relieves rather than burdens their religious exercise. The ACA and its implementing regulations entitle plan participants and beneficiaries to coverage whether or not the plaintiffs opt out. And the government has established a scheme where, if the law is followed, self-insured plaintiffs that opt out are relieved of providing, paying for, and

facilitating coverage; the government assigns that responsibility to their TPAs; and plan participants and beneficiaries receive the coverage to which they are entitled by federal law. Such an arrangement is among the common and permissible methods of religious accommodation in a pluralist society, and does not constitute a substantial burden under RFRA.

## A. Legal Background

### 1. Standard of Review

Each appeal before us seeks review of a district court order granting or denying a preliminary injunction. We review orders granting or denying a preliminary injunction for abuse of discretion.

A preliminary injunction may be granted if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of [53] irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." A district court abuses its discretion by granting or denying a preliminary injunction based on an error of law.

### 2. RFRA and Free Exercise

RFRA was enacted in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Supreme Court held that burdens on religious exercise are constitutional under the Free Exercise Clause if they result from a neutral law of general application and have a rational

basis. Congress enacted RFRA to restore the pre-Smith standard, which permitted legal burdens on an individual's religious exercise only if the government could show a compelling need to apply the law to that person and that the law did so in the least restrictive way. Congress specified the purpose of RFRA was to restore this compelling interest test as it had been recognized in *Sherbert v. Verner* and *Wisconsin v. Yoder*.

By restoring the pre-Smith compelling interest standard, Congress did not express any intent to alter other aspects of Free Exercise jurisprudence. Notably, pre-Smith jurisprudence allowed the government "wide latitude" to administer large administrative programs, and rejected the imposition of strict scrutiny in that context. As the Supreme Court indicated in *Bowen v. Roy*,

In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.

As we discuss at greater length below, the pre-Smith standards restored by RFRA permitted the Government to impose de minimis administrative burdens on religious

actors without running afoul of religious liberty guarantees.

### 3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." The burden then shifts to the government to demonstrate its law or policy advances "a compelling interest implemented through the least restrictive means available." The government must show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." "This burden-shifting approach applies even at the preliminary injunction stage."

We have previously stated "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief." As we discuss in the next section, whether a law substantially burdens religious exercise in one or more of these ways is a matter for courts—not plaintiffs—to decide.

### 4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA claim, courts do not question "whether the petitioner . . . correctly perceived the commands of [his or her] faith." But courts do determine whether a challenged law or policy substantially burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.

RFRA states the federal government "shall not substantially burden a person's exercise of religion." We must "give effect . . . to every clause and word" of a statute when possible. Drafts of RFRA prohibited the government from placing a "burden" on religious exercise. Congress added the word "substantially" before passage to clarify that only some burdens would violate the act.

We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word "substantial" would become wholly devoid of independent meaning. Furthermore, accepting any burden alleged by Plaintiffs as "substantial" would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.

Every circuit that has addressed a RFRA challenge to the accommodation scheme at issue here has concluded that whether the

government has imposed a "substantial burden" is a legal determination. This is consistent with our determination that we review *de novo* "what constitutes [a] substantial burden . . . and the ultimate determination as to whether the RFRA has been violated." Thus, we "accept[] as true the factual allegations that [Plaintiffs'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened."

We have cautioned that substantiality does not permit us to scrutinize the "theological merit" of a plaintiff's religious beliefs—instead, we analyze "the intensity of the coercion applied by the government to act contrary to those beliefs." Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." In determining whether a law or policy applies substantial pressure on a claimant to violate his or her beliefs, we consider how the law or policy being challenged actually operates and affects religious exercise. When evaluating RFRA claims, we have therefore recognized that not all burdens alleged by plaintiffs amount to substantial burdens. Furthermore, as we discuss in the following section, the existence of an accommodation may affect whether a law or policy burdens religious exercise and whether that burden is substantial.

## 5. Accommodations Can Lessen or Eliminate Burden

We finally note that accommodations function to lessen or eliminate the burden of a generally applicable law. In *Hobby Lobby*, this court said the stark choice between providing contraceptive coverage and paying steep fines constitutes a sufficiently substantial burden to warrant relief under RFRA. Religious objectors are not always put to such a stark choice. When, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA.

Accommodations may eliminate burdens on religious exercise or reduce those burdens to *de minimis* acts of administrative compliance that are not substantial for RFRA purposes. The Supreme Court recognized this point in *Hobby Lobby* when it suggested an accommodation to exempt the plaintiff corporations from complying with the Mandate could satisfy RFRA concerns.

The D.C. Circuit observed that "[a] burden does not rise to the level of being substantial when it places an inconsequential or *de minimis* burden on an adherent's religious exercise." Were it otherwise, our substantial burden inquiry would become a blunt tool incapable of recognizing the meaningful difference between forcing organizations to provide or pay for contraceptives and allowing them to opt out of that requirement. To determine whether the accommodation scheme in these cases renders the alleged burden on Plaintiffs' religious exercise

nonexistent or insubstantial, we turn to the merits of Plaintiffs' RFRA arguments.

## *B. Substantial Burden Analysis*

### 1. Plaintiffs' RFRA Arguments

The cases before us turn on whether complying with the accommodation constitutes a substantial burden. The Government does not dispute the sincerity of Plaintiffs' religious belief that they may not provide, pay for, or facilitate contraceptive coverage. The parties dispute whether the accommodation scheme substantially burdens the Plaintiffs' exercise of religion.

Plaintiffs oppose completing the Form or notifying HHS because they believe they are being asked to play a causal role in the delivery of contraceptive coverage and would be complicit or perceived to be complicit in the overall contraceptive delivery scheme by virtue of their opting out. They also allege their continuing involvement in the regulatory scheme is a substantial burden.

The Government responds that completing the Form or notification does not involve Plaintiffs in the delivery of contraceptive coverage. The accommodation relieves Plaintiffs of their obligations under the Mandate, and when that occurs, federal law authorizes and obligates a health insurance issuer or TPA to provide or arrange for the delivery of contraceptive coverage to plan participants and beneficiaries who are entitled to that coverage under the ACA. The Government therefore argues the

accommodation does not substantially burden Plaintiffs' religious exercise as a matter of law.

### 2. The Accommodation Scheme Eliminates Burdens on Religious Exercise

Under the accommodation scheme, the act of opting out relieves objecting religious non-profit organizations from complying with the Mandate and excuses them from participating in the provision of contraceptive coverage. The Departments designed the accommodation so that, upon receipt of the Form or a notification from the government, health insurance issuers and TPAs—not the objecting religious non-profit organization—provide contraceptive coverage and ensure the organization will not be required to provide, pay for, or otherwise facilitate that coverage. We review this feature of the accommodation scheme to show how it eliminates burdens Plaintiffs otherwise would face, similar to the burdens the for-profit plaintiffs faced in *Hobby Lobby*.

First, the regulations specify a health insurance issuer must handle contraceptive coverage separately from the insurance provided under the religious non-profit organization's plan.

A group health insurance issuer that receives a copy of the self-certification or notification . . . must (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and (B) Provide separate payments for any contraceptive services required to be covered under §



147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

Second, after a religious non-profit organization opts out, a health insurance issuer may not share the costs of providing contraception with the employer or employees.

With respect to payments for contraceptive services, the [health insurance] issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.

TPAs are subject to similar requirements.

Finally, a health insurance issuer or TPA must, in communicating with plan participants or beneficiaries, send separate notice regarding contraceptive coverage from other plan notifications and make clear the employer neither administers nor funds contraceptive benefits. A health insurance issuer or TPA:

must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first

day of each applicable plan year. The notice must specify that the eligible organization does not [68] administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

All of the foregoing removes the objecting religious non-profit organizations from providing contraceptive coverage, but Plaintiffs argue these protections of their religious liberty are insufficient because they still must deliver a Form or notify HHS to opt out of the Mandate. They contend this act substantially burdens their religious exercise because it "triggers" the provision of contraceptive coverage, makes them complicit in the larger delivery scheme, and demands their ongoing involvement. We disagree. The accommodation relieves Plaintiffs of their statutory obligation to provide contraceptive coverage to their plan participants and beneficiaries, and as we discuss below, taking advantage of that accommodation is not a substantial burden on religious exercise.

### 3. The Accommodation Scheme Does Not Impose a Substantial Burden

To explain why the accommodation scheme does not substantially burden Plaintiffs' religious exercise, we look at the theories argued by the Plaintiffs and why they fail.

a. Opting out does not cause contraceptive coverage.

Although the accommodation scheme frees Plaintiffs from providing, paying for, or facilitating contraceptive coverage, they contend that, by delivering the Form or notifying HHS, they nevertheless "trigger" or cause contraceptive coverage. They do not. As we explain below, Plaintiffs' causation argument misconstrues the statutory and regulatory framework. Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries. Because the mechanics of the accommodation scheme differ slightly for different types of plans, we examine how the regulations work for insured plans, self-insured plans, and self-insured church plans. But in each circumstance, Plaintiffs' causation argument fails to establish any burden on Plaintiffs' religious exercise.

#### i. Insured Plans

The plaintiffs with insured plans deal directly with a health insurance issuer and do not use a TPA. They argue the accommodation scheme levies a substantial burden on their religious exercise because "insurance issuers will sell [them] plans that either (a) expressly include abortifacients; or (b) functionally include abortifacients by guaranteeing separate payments for them upon [their] execution and conveyance of the self-certification to the issuer." We disagree.

The regulations do not burden the religious exercise of employers using insured plans. The ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. A religious non-

profit organization may comply with the Mandate and provide coverage to its employees, opt out using the accommodation, or not comply with the law and pay fines. But in each instance, the health insurance issuer must ensure the organization's employees receive contraceptive coverage.

By delivering the Form or notifying HHS, an organization with an insured plan does not enable coverage—to the contrary, it simply notifies its health insurance issuer the organization will not be providing coverage. The health insurance issuer then has an independent and exclusive obligation to provide that coverage without cost sharing. The relevant regulation states: "When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130." Because the ACA obligates health insurance issuers to provide contraceptive coverage, they must meet this obligation independently and irrespective of the notification. The self-certification does not impose any responsibility; it merely makes it the issuer's sole responsibility rather than one shared with the group health plan itself.

Because federal law requires the health insurance issuer to provide coverage and the accommodation process removes an objecting organization from participating, plaintiffs with insured plans fail to show the accommodation burdens their religious exercise. The insured plaintiffs are not burdened when they are relieved of their responsibility and their insurers provide

coverage as required by independent obligations set out in the ACA.

## ii. Self-Insured Plans

The accommodation scheme permits religious non-profit organizations with self-insured plans to opt out by delivering the Form to their TPA or notifying HHS that they have a religious objection and will not comply with the Mandate. When the objecting organization opts out, the TPA that administers its group health plan is responsible for providing contraceptive coverage if it wishes to remain a TPA for the plan. In this section, we address this self-insured arrangement. In the next section, we consider the subset of self-insured plaintiffs having church plans over which the government lacks enforcement authority under ERISA to compel the TPA to comply with its legal obligations.

### 1) Plaintiffs' argument

The only plaintiff with a self-insured plan subject to ERISA is Southern Nazarene. Southern Nazarene argues the accommodation scheme substantially burdens its religious exercise because the scheme requires it to "comply with the Mandate by either (a) setting up a self-insured plan that includes abortifacients; or (b) setting up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them by the TPA upon the entity's execution of the self-certification." Self-insured plaintiffs with ERISA-exempt church plans make similar claims.

Plaintiffs and the dissent emphasize that the TPA may arrange or provide coverage only after a religious non-profit organization opts out. We consider this to be an uncontested and unremarkable feature of the accommodation scheme. The regulations state that when a religious non-profit organization opts out of providing contraceptive coverage, the TPA is notified that the organization will not administer or pay for contraceptive coverage, and that it must provide or arrange for contraceptive coverage without cost sharing if it wishes to continue administering the plan. The TPA is authorized and obligated to provide the coverage guaranteed by the ACA only if the religious non-profit organization that has primary responsibility for contraceptive coverage opts out of providing it.

Plaintiffs suggest this shift in legal responsibility for contraceptive coverage substantially burdens their religious exercise under RFRA. They argue their opting out would trigger, cause, or offer a "permission slip" for the delivery of contraception by allowing their TPA to provide the coverage. We disagree.

### 2) Opting out does not cause coverage

The ACA requires all group health plans to cover preventive services, including contraception, without cost sharing. Because a group health plan must include contraceptive coverage under the ACA, the accommodation scheme requires a TPA that administers a self-insured religious non-profit organization's group health plan to

provide coverage if the organization opts out. The TPA must then arrange coverage for plan participants and beneficiaries if it wishes to continue functioning as the TPA for the objecting organization. This arrangement allows religious non-profit organizations to opt out and ensures plan participants and beneficiaries will receive the contraceptive coverage to which they are entitled by law.

Under this framework, the plaintiffs' argument does not identify a substantial burden on religious exercise. The opt out does not "cause" contraceptive coverage; it relieves objectors of their coverage responsibility, at which point federal law shifts that responsibility to a different actor. The ACA and its implementing regulations have already required that group health plans will include contraceptive coverage and have assigned legal responsibilities to ensure such coverage will be provided when the religious non-profit organization opts out.

This arrangement is typical of religious objection accommodations that shift responsibility to non-objecting entities only after an objector declines to perform a task on religious grounds. Although a religious non-profit organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead. In short, the framework established by federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will receive contraceptive coverage.

### 3) Response to dissent

The dissent argues that our reasoning fails to appreciate the difference between insured and self-insured plans. With insured plans, the health insurance issuer bears legal responsibility to provide contraceptive coverage whether or not the religious non-profit has opted out. With self-insured plans, the TPA shoulders legal responsibility for coverage only after the religious non-profit has opted out.

We agree this is a distinction between these types of plans, but the dissent overplays its importance. In both contexts, the ACA requires that group health plans cover contraceptive services, and a plaintiff knows coverage will be provided when it opts out. Plaintiffs do not dispute plan participants and beneficiaries' right to contraceptive coverage, nor do they contest the government's ability to require TPAs and health insurance issuers to arrange for such coverage when a religious non-profit organization opts out. The only question before us is whether the plaintiffs are substantially burdened when they notify the government of their objection with the knowledge that another party will be required to provide coverage in their stead. The answer is no.

A religious accommodation tries to reconcile religious liberty with the rule of law. When faced with an unavoidable conflict between following the law or religious belief, RFRA provides a religious objector a means to challenge a generally applicable law and seek an exception to avoid following that law without having to break it. A statutory accommodation, as we have here, serves the

same purpose. As noted above, this case is unusual because the Plaintiffs do not seek an accommodation where none exists, but instead challenge a statutory accommodation and argue that the process for seeking refuge in it substantially burdens their religious exercise. As to the self-insured plaintiffs, the dissent contends that if they opt out and transfer their duty to provide contraceptive coverage to the TPA, they necessarily cause such coverage. We disagree.

By opting out, the self-insured plaintiffs shift their duty to provide coverage to a TPA, but they do not change their plan participants and beneficiaries' entitlement to contraceptive coverage under federal law. The dissent suggests, however, that because the plaintiffs can stymie coverage to their employees by breaking the law and incurring fines, and because opting out ultimately results in the TPAs' providing coverage, the plaintiffs' opting out therefore would cause contraceptive coverage. But this misconstrues the purpose of religious accommodation: to permit the religious objector both to avoid a religious burden and to comply with the law. If the plaintiffs wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation. In making this argument, the dissent focuses almost exclusively on whether the plaintiffs' opt out is a but-for cause of the TPAs' authority to provide contraceptive coverage. It does, but this approach misses the mark. Although opting out is necessarily a but-for cause of someone else—the TPA—providing

contraceptive coverage, that is the point of an accommodation—shifting a responsibility from an objector to a non-objector. That is how a legislative policy choice—here, to afford women contraceptive coverage—can be reconciled with religious objections to that policy. We do not "den[y] the existence of any causation." We instead correctly identify the effect of opting out. The effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable. The effect is not the provision of contraceptive coverage, which would be afforded under the law whether or not the plaintiff opts out.

The ACA requires that either the religious non-profit organization or the TPA must provide contraceptive coverage for a self-insured group health plan, and the accommodation must be evaluated with that provision in mind. The scheme allows the religious non-profit organization to opt out of the responsibility of providing coverage and assigns that duty to the TPA administering the group health plan. Crucially, it does not change or expand contraceptive coverage beyond what federal law has already guaranteed. As the Supreme Court said in *Hobby Lobby*, the effect of the accommodation on employees "would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing."

The government has designed the accommodation so plaintiffs that opt out are freed from providing, paying for, or facilitating contraception, and the TPA's responsibility to provide coverage in their

stead stems from federal law. Because this arrangement does not substantially burden the plaintiffs when they comply with the law, it does not matter whether the plaintiffs could prevent plan participants and beneficiaries from receiving coverage by violating the law. The dissent seems to suggest the ACA and its implementing regulations give self-insured plaintiffs discretion to decide whether their employees receive contraceptive coverage. The ACA and its implementing regulations do not, and the plaintiffs do not contend that they do. To the contrary, federal law generally requires that all people must have health insurance and that all health insurance must include preventive services, including contraceptive coverage.

And "although [the ACA] does not specifically mention third-party administrators, they administer 'group health plans,' which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation." The accommodation scheme does not give plaintiffs discretion to thwart their employees' right to contraceptive coverage by refusing to provide coverage and also refusing to register their objection so the government can make alternative arrangements to free them from providing coverage. Because Congress has created a federal entitlement to contraceptive coverage and formulated a framework to guarantee that coverage will be provided even if plaintiffs decline to provide it, self-insured plaintiffs do not "cause" contraceptive coverage by exercising their ability to opt out.

#### 4) No cause of substantial burden

In sum, the self-insured plaintiffs' causal analysis falters regarding the effect of opting out, which is to shift legal responsibility to provide contraceptive coverage from plaintiffs to their TPAs. When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, plaintiffs are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met.

To establish a claim under RFRA, about which the dissent says little, a plaintiff must show the government substantially burdens its sincere religious exercise. The ACA states group health plans must cover contraception, and the regulations state that if a religious non-profit organization opts out, that coverage will be provided by a TPA. Opting out does not cause the coverage itself; federal law does, by establishing a scheme that permits plaintiffs to opt out of their legal responsibility while simultaneously ensuring that plan participants and beneficiaries receive the coverage to which they are legally entitled. Allowing plaintiffs to opt out is not a substantial burden under RFRA.

#### iii. Self-Insured Church Plans

The foregoing analysis of self-insured plans applies to the subset of self-insured church plans. We address additional reasons here to reject the church plan plaintiffs' RFRA claims.

The plaintiffs with self-insured church plans are in a unique position. A TPA cannot be compelled to provide or arrange for contraceptive coverage if it administers a church plan under 26 U.S.C. § 414(e) that has not elected to comply with provisions of ERISA under 26 U.S.C. § 410(d)—which describes the self-insured church plans in the cases before us. The Departments concede they lack authority under ERISA to force these church plan TPAs to perform their regulatory responsibility. As a result, the Government can require the plaintiffs with self-insured church plans to use the Form or notify HHS to register their objection and opt out, but it has no enforcement authority to compel or penalize those plaintiffs' TPAs if they decline to provide or arrange for contraceptive coverage.

The lack of enforcement authority makes any burden on plaintiffs with church plans even less substantial than the burden on plaintiffs with self-insured plans that are subject to ERISA. Nonetheless, plaintiffs with church plans offer the following arguments as to why the accommodation scheme might still burden their religious exercise. First, the Departments could decide to alter the regulations and assert authority over church plans under ERISA. Second, the mere act of signing the Form or delivering the notification may involve them in the provision of contraception, either by cooperating with the Departments or by providing authorization to a TPA, which then decides it wants to provide contraceptive coverage after all. Third, their opting out incentivizes TPAs to provide coverage even

if they are exempt from ERISA. Fourth, the Government has not demonstrated why the plaintiffs must complete the self-certification if their TPAs can decline to provide contraceptive coverage. In addition to the reasons self-insured plans in general are not substantially burdened by the accommodation scheme, we conclude the plaintiffs with self-insured church plans have failed to identify a substantial burden on religious exercise.

#### 1) Hypothetical regulation

The plaintiffs argue the Departments could assert authority over church plans under ERISA at some point in the future. We assess the regulations as they currently exist, not amendments to ERISA's implementing regulations the Department of Labor may hypothetically promulgate. An "[i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future." Should the Departments assert ERISA authority over church plans at some later date, plaintiffs may then seek a preliminary injunction to prevent the Departments from enforcing the Mandate. Unless and until the Departments change their position, however, plaintiffs' speculative argument does not warrant a preliminary injunction.

#### 2) No causation from church plan TPA notification

The plaintiffs contend completing the self-certification would be a substantial burden because it would allow TPAs to provide

coverage to their group health plan participants and beneficiaries, even if the Departments cannot compel the TPA to do so under ERISA. But plaintiffs with self-insured church plans are not substantially burdened by the requirement that they complete the Form or notification to HHS. As we explained in the previous section on self-insured plans, when a religious non-profit organization opts out of the Mandate, the requirement that the group health plan include contraceptive coverage is a product of federal law, not the product of the organization's opting out. Opting out frees plaintiffs from their obligation to provide contraceptive coverage under the ACA. The lack of substantial burden is especially evident when the group health plan is administered by a TPA that has made clear it will not provide contraceptive coverage on religious grounds. The Little Sisters' TPA, for example, is Christian Brothers, their co-plaintiff in this case. It is clear Christian Brothers need not, and will not, provide contraceptive coverage if the Little Sisters opt out of the Mandate.

### 3) No incentive from church plan TPA notification

Even when TPAs for self-insured church plans indicate they may comply with the Mandate, the TPAs make that decision, and the objecting religious non-profit organization is not substantially burdened. The plaintiffs in *Reaching Souls* argue one of their TPAs, Highmark, has indicated it will provide contraceptive coverage if they opt out of the Mandate. The *Reaching Souls* plaintiffs argue their act of opting out would

not only provide Highmark with permission to provide contraceptive coverage, but would incentivize it to do so because Highmark could then seek reimbursement from the government.

Plaintiffs fail to demonstrate the reimbursement provision actually gives TPAs an incentive to provide coverage. They claim a TPA that receives the Form or a letter from the government "becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead."

At a hearing in *Reaching Souls*, counsel for the Government seemed to accept this characterization. But the regulations themselves expressly contradict this reading. They state the payment for margin and overhead goes to health insurance issuers who act as intermediaries for the reimbursement, and need not go to TPAs

Moreover, even if TPAs were to receive a payment for margin and overhead—set at 15% of costs for 2014—plaintiffs do not demonstrate this allowance actually functions as an incentive to provide contraceptive coverage rather than repayment for the administrative costs TPAs incur by stepping in to arrange for or provide coverage. Plaintiffs have not demonstrated the allowance for administrative overhead actually generates a profit for TPAs, nor have they demonstrated that the allowance would incentivize TPAs to provide coverage where they otherwise would not.



#### 4) The Government may require affirmative objection

Plaintiffs finally argue that if the Departments lack ERISA enforcement authority against TPAs of self-insured church plans, the Government has no reason to require religious non-profit organizations to comply with the accommodation scheme and deliver the Form or notify HHS. It is the plaintiffs' burden, however, to state a prima facie case under RFRA. Because they cannot establish that signing the Form or notifying HHS constitutes a substantial burden on their religious exercise, we do not question the Departments' interest in requiring them to opt out of the Mandate to avoid penalties for failure to provide contraceptive coverage.

\* \* \* \*

We conclude the Plaintiffs' causation arguments do not establish a burden on their religious exercise, much less a substantial burden, because opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage. We therefore turn to Plaintiffs' argument that the act of opting out and the administrative requirements associated with the accommodation make them feel or appear complicit in the overall contraceptive coverage scheme.

#### e. No substantial burden from complicity

The accommodation relieves Plaintiffs from providing, paying for, or facilitating contraceptive coverage and federal law requires health insurance issuers and TPAs to

provide contraceptive coverage when religious non-profit organizations take advantage of the accommodation. Plaintiffs argue the act of opting out would nevertheless substantially burden their religious exercise because they believe delivering the Form or notification to HHS would make them complicit in the overall scheme to deliver contraceptive coverage. They wish to play no part in it. We find this argument unconvincing for a number of reasons.

First, the purpose and design of the accommodation scheme is to ensure that Plaintiffs are not complicit—that they do not have to provide, pay for, or facilitate contraception. Plaintiffs' concern that others may believe they condone the Mandate is unfounded. Opting out sends the unambiguous message that they oppose contraceptive coverage and refuse to provide it, and does not foreclose them from objecting both to contraception and the Mandate in the strongest possible terms.

Second, to the extent Plaintiffs assert that completing the Form or notification violates their religious beliefs, they state a necessary but not a sufficient predicate for a RFRA claim. Under RFRA, they must establish that completing the Form or notification substantially burdens their religious exercise; otherwise, this argument could be used to avoid almost any legal obligation that involves a form. Plaintiffs do not object to signing forms and paperwork generally—they object to the Form or notification to HHS, and they do so because they believe it involves them in directly or indirectly

providing, paying for, or facilitating contraceptive coverage, which they oppose as a matter of religious conviction. As we have explained, the Plaintiffs misstate their role in the accommodation scheme. RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.

Third, because the accommodation does not involve them in providing, paying for, facilitating, or causing contraceptive coverage, Plaintiffs' only involvement in the scheme is the act of opting out. Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves. All opt-out schemes require some affirmative act to free objectors from the obligations they would otherwise face. The Plaintiffs' logic would undermine conscientious objection schemes that require the objection to be made, relieve objectors of their obligations, but assign those obligations to other, non-objecting actors in their stead.

Having to file paperwork or otherwise register a religious objection, even if one disagrees with the ultimate aim of the law at issue, does not alone substantially burden religious exercise.

The Government may therefore require religious objectors to complete *de minimis* administrative tasks to opt out. Filing the Form or notifying HHS easily fits within this category. The Departments have made opting out of the Mandate at least as easy as obtaining a parade permit, filing a simple tax form, or registering to vote—in other words, a routine, brief administrative task. The

purpose of the Form or notification to HHS is to extricate Plaintiffs from their legal obligation to provide contraceptive coverage. Opting out ensures they will play no part in the provision of contraceptive coverage, prohibits TPAs and health insurance issuers from sharing the costs of providing coverage with them, and requires notice to employees that they do not administer or fund contraceptive services.

The notification to HHS is especially minimal, as it requires Plaintiffs only to register their objection with HHS and does not require any contact with their health insurance issuers or TPAs. Although Plaintiffs must tell HHS which health insurance issuer or TPA they use to opt out of the Mandate, this is not a substantial burden on religious exercise.

It is the kind of administrative task the Departments can require of religious believers in the administration of governmental programs. When understood in light of the ACA's requirement that group health plans and health insurance issuers provide contraceptive coverage and the manner in which the accommodation relieves Plaintiffs of providing that coverage, identifying one's TPA in a letter to HHS is at most a minimal burden and certainly not a substantial one.

Finally, Plaintiffs are not substantially burdened when, after they opt out and are relieved of their obligations under the Mandate, health insurance issuers or TPAs must provide contraception to plan participants and beneficiaries. Plaintiffs sincerely oppose contraception, but their

religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA. "Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." Pre-*Smith* case law and RFRA's legislative history underscore that religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that plaintiffs find objectionable. RFRA does not prevent the Government from reassigning obligations after an objector opts out simply because the objector strongly opposes the ultimate goal of the generally applicable law.

Plaintiffs' complicity argument therefore fails. Opting out would eliminate their complicity with the Mandate and require only routine and minimal administrative paperwork, and they are not substantially burdened by the Government's subsequent efforts to deliver contraceptive coverage in their stead.

#### f. No burden from ongoing requirements

As a final argument, Plaintiffs deny the act of opting out would free them from further involvement in the provision of contraceptive coverage. They argue the accommodation scheme would require their ongoing participation, and give two examples to support this claim.

First, Plaintiffs argue they would remain involved because the Departments are commandeering their group health plans to provide contraceptive coverage to their employees. They note their TPA or health insurance issuer can provide coverage only as long as plan participants and beneficiaries remain employed with the religious non-profit organization.

Plaintiffs have not shown, assuming they opt out, how the provision of coverage to plan participants and beneficiaries through the health insurance issuer or TPA would substantially burden their religious exercise. Plaintiffs' plan participants and beneficiaries are not guaranteed contraceptive coverage without cost sharing because they work for the Plaintiffs; they are guaranteed contraceptive coverage under the ACA. The ACA mandates health insurance that includes contraceptive coverage. Plaintiffs' theory would not only relieve them of complying with the Mandate, it would prevent health insurance issuers and TPAs from stepping in under the ACA to provide plan participants and beneficiaries with the coverage they are entitled to receive under federal law.

Second, Plaintiffs object that they must (a) notify their TPA or health insurance issuer when employees join or leave their broader health insurance scheme, and (b) complete the self-certification or notification to HHS when they create or terminate a relationship with a TPA or health insurance issuer. As to the first requirement, employers already must notify their TPA or health insurance issuer when they hire or fire employees. The communication with the TPA or health

insurance issuer regarding general health insurance coverage for entering or exiting plan participants and beneficiaries would occur regardless of any legal obligation under the accommodation scheme. The latter requirement, however, is an obligation specific to the accommodation scheme. An insured or self-insured employer using the Form must send it to "each" TPA or health insurance issuer as the employer forms contractual relationships with them. If the employer instead uses the notification process, the regulations state: "If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services."

Once again, this does not constitute a substantial burden. The only new requirement is that employers must complete the Form or notify HHS of their objection when they contract with a new health insurance issuer or TPA. Plaintiffs do not argue the time, cost, or energy required to comply with this requirement constitutes a substantial burden; they argue it is the moral significance of their involvement which burdens their religious exercise.

If the first self-certification is not a substantial burden, a second or third self-certification would not be substantially burdensome given the extremely minimal administrative requirements of the Form or notification. As we have discussed above, de minimis administrative requirements do not themselves amount to substantial burdens on religious liberty. If the actual delivery of the Form or notification is not a substantial burden, a contingent administrative

requirement to update the Form or notification is not either.

The regulations require the Plaintiffs to complete the Form or deliver the notification if they wish to opt out. But this ministerial act to opt out is not a substantial burden on religious exercise, nor are the collateral requirements of the scheme. The Departments have allowed Plaintiffs to opt out of a neutral and generally applicable requirement imposed by federal law, and have done so in a manner that affirmatively distances those organizations from the provision of contraceptive coverage that other employers must provide. It is not a substantial burden to require organizations to provide minimal information for administrative purposes to take advantage of that accommodation.

### *C. Strict Scrutiny*

Because we determine Plaintiffs have failed to demonstrate a substantial burden on their religious exercise, we need not address whether the Departments have shown a compelling state interest and adopted the least restrictive means of advancing that interest

### *D. Conclusion*

In the absence of a substantial burden, Plaintiffs have not demonstrated a strong likelihood of success on the merits of their RFRA claim, nor have they demonstrated they will suffer irreparable injury if an injunction is denied. Accordingly, a preliminary injunction on RFRA grounds is inappropriate.

## VI. FIRST AMENDMENT

Although the district courts focused almost exclusively on RFRA, Plaintiffs also raised constitutional claims. They argue the accommodation scheme violates the Free Exercise and Establishment Clauses of the First Amendment by exempting religious employers from the Mandate but requiring religious non-profit organizations to seek an accommodation. Plaintiffs also argue the accommodation scheme simultaneously compels and silences their speech in violation of the Free Speech Clause of the First Amendment. We disagree and conclude the accommodation scheme comports with the First Amendment. We note that the same standard of review we identified for the RFRA claim applies to the First Amendment claims.

### *A. Free Exercise Clause*

Plaintiffs contend the ACA and its implementing regulations violate the Free Exercise Clause by exempting some religious objectors—churches and their "integrated auxiliaries"—from the Mandate, while requiring others—specifically, religious non-profit organizations—to comply with the Mandate, seek an accommodation, or pay substantial fines. They have not explained how their Free Exercise claim differs from their Establishment Clause claim, nor do they explain how they could prevail under the standard in *Smith* if they are unlikely to succeed under RFRA. Because we conclude the Mandate and accommodation scheme are neutral and generally applicable laws, they

are subject only to rational basis review, which they survive.

### 1. Legal Background

The First Amendment's religion clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." To resolve challenges under the Free Exercise Clause, we use a well-established framework. If a law is neutral and generally applicable, it does not violate the Free Exercise Clause "even if the law has the incidental effect of burdening a particular religious practice." "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." A law that is facially neutral may nevertheless fail the neutrality test if it covertly targets religious conduct for adverse treatment.

To determine whether a law is generally applicable, we ask if the "legislature decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." "[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."

### 2. The Mandate and Accommodation Scheme are Neutral

The Mandate and the accommodation scheme are neutral laws. The Mandate is facially neutral with regard to employers, and neither the history nor the text of the ACA and its implementing regulations suggest the Mandate was targeted at a particular religion

or religious practice. Plaintiffs cannot show Congress or HHS "had as their object the suppression of religion." To the contrary, the Mandate arose from concerns about the personal and social costs of barriers preventing women from receiving preventive care, including reproductive health care.

The accommodation scheme was developed to facilitate the free exercise of religion, not to target religious groups or burden religious practice. To that end, the Departments expanded the religious employer exemption and religious non-profit organization accommodation to respond to the concerns of religious groups. The Plaintiffs' apparent dissatisfaction with the accommodation offered to them does not mean the Mandate or the accommodation scheme is non-neutral.

### 3. The Mandate and Accommodation Scheme are Generally Applicable

The Mandate and the accommodation scheme are also generally applicable. Plaintiffs cannot show Congress or the Departments sought to impose the Mandate only against religious groups; to the contrary, the Mandate applies to all employers with more than fifty employees using non-grandfathered health plans. "The exemptions do not render the law so under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective. Plaintiffs fail to demonstrate the accommodation scheme targets religious conduct or was created with the objective of disfavoring particular faiths. To the contrary,

the Mandate was enacted as part of a larger program of health care reform, and both the exemption for religious employers and the accommodation for religious non-profit organizations demonstrate federal deference to religious liberty concerns and were promulgated to facilitate rather than inhibit the free exercise of religion.

### 4. The Mandate and Accommodation Scheme Have a Rational Basis

Rather than make an argument based on the rational relationship standard, Plaintiffs instead contend our decision in *Hobby Lobby* precludes us from finding that public health and gender equality, without greater specificity, constitute compelling governmental interests. But, as we have explained, the compelling interest test does not apply; the rational basis test does. The Government observes that in the cases before us, the accommodation scheme rationally serves the twin interests of facilitating religious exercise and filling coverage gaps resulting from accommodating that religious exercise.

On rational basis review, these interests are sufficient. Alleviating governmental interference with religious exercise, which the accommodation scheme does, is a permissible legislative purpose. And we need not scrutinize whether the Government's interest in public health and gender equality is more compelling in this case than in *Hobby Lobby*. We need only determine that public health and gender equality are legitimate state interests. We believe they meet this more permissive standard, which is not

foreclosed by our compelling interest analysis in *Hobby Lobby*. The accommodation scheme advances both the free exercise of religion and the Government's legitimate interests in public health and gender equality.

Furthermore, when applying the rational basis test, we are not limited to interests specifically articulated by the Departments. We may look to any conceivable legitimate governmental interest, and "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis." The more specific governmental interest in health by ensuring access to contraception without cost sharing, which we did not specifically address in *Hobby Lobby*, would constitute a legitimate interest conceivably advanced by the accommodation scheme. The Departments' recognized interest in the uniformity and ease of administration of its programs would also meet this standard.

The Mandate and accommodation scheme easily pass the rational basis test. Because the Mandate is both neutral and generally applicable and supported by a rational basis, Plaintiffs fail to make out a plausible claim under the Free Exercise Clause.

### *B. Establishment Clause*

Plaintiffs contend that exempting churches and integrated auxiliaries from the Mandate but requiring religious non-profit organizations to seek an accommodation violates the Establishment Clause. We disagree. Because the Departments have

chosen to distinguish between entities based on neutral, objective organizational criteria and not by denominational preference or religiosity, the distinction does not run afoul of the Establishment Clause.

#### 1. Organizational Distinctions Well-Established in Federal Law

Federal law distinguishes between different types of religious organizations, and as we discuss below, this differentiation is constitutionally permissible. Under the ACA and its implementing regulations, a religious employer "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a "longstanding and familiar" distinction in federal law.

Exempting churches while requiring other religious objectors to seek an accommodation is standard practice under the tax code. The IRC and other regulations award benefits to some religious organizations—typically, houses of worship—based on articulable criteria that other religious organizations do not meet.

Churches, their integrated auxiliaries, and conventions or associations of churches are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit organizations must apply for tax-exempt status if their annual gross receipts are more than \$5,000. Similarly, churches,

their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order need not file tax returns, but religious non-profit organizations with gross receipts above \$5,000—even if they are tax-exempt—must file annually. Congress has placed special limitations on tax inquiries and examinations of churches, but not integrated auxiliaries, church-operated schools, or religious non-profit organizations.

Congress has used similar organizational distinctions in the realm of religious accommodations. Churches and qualified church-controlled organizations that object to paying Social Security and Medicare taxes for religious reasons may opt out of paying them by filing a form with the IRS, but other religious non-profit organizations may not.

## 2. Organizational Distinctions and Respecting the Religion Clauses

Distinctions based on organizational form enable the government to simultaneously respect both the Free Exercise Clause and Establishment Clause and permit the construction of accommodation schemes that pass constitutional muster. The Supreme Court has concluded:

[t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will

permit religious exercise to exist without sponsorship and without interference.

We recognize the Government enjoys some discretion in fashioning religious accommodations, and believe doing so on the basis of organizational form comports with the Establishment Clause.

## 3. Organizational Distinctions Compatible with Larson and Colorado Christian

The Departments have offered the accommodation to Plaintiffs based on their organizational form. Plaintiffs rely on the decisions in *Larson v. Valente*, and *Colorado Christian University v. Weaver*, to support their Establishment Clause claim. But those cases do not hold that distinctions based on organizational type are impermissible.

Larson involved an Establishment Clause challenge to a Minnesota law that imposed registration and reporting requirements on religious organizations that received less than half of their contributions from members or affiliated organizations. The legislature drew this distinction to discriminate against particular religions, which was evident in the legislative history. *Colorado Christian* differentiated institutions based on intrusive inquiries into their degree of religiosity. In *Colorado Christian*, we concluded Colorado's exclusion of "pervasively sectarian" institutions from state scholarship programs violated the First Amendment "for two reasons: the program expressly discriminates among religions without constitutional justification, and its criteria for



doing so involve unconstitutionally intrusive scrutiny of religious belief and practice."

Neither of these two concerns in *Colorado Christian* is applicable here.

*Larson* and *Colorado Christian* prohibit preferences based on denomination (e.g., Catholic, Jewish, Islamic, etc.) and religiosity (e.g., pervasively sectarian, moderately sectarian, non-sectarian, etc.), but do not prohibit distinctions based on organizational type (e.g., church, non-profit, university, etc.). As *Larson* noted: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."

In *Colorado Christian*, we determined that "defendants supply no reason to think that the government may discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." As a result, Establishment Clause jurisprudence clearly indicates denominational preferences expressed by the government are subject to strict scrutiny. Religiosity distinctions are subject to strict scrutiny as well because they involve the government in scrutinizing and making decisions based on particular expressions of religious belief.

Plaintiffs cite no case holding that organizational distinctions, as opposed to those based on denomination or religiosity, run afoul of the Establishment Clause.

Unlike *Awad v. Ziriax*, which concerned a state constitutional amendment forbidding courts from considering or using Sharia law,

evidence of animus or favoritism aimed at a denomination or degree of religiosity is absent here. "Because the law's distinction does not favor a certain denomination and does not cause excessive entanglement between government and religion, the framework does not violate the Establishment Clause."

Neither *Larson* nor *Colorado Christian* supports Plaintiffs' claim that distinctions between churches and other religious entities is impermissible. As we concluded in *Colorado Christian*, "if the State wishes to choose among otherwise eligible institutions, it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." This is what the Departments have done with the accommodation scheme in compliance with the First Amendment's Establishment Clause.

#### 4. Plaintiffs' Argument Based on the Departments' Rationale

Plaintiffs seize on the Departments' rationale for the distinction that religious non-profit organizations are more likely than churches to employ individuals who do not share their employers' beliefs but are nevertheless entitled to contraceptive coverage under the ACA. Plaintiffs argue some denominations are less likely to carry out ministry functions through a church or integrated auxiliary than others, and that the workforces of some non-profit institutions may be more religiously homogenous than the workforces of some established churches.

The Departments' rationale may not be perfectly accurate, but it does not make the accommodation scheme unconstitutional. The class of religious non-profit organizations encompasses a vast array of religiously affiliated universities, hospitals, service providers, and charities, some of them employing thousands of people. Of course, some religious non-profit organizations may be more likely than some churches to employ co-religionists, but the Departments may reasonably recognize that, on the whole, churches are more likely to employ those who share their beliefs. The Departments originally exempted religious employers to "respect[] the unique relationship between a house of worship and its employees in ministerial positions." We recognize that relationship between houses of worship and ministerial employees has been given special solicitude under the First Amendment. The Departments must avoid inquiries that involve them in "excessive entanglement" between religion and government, see *Colorado Christian*, and the general notion that houses of worship are more likely than religious non-profit organizations to employ people of the same faith avoids impermissible scrutiny into the beliefs of religious entities and their employees.

\* \* \* \*

Drawing a distinction between religious employers and religious non-profit organizations is a neutral and reasonable way for the Departments to pursue their legitimate goals in a constitutional manner. It gives special solicitude to churches to facilitate the

liberties guaranteed by the Free Exercise Clause, and offers the accommodation scheme to relieve religious non-profit organizations of their obligation to provide contraceptive coverage under the Mandate without imposing a substantial burden on their religious exercise. The accommodation scheme does not violate the Establishment Clause.

### *C. Free Speech Clause*

Plaintiffs finally contend the accommodation scheme violates the Free Speech Clause of the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. 1, by compelling them both to speak and remain silent, see *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, First, they argue that requiring them to sign and deliver the Form or the notification to HHS constitutes compelled speech. Second, they argue that prohibiting them from influencing their TPAs' provision of contraceptive coverage compels them to be silent. Both arguments fail.

#### 1. Compelled Speech

The compelled speech claim fails. To the extent such a claim requires government interference with the plaintiff's own message, the regulations do not require an organization seeking an accommodation to engage in speech it finds objectionable or would not otherwise express. The only act the accommodation scheme requires is for religious non-profit organizations with group health plans to sign and deliver the Form or

notification expressing their religious objection to providing contraceptive coverage. The Sixth Circuit reasoned: "Even assuming the government is compelling this speech, it is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim." Plaintiffs cannot point to speech they are required to express and find objectionable.

Indeed, Plaintiffs have not shown any likelihood that their sending in the Form or the notification would convey a message of support for contraception. Plaintiffs do not demonstrate their TPA, their health insurance issuer, or HHS—any one of which would be the sole recipient of the Form or notification—would view it as anything other than an objection to providing contraception. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("FAIR") is instructive. In FAIR, a group of law schools challenged the Solomon Amendment, a federal statute that denied federal funding to universities that barred military recruiters from their campuses. At that time, the military did not permit gay, lesbian, and bisexual individuals to serve. The schools claimed a First Amendment compelled speech violation, arguing their compliance with the Solomon Amendment would signal their agreement with this policy. The Supreme Court rejected the argument, noting compliance did not signal agreement with the military's positions, and the Solomon Amendment did not prevent the schools from making their own position clear.

This point is even stronger in the instant case, where Plaintiffs would send the Form or

notification to convey their opposition to providing contraception, and the ACA and implementing regulations do not prevent them from expressing that opposition widely. Plaintiffs remain free to express opposition to contraception; "[n]othing in the[] final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." With the passage of the interim final rule, Plaintiffs also have the option to send a letter or email to HHS expressly objecting to any provision of contraception. They can fully explain their position in that notification. We are especially unconvinced that this option, freed from the text of the Form and permitting greater self-expression, forces Plaintiffs to engage in unwanted speech. Plaintiffs have not suggested the notification must be conveyed or communicated to any third parties or wider audience aside from the Departments themselves.

Even if Plaintiffs could identify speech they disagreed with—for example, identifying the name of their TPA or health insurance issuer—the argument that they are forced to send a message they do not wish to send is unavailing. The First Amendment does not—and cannot—protect organizations from having to make any and all statements "they wish to avoid." The cases cited by Plaintiffs are not about routine administrative burdens akin to complying with the accommodation scheme.

"Compelling an organization to send a form to a third party to claim eligibility for an exemption 'is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live

Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."

"That would be the equivalent of entitling a tax protester to refuse on First Amendment grounds to fill out a 1099 form and mail it to the Internal Revenue Service." None of the cases cited by Plaintiffs involve compliance with the administrative requirements of a government program, and especially not a government program designed to exempt and distance an organization from activity it finds objectionable.

We finally note that Plaintiffs' signature and delivery of the Form or notification to HHS is "plainly incidental to the . . . regulation of conduct" and thus is not protected speech. The act of signing and delivering the Form or notification to HHS is required to opt out of the Mandate. The Supreme Court has "rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Instead, we have extended First Amendment protection only to conduct that is inherently expressive." The fact that Plaintiffs must complete the Form or notification to HHS to opt out of coverage does not render the act inherently expressive.

For the foregoing reasons, we reject Plaintiffs' compelled speech claim.

## 2. Compelled Silence

We further reject the claim that the accommodation scheme compels Plaintiffs' silence. Like the Sixth and Seventh Circuits, we note Plaintiffs have made only general claims objecting to the non-interference regulation and have failed to indicate how it precludes speech in which they wish to engage. After the issuance of the interim final rule repealing the non-interference regulation, we do not believe this question is before us. We agree with the Government and the D.C. Circuit that the repeal of the non-interference rule renders Plaintiffs' claims regarding compelled silence moot.

## VII. CONCLUSION

We have reviewed the district courts' decisions to grant or deny a preliminary injunction to Plaintiffs in the three cases before us. Because we determine the ACA and its implementing regulations do not substantially burden Plaintiffs' religious exercise or violate the Plaintiffs' First Amendment rights, Plaintiffs have not established a likelihood of success on the merits or a likely threat of irreparable harm as required for a preliminary injunction.

We therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, and reverse the district courts' grant of a preliminary injunction in *Southern Nazarene*, and *Reaching Souls*.

## “A Religion Case Too Far for the Supreme Court?”

*The New York Times*

Linda Greenhouse

July 23, 2015

The court of Chief Justice John G. Roberts Jr. has been one of the most religion-friendly Supreme Courts in modern history. Nearly every religious claim presented to the court has emerged a winner, from explicitly sectarian prayer at town board meetings, in last year’s closely divided Town of Greece decision, to beards for Muslim inmates in a prison system that banned facial hair — a unanimous decision that defied the court’s tradition of deference to prison officials and their rules.

Most famous, of course, was last year’s *Hobby Lobby* decision, exempting a for-profit company from having to cover contraception in its employee health plan, as otherwise required under the Affordable Care Act, because of the owners’ religious scruples about birth control.

Now the post-*Hobby Lobby* cases have, inevitably, arrived at the Supreme Court’s door. Three appeals have been filed so far, and the justices will decide shortly after the new term begins in October whether to accept any of them. At that point, the spotlight will return to the court, along with the heated rhetoric about the Obama administration’s supposed “war on religion.” Not only is there no such “war,” but the administration has bent over backward to accommodate religious claims that are by any measure extreme. The problem is that the religious groups pressing these claims refuse to take

yes for an answer. The question is whether their arguments go too far, even for the Roberts court.

At issue are the options the Obama administration has made available to a category of employers deemed “religious nonprofit organizations” that object to including birth control in their employee health plans. These groups differ from “religious employers,” a category essentially limited to churches, which are deemed exempt under the Affordable Care Act regulations. Rather, these are religiously affiliated nonprofits such as colleges, seminaries and religious orders like the Little Sisters of the Poor, which runs nursing homes and describes itself as an equal-opportunity employer in its hiring practices for lay staff members. These nonprofits do have to provide contraception coverage unless they accept the administration’s offer to opt out of the requirement by passing the legal obligation on to their insurance carriers.

Under pre-existing regulations that the Obama administration fine-tuned in the aftermath of the *Hobby Lobby* decision, all these organizations have to do to qualify for the exemption is to ask for it, by filling out a two-page form, or even more simply by sending a letter to the Department of Health and Human Services declaring that they have a religious objection to paying for birth control. At that point, their obligation ceases

and the coverage has to be provided by the organizations' insurance carrier or, in the case of a self-insured plan, by the third-party administrator, without any financial involvement by the organization.

Dozens of these organizations promptly filed suit claiming that they couldn't possibly fill out the form or sign the letter because to do so would make them complicit in the ultimate choice their employees might make to use birth control.

It's important to understand the difference between these cases and the lawsuit by *Hobby Lobby's* owners. As a for-profit company, *Hobby Lobby* had no accommodation available. It had either to provide the coverage or pay a huge fine. In fact, the court's majority opinion, written by Justice Samuel A. Alito Jr., strongly suggested that the problem, as the majority saw it, could be solved if only the administration would offer *Hobby Lobby* the same choice it was giving the religious nonprofits. Justice Alito wrote that the Department of Health and Human Services "itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." In a footnote, he added: "The less restrictive approach we describe accommodates the religious beliefs asserted in these cases." Justice Anthony M. Kennedy, who provided the fifth vote to the majority, wrote in a concurring opinion that the accommodation as described "does not impinge on the plaintiffs' religious beliefs."

The *Hobby Lobby* case had not been argued on this basis, and Justice Alito noted that the court was not deciding whether such an accommodation would suffice "for purposes of all religious claims." To that extent, the statements were nonbinding "dicta," not part of the holding. But they have had a powerful influence in the lower courts. Cases challenging the adequacy of the accommodation as applied to religious nonprofits have now made their way through six of the 12 federal appellate circuits. Remarkably, every court has rejected the religious claims.

Not all the decisions have been unanimous; there have been dissenting opinions by individual judges, a fact that may lead the Supreme Court to accept one or more of the pending appeals despite the absence of the "conflict in the circuits" that the court usually waits for. But, notably, judges across the ideological spectrum have ruled for the government. One of the country's most conservative federal judges, Jerry E. Smith, wrote the opinion last month for a unanimous panel of one of the country's most conservative courts, the United States Court of Appeals for the Fifth Circuit.

The Supreme Court's *Hobby Lobby* decision "is of no help to the plaintiffs' position," Judge Smith wrote in *East Texas Baptist University v. Burwell*. The reason, he explained, was "not just that there are more links in the causal chain here than in *Hobby Lobby*." Rather, it was that "what the regulations require of the plaintiffs here has nothing to do with providing contraceptives."

It's worth quoting Judge Smith at some length, including his reference to the Religious Freedom Restoration Act, the federal law under which the *Hobby Lobby* case and the current cases were brought:

“The plaintiffs urge that the accommodation uses their plans as vehicles for payments for contraceptives. But that is just what the regulations prohibit. Once the plaintiffs apply for the accommodation, the insurers may not include contraceptive coverage in the plans. The insurers and third-party administrators may not impose any direct or indirect costs for contraceptives on the plaintiffs; they may not send materials about contraceptives together with plan materials; in fact, they must send plan participants a notice explaining that the plaintiffs do not administer or fund contraceptives. The payments for contraceptives are completely independent of the plans. . . . The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but R.F.R.A. does not entitle them to block third parties from engaging in conduct with which they disagree.”

And of course, the choices and the rights of third parties, in this instance, the female employees, are the whole point. It is not only that female employees, and not their bosses, make the choice to use birth control. It is that the employers' religious objections, if honored, would cause these third parties actual harm — harm that would be avoided if the employers simply signed the form or sent the letter. The extreme to which the plaintiffs' refusal takes their “complicity” argument is what the appeals courts have found so

alarming. The organizations don't want to pay for birth control and they don't want anyone else to pay for it either.

The United States Court of Appeals for the 10th Circuit had this to say in a decision last week, *Little Sisters of the Poor v. Burwell*: “Plaintiffs sincerely oppose contraception, but their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled.”

The Religious Freedom Restoration Act, the court said, “does not prevent the government from reassigning obligations after an objector opts out simply because the objector strongly opposes the ultimate goal of the generally applicable law. Plaintiffs' complicity argument therefore fails. Opting out would eliminate their complicity with the mandate and require only routine and minimal administrative paperwork, and they are not substantially burdened by the government's subsequent efforts to deliver contraceptive coverage in their stead.”

Writing in *The National Catholic Reporter* last week, Michael Sean Winters, author of a blog on the publication's website called *Distinctly Catholic*, praised the 10th Circuit decision, saying: “If you think the form used to object to participation is itself a form of participation, I am not sure how we, as a nation, can ever carve out religious exemptions.”

Evidently, the religious groups pressing this litigation would rather keep fighting than declare victory. Mark Rienzi, senior counsel

of the Becket Fund for Religious Liberty, which represents the Little Sisters of the Poor and is involved in many of the other cases, responded to the 10th Circuit's decision by accusing the Obama administration of an "unrelenting pursuit of the Little Sisters of the Poor" and of seeking to "crush the Little Sisters' faith."

Hyperbole in defense of a legal position is no crime, certainly. But the vigor with which the complicity claim is being pressed does raise the question: What's going on? In an illuminating article last month in *The American Prospect* titled "Conscience and the Culture Wars," two constitutional scholars, Reva B. Siegel of Yale and Douglas NeJaime of U.C.L.A., observe that "the new conservative campaign for religious exemptions follows a well-established pattern" in which advocates whose core positions have lost legitimacy in the public mind "look for new ways to frame their views, often borrowing from their opponents."

The Religious Freedom Restoration Act was passed in 1993 by overwhelming bipartisan majorities in Congress and signed into law by President Bill Clinton; it was not proposed or seen as an agent of the culture wars. But it has become one, Professors Siegel and NeJaime argue: "After failing to prohibit abortion and same-sex marriage, conservatives have sought to create religious exemptions from laws that protect the right to abortion or same-sex marriage." They explain: "If unable to protect traditional sexual morality through laws of general application, conservatives can protect traditional values through liberal

frames — by asserting claims to religious exemption and by appealing to secular commitments to pluralism and nondiscrimination." Reva Siegel has elsewhere described this strategy as "preservation through transformation."

Will the Roberts court buy it? Or, I suppose, the question might be framed more precisely: Will Justice Kennedy? I don't see it. The implications are too enormous. As the 10th Circuit observed, "Courts have recognized that, to opt out of military service for religious reasons, a conscientious objector must notify the government of his objection knowing that someone else will take his place." Complicity? People have to pay their taxes, whether they have objections, religious or otherwise, to the wars they thereby help to finance. Complicity?

Of course, the court might avoid ensnaring itself in this web by allowing the circuit court decisions to continue to unfold in uniform fashion, as the justices briefly did with same-sex marriage last fall, before a nonconforming decision from the Sixth Circuit forced their hand. I hope the court doesn't wait. This year marks the 50th anniversary of *Griswold v. Connecticut*, the case that identified a constitutional right to birth control. At issue now is not only the right of women who happen to work for a religious employer to receive, on par with other women, a benefit the government deems an essential part of health care. At stake is the health of civil society in an increasingly diverse country. Religious conflict is a worldwide problem that of course lies far outside the Supreme Court's



purview. But the court can do its part, as I believe it will, by labeling this anachronistic

and politically driven dispute over birth control for what it is, a case too far.

## “With Health Care Lawsuit, the Little Sisters of the Poor Step into the Spotlight”

*The Washington Post*

Saba Hamedy

January 20, 2014

People recognized Saint Jeanne Jugan by the begging basket she carried while walking down the roads of Brittany, in northwest France, in the late 18th and early 19th centuries.

Going from door to door, Jugan would ask people for money, gifts — whatever they could spare for the elderly poor.

Nearly 175 years later, nuns from the religious order Jugan founded, the Little Sisters of the Poor, can still be seen in public, collecting donations to support their work. Unlike some nuns who wear casual clothing these days, the Little Sisters dress in traditional habits, all-white or black with gray veils.

Except for their soliciting of donations, the members of the “begging order,” as it’s sometimes known, have largely stayed out of the spotlight. But that changed in September when the order became one of the plaintiffs in a lawsuit filed against the Affordable Care Act’s contraceptive mandate, placing it at the center of a debate over health care and religious freedom.

The nonprofit gained even more public attention when Supreme Court Justice Sonia Sotomayor granted a last-minute temporary injunction Dec. 31, giving the sisters a reprieve from the requirement.

The sisters, who are among 45 religious groups fighting the legislation, take issue with an element of the law that requires all employers, regardless of religious affiliation, to provide insurance coverage for contraception to their workers. For the sisters, that would include employees at 29 homes they operate for the elderly in cities across the United States, including Baltimore, Chicago and Los Angeles.

The order’s “entire reason for being is to serve the poor and elderly,” said Robert Destro, a law professor at Catholic University.

So why join a widely watched legal battle?

“They didn’t think they had any other choice,” said Daniel Blomberg, senior counsel at the Becket Fund for Religious Liberty, a nonprofit public-interest law firm dedicated to protecting the free expression of religious traditions. The Little Sisters approached the Becket Fund about possible legal action, and the firm filed suit on behalf of the order’s home in Denver, which has 60 employees who are not nuns.

Blomberg said the sisters had two options: provide contraception coverage to their employees, in violation of their Roman Catholic beliefs, or pay hefty tax fines for failing to comply with the law.

The Obama administration offered church-related organizations, including the Little Sisters, an accommodation, allowing them to opt out of the mandate if they signed a self-certification form.

The compromise would mean that the sisters would not have to provide contraceptive coverage themselves, but in many cases their workers would be able to get birth control from their insurance carriers.

Some Catholic groups accepted that compromise, but many, like the Little Sisters, did not.

“The mandate violates our religious freedoms,” said Mother Loraine Marie Clare Maguire, provincial superior of the congregation’s Baltimore province.

The Little Sisters, who came to the United States in 1868, have 10 to 13 sisters in each home. They serve more than 13,000 elderly poor people in 31 countries around the world, said Sister Constance Carolyn Veit, the order’s spokeswoman.

The Little Sisters do not belong to the Leadership Conference of Women Religious, the umbrella group for most American nuns, which was censured by the Vatican for promoting what it called “radical feminist themes.” Instead, the Little Sisters belong to the Council of Major Superiors of Women Religious, and with 300 members in the United States they are considered one of the larger religious communities in the organization.

In addition to vows of chastity, poverty and obedience, the Little Sisters take a vow of hospitality. Admission to their homes is open to low-income people who are at least 60 years old, regardless of religion. Homes vary in size and offer several levels of care, including nursing homes and residential or assisted living.

As their founder, Jugan, ordered, the Little Sisters do not have an endowment.

The strong family spirit the sisters share with the elderly poor and their tradition of begging distinguishes them as an order, Veit said. The nuns put faith in Saint Joseph, their patron saint, and their motto: “If God is with us, it will be accomplished.”

“A lot of people look at poor elderly as if they don’t matter,” Blomberg said. “The sisters push back against that and make it very clear that these lives do matter. They are committed to honoring life at its very end.”

Pope Benedict XVI addressed the importance of their mission while visiting the Little Sisters in London in September 2010.

“I come to you as a brother who knows well the joys and struggles that come with age,” he said, according to the order’s Web site. “As advances in medicine and other factors lead to increased longevity, it is important to recognize the presence of growing numbers of older people as a blessing for society.”

Jugan, who was canonized by Benedict in 2009, often said, “Making the elderly happy — that is everything.”

Maguire says she hopes the sisters can continue channeling their founder for at least another 175 years.

“We take care of the elderly poor,” she said.  
“That’s really our main concern and objective: to live that mission.”

## **“Why Little Sisters of the Poor is Right to Be Concerned about Religious Freedom”**

*The Daily Signal*  
Elizabeth Slatterly  
July 31, 2015

The Obama administration continues its persistent attack on the Little Sisters of the Poor following their challenge to the Obamacare abortion drug mandate.

Earlier this summer, the 10th U.S. Circuit Court of Appeals ruled against the Little Sisters in their challenge to the Affordable Care Act requirement that they provide employees with health care coverage that includes contraceptives, sterilization, and abortion-inducing drugs and devices, or fill out a form notifying the Department of Health and Human Services of their religious objection to providing such coverage.

The Obama administration considers this second option as accommodating the Little Sisters’ religious beliefs because the notification initiates the process of insurers and third-party administrators providing the mandated coverage at no cost to the insured.

The Little Sisters, however, maintain that this so-called accommodation does no such thing.

Filling out the form does not insulate them from complicity in the facilitation of potentially life-ending drugs and devices, and that substantially burdens their free exercise of religion.

Noel Francisco and Paul Pohl, counsel for other nonprofit religious employers that are challenging the accommodation, aptly noted

that this “does not accommodate the plaintiffs’ religious beliefs at all” because it “still forces [the religious employers] to hire and maintain a contract with an insurance company that will provide the objectionable ... Maintaining this relationship is exactly what the plaintiffs find religiously objectionable.”

As Francisco and Pohl analogize:

Imagine that you hire a piano tutor for your children and learn that the tutor is supplying them with free cigarettes. You might object to maintaining the arrangement, regardless of whether you are paying for the cigarettes. Or imagine you have a religious objection to alcohol and learn that the caterer you have hired for your wedding is going to serve free booze to all of your wedding guests. You might want to fire the caterer.

It’s worth mentioning two other alternatives available to the Little Sisters: drop their health insurance or pay crushing fines of up to \$100 per employee per day.

The 10th Circuit panel agreed with the Obama administration, finding that the accommodation “relieves [the Little Sisters] of their statutory obligation” to provide the objectionable coverage.

The panel wrote that the Little Sisters are wrong about the legal effect of filling out this

form because “[f]ederal law, not the form or notification of HHS, provides contraceptive coverage.”

Thus, in the panel’s view, the Little Sisters’ argument that its act triggers coverage “fails to establish any burden” on their religious exercise, and even if it did establish a burden, the panel reasoned, “de minimis administrative tasks do not substantially burden religious exercise.”

Linda Greenhouse opined in the New York Times that the Little Sisters’ claims are “anachronistic and politically driven” and “a case too far.”

Greenhouse asserts that the “administration has bent over backward to accommodate religious claims.” But this misses the heart of the Little Sisters’ objection.

Though the government may believe its accommodation is sufficient to distance religious employers from acts they find morally objectionable, the Little Sisters (and many others) clearly do not agree.

As the Little Sisters explained in a brief filed with the 10th Circuit, the accommodation “merely offers [them] another way to violate their religion.”

The 10th Circuit panel declared that the Little Sister’s “religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled.”

But employees may obtain contraception in numerous ways without forcing the

involvement of the Little Sisters’ healthcare plan.

As Justice Samuel Alito noted in the majority opinion in *Burwell v. Hobby Lobby*, the government could provide or pay for these drugs and devices itself, while allowing the Little Sisters and other non-profits to obey their conscience.

The Little Sisters last week filed a cert. petition asking the Supreme Court to review their case, one of six accommodation cases pending before the Court.

Let’s hope the justices agree to hear one of these cases next term—and that one branch of government takes the right of conscience seriously.