Section 7: Constitutional Law

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VII. Constitutional Law

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New York State Rifle & Pistol Association Inc. v. City of New York, New York

Ruling Below: New York State Rifle & Pistol Ass’n v. City of New York, 883 F.3d 45 (2d Cir. 2018)

Overview: The plaintiffs were prohibited from transporting their handguns for shooting competitions by New York State Rule. The plaintiffs sought a declaration that the restrictions imposed by the rule was unconstitutional and an injunction against its enforcement. The plaintiffs also claim that the rule violates their Second Amendment rights, Commerce Clause, First Amendment right of expressive association, and fundamental right to travel.

Issue: Whether New York City’s ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.

THE NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, and JOSE ANTHONY IRIZARRY, Plaintiffs-Appellants

v.

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION, Defendants-Appellees

United States Court of Appeals, Second Circuit

Decided on February 23, 2018

[Excerpt; some citations and footnotes omitted]

Gerard E. LYNCH, Circuit Judge:

Plaintiffs New York State Rifle & Pistol Association, Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry (collectively, "the Plaintiffs") brought suit against Defendants City of New York and the New York Police Department-License Division (collectively, "the City"), challenging a provision of a New York City licensing scheme, Title 38, Chapter Five, Section 23 of the Rules of the City of New York ("RCNY"), under which an individual with a "premises license" for a handgun may not remove the handgun "from the address specified on the license except as otherwise provided in this chapter." Under Rule 5-23 ("the Rule"), the licensee "may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately."
The New York Police Department-License Division ("License Division") has defined "authorized" facilities, among other requirements, to be "those located in New York City." App. 38. The Plaintiffs sought to remove handguns from the licensed premises for the purposes of going to shooting ranges and engaging in target practice outside New York City as well as, in the case of one Plaintiff, transporting the handgun to a second home in upstate New York. The United States District Court for the Southern District of New York denied the Plaintiffs' motions for summary judgment and for a preliminary injunction, and granted the City's cross-motion for summary judgment. The district court held that the restrictions in premises licenses do not violate the Second Amendment, the Commerce Clause, the fundamental right to travel, or the First Amendment. The Plaintiffs appeal that judgment.

For the reasons that follow, we AFFIRM.

BACKGROUND

New York State law prohibits possession of "firearms" absent a license. Section 400.00 of the Penal Law establishes the "exclusive statutory mechanism for the licensing of firearms in New York State." Licenses can be held by individuals at least twenty-one years of age, of good moral character, and "concerning whom no good cause exists for the denial of the license," among other requirements.

To obtain a handgun license, an individual must apply to his or her local licensing officer. "The application process for a license is rigorous and administered locally. Every application triggers a local investigation by police into the applicant's mental health history, criminal history, [and] moral character." The licensing officers "are vested with considerable discretion in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license." The New York Penal Law specifies that in New York City, the licensing officer is the City's Police Commissioner The License Division exercises the Commissioner's authority to review applications for licenses, and issues handgun licenses.

The Penal Law establishes two primary types of handgun licenses: "carry" licenses and "premises" licenses. A carry license allows an individual to "have and carry [a] concealed" handgun "without regard to employment or place of possession . . . when proper cause exists" for the license to be issued.

"Proper cause" is not defined by the Penal Law, but New York State courts have defined the term to include carrying a handgun for target practice, hunting, or self-defense. When an applicant demonstrates proper cause to carry a handgun for target practice or hunting, the licensing officer may restrict a carry license "to the purposes that justified the issuance."
Generally, a carry license is valid throughout the state except that it is not valid within New York City "unless a special permit granting validity is issued by the police commissioner" of New York City.

A premises license is specific to the premises for which it is issued. The type of license at issue in this case allows a licensee to "have and possess in his dwelling" a pistol or revolver. Under the RCNY, a "premises license - residence" issued to a New York City resident is specific to a particular address, and "[t]he handguns listed on th[e] license may not be removed from the address specified on the license except" in limited circumstances, including the following:

(3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately.

(4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to her/his license.

Under Rule 5-23(a)(3), an "authorized small arms range/shooting club" is one that, among other requirements, is located in New York City, as the License Division notified Plaintiff Colantone in a letter dated May 15, 2012. When this challenge was brought, there were seven such facilities in New York City, including at least one in each of the City's five boroughs. The New York Police Department ("NYPD") also previously issued "target licenses" that allowed the licensee to take his or her handgun to shooting ranges and competitions outside New York City. These target licenses were not mandated by state law, but were issued by the NYPD in its discretion as the licensing agency for New York City. The NYPD received reports that licensees were using target licenses to carry weapons to many other locations, and not in the requisite unloaded and enclosed condition. In part because of these issues, the NYPD eliminated the target license in 2001.

Plaintiffs Colantone, Irizarry, and Alvarez hold premises licenses issued by the License Division that allow them to possess handguns in their residences in New York City. They seek to transport their handguns outside the premises for purposes other than the ones authorized by Rule 5-23. All three Plaintiffs seek to transport their handguns to shooting ranges and competitions outside New York City. In addition, Colantone, who owns a second home in Hancock, New York, seeks to transport his handgun between the premises for which it is licensed in New York City and his Hancock house. These plaintiffs, along with the New York State Rifle & Pistol Association, filed suit in the Southern District of New York, seeking a declaration that the
restrictions imposed by the Rule were unconstitutional and an injunction against its enforcement.

The Plaintiffs moved for summary judgment and for a preliminary injunction, and the City cross moved for summary judgment. The district court granted the City's cross-motion for summary judgment and dismissed the complaint. The district court determined that the Rule "merely regulates rather than restricts the right to possess a firearm in the home and is a minimal, or at most, modest burden on the right." Accordingly, the district court held that the Rule did not violate the Plaintiffs' Second Amendment rights. The district court also found that the Rule did not violate the dormant Commerce Clause, the First Amendment right of expressive association, or the fundamental right to travel.

**DISCUSSION**

The Plaintiffs argue on appeal, as they did below, that by restricting their ability to transport firearms outside the City, Rule 5-23 violates the Second Amendment, the dormant Commerce Clause, the First Amendment right of expressive association, and the fundamental right to travel. We review a district court's decision on summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. "We also review *de novo* the district court's legal conclusions, including those interpreting and determining the constitutionality of a statute." Pursuant to the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." For the reasons explained below, we reject each of the Plaintiffs' arguments.

**I. Rule 5-23 Does Not Violate the Second Amendment.**

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, the Supreme Court announced that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." In *McDonald v. City of Chicago*, the Court held that this right is incorporated within the Due Process Clause of the Fourteenth Amendment, and therefore binds the States as well as the Federal Government. However, the Court remarked that its holding should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." "Neither *Heller* nor *McDonald* . . . delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions.

**A. Analytical Framework**
Following *Heller*, this Circuit adopted a "two-step inquiry" for "determining the constitutionality of firearm restrictions." First, we "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment," and second, if we "conclude[] that the statute[] impinge[s] upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny."

1. **First Step: Whether the Second Amendment Applies**

At the first step, the Plaintiffs argue that Rule 5-23 impinges on conduct protected by the Second Amendment. We need not decide whether that is so, because, as explained below, the Rule "pass[es] constitutional muster" under intermediate scrutiny. Thus, as in *New York State Rifle*, we "proceed on the assumption that [the Rule restricts activity] protected by the Second Amendment."

2. **Second Step: Level of Scrutiny**

At the second step, we consider whether to apply heightened scrutiny. In Second Amendment cases, our Circuit has recognized at least two forms of heightened scrutiny — strict and intermediate. Our Circuit has also recognized that a form of non-heightened scrutiny may be applied in some Second Amendment cases. This recognition is limited by the Supreme Court's indication in *Heller* that rational basis review may be inappropriate for certain regulations involving Second Amendment rights. But we need not determine here which types of regulations may be subject only to rational basis review, or whether some form of non-heightened scrutiny exists that is more exacting than rational basis review. As explained below, we find that the Rule does not trigger strict scrutiny and that it survives intermediate scrutiny.

In determining whether some form of heightened scrutiny applies, we consider two factors: "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.' Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." As relevant to the individual right to possess a firearm recognized in *Heller*, a statute can "implicate the core of the Second Amendment's protections by extending into the home, 'where the need for defense of self, family and property is most acute.'" Thus, in *Heller*, the Supreme Court struck down the District of Columbia's ban on handgun possession in the home because it completely prohibited "an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense]." The Court found that this prohibition, which extended into the home, would fail constitutional muster under any standard of scrutiny.

As to the second factor, we have held that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for
other lawful purposes)." "The scope of the legislative restriction and the availability of alternatives factor into our analysis of the degree to which the challenged law burdens the right." For example, since *Heller*, we have found New York's and Connecticut's prohibitions of semiautomatic assault weapons to be distinguishable from the ban struck down in *Heller*, because under those statutes, "citizens may continue to arm themselves with non-semiautomatic weapons or with any semiautomatic gun that does not contain any of the enumerated military-style features." Even where heightened scrutiny is triggered by a substantial burden, however, strict scrutiny may not be required if that burden "does not constrain the Amendment's 'core' area of protection." Thus, the two factors interact to dictate the proper level of scrutiny.

The Plaintiffs argue that the Rule violates the Second Amendment in two ways: first, by preventing Plaintiff Colantone from taking the handgun licensed to his New York City residence and transporting it to his second home in Hancock, New York, and second, by preventing the Plaintiffs from taking their handguns licensed to New York City premises to firing ranges and shooting competitions outside the City. We address these arguments in turn.

In *Kachalsky*, we applied intermediate scrutiny and affirmed New York's "proper cause" requirement for the issuance of a carry license, despite finding that such a requirement "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public." In comparison to the regulation considered in *Kachalsky*, the restrictions complained of by the Plaintiffs here impose at most trivial limitations on the ability of law-abiding citizens to possess and use firearms for self-defense. New York has licensed the ownership and possession of firearms in their residences, where "Second Amendment guarantees are at their zenith," and does nothing to limit their lawful use of those weapons "in defense of hearth and home"—the "core" protection of the Second Amendment.

Strict scrutiny does not attach to Rule 5-23 as a result of Colantone's desire to transport the handgun licensed to his New York City residence to his second home in Hancock, New York. Even if the Rule relates to "core" rights under the Second Amendment by prohibiting Colantone from taking his licensed firearm to his second home, the Rule does not substantially burden his ability to obtain a firearm for that home, because an "adequate alternative[] remain[s] for [Colantone] to acquire a firearm for self-defense." This case is easily distinguished from *Heller*, in which the Supreme Court considered, and deemed unconstitutional, an outright ban on the possession of handguns in the home. Here, New York City imposes no limit on Colantone's ability to obtain a license to have a handgun at his second residence in Hancock; if he wants to keep a handgun at his Hancock house, he can apply to the licensing officers in Delaware County. The Rule restricts only his ability to remove the handgun licensed by New York City authorities from the City premises for which it is specifically licensed.
Colantone presents no evidence that the costs, either financial or administrative, associated with obtaining a premises license for his house in Hancock, or acquiring a second gun to keep at that location, would be so high as to be exclusionary or prohibitive. In Kwong v. Bloomberg, we assumed that intermediate scrutiny applied to New York City's $340 application fee for a premises license and upheld that fee. We noted that otherwise-proper costs associated with a state's regulation of firearms could be impermissible "if [they] were so high as to be exclusionary or prohibitive." But "the fact that the licensing regime makes the exercise of one's Second Amendment rights more expensive does not necessarily mean that it substantially burdens that right." Here, Colantone does not even estimate the amount of money or time potentially at issue by the requirement of obtaining a premises license and second firearm for his second home, and he does not allege that the Rule restricts in any way his ability to obtain such a firearm.

Next, the Plaintiffs argue that the Rule imposes a substantial burden on their core Second Amendment rights by prohibiting them from taking their licensed handguns to firing ranges and shooting competitions outside the City. The Plaintiffs' primary argument is that the right to possess and use guns in self-defense suggests a corresponding right to engage in training and target shooting, and thus restrictions on the latter right must themselves be subject to heightened scrutiny. Their argument relies on the Seventh Circuit's observation that the core right of the Second Amendment to use firearms in self-defense, particularly in the home, "wouldn't mean much without the training and practice that make it effective."

To the extent that the Plaintiffs argue that firearms practice is itself a core Second Amendment right, and that even minimal regulation of firearms training must survive heightened scrutiny to pass constitutional muster, we reject that argument. It is reasonable to argue as did the plaintiffs in Ezell I, that restrictions that limit the ability of firearms owners to acquire and maintain proficiency in the use of their weapons can rise to a level that significantly burdens core Second Amendment protections. Possession of firearms without adequate training and skill does nothing to protect, and much to endanger, the gun owner, his or her family, and the general public. Accordingly, we may assume that the ability to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns that regulations that sharply restrict that ability to obtain such training could impose substantial burdens on core Second Amendment rights. Some form of heightened scrutiny would be warranted in such cases, however, not because live-fire target shooting is itself a core Second Amendment right, but rather because, and only to the extent that, regulations amounting to a ban (either explicit or functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home. Indeed, if the Plaintiffs' broader argument were accepted, every regulation that applied to businesses that provide firearms training or firing-range use would itself require
heightened scrutiny, a result far from anything the Supreme Court has required.

Our analysis puts the focus where it belongs: on the core right of self-defense in the home. Rule 5-23 imposes no direct restriction at all on the right of the Plaintiffs, or of any other eligible New Yorker, to obtain a handgun and maintain it at their residences for self-protection. All of the individual Plaintiffs hold licenses to maintain handguns for that purpose. The Plaintiffs do not allege that the City's regulatory scheme imposes any undue burden, expense, or difficulty that impedes their ability to possess a handgun for self-protection, or even their ability to engage in sufficient practice to acquire and maintain the skills necessary to keep firearms safely and use them effectively.

We are further unpersuaded by the Plaintiffs' attempts to analogize the Rule to the restrictions held unconstitutional in Ezell I, as those restrictions are easily distinguishable from the ones at issue in this case. Ezell I concerned a Chicago ordinance that flatly banned firing ranges within city limits. We can assume, without deciding, that the Seventh Circuit correctly concluded that such a dramatic ban on target shooting substantially limits the right of law-abiding citizens to engage in the training and practice that would enable them to safely and effectively make use of firearms for defensive purposes in the home. Under the Chicago ordinance, residents could not engage in firearms activities without leaving the city. At a minimum, such a limitation imposes significant inconvenience, and we can accept, for purposes of the argument in this case, that the imposition of such a burden comes close to prohibiting gun training and practice altogether. Particularly when coupled with a training requirement, such a limitation would impose a considerable obstacle to gun ownership in the home. New York's rule, however, imposes no such limitations. Rule 5-23 allows a holder of a premises license to take the handgun licensed for his or her New York City premises to an authorized firing range in the City to engage in practice, training exercises, and shooting competitions.

Nor does the City take away with one hand what it gives with the other, by using its power to regulate firing ranges so restrictively that as a practical matter, firing ranges are unavailable. That was the route taken by Chicago in response to the Ezell I ruling. In Ezell v. City of Chicago ("Ezell II"), the Seventh Circuit confronted zoning restrictions that "seriously limit[ed] where shooting ranges may locate," and which were justified by nothing more than "sheer speculation about accidents and theft." In finding that the restrictions acted as a functional ban on firing ranges, the Ezell II Court cited calculations produced by the plaintiffs showing that only about 2.2% of the city's acreage could even theoretically be used to site a shooting range. Additionally, the court referenced testimony from two experts, presented by the plaintiffs, indicating that other jurisdictions made available significantly more land for use by shooting ranges.

In this case, by contrast, the Plaintiffs present no evidence demonstrating that the Rule
serves to functionally bar their use of firing ranges or their attendance at shooting competitions. In fact, the Plaintiffs concede that seven authorized ranges are available to them, including at least one in each of the City's five boroughs. What the Plaintiffs seek is the inverse of what the Ezell I plaintiffs sought: they do not complain that they are required to undertake burdensome journeys away from the city in which they live in order to maintain their skills, but rather they demand the right to take their handguns to ranges and competitions outside their city of residence. While the Plaintiffs make passing reference to the possibility that some New York City residents might find a firing range located outside the City more convenient to use, or closer to their residence, than the nearest facility within their home borough or an adjoining borough, they offer no evidence that the burden imposed by having to use a range within the City is in any way substantial.

As with absolute limitations on the ability to engage in firearms training, laws that limit such opportunities by imposing excessive costs could in principle impose a substantial burden entailing heightened scrutiny. But the test, again, is whether core rights are substantially burdened. As we noted in Kwong, a "hypothetical licensing fee could be so high as to constitute a 'substantial burden,'" nevertheless, we concluded that the permit fee charged by New York City did not impose such a substantial burden.

Furthermore, a law that "regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." An analysis of the evidence in this case reveals that, contrary to the Plaintiffs' assertions, the Plaintiffs have sufficient opportunities to train with their firearms without violating the Rule.

The record evidence demonstrates that seven firing ranges in New York City are available to any premises license-holder. One range, Olinville Arms in the Bronx, is open to any member of the public for an hourly fee. Six of the firing ranges require payment of a membership fee, although at least one of those six is open to non-members for weekly shooting competitions. The Plaintiffs argue that they should not be relegated to joining "private clubs" in order to engage in firearms competitions, Appellants' Br. 51, but the record does not support any claim that these "clubs" are exclusionary in any way. Like privately owned gyms and other athletic facilities, they are places of public accommodation, open to anyone who pays their fees. The Plaintiffs do not argue that the fees charged by the available firing ranges are prohibitively expensive, still less that their cost is driven up by any burdensome or unreasonable City regulations. That some portion of the fee is charged in the form of an annual or monthly "membership," rather than a per-hour usage fee, does not put the facilities out of reach for license holders. Nor does it warrant a conclusion that New York City has imposed an unreasonable burden on a resident's ability to pursue firearms training — which may be a somewhat costly pursuit in any event — thereby raising constitutional concerns.
Moreover, the Plaintiffs do not argue that the facilities located within the City are inadequate to provide the necessary opportunities for practice shooting. Indeed, the record reflects that some of these facilities are quite substantial. For example, the Richmond Boro Gun Club advertises a "100-yard rifle range with 30 covered and enclosed stations for Benchrest, Prone, and Bench shooting, [and an] outdoor 24 station 50-yard pistol range with covered and enclosed shooting bench with turning targets at 25 yards" among its many shooting facilities. "Various rifle and pistol matches are held each week all year," according to their website, and these matches are open to non-members.

Finally, nothing in the Rule precludes the Plaintiffs from utilizing gun ranges or attending competitions outside New York City, since guns can be rented or borrowed at most such venues for practice purposes. New York state law expressly allows individuals to use a gun that is not their own at a shooting range if the license holder is present. We recognize that the Plaintiffs may prefer to practice with their own weapon — something that the Rule makes fully possible within the City. That the Rule restricts practicing with their own firearms to ranges within the City does not make practicing outside the City or with their own firearms impossible, just not the two together.

In short, nothing in this record suggests that the limitations challenged by the Plaintiffs significantly inhibit their ability to utilize training facilities to obtain and maintain firearm skills, let alone that the Rule operates as a substantial burden on the right to keep and use firearms for self-defense in the home. Assuming arguendo that a total ban on firing ranges within the limits of a large city (as was at issue in Ezell I) or a functional ban on firing ranges through onerous zoning regulations (along the lines of Ezell II) would impose a substantial burden on the core Second Amendment right of residents to maintain firearms for self-defense in the home, we are not confronted with such a case here. Unlike the plaintiffs in Ezell II, the Plaintiffs here do not allege that any of the City's regulations, including Rule 5-23, serve to deter the construction or existence of firing ranges within city limits. Furthermore, given the existence of ample facilities for live-fire training and practice available at market prices within reasonable commuting distance from the homes of all City residents, the restrictions imposed by the Rule do not impose a substantial burden on the core Second Amendment right to own and possess handguns for self-defense.

It is clear, based on the essentially undisputed facts recited above, that strict scrutiny is not triggered by the Rule, either as applied to Colantone's second home or to the Plaintiffs' desire to take their handguns outside the City for shooting competitions or target practice. However, some form of heightened scrutiny may still be required. We have applied intermediate scrutiny when analyzing regulations that substantially burdened Second Amendment rights or that encroached on the core of Second Amendment rights by extending into the home.
Because we assume, *arguendo*, that the Rule approaches the Second Amendment's core area of protection as applied to Colantone's second home, though it does not impose a substantial burden, we find that intermediate scrutiny is appropriate to assess the Rule in that instance. As to the Plaintiff's' access to firing ranges and shooting competitions, the Rule does not approach the core area of protection, and we find it difficult to say that the Rule substantially burdens any protected rights. "But we need not definitively decide that applying heightened scrutiny is unwarranted here," because we find that the Rule would survive even under intermediate scrutiny. Accordingly, we proceed to assess the Rule by applying intermediate scrutiny.

B. Application of Intermediate Scrutiny

When applying intermediate scrutiny under the Second Amendment, "the key question is whether the statute[] at issue [is] substantially related to the achievement of an important governmental interest.

To survive intermediate scrutiny, the fit between the challenged regulation [and the government interest] need only be substantial, not perfect. Unlike strict scrutiny analysis, we need not ensure that the statute is narrowly tailored or the least restrictive available means to serve the stated governmental interest. Moreover, we have observed that state regulation of the right to bear arms has always been more robust than analogous regulation of other constitutional rights. So long as the defendants produce evidence that fairly supports their rationale, the laws will pass constitutional muster.

The Rule seeks to protect public safety and prevent crime, and "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." 

"[W]hile the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public." "There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety."

The City has presented evidence supporting its contention that the Rule serves to protect the public safety of both license-holding and non-license-holding citizens of New York City. In a detailed affidavit, the former Commander of the License Division, Andrew Lunetta, discussed why taking a licensed handgun to a second home or a shooting competition outside the City, even under the restrictions imposed by the Rule for permitted transportation, constitutes a potential threat to public safety. He explained that premises license holders "are just as susceptible as anyone else to stressful situations," including driving situations that can lead to road rage, "crowd situations, demonstrations, family disputes," and other situations "where it would be better to not have the presence of a firearm." Accordingly, he stated, the City has a legitimate need to control the presence of firearms in public,
especially those held by individuals who have only a premises license, and not a carry license. He went on to discuss how "public safety will be compromised" unless the regulations concerning when and where premises licensees can transport their firearms "can be effectively monitored and enforced, and are not easily ignored or susceptible to being violated."

Indeed, the City produces evidence that it has, in the past, had difficulty monitoring and enforcing the limits of the premises license. Lunetta's affidavit documented "abuses" that occurred when, prior to adoption of the current Rule, the City did allow licensees to carry their handguns to shooting ranges out of the City. "Examples included, licensees traveling with loaded firearms, licensees found with firearms nowhere near the vicinity of an authorized range, licensees taking their firearms on airplanes, and licensees traveling with their firearms during hours where no authorized range was open." Based on these abuses, Lunetta explained, the New York Police Department was concerned that allowing premises licensees to transport their firearms anywhere outside of the City for target practice or shooting competitions made it "too easy for them to possess a licensed firearm while traveling in public, and then if discovered create an explanation about traveling for target practice or shooting competition."

According to Lunetta's affidavit, the New York Police Department concluded that officers cannot be expected to verify whether a licensee stopped with a firearm was, in fact, traveling to a firing range outside of the City.

Based on that specific experience, the License Division restricted the scope of the premises license to allow for the transportation of the licensed handgun only to a firing range within New York City (or, with the proper additional authorization, to a designated hunting area). Lunetta explained the reasoning for the License Division's decision: "When target practice and shooting competitions are limited to locations in New York City the ability to create . . . a fiction[al legal purpose] is limited." Thus, the City asserts, limiting the geographic range in which firearms can be carried allows the City to promote public safety by better regulating and minimizing the instances of unlicensed transport of firearms on city streets.

In contrast to the City's evidence supporting the Rule's rationale, the Plaintiffs have produced scant evidence demonstrating any burden placed on their protected rights, and nothing which describes a substantial burden on those rights. The Plaintiffs have submitted individual affidavits expressing their desire to travel to additional locations with their handguns, and their decision not to participate in certain shooting competitions outside of the City. But, as we have stated, the Plaintiffs are still free to participate in those shooting competitions with a rented firearm, and to obtain licenses for handguns in their second homes, and the Plaintiffs have presented no evidence indicating that this understanding is mistaken. Additionally, the Plaintiffs present no evidence that the firing ranges that they wish to access outside the City are significantly less expensive or more accessible than those in the City. Even if the Plaintiffs did provide this evidence, they
would still need to demonstrate that practicing with one's own handgun provides better training than practicing with a rented gun of like model, and the Plaintiffs fail to even assert this fact.

In light of the City's evidence that the Rule was specifically created to protect public safety and to limit the presence of firearms, licensed only to specific premises, on City streets, and the dearth of evidence presented by the Plaintiffs in support of their arguments that the Rule imposes substantial burdens on their protected rights, we find that the City has met its burden of showing a substantial fit between the Rule and the City's interest in promoting public safety.

Constitutional review of state and local gun control will often involve difficult balancing of the individual's constitutional right to keep and bear arms against the states' obligation to "prevent armed mayhem in public places." This is not such a case. The City has a clear interest in protecting public safety through regulating the possession of firearms in public, and has adduced "evidence that fairly supports [the] rationale" behind the Rule. The burdens imposed by the Rule do not substantially affect the exercise of core Second Amendment rights, and the Rule makes a contribution to an important state interest in public safety substantial enough to easily justify the insignificant and indirect costs it imposes on Second Amendment interests. Accordingly, Rule 5-23 survives intermediate scrutiny.

The Plaintiffs next argue that Rule 5-23 violates the dormant Commerce Clause because it hinders interstate commerce. However, the Supreme Court has "recogniz[ed] that incidental burdens on interstate commerce may be unavoidable when a State legisitates to safeguard the health and safety of its people." Our inquiry "must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." We laid out the framework for this inquiry in _Town of Southold v. Town of East Hampton:_

In analyzing a challenged local law under the dormant Commerce Clause, we first determine whether it clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce. . . . We then apply the appropriate level of scrutiny. A law that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid per se and will survive only if it is demonstrably justified by a valid factor unrelated to economic protectionism. A law that only incidentally burdens interstate commerce is subject to the more permissive balancing test under _Pike v. Bruce Church, Inc._, and will be struck down if the burden imposed on

II. Rule 5-23 Does Not Violate the Commerce Clause.
interstate commerce clearly exceeds the putative local gains.

The Plaintiffs argue that the Rule discriminates against interstate commerce by prohibiting them "from engaging in the interstate commercial activity of traveling with their handguns to patronize firing ranges in states beyond the borders of New York City." "A clearly discriminatory law may operate in three ways: (1) by discriminating against interstate commerce on its face; (2) by harboring a discriminatory purpose; or (3) by discriminating in its effect." In our view, the Rule does not offend in any of these ways.

The Rule does not facially discriminate against interstate commerce, as it does not prohibit a premises licensee from patronizing an out-of-state firing range or going to out-of-state shooting competitions. The Plaintiffs are free to patronize firing ranges outside of New York City, and outside of New York State; they simply cannot do so with their premises-licensed firearm.

The Plaintiffs also present no evidence that the purpose of the New York City rule was to serve as a protectionist measure in favor of the City's firing-range industry. To the contrary, as discussed above, the Rule is designed to protect the health and safety of the City's residents. It is therefore directed to legitimate local concerns, with only incidental effects upon interstate commerce.

Finally, the Plaintiffs have not convinced us that the Rule violates the dormant Commerce Clause by creating a discriminatory effect on interstate commerce. We note, first, that the Plaintiffs have offered no evidence of discriminatory effect aside from their statements that they, personally, have "refrained from attending any shooting events with [their] handgun[s] that take place outside of the City of New York." They do not assert, for example, that they have refrained from attending all shooting events outside the City; they aver only that (in compliance with the Rule) they have refrained from attending such events with their premises-licensed handguns.

Even if we were to assume for the sake of argument, however, that the Plaintiffs have offered sufficient evidence of a discriminatory effect to raise a substantial dormant Commerce Clause question, we would nonetheless conclude that the Rule is "demonstrably justified by a valid factor unrelated to economic protectionism." The Plaintiffs themselves offer a useful comparison, arguing that the Rule functions in the same way as a law requiring New York City residents to use their tennis rackets only at in-City tennis courts. Of course, tennis rackets present none of the public safety risks that firearms do, and against which states have a legitimate interest in protecting themselves. Thus, there could be no public health justification for a law limiting the transportation of tennis rackets, whereas here the Rule clearly focuses on minimizing the risks of gun violence and "prevent[ing] armed mayhem in public places." While such a justification might theoretically be shown to be pretextual, the Plaintiffs have provided no evidence that the true intent or function of the Rule was protectionist. Accordingly, we conclude that the Rule does not discriminate against interstate commerce.
Additionally, the Plaintiffs contend that Rule 5-23 has an impermissible extraterritorial effect because it attempts to control economic activity that is fully outside of New York City. But Rule 5-23 does not govern extraterritorial conduct in any way. As noted above, the Plaintiffs are free to patronize out-of-state firing ranges and to use firearms for target practice or competitive sporting events anywhere in the country or beyond; they simply may not transport the firearm licensed to them for possession at a particular New York premises to such locations. To the extent that the Rule has any effect on conduct occurring outside the City, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." An ordinance may be unconstitutional when it regulates commerce that takes place fully outside its borders. But "the Commerce Clause's ban on extraterritorial regulation must be applied carefully so as not to invalidate many state laws that have permissible extraterritorial effects." Here, the Rule directly governs only activity within New York City, in order to protect the safety of the City's residents. Any extraterritorial impact is incidental to this purpose and thus "is of no judicial significance."

III. Rule 5-23 Does Not Violate the Right to Travel.

The Plaintiffs next invoke the constitutional right to travel interstate. "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." This Court has "acknowledge[d] a correlative constitutional right to travel within a state." However, that local regulations "[m]erely hav[e] an effect on travel is not sufficient to raise an issue of constitutional dimension." The constitutional right is implicated only when the statute "actually deters such travel, or when impedance of travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."

The Plaintiffs' right to travel argument fails for much the same reasons as does their parallel invocation of the dormant Commerce Clause. Nothing in the Rule prevents the Plaintiffs from engaging in intrastate or interstate travel as they wish. The Plaintiffs may go where they like, and in particular may attend and participate in shooting tournaments or similar events held outside the City of New York. The regulation concerns only their ability to remove the specific handgun licensed to their residences from the premises for which they hold the license. The Constitution protects the right to travel, not the right to travel armed.

The Rule was not designed to impede interstate travel and the history behind it "demonstrates that its purpose was not to impede travel but to protect the welfare of [city] residents." Nor does the Rule impose a significant disincentive to travel, any more
than any other regulation that limits the possession in one jurisdiction of items that may be more broadly permitted in another. Any incidental impact on travel does not create a constitutional violation because "[i]f every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue." State and local regulations that have an indirect effect on some travel impose merely "minor restrictions on travel [that] simply do not amount to the denial of a fundamental right."

IV. Rule 5-23 Does Not Violate the First Amendment.

The Plaintiffs argue that the Rule violates their First Amendment right to expressive association by (1) curtailing their ability to join the gun club of their choice and (2) forcing them to join a gun club in New York City. We disagree.

The Plaintiffs fail to demonstrate how the ability to join a specific gun club, or the ability to transport their licensed firearms to a shooting club outside of New York City, qualifies as expressive association. "The Constitution does not recognize a generalized right of social association. The right generally will not apply, for example, to business relationships; chance encounters in dance halls; or paid rendezvous with escorts." "It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." "Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it." The Plaintiffs fail to identify what expressive activity they would engage in with their guns and argue instead that they seek "participation in recreational and competitive shooting events." Gathering with others for a purely social and recreational activity, whether it is dancing, Sanitation & Recycling Indus., or shooting guns, does not constitute expressive association under the First Amendment. Accordingly, the ability to join a specific gun club is not protected association under the First Amendment.

Even if we were to assume that engaging in firearms training or competition qualifies as expressive association, as repeatedly discussed above, the Plaintiffs are not prevented from engaging in such activities, wherever or with whomever they choose to do so.

First, nothing in the Rule forbids the Plaintiffs from joining and associating with gun clubs outside the City. The Plaintiffs claim that the Rule "impedes their right to associate with whom they choose," but the Rule does nothing of the sort. The Plaintiffs remain free to associate with whomever they choose. They may join any club they like outside of New York City. To the extent that the gun clubs the Plaintiffs wish to join "take positions on public questions or perform any
of the other similar activities" characteristic of expressive association, the Plaintiffs are not inhibited from joining in those activities. The Rule limits only their ability to carry the handgun that is licensed for a specific premises outside of those premises.

The Plaintiffs also contend that the Rule constitutes "forced association" because it "effectively coerce[s]" them to join clubs that they "may prefer not to join." That "effective" coercion is not coercion at all: the Rule does not require the Plaintiffs to join a gun club in New York City. The licensing scheme does not require the Plaintiffs to complete firearms training, and even if it did, they have access to Olinville Arms, which is open to the public, and the Richmond Boro Gun Club, which is available to non-members for weekly shooting competitions.

Regardless, the Plaintiffs are incorrect that there is any constitutional injury at stake in the question of "membership" in a firing range or gun club. As noted above, the Plaintiffs have not demonstrated that their firearms training is expressive association, and actually concede that it is recreational activity. Moreover, the decision of whether to charge a membership fee or a fee based on hourly usage is a business decision of the club or range. The Plaintiffs have offered no evidence that the firing ranges in New York City that structure themselves as clubs requiring "membership" either engage in (or require their members to engage in) expressive activity of any kind, let alone activity to which the Plaintiffs object. Nor have the Plaintiffs shown that these ranges have selected their particular fee structures as a byproduct of the Rule, or that their fee structures reflect any ideological or expressive content to which the Plaintiffs, by utilizing the range, can be taken as assenting.

Accordingly, the Rule does not violate the First Amendment.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.
The Supreme Court waded into the debate over gun rights for the first time in nearly a decade, agreeing Tuesday to hear a case over whether—and to what degree—lawmakers can restrict the right to carry guns outside the home.

The case, a review of New York City regulations that curtail the transportation of guns, offers the court’s newly bolstered conservative majority an opportunity to expand the constitutional right to bear arms beyond a pair of decisions that, beginning in 2008, found the Second Amendment allows individuals to keep handguns in the home for self-defense. Although New York City’s ordinance is unusual—gun advocates behind the suit call it an “extreme outlier”—the implications could stretch beyond the city’s five boroughs.

At issue is “the right to have a gun in public. It’s the biggest open question in Second Amendment law today,” said Adam Winkler, a law professor at the University of California, Los Angeles, and author of “Gunfight,” a history of firearms regulations.

In other court developments on Tuesday, the justices intervened to allow Trump administration restrictions on military service by transgender individuals to be put in place as lower-court proceedings continue. Separately, the court took no action for now on an administration appeal of rulings blocking Republican President Trump’s planned cancellation of the Deferred Action for Childhood Arrivals program, or DACA, an initiative of former President Obama, a Democrat, that benefited illegal immigrants who came to the U.S. as children.

The gun case is expected to be heard in the court’s next term, which begins in October as the 2020 presidential campaign comes into focus. The spotlight is expected to turn to Mr. Trump’s two appointees, Justices Neil Gorsuch and Brett Kavanaugh, who were strongly backed by the National Rifle Association and other gun advocacy groups. These organizations have been frustrated as the high court largely ignored lower court rulings upholding the vast majority of state and local gun regulations.

On a closely divided court, the pivotal vote could rest with Chief Justice John Roberts, who backed the expansion of gun rights in prior opinions but kept silent as other conservatives, including Justices Clarence Thomas and Samuel Alito, fumed over the court’s refusal in recent years to review other weapons regulations upheld by lower courts.
But the spotlight may shine particularly bright on Justice Kavanaugh, whose expansive view of gun rights while a lower-court judge came into play during confirmation hearings last fall. In 2011, while serving on the U.S. Court of Appeals for the District of Columbia Circuit, then-Judge Kavanaugh dissented from an opinion upholding a D.C. law prohibiting semiautomatic rifles it classified as “assault weapons” within city limits and barring large-capacity ammunition magazines.

The majority opinion by Judge Douglas Ginsburg found the D.C. law a justifiable policy for “protecting police officers and controlling crime.” Judge Kavanaugh, however, wrote that “the Constitution disables the government from employing certain means to prevent, deter, or detect violent crime.”

New York City issues two kinds of gun licenses, “carry” permits that allow individuals to bring along their weapons, and “premises” permits that are specific to a location. Individuals with premises permits can take their weapons from home only for limited purposes, such as target practice at a shooting range within city limits or to a designated in-state hunting area.

“We believe that our gun laws protect people in this city, and law enforcement in this city believes that, too, so we’ll fight vigorously to protect what we have,” said New York City Mayor Bill de Blasio, a Democrat, at a Tuesday press conference. “I’m absolutely concerned because anything that takes away our right to protect our own people would hurt this city deeply.”

Tom King, president of the New York Rifle & Pistol Association, which brought the appeal, characterized the city’s rules as almost senseless. “This is more of a restraint-of-travel case than it is a Second Amendment case,” he said. “The city of New York will not allow a licensed gun owner to travel outside the five boroughs” with a pistol. According to the petition, there are seven shooting ranges in NYC available to the public. Mr. King said hundreds more are located in nearby New Jersey and New York state.

Last year, the Second U.S. Circuit Court of Appeals, in New York, upheld the city ordinance from a challenge filed by several gun owners and the state rifle group, which is affiliated with the NRA.

The opinion, by Judge Gerard Lynch, said the city provided evidence that its rules promote public safety, including an affidavit from a police commander that “premises license holders ‘are just as susceptible as anyone else to stressful situations,’ including driving situations that can lead to road rage, ‘crowd situations, demonstrations, family disputes,’ and other situations ‘where it would be better to not have the presence of a firearm.’”

In their appeal to the Supreme Court, gun owners argued that the city’s law, while predating recent precedents expanding access to weapons, exemplified state and local efforts to restrict firearms beyond constitutional limits.
Unable to flatly ban the possession of handguns in the home, many local governments have responded by erecting obstacles to acquiring them,” they said. The petition lists other measures they consider improper, including a $25 tax on firearms sales imposed in Chicago and Seattle and a $5 fee California collects from gun purchasers to fund police.

The Second Amendment was ratified in 1791, but it took more than two centuries before the Supreme Court, with conservatives prevailing in a 5-4 vote along ideological lines, found that the right to “keep and bear Arms” extended to individuals for self-defense, rather than falling within service in a state’s “well regulated Militia.”

The 2008 opinion, District of Columbia v. Heller, by the late Justice Antonin Scalia, struck down an effective ban on handgun possession within Washington’s city limits. Two years later, in 2010, the court expanded that holding beyond the federal enclave to limit states’ power to regulate firearms. Armed with the Heller precedent, gun-rights advocates launched a fusillade against state and local weapons regulations, filing more than 1,000 lawsuits seeking to expand access to guns and ammunition. But lower courts found nearly all such measures fell within Heller’s allowance for reasonable weapons regulations. According to a study published last year in the Duke Law Journal Online, less than 10% of such challenges prevailed in state and federal courts.

A co-author of the study, Duke University law professor Joseph Blocher, said lower-court opinions display “a remarkable amount of consistency in how they evaluate gun regulations.” Typically, he said, they employ a two-part test, first evaluating whether a rule burdens a Second Amendment right and, if so, whether that burden can be justified.

For jurists, the most important decision the high court may make is whether that approach passes muster. Justice Kavanaugh, for one, has urged a different method, focusing instead on whether a law is consistent with the “text, history and tradition” of American gun laws.
A couple of weeks ago, the New York Police Department held an unusual public hearing. Its purpose was to make a Supreme Court case disappear.

In January, the court agreed to hear a Second Amendment challenge to a New York City gun regulation. The city, fearing a loss that would endanger gun control laws across the nation, responded by moving to change the regulation. The idea was to make the case moot.

The move required seeking comments from the public, in writing and at the hearing. Gun rights advocates were not happy.

“This law should not be changed,” Hallet Bruestle wrote in a comment submitted before the hearing. “Not because it is a good law; it is blatantly unconstitutional. No, it should not be changed since this is a clear tactic to try to moot the Scotus case that is specifically looking into this law.”

David Enlow made a similar point. “This is a very transparent attempt,” he wrote, “to move the goal post in the recent Supreme Court case.”

The regulation allows residents with so-called premises licenses to take their guns to one of seven shooting ranges in the city. But it prohibits them from taking their guns to second homes and shooting ranges outside the city, even when the guns are unloaded and locked in containers separate from ammunition.

The city’s proposed changes, likely to take effect in a month or so, would remove those restrictions. Whether they would also end the case is another matter.

Until the Supreme Court agreed to hear the dispute, the city had defended the regulation vigorously and successfully, winning in two lower courts. In inviting public comments on the proposed changes, the Police Department said it continued to believe the regulation “furthers an important public-safety interest.”

Still, the city seems determined to give the plaintiffs — three city residents and the New York State Rifle and Pistol Association — everything they had sued for. The plaintiffs, in turn, do not seem to want to take yes for an answer.

There is a precedent for the city’s strategy, from a surprising source. The National Rifle Association tried a similar tactic in connection with the 2008 Supreme Court case that ended up revolutionizing Second
Amendment law, District of Columbia v. Heller.

The N.R.A. was initially skittish about the case, which was brought by a scrappy group of libertarian lawyers led by Robert A. Levy.

“The N.R.A.’s interference in this process set us back and almost killed the case,” Mr. Levy said in 2007. “It was a very acrimonious relationship.”

As Mr. Levy and his colleagues were persuading a federal appeals court to strike down part of Washington’s tough gun control law, the N.R.A. tried to short-circuit the case.

“The N.R.A.’s next step was to renew its lobbying effort in Congress to repeal the D.C. gun ban,” Mr. Levy wrote in 2008 in a Federalist Society publication. “Ordinarily that would have been a good thing, but not this time.”

“Repealing D.C.’s ban would have rendered the Heller litigation moot,” he wrote. “After all, no one can challenge a law that no longer exists.”

Only an intensive countereffort kept the case alive, Mr. Levy wrote.

“After expending considerable time and energy in the halls of Congress, we were able, with help, to frustrate congressional consideration of the N.R.A.-sponsored bill,” he wrote.

The N.R.A. came around in the end. In the Supreme Court, it supported the suit, working closely with the lawyers who had brought it.

The court’s decision in the Heller case established an individual right to own guns, imperiling gun control laws around the nation. But aside from one follow-up case in 2010, the court has not elaborated on the scope of the right.

With the departure of Justice Anthony M. Kennedy and the arrival of Justice Brett M. Kavanaugh, the court seems ready to start. It agreed to hear the New York case, New York State Rifle and Pistol Association v. City of New York, No. 18-280, just months after Justice Kavanaugh joined the court. Unless the case is dismissed, it will be argued in the fall.

The question of whether the changes to the city’s gun regulation will make the case moot is a hard one. The city lost an initial skirmish at the court last month when the justices turned down its request to suspend the filing of briefs while changes to the regulation were considered.

The plaintiffs opposed that request. “To state the obvious, a proposed amendment is not law,” they wrote.

The changes to the regulations will happen soon enough, though, and the Supreme Court will then have to consider whether there is anything left to decide.

The court has said the “voluntary cessation” of government policies does not make cases moot if the government remains free to reinstate them after the cases are dismissed. But formal changes in laws may be a different matter.
To hear the plaintiffs tell it, the court should not reward cynical gamesmanship.

“The proposed rule making,” they wrote, “appears to be the product not of a change of heart, but rather of a carefully calculated effort to frustrate this court’s review.”
“New York eased gun law hopeful Supreme Court would drop Second Amendment case – but that hasn’t happened yet”

The Washington Post

Robert Barnes

August 11, 2019

As the nation renews debate over gun control, the Supreme Court must decide whether to press ahead with a Second Amendment case it has accepted for the coming term, its first in a decade.

Gun-control groups operate under a no-news-is-good-news approach to the Supreme Court, leery of giving what they view as a strengthened conservative majority the chance to expand gun rights and weaken restrictive laws.

In New York State Rifle & Pistol Association v. City of New York, which the court accepted in January, the city and state of New York appear to agree. They have essentially surrendered, changing the restrictions at issue even though the city successfully defended them before a district judge and a federal appeals court.

New York says it has given those who hold licenses to have guns on their premises exactly what they asked for — a greater ability to transport their weapons through and outside the city — and there no longer is a controversy for the Supreme Court to settle.

“The court has told both sides to continue filing briefs and that it will consider New York’s request to dismiss the case on Oct. 1, a week before the new term begins.

Any Supreme Court decision on guns will be magnified in a presidential election year and with the backdrop of the mass shootings that have plagued the country. Whether the recent attacks in El Paso and Dayton, Ohio, will affect the justices’ decision is anyone’s guess, experts say.

“They’re human beings and this can’t help but color a little bit how they see this case,” said Adam Winkler, a UCLA law professor who has written extensively about Second Amendment litigation.
On how to decide when a case is moot, he said, “I think the Supreme Court has enough wiggle room to go in either direction.”

The New York restrictions were unique — no other jurisdiction has such strict rules on transporting a weapon. But the case is significant because it marked the first accepted challenge since the Supreme Court recognized an individual right to gun ownership in 2008’s District of Columbia v. Heller and ruled two years later that the Second Amendment governed state and local gun laws as well as those adopted by the federal government.

Since then, the court has declined to hear challenges to all manner of gun-control measures, such as bans on certain military-style weapons and state restrictions that make it extremely difficult to obtain a permit to carry a gun outside the home.

In some cases, it has upheld gun restrictions, prompting complaints chiefly from Justice Clarence Thomas about the way his colleagues consider the Second Amendment. “We treat no other constitutional right so cavalierly,” he wrote in 2016.

Justice Neil M. Gorsuch has joined Thomas in saying the court should take more Second Amendment cases. But the momentum really has increased since Justice Brett M. Kavanaugh replaced Justice Anthony M. Kennedy last year.

Kennedy was part of the five-member Heller majority, but his vote was a shaky one, according to the late justice John Paul Stevens’s memoir. Stevens said he believed Kennedy insisted on language in the opinion that has been cited by lower courts in upholding state and municipal restrictions.

Kavanaugh, by contrast, was strongly endorsed by the National Rifle Association. In 2011, as a judge on the U.S. Court of Appeals for the D.C. Circuit, he dissented from a decision upholding the District’s ban on some semiautomatic rifles and a gun registration requirement.

He reasoned that while the Heller decision agreed that government may prohibit “dangerous and unusual” weapons not in common use, the guns at issue did not meet that definition.

“It follows from Heller’s protection of semiautomatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.’s ban on them is unconstitutional,” Kavanaugh wrote.

New York’s approach to get rid of the case is similar to what some gun-control advocates had hoped the city of Washington would have done with its restrictive handgun policy that led to the Heller decision. The District’s mayor at the time, Adrian Fenty, decided to press ahead after the D.C. Circuit ruled against the city, resulting with the Supreme Court finding an individual right to gun ownership for protection in one’s home.

The gun violence reform movement thought D.C. should amend the law rather than take it to the Supreme Court, Winkler said. “The result was disastrous for them,” he said.

If the court proceeds with the New York case, it could decide it very narrowly, or it could
resolve long-standing questions about the right to a gun outside the home.

The New York gun association, represented by Paul D. Clement, who was solicitor general during the George W. Bush administration, said the city’s “undisguised effort to avoid a precedent-setting loss and to frustrate this court’s discretionary review falls short by every measure.”

The city battled for years and relented only when the Supreme Court took the case, the association argues. New York officials said the gun owners should simply acknowledge that they won.

“A primary purpose of litigation like this [is] to pressure the governmental actors to agree to a demand,” the city wrote. “All that matters is whether the plaintiffs’ purported injuries have been redressed. If so, there is no longer a case or controversy.”

If the court decides there is no longer a reason to hear the New York case, there are others in the wings.

Some more clearly present the issue of the right to carry a weapon outside the home. There are still legal challenges to President Trump’s decision to ban bump stocks. There is a case challenging California’s Unsafe Handgun Act.

Recently, Remington Arms asked the court to review a Connecticut Supreme Court ruling that a lawsuit brought against the company by a survivor and relatives of victims of the Sandy Hook Elementary School shooting could go forward. The company says it is protected under federal law from such suits.
“NRA, gun rights group using New York City rule to seek expansion of Second Amendment in Supreme Court”

USA Today

Richard Wolf

May 22, 2019

Gun rights groups are using New York City restrictions that may be repealed as a rallying cry to press the Supreme Court for a major expansion of its Second Amendment precedents.

The effort is based on the hope that the court’s new, five-member conservative majority will be more sympathetic to gun rights, in much the same way that anti-abortion groups are hoping for a high court crackdown on reproductive rights.

Conservatives' efforts extend beyond guns and abortion to other pet peeves, such as affirmative action and immigrant rights. In all of those areas, activists are pushing lawsuits in the court's direction with renewed vigor.

While most of the legal action began before President Donald Trump's thus far successful effort to appoint conservative judges to federal courts – including Associate Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court – the chances for victory have vastly improved.

“People who want to have test cases and advance a certain legal agenda were definitely emboldened by Donald Trump's election and his ability to appoint two justices," says Ilya Shapiro of the libertarian Cato Institute.

It's been more than a decade since the Supreme Court ruled that the Second Amendment protects the right of citizens to keep guns at home for self-defense. The justices later extended that right to states and localities.

But Associate Justice Antonin Scalia's most famous opinion in District of Columbia v. Heller never defined the breadth of that right. He acknowledged the ruling did not uphold “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

Gun rights groups, led by the National Rifle Association, have sought for years to win the next battle: a broad right to carry weapons outside the home. Forty-five states allow that to some degree, though 15 require special licenses or permits. But several large states, including California, Florida, Illinois and New York, have prohibitions.

The high court has refused for nearly a decade to jump back into the gun debate, declining at least eight opportunities in recent years. It let stand Chicago's semiautomatic weapons ban and a variety of prohibitions
against carrying guns in public, from New Jersey to California. It refused to second-guess age limits for carrying guns in Texas and rules for disabling or locking guns when not in use in San Francisco.

Now gun rights groups hope Kavanaugh's replacement of Associate Justice Anthony Kennedy, the court's swing vote, could turn the tide.

"The NRA and the challengers won’t be satisfied if New York repeals its law," says Adam Winkler, a UCLA School of Law professor and author of a book on the gun rights battle. "They want the Supreme Court to step in and announce stronger protections for gun rights under the Second Amendment."

**City moves to repeal rules**

Already, the court has scheduled the New York City case for next fall. The city's rules generally block gun owners with possession licenses from transporting their guns outside the home, except to one of seven shooting ranges inside city limits. The guns must be unloaded and locked up, with ammunition carried separately.

Gun owners who sought to take their firearms to second homes or shooting ranges outside the city challenged the rules in federal court, but they were upheld last year by the U.S. Court of Appeals for the Second Circuit.

Sensing a losing hand at the Supreme Court, gun control groups urged the city to change its rules in hopes a quick surrender would prompt the justices to drop the case. The city's police department held a public hearing last week on proposed changes that would allow travel outside the city. A decision is expected within weeks.

But gun rights groups argued in court papers this month that the justices should not dismiss the case even if the restrictions are lifted. Instead, they urged an expansion of Second Amendment rights.

"The historical understanding of the right to keep and bear arms removes any remaining doubt that it extends outside the home," the NRA said.

"The primary need for self defense, unquestionably protected by the Second and Fourteenth Amendments, is typically not in the home but outside of the home," attorneys general from 24 Republican-led states said. They noted that only about one in five violent crimes occurs at home.

The New York State Rifle & Pistol Association, which brought the case against the city, accused it of a "nakedly transparent effort to evade this court’s review" by moving to ease the restrictions. The Cato Institute warned that the rules could be changed "just long enough for the case to be dismissed."

But Winkler notes the challengers only sought an injunction to stop New York's law from being enforced. If it's repealed, he says, "the case should be moot, because the challengers will have effectively won."

**Trump administration takes stand**

The Trump administration also urged the court to strike down the New York City rules
by following the "text, history and tradition" of the Second Amendment and gun rights and regulations. But in a more conciliatory pose, Solicitor General Noel Francisco said challengers "do not seek a right to transport loaded handguns for self-defense in public."

Kavanaugh's addition to the court in October may have given the other conservatives the vote they need to win future cases. As a federal appeals court judge, he dissented in 2011 from a decision upholding the District of Columbia's ban on semi-automatic rifles, insisting that courts should use the "text, history and tradition" test.

Several gun control groups didn't wait for New York City's response, due at the court in August. Instead, they filed briefs this month "in support of neither party" to urge that the justices avoid a broad constitutional ruling that expands Second Amendment rights, particularly since the city is moving to change its rules.

"Our concern is that petitioners are asking the court to issue a broad ruling that would entitle people to carry loaded firearms in public to use in armed confrontation," says Jonathan Lowy, chief counsel at the Brady Campaign to Prevent Gun Violence. "That would have a broad effect on a wide array of gun laws around the country."

The Giffords Law Center to Prevent Gun Violence similarly sidestepped taking a position on New York City's law. Instead, it urged the justices to avoid "adopting a standard that would preclude sensible regulation and save lives."
A specter is haunting the Supreme Court — disrespect for the Second Amendment. Perhaps you haven’t realized that the Supreme Court’s disinclination to expand on its landmark 2008 decision creating an individual right to gun ownership means that the justices are treating the Second Amendment as a “second-class right.” A “watered-down right.” A “disfavored right.”

If you are unaware of these outlandish claims, then you haven’t tuned into the rising chorus of judicial voices demanding more from the Supreme Court than gun fanciers already won in that intensely disputed 5-to-4 decision a decade ago, District of Columbia v. Heller.

Why is this happening, and why now? To understand why the “second-class right” meme is suddenly penetrating the judicial conversation, we have to begin with Justice Clarence Thomas. He is not the first member of the current Supreme Court to use the phrase; Justice Samuel Alito Jr. used it in his 2010 opinion that extended the analysis of the Heller decision, which had applied only to Washington, D.C., as a federal enclave, to the states. The court was being asked, Justice Alito wrote in McDonald v. City of Chicago, “to treat the right recognized in Heller as a second-class right,” which he said the court would not do.

But it is Justice Thomas who has taken up the phrase as a weapon, using it in a series of opinions over the past four years to accuse his colleagues of failing in their duty to keep pushing back against limitations on gun ownership and use. The opinions were all dissents from the court’s decisions not to hear particular gun-rights appeals.

In 2015, for example, he wrote that the United States Court of Appeals for the Seventh Circuit had been wrong to uphold an Illinois city’s ban on assault weapons, and that by refusing to hear the appeal, his colleagues had failed to “prevent the Seventh Circuit from relegating the Second Circuit from relegating the Second Amendment to a second-class right.”

Last year, objecting to the court’s decision not to hear a challenge to California’s 10-day waiting period for gun purchases, Justice Thomas mused that “I suspect that four members of this court would vote to review a 10-day waiting period for abortions.” He declared, “The right to keep and bear arms is apparently this court’s constitutional orphan.”

In another opinion, this time joined by Justice Neil Gorsuch, Justice Thomas said it was
“indefensible” and “untenable” for the Court of Appeals for the Ninth Circuit to have upheld California’s ban on carrying concealed weapons. By turning down the appeal, he wrote, the justices were enabling “the treatment of the Second Amendment as a disfavored right.” And in a remarkable concluding paragraph to his eight-page opinion, he added:

“For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a state denies its citizens that right, particularly when their very lives may depend on it.”

By calling attention to Justice Thomas’s Second Amendment crusade, I want to make four points.

First, he’s simply wrong. The court decided Heller to vindicate what the majority described as a “core” Second Amendment right — the right of an individual to keep a handgun at home for self-defense. That’s all. Whatever else the Second Amendment enables people to do with their guns was left open. As Justice Antonin Scalia observed in his majority opinion, “It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”

Maybe Justice Scalia included that and a few other disclaimers in order to stay within the comfort zone of a member of his narrowest of majorities, probably Justice Anthony M. Kennedy. Or maybe he was just kicking the can down the road. In any event, it’s certainly not the case that justices who decline to overturn a 10-day waiting period can be accurately labeled hypocrites who are content to hide in their marble palace while leaving the populace unprotected.

Nor is the Second Amendment absolutism that Justice Thomas is calling for reflected in the way the Supreme Court interprets most other constitutional guarantees. Judge Bruce Selya of the Court of Appeals for the First Circuit made this point in a majority opinion in November rejecting a challenge to a provision of the Massachusetts gun licensing statute. “Even though the Second Amendment right is fundamental,” Judge Selya, an appointee of President Ronald Reagan, wrote in his opinion for a unanimous panel, “the plaintiffs have offered us no valid reason to treat it more deferentially than other important constitutional rights.” That decision, Gould v. Morgan, will shortly be appealed to the Supreme Court.

My second point is to underscore the role Justice Thomas plays in creating this rhetorical tidal wave. He is a Federalist Society icon and a hero to many young conservative lawyers, including the 10 former Thomas law clerks whom President Trump has already appointed to federal judgeships. (A dozen other former Thomas clerks hold important nonjudicial positions in the administration.) They and their colleagues among the new Trump judges, many of whom clerked for other conservative justices, are the ones who are making the “second-class right” mantra a standard
feature of any Second Amendment dissent — in other words, not only that a particular majority opinion is incorrect, but that it is part of a dangerous trend that the Supreme Court, by implication if not explicitly, needs to address right now.

For example, the full 15-member Court of Appeals for the Fifth Circuit recently refused to reconsider a decision by a three-judge panel to uphold the longstanding federal ban on interstate sales of handguns. Dissenting from that refusal, Judge James C. Ho, a former Thomas clerk who joined the Fifth Circuit last year, cited Justice Thomas’s opinions in observing, “Yet the Second Amendment continues to be treated as a ‘second-class’ right.”

His dissent included a subtle dig at Chief Justice John Roberts, who notably has not joined Justice Thomas’s Second Amendment choir. The government rationale for the ban on interstate handgun sales is that while federally licensed firearm dealers can be expected to know the laws of their own state, they may not be familiar with laws of other states and so may not know whether an out-of-state purchaser is legally entitled to own a gun.

That is not sufficient justification for the ban, Judge Ho wrote; if dealers could learn their own state’s laws, they could learn other states’ laws as well. “Put simply, the way to require compliance with state handgun laws is to require compliance with state handgun laws,” he wrote in a riff on the chief justice’s much-discussed line in a 2007 school integration case: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Judge Ho’s Fifth Circuit colleague Don R. Willett, another new member of the court, observed in his own dissenting opinion in the same case, “The Second Amendment is neither second class, nor second rate, nor second tier.” An appeal in that case, Mance v. Whitaker, is now pending at the Supreme Court, and the justices will decide this month or next whether to accept it.

Another new judge, Stephanos Bibas, dissented last month from a decision by a panel of the Court of Appeals for the Third Circuit that upheld a New Jersey law limiting a firearm magazine to 10 rounds of ammunition. He said the state had failed to provide sufficient evidence that “specifically links large magazines to mass-shooting deaths.” Acknowledging that five other federal circuit courts have also upheld limits on magazine sizes, Judge Bibas observed that while judges were understandably concerned about gun violence, “they err in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof.”

“The Second Amendment is an equal part of the Bill of Rights,” Judge Bibas wrote. “We may not water it down and balance it away based on our own sense of wise policy.” That case is likely to be appealed to the Supreme Court. The New Jersey affiliate of the National Rifle Association, which brought the case, is first seeking review by the full Third Circuit.
The 49-year-old Judge Bibas, a former law professor, won plaudits for his dissenting opinion. “It is easy to see why President Trump chose to appoint him,” said an article on the website ammoland.com that appeared under the headline: “Third Circuit: Second Amendment Is a Second Rate Right.” John O. McGinnis, a well-known conservative professor at Northwestern University Law School, writing on the Law and Liberty website, called Judge Bibas’s dissent “the judicial equivalent of a perfect game, a first-round knockout, or a checkmate within 10 moves.” He added, “It will not be the last opinion of the Trump appellate judges that will shake the judiciary from its dogmatic slumber.”

My third point is this: Professor McGinniss may well be right, at least when it comes to the Second Amendment. The substitution of Brett Kavanaugh for Justice Kennedy may do the trick. On his former court, the Court of Appeals for the District of Columbia Circuit, Justice Kavanaugh took an aggressive gun-rights position, dissenting in 2011 from a decision that upheld the district’s ban on certain assault rifles.

Calling the majority’s analytical approach to the case “especially inappropriate,” then-Judge Kavanaugh wrote: “A ban on a class of arms is not an ‘incidental’ regulation. It is equivalent to a ban on a category of speech.” As a matter of constitutional doctrine, I understand his argument: that a right deemed by the Supreme Court to be fundamental, whether under the First Amendment or the Second, is entitled to the highest level of judicial protection. Nonetheless, to analogize possession of assault rifles to the right to free speech is a provocative move.

The two conservative judges who made up the majority on the three-judge panel, Douglas Ginsburg and Karen LeCraft Henderson, were sufficiently provoked by Judge Kavanaugh’s 52-page dissent that they added to their own opinion an unusual six-page “appendix” for the specific purpose of contesting his arguments. “The dissent mischaracterizes the question before us,” Judge Ginsburg wrote for himself and Judge Henderson. “We simply do not read Heller as foreclosing every ban on every possible subclass of handguns or, for that matter, a ban on a subclass of rifles.”

Justice Thomas himself has cited Judge Kavanaugh’s dissenting opinion favorably. It would hardly be surprising for Justice Kavanaugh to return the favor and join the crusade.

And that brings me to my final point. The Supreme Court’s appetite for expanding the Second Amendment, if such an appetite develops, will be wildly out of sync with the mood of the country. As The Times reported last month, based on data compiled by a gun-control advocacy group, public support for gun-control measures is surging. State legislatures passed 69 gun-control measures in 2018, more than three times the number in the previous year. More than half the states enacted at least one, while 90 percent of bills the National Rifle Association backed at the state level were defeated.

Even the Trump administration has caught the trend, with its announcement last month
of a ban on bump stocks, the cheap attachments that turn ordinary rifles into something close to machine guns and that the Las Vegas killer used to commit mass murder a year ago. The ban, to take effect in March, has already drawn at least two lawsuits. Perhaps these lawsuits will be a step too far even for the Second Amendment newbies on the federal bench. Or maybe not. Does it matter if the public and the Supreme Court are running in opposite directions? It’s good news to anyone who would like to accelerate the collapse of public confidence in the one organ of government that at the moment seems to stand between us and disaster. For the rest of us, it’s one more thing to worry about as the new year begins.
“Trump says NRA is ‘under siege by Cuomo’ after New York AG opens investigation into gun group”

CNBC
Tucker Higgins
April 29, 2019

President Donald Trump said Monday the National Rifle Association is “under siege by Cuomo,” days after New York’s attorney general opened an inquiry into the gun rights lobbying organization.

The president also chided the group for a leadership fight that has played out in public in recent days, saying the NRA “must get its act together quickly, stop the internal fighting, & get back to GREATNESS - FAST!”

The president’s comments follow the news that New York Attorney General Letitia James opened an investigation into the group, including ordering the preservation of internal documents. James said during her campaign that she intended to look into the New York-chartered group’s nonprofit status.

“The NRA should leave and fight from the outside of this very difficult to deal with (unfair) State!” the president wrote in a subsequent tweet.

The chaos gripping the NRA spilled into public view last week in the midst of its annual convention in Indiana, where both Trump and Vice President Mike Pence delivered remarks.

Shortly after Trump spoke to the group, The Wall Street Journal reported that the NRA’s longtime leader, Wayne LaPierre, had informed the board that he was being extorted and pressured to resign by retired Lt. Col. Oliver North, another top NRA official.

LaPierre wrote in a letter to the organization’s board that North was threatening to make public “destructive” embarrassing information about him and the NRA’s financial dealings.

On Saturday, North announced that he will not serve a second term as the group’s president. The Iran-Contra figure wrote in a letter to NRA members on Saturday that the organization faced a “clear crisis” and that, if the allegations about financial mismanagement were true, “the NRA’s nonprofit status is threatened.”

James’ office has gone after the president’s own nonprofit, the Donald J. Trump Foundation. The foundation agreed to dissolve under judicial supervision last year after state’s previous attorney general, Barbara Underwood, accused it of “a shocking pattern of illegality,” and said her office would pursue further investigations.
In a March filing, James wrote that the foundation broke “some of the most basic laws” related to private foundations. Her office is seeking nearly $3 million in restitution from the foundation.

Trump foundation attorneys have denied the allegations and accused officials in the heavily Democratic state of having political motivations.

New York Gov. Andrew Cuomo, a Democrat, recently opened up his formidable financial support network to Democratic presidential contender Joe Biden, the former vice president, who is the early front runner in the primary race that will determine which candidate faces off against Trump in 2020.

In a statement, Cuomo fired back against the president’s tweet.

“Unlike you, President Trump, New York is not afraid to stand up to the NRA. I will continue to fight for the children of this state. As for the NRA, we’ll remember them in our thoughts and prayers,” he said.

And James’s office said in a statement that “we will follow the facts wherever they may lead.”

“We wish the President would share our respect for the law,” the statement said.
“New York City law survives gun rights group’s legal challenge”

 Reuters

 Jonathan Stempel

 February 23, 2018

A federal appeals court on Friday rejected a gun rights group’s constitutional challenge to strict New York City limits on how licensed handgun owners may use their weapons outside the home.

By a 3-0 vote, the 2nd U.S. Circuit Court of Appeals in Manhattan said the restrictions on people who have licenses to have guns at home, known as “premises” licenses, did not violate the Second Amendment.

Backed by the National Rifle Association, three gun owners and the New York State Rifle & Pistol Association had sought permission for holders of premises licenses to take guns to shooting ranges outside New York City, or other homes in New York state.

Though license holders could take unloaded guns to seven ranges within the city, the plaintiffs said the city’s restrictions amounted to a “near-complete ban” on gun transport.

Premises licenses are different from “carry” licenses, which give holders broader freedom to take guns outside the home.

Writing for the appeals court, Circuit Judge Gerard Lynch said the restrictions advanced the city’s “substantial, indeed compelling” interests in protecting public safety and preventing crime, by regulating firearms possession in public.

Lynch said that was enough to “easily justify the insignificant and indirect costs” imposed on gun owners’ rights, despite a 2008 U.S. Supreme Court decision that the Second Amendment protects an individual right to own guns.

The appeals court also rejected claims that the city impeded interstate commerce, and violated the plaintiffs’ right to travel and First Amendment right to “expressive association.”

Neither the Rifle & Pistol Association nor its lawyer immediately responded to requests for comment.

“We are pleased the court upheld this important rule,” said Nick Paolucci, a spokesman for the city’s law department. “Limiting public transport of handguns licensed for home possession makes us all safer.”

The decision was issued 1-1/2 years after oral arguments.

It upheld a February 2015 ruling by U.S. District Judge Robert Sweet in Manhattan.
Sweet wrote that there were at the time more than 40,000 active handgun licenses in the city.

Espinoza v. Montana Department of Revenue


Overview: The Montana Supreme Court struck down a Montana law that created tax credits to provide scholarships for families who sent their children to private schools, including religious ones. The Court claimed that this violated the Constitution because it favored religious institutions. This petition was filed by three low-income mothers who used the scholarships to send their children to a Christian school.

Issue: Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Kendra ESPINOZA, Jeri Ellen Anderson, and Jaime Schaefer, Plaintiffs-Appellees

v.

MONTANA DEPARTMENT OF REVENUE, and Mike Kadas, in his official capacity as Director of the Montana Department of Revenue, Defendants-Appellants

Supreme Court of the State of Montana

Decided on December 12, 2018

[Excerpt; some citations and footnotes omitted]

MCKINNON, Montana Supreme Court Justice:

The Montana Department of Revenue (the Department) appeals from an order of the Eleventh Judicial District Court, Flathead County, granting Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer (collectively, Plaintiffs) summary judgment. The Department is responsible for administering § 15-30-3111, MCA (the Tax Credit Program), which provides a taxpayer a dollar-for-dollar tax credit based on the taxpayer’s donation to a Student Scholarship Organization (SSO). SSOs fund tuition scholarships for students who attend private schools meeting the definition of Qualified Education Provider (QEP). The Legislature instructed the Department to implement the Tax Credit Program in compliance with Article V, Section 11(5), and Article X, Section 6, of the Montana Constitution. Pursuant to that grant of authority, the Department implemented Admin. R. M. 42.4.802 (Rule 1), which it believed was necessary to constitutionally administer the Tax Credit Program. Rule 1 adds to the Legislature’s definition of QEP and excludes
religiously-affiliated private schools from qualifying as QEPs.

Plaintiffs are parents whose children attend a religiously-affiliated private school. Because Rule 1 precludes religiously-affiliated private schools from the definition of QEP, SSOs cannot fund tuition scholarships at the school Plaintiffs’ children attend. Plaintiffs filed this proceeding challenging Rule 1. The Department responded, arguing Rule 1 was necessary because the Tax Credit Program as enacted by the Legislature violates Montana’s Constitution. The District Court determined the Tax Credit Program was constitutional without Rule 1 and accordingly granted Plaintiffs summary judgment. The Department now appeals, arguing that the Tax Credit Program is unconstitutional absent Rule 1. We address the following issue on appeal:

Does the Tax Credit Program violate Article X, Section 6, of the Montana Constitution?

We conclude the Tax Credit Program violates Article X, Section 6, of the Montana Constitution and accordingly reverse the District Court’s order granting Plaintiffs summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2015, the Legislature, through Senate Bill 410, enacted Title 15, chapter 30, part 31, MCA, entitled “Tax Credit for Qualified Education Contributions.” Part 31 provides two types of dollar-for-dollar tax credits to taxpayers who donate to educational programs in Montana. A taxpayer may receive a tax credit for providing supplemental funding to public schools, § 15-30-3110, MCA, or for donating to the Tax Credit Program, § 15-30-3111, MCA. The only tax credit at issue in these proceedings is the credit a taxpayer receives based on her donation to the Tax Credit Program, § 15-30-3111, MCA. The Tax Credit Program provides a taxpayer a dollar-for-dollar tax credit of up to $150 based on her donation to an SSO.

An SSO is a charitable organization in Montana that is (1) “exempt from federal income taxation under [I.R.C. § 501(c)(3)]”; (2) “allocates not less than 90% of its annual revenue for scholarships to allow students to enroll with any [QEP]”; and (3) “provides educational scholarships to eligible students without limiting student access to only one education provider.” The purpose of SSOs “is to provide parental and student choice in education with private contributions through tax replacement programs.”

Taxpayer donors donate to SSOs generally; they “may not direct or designate contributions to a parent, legal guardian, or specific [QEP].” SSOs then use those donations to fund student tuition scholarships at private schools meeting the definition of QEP in § 15-30-3102(7), MCA. SSOs are responsible for maintaining “an application process under which scholarship applications are accepted, reviewed, approved, and denied.” Section 15-30-3103(1)(h), MCA. After an SSO decides to grant a student a tuition scholarship, the SSO pays the
scholarship directly to the scholarship recipient’s QEP. Section 15-30-3104(1), MCA. The Legislature defined QEP as “an education provider that”:

(a) is not a public school;

(b) (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or (ii) is a nonaccredited provider or tutor and has informed the child’s parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;

(c) is not a home school as referred to in 20-5-102(2)(e);

(d) administers a nationally recognized standardized assessment test or criterion-referenced test and:

(i) makes the results available to the child’s parents or legal guardian;

(ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;

(e) satisfies the health and safety requirements prescribed by law for private schools in this state; and

(f) qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

Essentially, the Legislature’s definition of QEP means “a private school.”

The Department is responsible for implementing and administering Part 31. The Department must perform extensive administrative tasks to ensure Part 31 functions appropriately. Sections 15-30-3103, -3105, -3111 to -3113, MCA. The Legislature explicitly granted the Department rulemaking authority to “adopt rules, prepare forms, and maintain records that are necessary to implement and administer [Part 31].” The Legislature also instructed the Department to administer Part 31 in compliance with Article V, Section 11(5), and Article X, Section 6, of the Montana Constitution.

Beginning in fiscal year 2016, to accomplish these statutorily-mandated responsibilities, the Department required additional resources and personnel. Senate Bill 410’s Fiscal Note [hereinafter Fiscal Note] estimated one-time costs to the Department of $420,325 to develop new forms and add data processing systems. Further, the Department required two additional full-time employees: one to process and verify credit applications and annual reports from SSOs and another to verify and audit the new tax credits.

Tasked with constitutionally implementing Part 31, the Department identified what it saw as a constitutional deficiency: the Tax Credit Program aided sectarian schools in
violation of Article X, Section 6, of Montana’s Constitution. Under the Legislature’s definition of QEP, most QEPs were religiously-affiliated private schools. The Department examined how the Tax Credit Program operated and determined it unconstitutionally aided those religiously-affiliated QEPs. To combat the issue, and pursuant to the rulemaking authority granted by the Legislature, §§ 15-30-3101, -3114, MCA, the Department adopted Rule 1.

Rule 1 added to the Legislature’s definition of QEP, § 15-30-3102(7), MCA, providing:

(1) A “qualified education provider” has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:

(a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or

(b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.

(2) For the purposes of (1), “controlled in whole or in part by a church, religious sect, or denomination” includes accreditation by a faith-based organization.

Simply put, Rule 1 excluded religiously-affiliated private schools from the Legislature’s definition of QEP, § 15-30-3102(7), MCA.

Plaintiffs are parents whose children attend a religiously-affiliated private school in Montana. The school qualifies as a QEP under the Legislature’s definition, § 15-30-3102(7), MCA, but does not qualify as a QEP under the Department’s definition, Rule 1. Plaintiffs challenged Rule 1 in District Court, arguing it violated the free exercise clauses of the Montana and U.S. Constitution.2 Plaintiffs further reasoned that Rule 1 was unnecessary because the Tax Credit Program and the Legislature’s definition of QEP were constitutional. The Department responded, arguing that the Tax Credit Program is unconstitutional and reasoning that Rule 1 necessarily restricted the Tax Credit Program which, absent Rule 1, aided sectarian schools. Both sides filed cross-motions for summary judgment.

The District Court narrowly focused its analysis on the tax credits themselves, noting the credits did not “involve the expenditure of money that the state has in its treasury.” Instead, it determined the tax credits “concern[ed] money that is not in the treasury and not subject to expenditure.” For that reason alone, the District Court concluded the Department incorrectly interpreted Article V, Section 11(5), and Article X, Section 6(1), of the Montana Constitution. Because it decided
the Tax Credit Program was constitutional as enacted by the 2015 Legislature, the District Court did not further address Rule 1’s constitutionality. The District Court granted Plaintiffs’ motion for summary judgment, denied the Department’s motion for summary judgment, and permanently enjoined the Department from applying or enforcing Rule 1. The Tax Credit Program remained as enacted by the 2015 Legislature. The Department now appeals the District Court’s decision.

STANDARD OF REVIEW

This Court exercises plenary review over constitutional law questions. A statute is presumed constitutional unless it “conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.” The party challenging the constitutionality of the statute bears the burden of proof. If any doubt exists, it must be resolved in favor of the statute.

Whether an administrative rule impermissibly conflicts with a statute is a question of law to be decided by the court. We review a district court’s conclusions of law to determine if they are correct.

DISCUSSION

The First Amendment’s Religion Clauses—the Establishment Clause and the Free Exercise Clause—are “frequently in tension.” Yet, “there is room for play in the joints” between them. A state’s constitutional prohibition against aid to sectarian schools may be broader and stronger than the First Amendment’s prohibition against the establishment of religion. Where a state’s constitution “draws a more stringent line than that drawn by the United States Constitution,” the “room for play” between the Establishment and Free Exercise Clauses narrows. The Montana Constitution broadly and strongly prohibits state aid to sectarian schools, leaving a very limited amount of “room for play.” See Mont. Const. art. X, § 6 (hereinafter, Article X, Section 6).

Our analysis, therefore, considers Article X, Section 6, within a narrower “room for play” between the federal Religion Clauses and, consequently, we do not address federal precedent. We conclude that Montana’s Constitution more broadly prohibits “any” state aid to sectarian schools and draws a “more stringent line than that drawn” by its federal counterpart. Therefore, the sole issue in this case is whether the Tax Credit Program runs afoul of Montana’s specific sectarian education no-aid provision, Article X, Section 6. For the following reasons, we conclude the Tax Credit Program aids sectarian schools in violation of Article X, Section 6.

I. Article X, Section 6, broadly and strictly prohibits aid to sectarian schools.

Article X, Section 6, of the Montana Constitution, entitled “Aid prohibited to sectarian schools,” provides:

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church,
school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

The Constitutional Convention Delegates’ intent controls our interpretation of a constitutional provision. We primarily discern the Delegates’ intent “from the plain meaning of the language used.” However, we define the Delegates’ intent “not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the [Delegates] drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.” Accordingly, we “determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language is vague or ambiguous or 12 extrinsic aids clearly manifest an intent not apparent from the express language.”

In determining what the Delegates intended Article X, Section 6, to mean, we first observe that the plain language of the provision’s title is expansive and forceful: “Aid prohibited to sectarian schools.” The title clearly manifests the Delegates’ intent to broadly prohibit aid to sectarian schools. The provision’s text is equally expansive, prohibiting numerous types of state actors, including the “legislature, counties, cities, towns, school districts, and public corporations” from making “any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination.”

The provision’s plain language begs three main inquiries, each of which cast a broad net clearly intended to prohibit “any” type of state aid being used to benefit sectarian education. First, the provision’s plain language identifies the entity that is prohibited from providing the aid: Article X, Section 6, prohibits the “legislature, counties, cities, towns, school districts, and public corporations” from aiding sectarian schools. Second, the provision’s plain language identifies the type of aid it prohibits: Article X, Section 6, broadly prohibits any type of direct or indirect aid to sectarian schools—“any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property.” Third, the provision’s plain language specifies that the aid is prohibited “for any sectarian purpose or to aid any church, school, academy, seminary, college, 13 university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”

The Delegates adapted Article X, Section 6, of the Montana Constitution from the 1889 Constitution’s broad and general no-aid provision, recognizing that it was already “among the most stringent [no-aid clauses] in the nation.” Montana Constitutional

The Delegates’ strong commitment to maintaining public education and ensuring that public education remained free from religious entanglement is evident from the Constitutional Convention Transcripts; the Delegates wanted the public school system to receive “unequivocal support.” Delegate Burkhardt noted, “Under federal and state mandates to concentrate public funds in public schools, our educational system has grown strong in an atmosphere free from divisiveness and fragmentation.” He further emphasized, “Any diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes.” (emphasis added).

A minority of Delegates sought to delete the language prohibiting indirect aid from Article X, Section 6. Those Delegates wanted to ensure private school students could receive federal aid under the United States Supreme Court’s child-benefit theory, which allows federal aid as long as it directly supports the child and not the religious school. Delegate Blaylock, however, expressed concern that deleting the indirect language would make it “fairly easy to appropriate a number of funds . . . to some other group and then say this will be done indirectly.” The Delegates ultimately maintained the indirect language and instead added a separate subsection specifically addressing federal aid: “[Article X, Section 6] shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.” Notably, the Delegates understood that Montana could prohibit forms of state aid that were otherwise permissible as federal aid. Our conclusion that Article X, Section 6, more broadly prohibits aid to sectarian schools than the federal Establishment Clause is consistent with the Delegates’ intent of the provision.

It is also worth observing that Montana’s no-aid provision is unique from other states’ no-aid provisions. Article X, Section 6’s prohibition of “any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church” make it a broader and stronger prohibition against aid to sectarian 15 schools than other states. Even other states whose no-aid provisions also contain “indirect” language only prohibit aid in the form of the direct or indirect taking of money from the public treasury. Such language is distinct from and less stringent than Montana’s prohibition on any type of aid, whether it be a “direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property.”

As a Court, we have not yet interpreted Article X, Section 6. However, the 1972 Constitutional Convention Delegates intended Article X, Section 6, to retain the meaning of Article XI, Section 8, of the Montana Constitution of 1889. Accordingly, this Court’s pre-1972 precedent analyzing Article XI, Section 8, of the Montana
Constitution of 1889 remains helpful to our analysis of Article X, Section 6. In *State ex rel. Chambers v. School Dist. No. 10*, the Court considered whether a tax levy intended to fund general teaching positions at a religiously-affiliated private school violated Article XI, Section 8, of the Montana Constitution of 1889. The Court observed that the tax levy permitted a religiously-affiliated school to unconstitutionally obtain teachers at public expense. Even though the teachers would have taught general, secular subjects, the Court noted that the funding nonetheless aided sectarian schools, as there was no way to determine “where the secular purpose ended and the sectarian began.” Accordingly, the Court determined Article XI, Section 8, of the Montana Constitution of 1889 prohibited “a public school board from making a levy for, or expending funds for the employment of teachers to teach in a parochial school.”

The plain language of Article X, Section 6, and the Constitutional Convention Transcripts demonstrating the Delegates’ clear objective to firmly prohibit aid to sectarian schools lead us to the conclusion that the Delegates intended Article X, Section 6, to broadly and strictly prohibit aid to sectarian schools.

**II. The Tax Credit Program aids sectarian schools in violation of Article X, Section 6, of the Montana Constitution.**

Plaintiffs initially filed this action challenging Rule 1. The District Court focused its analysis on the underlying Tax Credit Program, determining the program itself was constitutional. Therefore, the District Court easily dispelled of Rule 1 after concluding it was based on a mistake of law. On appeal, the Department argues that the Tax Credit Program is unconstitutional and, accordingly, Rule 1 is necessary for the Department to constitutionally administer the program. To properly evaluate the propriety of Rule 1, we must first address the Department’s contention that the Tax Credit Program is unconstitutional. It is clear the Department’s contention is a facial challenge to the Tax Credit Program, as it asserts the Tax Credit Program unconstitutionally aids sectarian schools and promulgated Rule 1 to cure the constitutional defect. Under *United States v. Salerno*, a party bringing a facial challenge must “establish that no set of circumstances exists under which the [statute] would be valid”—that is, that the law is unconstitutional in all of its applications.

To analyze the Tax Credit Program under Article X, Section 6, first, we identify the entity providing the aid; second, we identify the type of aid; and third, we consider whether the entity provided the aid “for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church . . .” We ultimately conclude the Tax Credit Program aids sectarian schools in violation of Article X, Section 6, and that it is unconstitutional in all of its applications.

**a. The Legislature aided sectarian schools when it enacted the Tax Credit Program.**

Article X, Section 6, directly prohibits various entities, including the Legislature,
from aiding sectarian schools. Preliminarily, we recognize that an individual taxpayer may give money to any cause she wishes. A taxpayer is free to donate to an SSO, a QEP, or any other charitable cause of her choice. There is no prohibition on a taxpayer giving her money away, nor would such prohibition be constitutional.

In this case, the action under scrutiny is the Legislature’s provision of a tax credit to taxpayer donors. The Legislature, by enacting the Tax Credit Program, involved itself in donations to religiously-affiliated private schools. The Tax Credit Program provides a dollar-for-dollar incentive of up to $150 for taxpayer donations to SSOs. The tax credit encourages the transfer of money from a taxpayer donor to a sectarian school because the taxpayer donor knows she will be reimbursed, dollar-for-dollar, for her donation to an SSO. SSOs, in turn, directly fund tuition scholarships at religiously-affiliated QEPs. The Legislature, by enacting a statute that provides a dollar-for-dollar credit against taxes owed to the state, is the entity providing aid to sectarian schools via tax credits in violation of Article X, Section 6.

b. The Tax Credit Program permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools.

Article X, Section 6, broadly prohibits any type of direct or indirect aid: the Legislature may not make “any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property.” The Tax Credit Program permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools. Parents owe a certain amount of tuition to the QEP their child attends. If a child receives a tuition scholarship from an SSO, the scholarship decreases the amount of tuition that child’s parents owe to the QEP. Many of the taxpayer donors who would donate to SSOs would be parents of children who attend QEPs. When parents donate to an SSO, they receive a dollar-for-dollar tax credit of up to $150. If the parents’ child also receives a tuition scholarship from an SSO in the amount of, for example, $150, the parents’ tuition obligation to the QEP decreases by $150—the exact amount the parents received as a tax credit for their donation to an SSO. The parents donated $150 to an SSO, received a dollar-for-dollar reimbursement for that donation in the form of a tax credit, and subsequently owed $150 less in tuition to their child’s QEP. The Legislature indirectly payed $150 of that student’s tuition by permitting his or her parents to claim a tax credit instead of paying that amount of tuition to the QEP.

The Legislature attempted to sever the indirect payment by requiring taxpayer donors to donate to an SSO generally and prohibiting them from directing or designating contributions to specific parents, legal guardians, or QEPs. Therefore, parents cannot donate to an SSO, claim a tax credit for their donation, and then directly designate the funds they donated to their own child’s scholarship. However, an indirect payment still exists, as described above, when a student whose parents claimed the tax credit
receives a scholarship from an SSO. The simple fact that parents who donate to SSOs cannot directly designate the scholarship funds to their own child or to their child’s school does not defeat the fact that the Legislature indirectly pays tuition to the QEP. Senate Bill 410’s Fiscal Note recognized as much, stating that the donations to SSOs, the bases for the tax credits, “would primarily represent funds that would have been used to pay tuition directly . . . .” The Tax Credit Program permits the Legislature to indirectly pay tuition at QEPs by reimbursing parents for donating to SSOs, donations funded with money the parents would have otherwise used to pay their child’s tuition.

The Tax Credit Program permits the Legislature to subsidize tuition payments at religiously-affiliated private schools. A subsidy is a “grant, usu[ally] made by the government, to any enterprise whose promotion is considered to be in the public interest.” “Although governments sometimes make direct payments (such as cash grants), subsidies are usu[ally] indirect. They may take the form of . . . tax breaks . . . .” When the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school’s educational program. That type of government subsidy in aid of sectarian schools is precisely what the Delegates intended Article X, Section 6, to prohibit.

While $150 may seem like a small sum of money when compared to the State’s overall operating budget, the amount of aid is wholly insignificant to an Article X, Section 6, analysis. The Legislature violates Article X, Section 6’s prohibition on aid to sectarian schools when it provides any aid, no matter how small. Further, the $150 indirect payments certainly add up over time, especially as the aggregate limits on the tax credits increase from $3 million each year the limit is met. The Tax Credit Program creates an indirect payment: the program reduces “the net price of attending private school . . . for students who receive scholarships and whose families claim the credit.” Article X, Section 6, expressly prohibits that type of indirect payment to sectarian schools.

Importantly, for purposes of examining the facial constitutionality of the Tax Credit Program, the schools meeting the Legislature’s definition of QEP may be—and, in fact, the overwhelming majority are—religiously affiliated. There is simply no mechanism within the Tax Credit Program itself that operates to ensure that an indirect payment of $150 is not used to fund religious education in contravention of Article X, Section 6. The Department, in administering the Tax Credit Program pursuant to the Legislature’s definition of QEP, § 15-30-3102(7), MCA, has no ability to ensure that indirect payments are not made to religious schools. Or, as this Court has previously cautioned, there is no mechanism within the Tax Credit Program to identify “where the secular purpose end[s] and the sectarian beg[ins].” The Department cannot discern when the tax credit is indirectly paying tuition at a secular school and when the tax credit is indirectly paying tuition at a sectarian school. Because the Tax Credit
Program does not distinguish between an indirect payment to fund a secular education and an indirect payment to fund a sectarian education, it cannot, under any circumstance, be construed as consistent with Article X, Section 6.

c. The Legislature provided the tax credits to aid schools controlled in whole or in part by churches.

Article X, Section 6, prohibits aid used “for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination.” In Chambers, we explained that public funds could not be used to pay teachers’ salaries at a religiously-affiliated private school, even if those teachers provided standard, non-religious instruction. In support of that conclusion, we reasoned that the school was sectarian as a whole, and therefore there was no way to determine “where the secular purpose ended and the sectarian began.”

Under the Legislature’s definition of QEP, the majority of QEPs are private schools controlled by churches. SSOs pay scholarship funds directly to QEPs and the funds offset scholarship recipients’ general tuition obligations. General tuition payments fund the sectarian school as a whole and therefore may be used by the school to strengthen any aspect of religious education, including those areas heavily entrenched in religious doctrine. Religious education is a “rock on which the whole [church] rests, and to render tax aid to [a religious school] is indistinguishable . . . from rendering the same aid to the [c]hurch itself.” The Tax Credit Program aids schools controlled by churches, in violation of Article X, Section 6.

“The most effective way to establish any institution is to finance it.” The Legislature’s enactment of the Tax Credit Program is facially unconstitutional and violates Montana’s constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools. This basic notion of separation of church and state is a foundation of our Nation’s federal Constitution, but is more fiercely protected by Montanans through the broader prohibitions contained in Article X, Section 6. Although the Tax Credit Program provides a mechanism of attenuating the tax credit from the SSO’s tuition payment to a religiously-affiliated QEP, it does not comport with the constitutional prohibition on indirectly aiding sectarian schools. We conclude, following consideration of both the plain language of the provision and the Delegates’ intent as discerned from their discussion when drafting Montana’s 1972 Constitution, that such attenuation remains inconsistent with Article X, Section 6’s strict and broad prohibition on aid to sectarian schools. The Tax Credit Program constitutes the precise type of indirect payment the Delegates sought to prohibit in their formulation of Article X, Section 6. Based on the Legislature’s definition of QEP, the Department cannot constitutionally implement or administer the Tax Credit Program. Because Senate Bill 410 contained a severability clause,7 we conclude the Tax Credit Program, § 15-30-3111, MCA, must be severed from the remainder of Part 31, §§ 15-30-3101 to -3114, MCA.
Having concluded the Tax Credit Program violates Article X, Section 6, it is not necessary to consider federal precedent interpreting the First Amendment’s least-restrictive Establishment Clause. Conversely, however, an overly-broad analysis of Article X, Section 6, could implicate free exercise concerns. Although there may be a case where an indirect payment constitutes “aid” under Article X, Section 6, but where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases. We recognize we can only close the “room for play” between the joints of the Establishment and Free Exercise Clauses to a certain extent before our interpretation of one violates the other.

III. Rule 1 is unnecessary because the underlying Tax Credit Program is unconstitutional and, further, the Department exceeded its rulemaking authority when it enacted Rule 1.

The Department enacted Rule 1 in its efforts to constitutionally implement the Tax Credit Program, which we have now determined is unconstitutional. We severed the Tax Credit Program from the remainder of Part 31. As a result, Rule 1 is superfluous. However, we further note that, in enacting Rule 1, the Department exceeded the Legislature’s grant of rulemaking authority.

An agency’s authority to adopt rules is limited:

Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is:

(a) consistent and not in conflict with the statute; and

(b) reasonably necessary to effectuate the purpose of the statute.

Accordingly, the Department’s rules implementing Part 31 needed to be (1) consistent and not in conflict with Part 31 and (2) reasonably necessary to effectuate the purpose of Part 31.

Rule 1 is inconsistent with the Legislature’s definition of QEP. The Legislature broadly defined QEP to include all private schools in Montana, including religiously-affiliated schools. The Department’s Rule 1 significantly narrowed the scope of the schools qualifying as QEPs, excluding all schools controlled in whole or in party by any church. The Department’s limitation on the definition of QEP conflicts with the Legislature’s broad definition.

Although we recognize that the Legislature, by enacting § 15-30-3101, MCA, granted the Department broad authority to implement Part 31 consistent with Article X, Section 6, an agency may only adopt rules to “implement, interpret, make specific, or otherwise carry out the provisions of [a] statute.” An agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule. It is the
Legislature’s responsibility to craft statutes in compliance with Montana’s Constitution, which it failed to do here. Rule 1 is superfluous because the underlying Tax Credit Program is unconstitutional and, additionally, the Department exceeded the Legislature’s grant of rulemaking authority in enacting Rule 1.

**CONCLUSION**

We conclude the Tax Credit Program violates Article X, Section 6’s stringent prohibition on aid to sectarian schools. Because the Tax Credit Program is unconstitutional, Rule 1 is superfluous and, further, the Department exceeded the scope of its rulemaking authority when it enacted Rule 1. We accordingly reverse the District Court’s order granting Plaintiff's summary judgment and determine the Tax Credit Program, § 15-30-3111, MCA, must be severed from the remainder of Part 31, §§ 15-30-3101 to -3114, MCA.

GUSTAFSON, Justice, concurring:

I concur in the Majority’s Opinion and agree the Tax Credit Program violates our Constitution’s prohibition against providing aid to religious schools, and this constitutional deficiency cannot be cured via administrative rule. I write separately to discuss additional grounds upon which the Tax Credit Program creates an indirect payment under Article X, Section 6(1), of the Montana Constitution. Although this Court has decided this matter purely on State constitutional grounds, I also discuss how the Tax Credit Program violates the federal Establishment and Free Exercise Clauses.

*The Tax Credit for Qualified Education Contributions is an indirect payment under Article X, Section 6(1), of the Montana Constitution.*

Montana’s definition of “appropriation” is “well-established and quite limited,” referring only to the authority given to the Legislature to expend money from the state treasury. However, the plain language of Article X, Section 6(1), prohibits more than appropriations; as Justice Baker notes in her Dissent, it prohibits four actions, including indirect payments. In this case, the District Court ended its analysis prematurely by not considering whether the Tax Credit Program constitutes an “indirect payment.”

As to whether the money comes from a public fund, when determining whether the Tax Credit for Qualified Education Contributions (TCQEC) of Title 15, chapter 30, part 31, creates a “direct or indirect appropriation or payment,” it is necessary to understand that while the TCQEC deems the money provided to the SSO by a taxpayer to be a “donation,” it is not in fact a donation. To donate is to give property or money without receiving consideration for the transfer. Here, the taxpayer “donates” nothing, because for every dollar the taxpayer diverts to the SSO, the taxpayer receives one dollar in consideration from the State in the form of a lower tax bill. The taxpayer simply chooses, with the State’s blessing, to pay the money he or she otherwise owes to the State to an SSO. Since religious schools would be eligible to
receive tuition payments from these funds, this runs afoul of the purpose of Article X, Section 6 “to guard against the diversion of public resources to sectarian school purposes.”

For the “donor,” the difference between a dollar-for-dollar tax credit and a typical charitable tax deduction is remarkable. The former costs them absolutely nothing out of pocket. The dollar-for-dollar diversion distinguishes this program from other tax credit programs, such as the contributions to university or college foundations and endowment funds codified in § 15-30-2326, MCA, which offers taxpayers a tax credit equal to 10% of the amount of qualifying charitable contributions made. In such instances, the State incentivizes charitable giving; for example, under § 15-30-2326, MCA, for every $10 a taxpayer contributes, that taxpayer’s tax liability is decreased by $1. The taxpayer, however, still donates $9 out of his or her own pocket. Here, the taxpayer donates none of his or her own funds, but instead dictates where and how a portion of their tax liability is spent. Our first—and currently only—SSO acknowledges as much, urging taxpayers to make a donation “to direct a portion of your taxes to help a student thrive . . . .”

Justice Baker observes that under the TCQEC, “[n]o money originates, is deposited into, or is expended from the state treasury or any public fund.” And since the money is never deposited into and then expended from a public fund, it is not an appropriation. However, the only reason the money is not deposited into and then expended from a public fund is because the TCQEC diverts it before it reaches the public treasury. The Legislature recognized this diversion within SB410, the bill that created the TCQEC, when it set aside $3 million from the State’s budget to cover the revenue shortfall the Tax Credit Program created.3 Justice Baker likewise acknowledges the TCQEC diverts funds, although she would deem this “an indirect transfer of benefit to the student-selected school” but not find this to be an indirect payment. A “transfer of benefit” is simply an oblique way of saying “assignment.”4 Allowing a taxpayer to assign a portion of his or her tax liability by paying the money owed to the State to a third party is not a “donation” by the taxpayer.

The TCQEC was explicitly designed as a tax expenditure.5 Section 5-4-104(2), MCA, defines “tax expenditures” as “those revenue losses attributable to provisions of Montana tax laws that allow a special exclusion, exception, or deduction from gross income or that provide a special credit . . . . (d) credits allowed against Montana personal income tax or Montana corporate income tax.” Indisputably, the Tax Credit Program creates a “tax expenditure” under § 5-4-104(2), MCA. Moreover, many of the items enumerated under § 5-4-104(2), MCA, while not appropriations, are nonetheless expenditures.

Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become “indirect and vicarious ‘donors.’” “Both tax exemptions and tax deductibility are a form of subsidy . . . .” Deductible contributions are similar to cash
grants of the amount of a portion of the individual’s contributions.” Regan further held that, by denying a political lobbying organization tax-exempt status under § 501(c)(3), the U.S. Code was not denying the organization any independent benefit, but “Congress has merely refused to pay for the lobbying out of public moneys.” Texas Monthly, Bob Jones University, and Regan all recognize that deductions and exemptions function the same as an appropriation by allowing some taxpayers to pay lower taxes than they otherwise would. Although Justice Rice in his Dissent characterizes DOR’s argument on this point as “an utter misstatement of the fundamental right of private property ownership,” it is, in fact, consistent with the U.S. Supreme Court’s holdings. Likewise, Article X, Section 6(1), of the Montana Constitution recognizes that a tax expenditure may not be an appropriation per se but nonetheless may function in the same manner. Thus, Article X, Section 6(1), prohibits not only appropriations, but also payments.

By creating a diversionary scheme whereby money otherwise bound for the public treasury is diverted, the Legislature has created an indirect payment. Moreover, as noted above, the TCQEC does require “funding,” with the State setting aside $3 million to cover the anticipated revenue shortfall this statutory scheme is expected to cause in its first year—in addition to the substantial administrative costs described in the Majority Opinion.

The funds generated by the Tax Credit for Qualified Education Contributions aid schools controlled in whole or in part by a church, sect, or denomination.

Under the Tax Credit Program, no funds are delivered to students, but are paid directly to the schools. Section 15-30-3104(1), MCA, provides that the SSO delivers the scholarship funds “directly to the qualified education provider . . . .” Thus, while the scholarships aid the students in assisting them in covering the cost of tuition, they aid the schools in the form of direct monetary payments. The economic effect of these funds is that of aid given directly to the school.

In addition to the Montana cases cited by the Majority, federal precedent compels the conclusion that these funds aid religious schools. In Comm. for Public Educ. & Religious Liberty v. Nyquist, the U.S. Supreme Court found unconstitutional a statutory scheme which provided a grant to low-income parents who paid private school tuition. The Supreme Court rejected the argument that these grants did not constitute aid to a religious school since they went to the parents, holding, “By reimbursing parents for a portion of their tuition bill, . . . the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.” The Nyquist majority rejected the dissenters’ position that “government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions.” Here, by relieving parents of a portion of their tuition bill by directly paying part of the students’ tuition, the effect of the aid is to provide financial support to QEPs, including religious schools.
Later, in *Zobrest v. Catalina Foothills Sch. Dist.*, the U.S. Supreme Court upheld a deaf student’s right to the services of a sign-language interpreter funded by the local school district, and pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., even though he attended a Catholic high school. The Supreme Court reasoned that the funding of an individual’s interpreter “creates no financial incentive for students to undertake sectarian education.” In other words, the student would have received the services of a district-funded sign-language interpreter regardless of which school he attended, and providing the interpreter gave no aid to the religious school because it did not relieve it of any costs it otherwise would have borne to educate its students. The interpreter benefited the student and not the school. Here, however, the tuition payments aid the recipient schools because these funds directly cover the costs of educating the school’s students. They do not, as in *Zobrest*, provide a benefit only to the student and to which the student would have been entitled regardless of school attended.

Therefore, I agree with the majority that the Tax Credit Program unconstitutionally creates an indirect payment of public funds that aids religious schools.

Section 15-30-3111(1), MCA, provides in part that “[t]he donor may not direct or designate contributions to a parent, legal guardian, or specific qualified education provider.” Thus, a taxpayer who reduces his or her tax liability by up to $150 by sending those funds to the SSO has no control over which QEP receives the benefit of those funds. Those funds may go to pay the tuition of a student at a secular school or a religious school, but the taxpayer cannot choose which school—or which type of school—to support.

As explained above, I do not consider this diversion of funds to be a genuine “donation.” Nonetheless, taxpayers may wish to take advantage of the proffered tax credit, whether to support a school or schools providing instruction consistent with a particular religion, to support the secular school that is designated as a QEP, or because they believe their tax money is better spent supporting private schools in general. Nonetheless, a taxpayer who desires to donate to an SSO in exchange for a tax credit may find donating under the constraints of the TCQEC untenable as the SSO is free to use this money to aid a religious school which the taxpayer may prefer not to support financially.

As the Majority explains, “The Legislature attempted to sever the indirect payment by requiring taxpayer donors to donate to an SSO generally and prohibiting them from directing or designating contributions to specific parents, legal guardians, or QEPs.” However, in their attempt, the Legislature ran afoul of the Establishment and Free Exercise
Clauses by compelling taxpayers who seek the tax credit to relinquish the choice as to whether to support a religious school, and whether to support, or decline to support, a particular religion.

A. The Tax Credit Program violates the Establishment Clause because it prohibits the donating taxpayer from choosing whether the funds aid a religious school.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the “purpose” or “effect” of advancing or inhibiting religion. In Agostini v. Felton, the U.S. Supreme Court acknowledged its recent cases had undermined the assumptions upon which some of its earlier Establishment Clause cases had rested. It then took the opportunity to reiterate the principles it uses to evaluate Establishment Clause challenges: “[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion,” and “we continue to explore whether the aid has the ‘effect’ of advancing or inhibiting religion.” We apply those principles here.

In Nyquist, the U.S. Supreme Court concluded that a state-funded tuition reimbursement for nonpublic schools violated the Establishment Clause. The Supreme Court explained, “[I]f the grants are offered as an incentive . . . the Establishment Clause is violated . . . . Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.” The Supreme Court further held that, whether a parent received a cash reimbursement for tuition or was allowed to reduce his or her tax bill, “in both instances the money involved represents a charge made upon the state for the purpose of religious education.”

In Mueller, 463 U.S. at 390, 103 S. Ct. at 3064, the U.S. Supreme Court upheld a Minnesota tax scheme which allowed parents to deduct certain educational expenses from their state income tax. Some Minnesota taxpayers had challenged the law, arguing that it violated the Establishment Clause by providing financial assistance to religious schools. The Supreme Court, noting that in some instances it had struck down “arrangements resembling . . . forms of assistance,” while in other instances it upheld roughly similar arrangements, analyzed the constitutionality of Mueller by comparing its facts to Nyquist and the cases Nyquist relied upon to determine if the Minnesota statute violated the Establishment Clause. First, the Supreme Court concluded that a State’s decision to defray the educational expenses parents bear is a secular and understandable purpose, regardless of the nature of the school attended. The Mueller court found the universality of the tax deduction to be of considerable importance in upholding the Minnesota tax scheme. It held: In this respect, as well as others, this case is vitally different from the scheme struck down in Nyquist. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools. Because the Minnesota tax scheme was available to the parents of all students in any school, public or private, the Supreme Court found it
distinguishable from *Nyquist*, and thus constitutional. Here, the scholarships regulated by the TCQEC bear the purpose of defraying the cost of tuition. However, this aid is available only for the parents of students attending certain non-public schools—unlike in *Mueller*, where parents could claim the tax deduction regardless of whether their children attended public or private schools. The present case is more akin to *Nyquist* than *Mueller* in this regard.

In *Zelman*, the U.S. Supreme Court considered whether an Ohio program that provided tuition aid to families violated the Establishment Clause. In so doing, the Supreme Court found that its Establishment Clause jurisprudence drew “a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” Most pertinent to the present case, the Supreme Court explained that the amount of government aid channeled to religious institutions by aid recipients is irrelevant to the constitutionality of the scheme. The salient point is “whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.” Relying on *Mueller*, *Witters*, and *Zobrest*, *Zelman* held: “[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”

Here, the recipients of the “government aid” are not the parents and students; they are the taxpayers who donate to the SSO and in exchange obtain tax credits. Under §§ 15-30-3104(1), and -3111(1), MCA, these taxpayers get no choice; they are at the mercy of the SSO as to where their donations are spent. Thus, it cannot be said the donations are given “to religious schools wholly as a result of their own genuine and individual private choice.”

In *Ariz. Christian Sch. Tuition Org. v. Winn*, the U.S. Supreme Court concluded that Arizona taxpayers, as mere taxpayers, lacked standing to challenge a tax credit/tuition scheme roughly similar to the TCQEC. In that instance, the scholarship organization, similar to our SSO, was called a “school tuition organization,” or STO. There, the Supreme Court held that taxpayers had no standing to challenge the scheme because they were free to choose not to donate to an STO, and because they had no right to dictate how other citizens spent, or chose not to spend, their own pre-tax money. The Supreme Court explained that all Arizona taxpayers “remain free to pay their own tax bills, without contributing to an STO,” or may “contribute to an STO of their choice, either religious or secular.” Here, Montana taxpayers who wish to take advantage of the Tax Credit Program have no such choice, as § 15-30-3111(1), MCA, mandates that the donor cannot choose which school receives their contribution. Thus, since only one SSO exists in Montana, and its QEPs consist of
both religious and secular schools, the contributor cannot choose whether or not to support a religious school and still avail himself or herself of the tax credit.

Plaintiffs have litigated this matter in their role as parents of children attending Stillwater Christian School and not as taxpayers seeking a tax credit. The Tax Credit Program does not inhibit Plaintiffs’ choice as to whether their children attend a religious school, but it does inhibit the taxpayers’ right to exercise their own “genuine and individual private choice[s]” as to whether their donations fund a secular or religious education. On these grounds, I would hold the Tax Credit Program violates the Establishment Clause.

B. The Tax Credit Program violates the Free Exercise Clause because it compels taxpayers to acquiesce in the use of their donations to support religious schools in order to claim a tax credit.

In *Mitchell v. Helms*, the U.S. Supreme Court commented that it had, in numerous decisions, “prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.” Here, however, the TCQEC discriminates in its distribution of a tax credit for donations to SSOs because donors have no choice but to permit the SSO to designate a donation to a student attending a religious school.

In *Trinity Lutheran*, the U.S. Supreme Court found that a policy of the Department of Natural Resources of the State of Missouri, which barred religious institutions from participating in a playground resurfacing program, “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” Here, contributors who wish to claim an otherwise available tax credit for donating to an SSO cannot do so without being compelled to support a religious school. In *Trinity Lutheran*, the Supreme Court stated, “[T]he Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.” Here, § 15-30-3111(1), MCA, puts the taxpayer to a choice: He or she may participate in the Tax Credit Program, but only if he or she agrees to relinquish control of where that donation is spent, with the likely result that the SSO will give those funds to a religious school.

The Free Exercise Clause protects religious observers from unequal treatment. Denying a generally available benefit solely due to religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest “of the highest order.” Here, the Tax Credit Program would deny this benefit to taxpayers who wish to avail themselves of a tax credit for private-school scholarships but prefer not to support religious schools, or may prefer to support only a specific religion’s schools.

The U.S. Supreme Court has held that the exclusion of degrees in devotional theology from eligibility in a state scholarship program did not violate the Free Exercise Clause because the exclusion “does not require
students to choose between their religious beliefs and receiving a government benefit.” Here, however, taxpayers wishing to donate to a QEP and claim a tax credit for that donation are forced to choose between their religious beliefs and a government benefit because they cannot control whether the donation is used to fund a religious education.

Notwithstanding the additional analysis I offer here, I concur with and join in this Court’s Opinion.

SANDEFUR, Justice, concurring:

I concur in the ultimate result reached by the Court and much of its reasoning. However, I write separately to clearly state the reasons for my concurrence.

As a preliminary aside not at issue, I reject and condemn this Court’s continuing use of a reasonable doubt standard for reviewing the constitutionality of statutes. As it has many times before, the Court again begins an analysis of the constitutionality of a statute by stating as the standard of review that:

[a] statute is presumed constitutional unless it “conflicts with the constitution, in the judgment of this court, beyond a reasonable doubt.” The party challenging the constitutionality of the statute bears the burden of proof. If any doubt exists, it must be resolved in favor of the statute.

Certainly, legislative enactments are and should be presumed constitutional until clearly demonstrated otherwise upon legal analysis. However, reasonable doubt is inherently and exclusively a standard of factual proof. Nothing more. The question of whether a statute conflicts with a federal or state constitutional provision, whether facially or as applied to a certain factual scenario, is a pure question of law. Whether facially or as applied, a statute either conflicts with a constitutional provision as a matter of law or it does not. Without reference to “reasonable doubt” or “proof,” the proper standard for reviewing the constitutionality of statutes should be that statutes are presumed constitutional until clearly demonstrated to conflict with a constitutional provision, whether facially or as applied to a particular set of facts. The party challenging the constitutionality of a statute has the burden of demonstrating the asserted unconstitutionality by appropriate legal analysis.

Turning to the matters at issue, I concur that the dollar-for-dollar private school tax credit program embodied in §§ 15-30-3101 to 3114, MCA, is not a direct or indirect “appropriation” as referenced in Article V, Section 11(5), or Article X, Section 6, of the Montana Constitution. In context, the constitutional phrase “appropriation” from “any public fund or monies” narrowly connotes an expenditure or commitment of public money in hand. I further concur that the program does not effect a direct payment from “any public fund or monies” as referenced in Article X, Section 6.

I concur, however, that as applied to religiously-affiliated private schools, the private school tax credit program effects an
indirect payment of public monies for a sectarian purpose or to aid schools controlled in whole or in part by a church, religious sect, or religious denomination. Though it does not effect a direct or indirect “appropriation” or a direct payment, the program nonetheless diverts, on a dollar-for-dollar basis, funds otherwise earmarked and accrued to the public purse in the form of tax liability independently imposed by law. As applied to religiously-affiliated private schools, the undeniable purpose of the diversion is to further a sectarian purpose—the proliferation of the chosen religious beliefs and values of the participating parents—thereby further aiding private schools controlled in whole or in part by the affiliated church, religious sect, or religious denomination. As noted by the majority and previously by this Court, “[t]he most effective way to establish any institution is to finance it.” The private school tax program is a clever, even somewhat ingenious, attempt by the Legislature to have the State provide affirmative financial aid to help parents enroll their children in private schools, not coincidentally including religiously-affiliated private schools. The Legislature attempted to accomplish this manifest objective through the guise of a facially neutral statutory scheme that does not reference religion or religiously-affiliated schools and which directs an administrative agency to administer the scheme in a constitutional manner.

Plaintiffs assert, inter alia, that the program does not violate Article X, Section 6, of the Montana Constitution because the purpose and effect of the program is not to further a sectarian purpose or aid religiously-affiliated schools but, rather, merely to facilitate parental educational choice without regard for the choice made. They assert that any secondary benefit to religiously-affiliated schools is only incidental or de minimis. Despite the superficial appeal of this argument, closer examination quickly unveils the false distinction on which it is premised. Religiously-affiliated schools exist for the purpose of providing a quality general education, but with a specific emphasis on religious beliefs and values not taught in public schools. It is certainly conceivable that some parents, even though they do not subscribe to the affiliated religion, may nonetheless choose a religiously-affiliated school in pursuit of a quality general education perceived to be unavailable in public schools. However, the obvious and indisputable fact is that most, if not all, parents choose to send their children to a religiously-affiliated school for the specific purpose of educating their children with an emphasis on particular religious beliefs and values not taught in public schools. Providing children with particular religious instruction or emphasis incident to general education unquestionably aids and benefits the exercise and proliferation of those religious beliefs and values—the very raison d’être for religiously-affiliated schools. Tuition aids also help maintain enrollment in religiously-affiliated schools, thereby helping facilitate their continued existence and administration. However neutrally characterized, a law diverting money otherwise earmarked and accrued to the public purse to allow parents to choose religiously-affiliated schools is clearly tantamount to an indirect payment of government monies for a sectarian purpose.
and aids schools controlled in whole or in part by a particular church, religious sect, or religious denomination.

As an ancillary matter not necessary to the Court’s decision in light of its primary holding, I further concur with the majority that the Department of Revenue exceeded the scope of its administrative rulemaking authority in adopting Rule 1. Regardless of its general charge to the Department to administer the private school tax credit program in a constitutional manner, the Legislature has long provided that administrative agencies have no authority to promulgate rules conflicting with or otherwise limiting a clear and unequivocal statutory provision. The Legislature put the Department in a hopelessly untenable position—it enacted a facially neutral statutory scheme with obvious application, *inter alia*, to an unconstitutional purpose and effect, and then inconsistently charged the Department with the task of administering the scheme in a constitutional manner. The only way for the Department to carry out the Legislature’s mandate was to administer the program in a manner inconsistent with the manifest intent and express provision of the statute—by declaring the tax credit unavailable to help fund the cost of sending children to religiously-affiliated schools.

I further concur with the Court’s implicit holding, and Justice Gustafson’s express concurrence, that as applied to religiously-affiliated schools, the private school tax credit program not only violates Article X, Section 6, of the Montana Constitution, but also violates the Establishment Clause of the First Amendment to the United States Constitution. As applied to the states through the Fourteenth Amendment, the Establishment Clause clearly, broadly, and unequivocally prohibits state governments from “mak[ing]” any “law respecting an establishment of religion . . . .” As applied to religiously-affiliated schools, and for the same reasons that it violates Article X, Section 6, of the Montana Constitution, the private school tax credit program constitutes a state law “respecting an establishment of religion.” Whether viewed objectively or through the subjective view of the churches or religious denominations that provide and control religiously-affiliated schools, the provision of government tuition subsidies, aids, or incentives to facilitate enrollment in those schools is a substantial, if not essential, aid to the proliferation of the affiliated religions and the continued existence and administration of the schools.

Finally, I concur with the majority and Justice Gustafson’s concurrence, that as applied to the private school tax credit program as it applies to religiously-affiliated schools, Montana’s constitutional prohibition on the indirect payment of public monies for sectarian purposes or to aid schools controlled in whole or in part by a church, religious sect, or denomination does not violate the Free Exercise Clause of the First Amendment to the United States Constitution. As applied to state governments through the Fourteenth Amendment, the Free Exercise Clause does nothing more than clearly, broadly, and unequivocally prohibit state governments from “mak[ing]” any “law . . . prohibiting the free exercise” of religion.
Regardless of the increasingly value-driven hairsplitting and overstretching that unnecessarily complicates its modern jurisprudence, the Free Exercise Clause is nothing more than a protective shield against government interference in the free exercise of a citizen’s chosen religion or religious views. The Free Exercise Clause is not, nor did the Framers intend it to be, a sword or affirmative right to receive government aid—precisely the manifestly intended purpose and effect of the private school tax credit program as applied to religiously-affiliated schools. Though there may indeed be some room for “play” in reconciling the Establishment and Free Exercise Clauses, the bottom line is that the Free Exercise Clause only prohibits the government from interfering with the exercise of religious beliefs, practices, and, by extension, related activities and operations of religious and affiliated entities. As applied to the private school tax credit program, Montana’s constitutional ban on sectarian aid does not in any way interfere with or otherwise substantially burden the preexisting First Amendment right of parents to send their children to religiously-affiliated schools without government-imposed interference or impediment. Parents who wish to send their children to religiously-affiliated schools can and will continue to do so without government interference or impediment, just as they always have. As applied here, Article X, Section 6, of the Montana Constitution merely prohibits state and local governments from affirmatively promoting or facilitating the exercise of religious beliefs by diverting or foregoing government tax revenue for that purpose. The right to freely exercise religious beliefs without government interference or impediment cannot be reasonably stretched to require the state and its taxpayers to help pay for the exercise of that right through the diversion of otherwise earmarked and accrued government tax revenue.

Nor does Montana’s broad constitutional ban on sectarian aid unconstitutionally discriminate on the basis of religion. Article X, Section 6 may well have broader application that might be problematic in some other context. But, as specifically applied to the particular private school tax credit at issue and its application to religiously-affiliated schools, Article X, Section 6 does not discriminate against the exercise of religion any more than the First Amendment Establishment Clause already lawfully does, just as intended and expressly provided by the Framers of the United States Constitution.

Having greatly benefitted from eight years of attendance in a religiously-affiliated elementary and middle school, I certainly understand the value and import to parents of educating their children with an emphasis on their chosen religious beliefs and values, parents’ desire to further the proliferation of those beliefs and values, parents’ fundamental right to make that choice for their children without governmental interference or impediment, and the concerted, well-intentioned efforts of powerful social and political forces to advance the proliferation of their respective religious beliefs in our state and country. However, the federal and state constitutional prohibitions on government aid for sectarian
purposes respectively embodied in the First Amendment Establishment Clause and Article X, Section 6, of the Montana Constitution do not conflict, and are perfectly consistent, with the fundamental right to freely exercise one’s chosen religion. In balanced tandem, the Establishment and Free Exercise Clauses form one of the cornerstones upon which our country and federal and state constitutions were founded and framed to the benefit and protection of all—the clear separation of church and state regardless of the will of the majority at any given time. The Court today fulfills its constitutional oath and duty to neutrally recognize, enforce, and maintain that critical constitutional balance under our state and federal constitutions.

I concur.

BAKER, Justice, dissenting:

I agree that the Department overstepped its executive authority when it adopted Rule 1 because the enabling legislation did not trump existing statutory limitations on an agency’s rulemaking authority. Rule 1 conflicts with § 15-30-3111, MCA, and was an ultra vires act by the Department. I do not join the Court’s Opinion, however, because, in my view, the Court oversteps its own authority in invalidating § 15-30-3111, MCA (the Tax Credit Program), as unconstitutional.

Cases that test the limits of the government’s involvement in matters of religion are difficult, in no small part because of the constitutional tension between prohibited government establishment of religion and the restraint against government action interfering with its free exercise. The Montana Constitutional Convention Delegates, seeking to avoid “jeopardiz[ing] the precarious historical balance which has been struck between opposing doctrines and countervailing principles,” Montana Constitutional Convention, Committee Proposals, Feb. 22, 1972, p. 728, preserved the 1889 State Constitution’s protection against direct or indirect public funding for sectarian purposes. As the Court accurately observes, other than stylistic changes, the Delegates maintained the language, and thus the meaning, of the 1889 Constitution when they adopted Article X, Section 6. Opinion, ¶¶ 21, 25. The Court today seeks to outline a logical framework for examining claimed violations of Article X, Section 6, of the Montana Constitution. But it does not adhere to controlling principles of law in analyzing § 15-30-3111, MCA, and Rule 1 within that framework.

The Court begins with a fundamental mistake that permeates the remainder of the Opinion and flaws its conclusions. Relying in part on the title of Section 6, the Court makes a sweeping statement that the provision broadly prohibits “aid” to sectarian schools. Recognizing the first principle of statutory construction—to examine the plain meaning of the words used—it nonetheless skips over the words used in Section 6 to divine the Delegates’ intent. Throughout the Opinion, the Court then applies its broad construct of “aid” to draw conclusions on each element within its outlined framework.
Let’s back up a step. Article X, Section 6, says that the government “shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, . . . or other . . . institution, controlled in whole or in part by any church, sect, or denomination.” In purporting to identify the “three main inquiries” required in its analysis, the Court applies the sweeping term “aid” instead of the textual “appropriation or payment from any public fund or monies.” As an established principle of statutory construction, we do not rely on a provision’s title over the language contained within its text. The operative language in the text is “direct or indirect appropriation or payment from any public fund or monies.” Without examining what that language plainly means, the Court employs a broad meaning of “aid” for its analysis. I begin with the plain language.

Article X, Section 6(1) prohibits four actions:

1. direct appropriations;
2. indirect appropriations;
3. direct payments; or
4. indirect payments

from public funds or monies. The first step is to examine what is an “appropriation” and what is a “payment.” “A long line of Montana cases has established that ‘appropriation’ refers only to the authority given to the legislature to expend money from the state treasury.” We discussed the nature of state appropriations in Dixon, explaining:

“Appropriation” means an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state. It means the setting apart of a portion of the public funds for a public purpose, and there must be money in the fund applicable to the designated purpose to constitute an appropriation.

A “payment” is the “[p]erformance of an obligation by the delivery of money or some other valuable thing . . . .” The Constitution likewise extends this prohibition to “any grant of lands or other property”—other items of value that the government must own, or be entitled to, before it can effectuate a delivery to another. Article X, Section 6, using the disjunctive “or,” distinguishes an “appropriation” from a “payment.” As discussed above, an appropriation comes “from the law-making body” or the “legislature” to “expend” or “apply” money “from the state treasury.” A “payment,” in contrast, is attenuated from the law-making body. The Legislature cannot “appropriate” funds “to any private individual, private association, or private corporation not under control of the state.” “Payments” are made by the Executive Branch carrying out its appropriated spending authority, for example, by spending on contracts or by awarding grants.

For illustrative purposes, using the SSO Program as an example, the plain language of Article X, Section 6, would apply to the following:

1. Direct Appropriation: the Legislature appropriates $3 million to QEPs as defined in the statute, including religious schools;
2. Indirect Appropriation: the Legislature appropriates $3 million to SSOs, which then award the funds to QEPs, including religious schools;

3. Direct Payment: (a) the Office of Public Instruction (OPI) implements a grant program to award grants from its general fund budget to QEPs, including religious schools, or contracts with religious schools to hire teachers, or (b) the State Land Board donates a section of state trust land to a QEP on which to build a religious school;

4. Indirect Payment: (a) OPI grants funds to SSOs to provide teachers to religious schools, or (b) the State Land Board donates a section of state trust land to an SSO, which then auctions the land to support QEPs, including religious schools, or conveys the land for a sectarian school building site.

There is little dispute that the Tax Credit Program’s tax credit does not constitute a direct appropriation or payment. The Department argues instead that the District Court erred by failing to consider the indirect impact that targeted tax breaks have on the public fisc. It emphasizes that the tax breaks indirectly aid sectarian schools. This argument becomes the lynchpin for the Court’s holding. The argument may be correct, as far as it goes. But a theory based upon “indirect impacts” or “indirect effects” of the Tax Credit Program diverges from the constitutional text. Unambiguous constitutional language must be given its plain, natural, and ordinary meaning.

In this regard, “we have long adhered to ordinary rules of grammar” in construing statutes. As the Court observes, the same principles of statutory construction apply when we interpret constitutional provisions. To invalidate the statute on the basis that it indirectly impacts sectarian schools to the detriment of the public fisc violates ordinary rules of grammar, as it requires reading “indirect” to modify “aid” rather than “appropriation or payment.” The clause, “any direct or indirect appropriation or payment from any public funds or monies . . . for any sectarian purpose or to aid any” sectarian institutions, contains at least two modifiers of “appropriation or payment.” The first, “direct or indirect,” modifies the parallel terms “appropriation or payment.” It thus prohibits any appropriations or payments, whether direct or indirect. What follows are non-parallel prepositional phrases, which describe from where these appropriations or payments may not be taken—“any public fund or monies”—and for what these appropriations or payments may not be used—“any sectarian purpose” or “to aid” sectarian institutions. The sentence structure means that “direct or indirect” modifies “appropriation or payment,” and does not modify the non-parallel phrases “from public funds or monies” or “to aid any” sectarian school.

The funds at issue pass from donor to SSO to student-selected school; they are accounted for in the public fisc by virtue of the dollar-for-dollar offset. Although this may be an indirect transfer of benefit to the student-selected school, the word “indirect,” by itself, does not impose a prohibition upon all tax
policies merely because they have that indirect effect. Rather, “indirect” modifies the subject of the clause, which is the “payment.” Thus, the provision prohibits government agencies from making payments from a public fund or monies to religious schools indirectly. In this case, the funds eligible for tax credits are not “payment from any public fund or monies.” The creation of the credit is a government’s determination not to collect tax revenues. The statute diverts the funds before they ever become public monies. This well may result in an indirect impact on the “public fund or monies,” but it is not an indirect payment.

Under the Tax Credit Program, the funds originate with private donors and are donated to the SSOs, which in turn direct the funds to the student’s chosen school as a credit toward the student’s obligation. No money originates, is deposited into, or is expended from the state treasury or any public fund. The State never takes “title” to the donated money or otherwise possesses it.

When this Court struck the property tax levy for private schools in Chambers, it was careful to distinguish its holding from property tax exemptions for religious institutions that had been upheld by the U.S. Supreme Court in Walz. This was so even though the 1889 Constitution, under which Chambers was decided, contained the same prohibition on payments “from any public fund or moneys whatever” in aid of religious schools, whether directly or indirectly, as in the 1972 Constitution.

The concern about “indirect payments” that undergirded the Delegates’ decision to re-adopt the subject provisions in the 1972 Constitution was the possibility that government would appropriate funding for religious schools through intermediaries, necessitating retention of the language prohibiting “indirect” payments. “[I]t would be fairly easy to appropriate a number of funds and then-to [sic] some other group and then say this will be done indirectly.” The Constitutional Convention was held one year after this Court had decided Montana State Welfare Board v. Lutheran Social Services, in which we rejected the State Welfare Board’s argument that payment of medical benefits to a woman using a religiously affiliated adoption agency would violate the Constitution—and two years after this Court’s decision in Chambers, in which we distinguished property tax exemptions from impermissible property tax levies in support of religious schools. Delegate Loendorf, sponsor of the proposal to retain the “indirect” language that the Convention ultimately adopted, stated that, under his proposal, the provision “will continue to mean and do whatever it does now,” expressing an apparent desire to preserve the status quo so recently stated by this Court. Beyond indirect payments, the delegates did not discuss tax credits or deductions for private donations to religious schools.

The Convention debates on Article X, Section 6, thus reflect an intention that is consistent with the plain language the Delegates ultimately adopted. For this reason, the Court’s reliance on Nelson to divine a broader meaning is misplaced. The
Constitutional Convention record we examined in Nelson directly discussed the issue before the Court—the retention of common-law privileges—and contained thorough consideration explaining the Delegates’ intention that such privileges would survive the broad language of the public’s right to know in Article II, Section 9. Here, in contrast, the Convention transcript contains zero discussion of the use of, or prohibition against, tax incentives to encourage donations to private schools. The transcripts thus do not “clearly manifest an intent not apparent from the express language.” Rather, as the Court acknowledges, the transcripts demonstrate the Delegates’ desire to maintain the 1889 status quo.

Turning its focus to the specific provisions of § 15-30-3111, MCA, the Court strikes the statute in its entirety as unconstitutional. The Court concludes that the statute is facially invalid. But it does not properly address the difference between a facial and an as-applied challenge, important here because the Court’s analysis—and its rationale for striking the statute—employs a strictly as-applied theory.

A party bringing a facial challenge “must show that no set of circumstances exists under which the statute would be valid or that the statute lacks any plainly legitimate sweep.” We presume that a statute is constitutional, unless the Court is convinced beyond a reasonable doubt that the statute conflicts with the constitution. Any doubt must be resolved in favor of upholding the statute. Importantly, the party challenging the constitutionality of a statute bears the burden of proof. The Court mentions the heightened standard that a facial challenge brings, but falls short of actually analyzing the statute under this standard. Conceivably, the statute would not be applied unconstitutionally if a student chose to apply her scholarship to a non-sectarian private school. In such a case, the tax credits offered under the statute would not offend Article X, Section 6. The Court dismisses any such constitutional applications because the statute contains “no mechanism” for the Department to determine whether the money will be used to indirectly pay tuition at sectarian schools. This conclusion is problematic for at least two reasons. First, no one—not even the Department—argued that every application of the statute was unconstitutional under Article X, Section 6. Rather, the Department instituted Rule 1 to prohibit what it saw as unconstitutional applications of the statute, while still allowing what it saw as constitutional applications to continue to utilize the Tax Credit Program. Second, the Court’s holding transforms almost any as-applied challenge into a facial challenge; challenged statutes rarely have a built-in mechanism to sift out unconstitutional applications. The Court notably ignores the statute’s severability clause until after it already has thrown out the entire Tax Credit Program.

The Court’s heavy reliance on Chambers, e.g., fails because that case involved payment from public monies to hire teachers at a parochial high school—a plain violation of the prohibition against “direct appropriations.” Even though the teachers
were to give “a standard course of instruction” at the sectarian school, the public school district had no control over the parochial school, and “it of necessity must supplement these courses of instruction by those required by the doctrines of the Church.” Citing a Roman Catholic Encyclical, the Court pointed out that every subject taught must “be permeated with Christian piety.” It was in this context—public payment of teacher salaries—that the Court concluded the lines between secular and sectarian purposes were impermissibly blurred. The case sheds no light on whether Tax Credit Program at issue is facially invalid simply because the Department does not examine how a taxpayer’s contributions are used.

In rejecting any valid application of the statute, the Court’s singular focus is on the Fiscal Note to Senate Bill 410. The Court relies on the Fiscal Note to conclude that many donors claiming the tax credit also would be parents who send their children to QEPs. It cites the Fiscal Note to demonstrate “the fact that the Legislature indirectly pays tuition to the QEP.” And it cites the Fiscal Note in holding that the Tax Credit Program “creates an indirect payment” by reducing “the net price of attending private school.” The Opinion contains no other support for its key holding that the Tax Credit Program is an indirect payment of tuition at private, religiously affiliated schools.

This is a problem. First, fiscal notes are prepared by the Governor’s Office of Budget and Program Planning, an agency of the Executive Branch, not by the Legislature. Second, a fiscal note is simply the Executive’s estimate of revenue and spending impacts based on a series of assumptions made by presumably affected agencies. The Court relies on the Department’s fiscal note assumptions to support its conclusion that the statute is facially unconstitutional because of how the agency surmised the tax credit would be used. Those assumptions reflect the Department’s advocacy here—that Rule 1 was necessary to save the statute from “aiding” sectarian schools. Whether the Department’s assumptions were well-researched or its predictions accurate is not the point of an inquiry into the constitutionality of the statute. They do not represent the Legislature’s rationale for the statute and do not control a facial analysis of the statute’s constitutionality. Third, relying on the assumption that many donors who claim the tax credit also will be parents who otherwise would be paying tuition reduces the issue to a purely as-applied challenge. It overlooks the instances in which the Tax Credit Program could constitutionally be applied.

Its failure to recognize constitutional applications of the statute under Article X, Section 6, undermines the Court’s severability analysis, because—focusing only on Article X, Section 6, as the Court does—parts of the law would have valid application. Tax credits could be afforded for donations to private secular schools without running afoul of that section. That said, given its conclusion that the Tax Credit Program violates the prohibition against aid to religious schools, First Amendment
considerations may require the Court’s ultimate solution here—striking § 15-30-3111, MCA, in its entirety.

Quite remarkably, the Court dismisses any Free Exercise Clause concerns by proclaiming simply that “this is not one of those cases.” I do not believe this issue so easily may be discarded. The Department acknowledges this as well, explaining that if the Court holds the Tax Credit Program unconstitutional, “the only way of respecting both constitutional limits on the State is to invalidate the private school tax-credit program and sever it from the remaining curricular innovation program.” A State’s interest “in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution [] is limited by the Free Exercise Clause.” The exclusion of a group “from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution.” Only an analysis of both Article X, Section 6, and the Free Exercise Clause would eliminate all applications of the tax credits, and the Opinion offers no such analysis.

The Court today holds that a tax credit—granted to a private individual for a donation that may or may not be directed to a religious entity—violates the State Constitution, even though it is clear under the law that a direct tax exemption by the State to a church does not. As discussed above, the Delegates did not “clearly manifest” this intent in their discussions of Article X, Section 6. Although the Court does not mention them, its ruling calls into question numerous other state laws granting tax credits that may benefit religious entities, among them Montana’s College Contribution Credit, § 15-30-2326, MCA, and Qualified Endowment Credit, § 15-30-2328, MCA.

At the end of the day, this case—like others involving the religion clauses—may be made more difficult by the circuitous path a legislative body designs in attempting to advance policy within its constitutional limits. It is in those instances that the Court’s examination must be particularly precise. Tax policy is within the Legislature’s wheelhouse. Tax laws “that seek to influence conduct are nothing new.” Quoting Justice Joseph Story’s early treatise on the United States Constitution, the NFIB Court pointed out that “the taxing power is often, very often, applied for other purposes, than revenue.” The Montana Constitution does not bar the Legislature from setting tax policy to encourage any manner of private action, including incentivizing individuals to support certain philanthropic undertakings, religious or otherwise. Precisely because there is “play in the joints” between prohibited establishment and interference with free exercise, the Court should hew closely to the constitutional text and uphold statutes unless their invalidity is established beyond a reasonable doubt. Even if “it differs from our idea of wise legislation, . . . with the wisdom and policy of legislation, the courts have nothing to do.”

I dissent and would affirm the District Court on the grounds discussed above.

RICE, Justice, dissenting:
I concur in Justice Baker’s dissenting opinion, and offer the following further thoughts.

First, this case was pled and litigated as a challenge brought by the Plaintiffs against the Department’s enactment of Rule 1. The Plaintiffs gave notice of their challenge, stating “the Department of Revenue’s Rule 1 implementing the [Scholarship] program violates Named Plaintiffs’ rights under the Montana and U.S. Constitutions” and that “the Department of Revenue’s rule is inconsistent with the statutory language and intent.” In response, the Attorney General elected not to defend the Rule. No challenge to the constitutionality of § 15-30-3111, MCA, was ever made or noticed and, therefore, the Attorney General was not provided an opportunity to appear and defend its constitutionality. While the State is a party, and therefore, had notice of the proceeding itself, no challenge to the statute was made within the proceeding, and, consequently, the issue was not noticed, briefed, or argued. The Court has raised the constitutionality of the statute *sua sponte*. Striking a statute under such circumstances, including without notice, briefing or argument, and an opportunity for the parties and Attorney General to argue the issue, is a violation of due process and an inappropriate exercise of the Court’s powers.

On the merits of its analysis, the Court’s conclusions are largely devoid of supporting authority, and I concur with Justice Baker that the Court is not interpreting the Montana Constitution in accordance with established legal principles. Indeed, the Court’s interpretation ignores, for the most part, the plain language of the Constitution and our Constitutional history.

The Court summarily declares that the subject Scholarship Program “aids sectarian schools” in violation of Article X, Section 6, of the Montana Constitution, a conclusion that is factually and legally incorrect. First, as the Department acknowledges, the Program is facially neutral, and does not require any benefit to accrue to a particular school, religious or otherwise. The Program is voluntary, funded by charitable donations, and, consistent with its stated legislative purpose to promote school choice, is entirely directed by private action, without government direction, as follows: (1) the charitable donor has a choice, first, whether to donate, and, second, whether to donate to the private or to the public school scholarship program, but may not direct contributions to specific schools; (2) the student and parents/guardians choose the qualifying private institution, whether religious or non-religious, which the student will attend and to which a scholarship is directed; and (3) the SSO must direct the scholarship to the institution, religious or non-religious, chosen by the student’s family, and may not otherwise reserve or restrict scholarships for use at a particular school. Thus, a religiously affiliated school cannot be designated by the donor, the SSO, or the government—only by students and their families.

Further, the beneficiary of the Program is not the school, but the student/family receiving the scholarship, because they are relieved of a portion of their financial obligation for the
student’s attendance at a private school. This is separate from the private school itself, which must be paid the same tuition regardless of any assistance from the Program. Other courts have widely recognized this principle.

Similar to our acknowledgment in *Mont. State Welfare Bd. v. Lutheran Soc. Servs.*, of the “purely incidental” benefit that inured to the private adoption agency under the indigent mother’s assistance program, Kottermann recognized that programs such as the Scholarship Program can have “ripple effects” that “radiate to infinity,” but that these are not constitutionally significant. Any benefit of the Scholarship Program flowing from the private donor’s voluntary contribution to the SSO, and then, if the student and family so chose, to a qualified religiously-affiliated school, is incidental and attenuated. Indeed, it is even more attenuated than the benefit provided by the government program in *Lutheran Soc. Servs.*, because the Scholarship Program does not involve money that issues from a government fund. As the U.S. Supreme Court has stated for establishment clause purposes, “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion” are not invalid merely “because sectarian institutions may also receive an attenuated financial benefit.” The Program stands in stark contrast, factually and legally, to the levy imposed upon taxpayers in *State ex rel. Chambers v. Sch. Dist.*, 155 Mont., as Montana taxpayers have not been implicated in, or made to support, a sectarian or religious activity by way of government extraction and expenditure of tax dollars, or by other coercive means.

Because the scholarships are directed by students and families, and there is no government action endorsing or directing funds for sectarian or religious purposes, there is no significance to the fact that more Program options are currently available for students choosing to attend private religious schools than private non-religious schools. The same was true for the private religious adoption agencies at issue in *Lutheran Soc. Servs.* Other courts have widely recognized this principle. As stated by the U.S. Supreme Court, the “constitutionality of a neutral education aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.” The Program simply creates a neutral opportunity for genuine independent choices of donors and scholarship recipients, and provides that the beneficiaries of the program are the scholarship recipients.

Thus, in my view, the Court’s conclusion that the Program “permits the Legislature to indirectly pay” sectarian schools, is not supported by the facts here, and, as Justice Baker’s dissenting opinion also illustrates, is not supported by the plain language of the Constitution or the history of the Constitutional Convention. This conclusion follows the Department’s troubling argument that the Scholarship Program is a “diversion” of “public funds” by the Legislature. The argument is premised on the Department’s theory that the base tax liability each taxpayer
will owe to the State on income that the taxpayer will earn should be considered “public funds,” and that all tax liability—even potential liability on potential income, before a taxpayer timely completes the tax return process and applies deductions and credits for the entire year—is the property of the State, until such time a proper tax return is filed and the state permits a credit for the year’s donations to be made against the taxpayer’s liability. The Department’s view, that “‘[t]ax expenditures’ are monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment . . . the various deductions, credits and loopholes [] are just spending by another name,” might be correct for purposes of internal state government budgeting, § 5-4-104, MCA, but it is an utter misstatement of the fundamental right of private property ownership. A citizen’s income—all income of each year, every year—belongs to the citizen until such time the proper portion thereof becomes owed to the government; the government does not own all income until the citizen demonstrates otherwise. At the time a citizen donates to the Scholarship Program, the tax year has not ended, the donor’s total income may not have been earned, the tax return process has not been timely initiated, and the donor’s potential tax liability is unknown. The government cannot at that time “own” the unknown tax liability as a public fund, or even an asset, regardless of whether the tax credit is “dollar-for-dollar” or otherwise, and regardless of the previous year’s tax law. “[U]nder such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature.”

A study of history reminds us that governments have oppressed or discriminated against citizens based upon their religious faith over millennia. Today, courts are to ensure that the citizen’s free exercise of religion is not violated by the government. As the U.S. Supreme Court has stated in a recent religious rights case, “all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” I thus disagree with the Court’s determination that it need not entertain the Plaintiffs’ pled free exercise claims because “this is not one of those cases.”
The U.S. Supreme Court agreed to hear oral arguments this fall concerning a decision by Montana's Supreme Court to halt the operation of a tax credit scholarship program that allowed students to enroll in private schools, including private religious schools.

The announcement Friday breathed new life into the private school choice movement, which has made little to no headway at the federal level despite a tax credit scholarship being the No. 1 agenda item of Secretary of Education Betsy Devos, herself a private school choice supporter.

Private school choice advocates cheered the decision by the high court to review Espinoza v. Montana Department of Revenue, saying they're hopeful the court will provide a definitive answer on the constitutionality of directing public money or aid to private religious schools.

"We are incredibly pleased to learn that the Supreme Court will hear oral arguments this fall on the Montana tax credit scholarship case, which could fundamentally alter the landscape for school choice across the country," John Schilling, president of the American Federation of Children, the school choice advocacy organization that Devos formerly led, said in a statement.

"This could be the most impactful Supreme Court case since the pivotal Zelman decision in 2002, which ruled that state-level voucher programs are constitutional," he said. "This Montana case has the opportunity to definitively establish that religious schools cannot be excluded from school choice programs by virtue of their religion."

But opponents of private school choice programs, including teachers unions, argued that the separation of church is a fundamental pillar to the U.S. Constitution.

"This long tradition – established to ensure the religious freedom of all – should be protected by conservatives and liberals alike," said Randi Weingarten, president of the 1.7-million-member American Federation of Teachers. "It's alarming that the current Supreme Court would try to revisit and undo that precedent, in public schools no less, as it sets a dangerous standard and opens the door to the dismantling of a basic tenet of our nation's democracy."

The specific question the court will consider is whether the state of Montana violates the
First Amendment by prohibiting students and families who choose to enroll in private religious schools from participating in the state's tax credit scholarship program, which provides tuition assistance to students to attend private school.

The program was enacted in 2015 and served 25 students with an average scholarship of $500 during the 2016-17 school year. In 2018, the Montana Supreme Court ruled the program unconstitutional, rendering it inoperable. The state's Constitution includes language that bars direct and indirect aid to religious institutions – just one of the 37 states that's adopted what's known as a Blaine Amendment.

The Trump administration has not commented on the Montana case, but earlier this month the Justice Department lent its support to three families seeking to require the state of Maine to pay tuition for their children to attend religious high schools.
“Religious-School Scholarships Draw U.S. Supreme Court Review”

Bloomberg

Greg Stohr

June 28, 2019

The U.S. Supreme Court added a new religion case to the calendar for its next term, agreeing to rule on a Montana tax-credit program that generates scholarship money for students who attend private schools.

The high court on Friday agreed to hear arguments from three parents who have used money from the program to send their children to a Christian school.

The Montana Supreme Court struck down the program as violating a state constitutional provision that bars aid to religious schools. The parents say that ruling violates the U.S. Constitution.

Montana officials say the state court was right to invalidate the entire program if any of the money would go to religious schools. The state Department of Revenue says more than 90% of the scholarships go to students attending religious schools.

The 2015 scholarship program gives individuals and corporations a tax credit for contributing up to $150 to an organization that funds scholarships to help needy students attend private schools.

The only organization formed under the law, Blue Sky Scholarships, supports just one non-religious school along with 12 religious schools, the state says. Big Sky awarded 54 scholarships during the most recent school year, totaling $27,000.

The parents sued after the Department of Revenue issued a rule that barred use of scholarship money at religious schools. A trial judge blocked the rule before the Montana Supreme Court threw out the entire program.

The case is Espinoza v. Montana Department of Revenue, 18-1195.
This summer the US Supreme Court is expected to decide whether or not to hear *Espinoza v. Montana Department of Revenue*. If it hears the case, its decision will have huge repercussions for public education. To grasp why this case matters and why it's coming up now, there are two pieces of background you need to understand.

**Tax Credit Scholarships**

Tax credit scholarships are yet another variation on a school voucher program. With vouchers, a family picks the school it wants its child to attend, and the state hands that child's "share" of education funding to that school. The problem is that when a family chooses a religious school (as is often the case), that can run afoul of the separation of church and state in general, and Blaine Amendment laws in particular. The Blaine Amendment was a failed Constitutional amendment that prohibited spending tax dollars on sectarian schools; 38 states adopted it for their own constitutions. It's not an easy law to defend, because it rose out of nativist reaction to immigrant Catholics, even if it does fit with the wall between church and state.

Rules vary from state to state (in Georgia, for example, contributors can actually turn a profit on the TCS donation). But one feature is constant--whatever money is fed into the TCS represents money subtracted from state revenue. This, it should also be noted, is the model for Betsy DeVos's proposed Education Freedom Scholarships. In all cases, these are vouchers dressed up with fancy accounting.

**A Church Parking Lot In Missouri**

The other factor here is *Trinity Lutheran v. Comer*. The case seems like small potatoes; a church in Missouri wanted to apply for a public monies grant to help resurface its playground. It was disqualified because it's a church. The case ended its five-year trek to
the Supreme Court in 2017, and Chief Justice Roberts said, "The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand.” This was a big deal because, as Bloomberg noted:

It’s the first time the court has used the free exercise clause of the Constitution to require a direct transfer of taxpayers’ money to a church. In other words, the free exercise clause has trumped the establishment clause, which was created precisely to stop government money going to religious purposes.

Some of the majority tried to rein in the implications of the case by noting it was a ruling strictly about playground resurfacing. Justices Gorsuch and Thomas, however, indicated that they believed that discriminating against religious practices was not okay "on the playground or anywhere else."

**Meanwhile, In Montana**

Montana's legislature tried to get a voucher foot in the door with the Montana Tax Credit Scholarship Program, which allowed a not-very-staggering tax credit of $150. There was just one problem; the Montana Department of Revenue wouldn't implement the program, claiming it broke the law. The Montana Supreme Court agreed that the tax credit benefited religious schools and therefore broke the rules.

The case has found its way very quickly to the Supreme Court, and the long list of very conservative and religious school choice fans filing amicus briefs lets us know just how much some folks are hoping the Supremes will reverse Montana's own high court. Cato Institute, EdChoice, Christian Legal Society, Liberty Justice Center, Becket Fund for Religious Liberty, Wisconsin Institute for Law and Liberty, Georgia Goal Scholarship Program, Alliance for Choice in Education, and former governor Scott Walker are among the many who have been urging SCOTUS to take this case and run with it.

The case matters because it could extend the Trinity Lutheran notion that free exercise beats the establishment clause. The case matters because it could open the door wide to the use of public tax dollars for private religious schools. The court could also drive a stake through the heart of voucher programs aimed at shuttling public funds to private religious schools, no matter how clever and convoluted the voucher scheme may be. That last possibility seems less likely, because, as with many issues beloved by the right, this is an issue that may be facing the friendliest court in many decades. This is definitely one case to watch for this summer.
“The Supreme Court has a chance to uphold school choice and religious liberty”

The Hill

Jamie Gass and Ben Degrow

June 20, 2019

The Supreme Court of the United States is expected to decide whether to hear Espinoza v. Montana Department of Revenue, a case that reveals the harm a state constitutional amendment marked by religious bias can do to families.

Kendra Espinoza, who suddenly became a single mom, sought a better education for her daughters. In their public schools, one daughter was bullied and the other struggled academically. Both later would thrive in parochial school.

After the Montana Supreme Court struck down her state’s education tax credit program, Espinoza was denied access to scholarships her children badly needed. She and two other Montana moms facing similar plights have asked the nation’s highest court to weigh in.

Nationally, over 250,000 students benefit from private-school choice through education tax credits. The basis for the Montana court’s decision was the state’s 130-year-old anti-aid, or Blaine, amendment. The state constitutional provisions in Montana, along with those in our respective states of Massachusetts and Michigan, represent distinct but formidable legacies of a dark, bigoted chapter of history that still limit educational opportunities for students and families who need them most.

The case offers the U.S. Supreme Court the opportunity to reject the last vestiges of 19th century, anti-Catholic legal discrimination that remain in nearly 40 states. Massachusetts has the oldest discriminatory amendment and Michigan has the most recent, but both are considered to be among the worst.

In the mid-1850s, in the wake of Irish immigration, Massachusetts’ virulently anti-Catholic Know-Nothing party passed the nation’s first anti-aid amendment, which, along with a revised amendment added in the early 20th century, prohibits any governmental unit from disbursing public funds to parochial-school parents.

Today, these anti-aid amendments prevent more than 100,000 urban Bay State families with children in chronically underperforming districts from receiving education vouchers and tax credits that would grant them greater school choice.

In the late 19th century, President Ulysses S. Grant proposed an anti-aid amendment to the
federal constitution. Maine Congressman James G. Blaine’s anti-aid bill followed, falling just short of congressional approval. Ultimately, his nativist scheming encouraged states to adopt anti-aid amendments in their own constitutions.

Michigan’s turn came nearly a century later, as then-Gov. William Milliken sought to direct state aid to private and religious schools. While Reformed and Lutheran leaders were among those seeking financial support, the ensuing backlash took full aim at the most prominent target. “There can be no doubt in the mind of any informed observer,” private school choice opponents wrote in 1969, “that the goal of the Catholic Church hierarchy is complete tax support for its schools.”

Resistance to the governor’s proposal, referred to as “parochiaid,” stoked the flames of bigotry. “I have never witnessed such anti-Catholic sentiment in my life,” one state senator observed.

Some of that sentiment carried over to a successful 1970 ballot initiative campaign. Advocates for church-state separation joined forces with the teachers unions to prohibit both direct and indirect state support for families paying private school tuition. One pro-initiative brochure noted that the measure would overwhelmingly deny funds to “schools owned by the clergy of one politically active church.”

In the half-century since Michigan’s anti-aid initiative passed, about half the states — including some with less onerous Blaine amendments — have adopted some form of private school parental choice. Yet harmful constitutional language still denies many Massachusetts and Michigan families equal access to educational options aligned to the dictates of their consciences.

The U.S. Supreme Court has recognized that our Constitution’s First Amendment allows states to give families options between religious and nonreligious schools. Now the justices can take a close look at removing additional barriers to choice.

Thanks to Kendra Espinoza, a determined Montana mom, the court has the opportunity to take up and strike down the infamous legacy of state Know-Nothing and Blaine amendments. From Massachusetts to Michigan and across the nation, many families’ hopes for more educational choice and religious liberty hang in the balance.
Montana's highest court has struck down a tuition tax-credit program which, as enacted by that state's legislature, allowed tuition scholarships to benefit students at private religious schools as well as secular schools.

The program, which provides a tax credit of up to $150 per year to individuals and corporations that donate to tuition scholarship organizations, violates the state constitution's provision barring government aid to "sectarian schools," the Montana Supreme Court ruled 5-2. The program could not be saved by a rule adopted by the state department of revenue that excluded private religious schools from participation, the court further held.

The state high court ruled that the Montana Constitution "more broadly prohibits 'any' state aid to sectarian schools and draws a more stringent line than that drawn by" the U.S. Constitution's prohibition against government establishment of religion.

"Therefore, the sole issue in this case is whether the Tax Credit Program runs afoul of Montana's specific sectarian education no-aid provision, Article X, Section 6," Justice Laurie McKinnon wrote for the majority on Dec. 12 in Espinoza v. Montana Department of Revenue. "The legislature's enactment of the Tax Credit Program is facially unconstitutional and violates Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools."

Writing in a dissent joined by one other member of the court, Justice Beth Baker said the scholarship funds never truly become public funds because they are donated to private scholarship organizations, and thus the inclusion of religious schools as beneficiaries does not violate the state constitutional bar against indirect aid to religion.

A legal organization representing religious school families who would have benefited from the tax-credit program as enacted by the legislature vowed to appeal to the U.S. Supreme Court.

"Not only is the court misinterpreting the Montana Constitution, but it is ignoring important provisions in the federal Constitution," Erica Smith, a lawyer with the Arlington, Va.-based Institute for Justice, said in a statement. "The U.S. Supreme Court has been clear that the First Amendment of the U.S. Constitution
prevents the government from discriminating against religious individuals in awarding public benefits. We plan to immediately appeal."

Those families, in their suit that challenged the revenue department rule that sought to save the tax-credit program by barring religious schools, allege that there was anti-Catholic sentiment behind the inclusion of the no-aid-to-sectarian-schools provision in Montana's 1889 Constitution. (The state in 1972 adopted a new constitution, which kept language barring direct and indirect aid to religious institutions.)

The U.S. Supreme Court has recently been skeptical of state programs that exclude religious institutions from general aid programs, but it has left open the question of how it would analyze such aid to religious schools.
June Medical Services v. Gee

Ruling Below: June Medical Services v. Gee, 905 F. 3d 787 (5th Cir. 2018).

Overview: Louisiana created a law that required doctors who perform abortions to have the authority to admit patients at a hospital within 30 miles of the clinic that the doctor provides abortion care. The Louisiana law was scheduled to go into effect on Monday, February 4, 2019. Abortion providers went to the Supreme Court to bar the Louisiana law from going into effect and the Supreme Court has put the law on hold indefinitely.

Issue: Whether the U.S. Court of Appeals for the 5th Circuit’s decision upholding Louisiana’s law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court’s binding precedent in Whole Woman’s Health v. Hellerstedt.

JUNE MEDICAL SERVICES, L.L.C., Behalf of Its Patients, Physicians, and Staff, Doing Business as Hope Medical Group for Women; John Doe 1; John Doe 2, Plaintiffs-Appellees

v.

Doctor Rebekah GEE, Defendant-Appellant

United States Court of Appeals, Fifth Circuit

Decided on September 26, 2018

[Excerpt; some citations and footnotes omitted]

SMITH, Circuit Judge:

Louisiana enacted the Unsafe Abortion Protection Act ("Act 620" or "the Act"), requiring abortion providers to have admitting privileges at a hospital located within thirty miles of the clinic where they perform abortions. On remand for consideration in light of Whole Woman's Health v. Hellerstedt, ("WWH"), the district court invalidated the Act as facially unconstitutional. The court overlooked that the facts in the instant case are remarkably different from those that occasioned the invalidation of the Texas statute in WWH. Here, unlike in Texas, the Act does not impose a substantial burden on a large fraction of women under WWH and other controlling Supreme Court authority. Careful review of the record reveals stark differences between the record before us and that which the Court considered in WWH.

Almost all Texas hospitals required that for a doctor to maintain privileges there, he or she had to admit a minimum number of patients annually. Few Louisiana hospitals make that demand. Because Texas doctors could not gain privileges, all but 8 of 40 clinics closed. Here, only one doctor at one clinic is
currently unable to obtain privileges; there is no evidence that any of the clinics will close as a result of the Act. In Texas, the number of women forced to drive over 150 miles increased by 350%. Driving distances will not increase in Louisiana. Unlike the record in Louisiana, the record in Texas reflected no benefits from the legislation. Finally, because of the closures, the remaining Texas clinics would have been overwhelmed, burdening every woman seeking an abortion. In Louisiana, however, the cessation of one doctor's practice will affect, at most, only 30% of women, and even then not substantially.

That is only a summary. As we explain in detail, other facts underscore how dramatically less the impact is in Louisiana than in Texas. Because the Louisiana Act passes muster even under the stringent requirements of \textit{WWH} and the other Supreme Court decisions by which we are strictly bound, we reverse and render a judgment of dismissal.

I.

Act 620 requires "a physician performing or inducing an abortion" to "have active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." "Active admitting privileges' means that the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient . . . ." Each violation can result in a fine up to $4,000.

Act 620 is premised on the state's interest in protecting maternal health. Introducing the Act, Representative Katrina Jackson explained, "[I]f you are going to perform abortions in the State of Louisiana, you're going to do so in a safe environment and in a safe manner that offers women the optimal protection and care of their bodies." During consideration of the Act, the Louisiana Senate Committee on Health and Welfare heard testimony from women who had experienced complications during abortions and had been treated harshly by the provider. For example, Cindy Collins with Louisiana Abortion Recovery testified that when she underwent an abortion and began to hemorrhage, "the abortion doctor could see that something had gone wrong" but, instead of assisting her, "told [her] to get up and get out." She eventually required an emergency dilation and curettage ("D&C"). Testimony also established numerous health and safety violations by Louisiana abortion clinics.

In addition to the concern for maternal health expressed at the hearing, Louisiana has an underlying interest in protecting unborn life. The state has codified its intent to "regulate abortion to the extent permitted." Its longstanding policy is that "the unborn child is a human being from the time of conception and is, therefore, a legal person . . . entitled to the right to life." And, Louisiana enacted a trigger law such that "if those decisions of the United States Supreme Court [legalizing abortion] are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the
former policy of this State to prohibit abortions shall be enforced."

A.

Act 620 was set to become effective September 14, 2014, but on August 22, 2014, Bossier Medical Suite ("Bossier"), Causeway Clinic ("Causeway"), Hope Medical Group for Women ("Hope"), and two abortion doctors—Doe 1 and Doe 2 — (collectively "June Medical") sued to enjoin the Act, mounting a facial challenge, claiming that the Act placed an undue burden on women's access to abortions. The district court entered a temporary restraining order allowing the doctors to seek privileges during the preliminary-injunction proceedings. After a bench trial, the court granted a preliminary injunction on January 26, 2016, and denied a stay pending appeal.

Louisiana requested and received from this court an emergency stay that the Supreme Court vacated on March 4, 2016. After the Supreme Court decided WWH, we remanded "so that the district court can engage in additional fact finding required by [WWH]." The district court entered final judgment April 26, 2017, permanently enjoining the Act. The court found "minimal" health benefits but "substantial burdens" and ruled the Act unconstitutional on its face under Planned Parenthood of Southeastern Pennsylvania v. Casey, and WWH. Louisiana appeals.

B.

At the time of enactment, only five abortion clinics operated in Louisiana, and only six doctors performed elective abortions, of whom only one had qualifying admitting privileges. Since the enactment, two clinics have closed for reasons unrelated to the Act, and at least one doctor has obtained qualifying privileges. The analysis is fact-bound, as required by WWH, so we begin with a detailed overview of each clinic and the abortion doctors it employs.

1. The Causeway Clinic

Causeway opened in 1999 and was located in Metairie, a suburb of New Orleans. It closed February 10, 2016, for reasons not disclosed in this record. It had provided only surgical abortions during the first and second trimesters. Between 2009 and mid-2014, about 10,836 abortions were performed there. Causeway employed two abortion doctors, Doe 2 and Doe 4, neither of whom held admitting privileges at the time of Act 620's enactment. Within 30 miles of Causeway's former location, there are 10 qualifying hospitals.

a. Doe 2

Doe 2 is a board-certified OB/GYN who has been performing abortions since 1980. He is the only doctor in Louisiana willing to provide abortions after 18 weeks up to the legal limit of 21 weeks, 6 days. At Causeway, Doe 2 performed only surgical abortions between 6 weeks and 21 weeks, 6 days. He worked 2 weekends a month and performed 25% of the clinic's abortions. In 2014, he estimated he performed about 450 abortions at Causeway, the majority being first-trimester terminations.

From 2009 through mid-2014, Doe 2 had only two patients who required
hospitalization. In one instance, during a second-trimester procedure, the woman experienced heavy vaginal and intra-abdominal bleeding from a rupture of her incision from a prior C-Section. Doe 2 called 9-1-1 and sent her charts and a note explaining the situation to the emergency room doctor. Doe 2 also called the doctor before the woman's arrival to explain the situation and visited her in the hospital after the surgery.

The second instance was also a second-trimester termination. The woman experienced some bleeding from uterine atony, and though Doe 2 believed it was non-critical bleeding, he called 9-1-1 to be safe. Though he did not have admitting privileges before the Act's effective date, Doe 2 has since secured limited, non-qualifying privileges at Tulane in New Orleans.

b. Doe 4

Doe 4 is 82 years old and a board-certified OB/GYN with over 51 years' experience. He once provided abortions at the Acadian clinic but stopped in 2003 when that clinic closed. Though he retired from practice in 2012, Causeway requested in 2013 that he fill in for a doctor who had fallen ill. He agreed and provided abortions (for the first time in ten years) at Causeway until its closure. Other than ensuring that Doe 4 remained board-certified, had a DEA license, and "was in good standing with the medicals," Doe 4 knows of no other review undertaken, similar to hospitals' credentialing process, that ensures a doctor has the requisite skills and capacity to perform relevant procedures.

Doe 4 worked Thursdays and every other weekend and performed 75% of the abortions that were done at the Causeway Clinic; all of his were first-trimester terminations. Doe 4 "imagine[s] [he performs] about a thousand, fifteen hundred" abortions annually. He explained he would provide from 5 to 15 abortions per day and that there was not a high demand or "a significant volume of business" at the Causeway clinic.

Since resuming his abortion practice in 2013, Doe 4 has had one patient experience heavy bleeding caused by an atonic uterus. An ambulance had to be called, as the woman was not responding. Doe 4 thinks he "sent a note with her or a copy of her chart went with her to the emergency room," then he explained the situation to the doctor over the phone.

Doe 4 does not currently possess admitting privileges but did apply to Ochsner at Kenner. He applied only to Ochsner because he "worked at Ochsner before in Baton Rouge and [he] had a doctor who had privileges at Ochsner who would certify that he would back up for" him. Other than a request for additional information (which he provided) and learning that Ochsner had spoken to one of his references, Doe 4 did not receive a decision on his application, though he "think[s] he [has] a very good chance of getting privileges there." Doe 4 agreed that requiring the covering doctor to be an OB/GYN is not "an overburdensome requirement for admitting privileges." But he does not know any OB/GYNs in the area because "[a]ll the doctors that [he has] known, they've kind of died out. . . . [or] are no longer in practice."
Upon Causeway's closure, Doe 4 stopped performing abortions and no longer intends to seek admitting privileges. Nothing in the record suggests he has been asked to continue at any other clinic or that the Act has caused him not to move to another clinic. In fact, during his deposition (when still working at Causeway) he was asked whether he would work at other clinics if requested, and he stated he was already "working more than enough for [his] age" and "do[es]n't want to work more." That would be his "personal choice."

2. The Bossier Clinic

Bossier Medical Suite opened in 1980 and was located in Bossier City in Northwestern Louisiana. It closed on March 30, 2017, for reasons not reflected in this record. It provided both medication and surgical abortions during the first and second trimesters. Between 2009 and mid-2014, about 4,171 abortions were performed there. Bossier employed one abortion doctor, Doe 2, who did not hold admitting privileges at the time of the Act's enactment. There are 5 qualifying hospitals within 30 miles of Bossier.

In addition to his work at Causeway, Doe 2 provided medical and surgical abortions at Bossier, his primary clinic. He worked there Tuesday through Saturday when he was not going to Causeway and Tuesday, Wednesday, and Thursday when he was going to Causeway. In 2014, he performed about 550 abortions at Bossier, at least 90% of which were first-trimester terminations.

Doe 2 applied for privileges within thirty miles of the Bossier clinic. Because he already had consulting privileges at University Health, Doe 2 inquired about upgrading to courtesy privileges. He says that the "head of the department [of OB/GYN] . . . was very reticent and reluctant to consider that because of the political nature of abortion. The department head spoke with the Dean and then informed Doe 2 "that [he was] not going to go beyond [his] [consulting] privileges."

Doe 2 also applied to Willis Knighton Bossier City Hospital ("WKBC") on May 12, 2014. WKBC sent a letter indicating that "applicants must demonstrate they have been actively practicing Obstetrics/Gynecology (in your case only Gynecology) in the past 12 months." "In order for the Panel to sufficiently assess current clinical competence," WKBC requested that Doe 2 "submit documentation, which should include operative notes and outcomes, of cases performed within the past 12 months for the specific procedures you are requesting on the privilege request form." Doe 2 testified that "it would have been impossible for [him] to submit that information . . . because [he has not] done any in-hospital work in ten years, so there is no body of hospitalized patients that [he has] to draw from."

Doe 2 sent an email to WKBC indicating that "[o]ver the past 12 months [he] performed the procedures [he is] requesting privileges for several hundred times with no major complications" at Bossier. Instead of attaching documentation to that email, however, he merely invited "any qualified person who would like to visit the Clinic and
examine the records" to do so. Doe 2 initially testified that was his only response, but he later vaguely contradicted himself on redirect, prompting the district court to question him directly to determine whether he had submitted any information. In response, Doe 2 stated, "I actually called . . . and [they] said send 20 representative cases and that's what I did."

It remains unclear whether Doe 2 sent a list of cases, as no document supporting that contention was ever supplied. Even the district court, in its thoroughly documented opinion, did not point to any evidence other than Doe 2's contradictory testimony. WKBC responded via letter that his answer (whatever it was) was not satisfactory. WKBC stated that the "application remains incomplete and cannot be processed" until the pertinent list of cases was submitted. Thus, Doe 2 has not been able to secure privileges at WKBC.

Doe 2 has not applied, nor does he intend to apply, to any other hospital within thirty miles of Bossier. For instance, he refused to apply to Christus Schumpert. He says applying would be fruitless because the Catholic hospital would be unlikely to grant him privileges on account of the nature of his work.

That assumption is belied by Doe 2's own personal history. He previously secured privileges at that hospital when he had both an OB/GYN practice and an abortion practice. Furthermore, as Doe 2 is aware, Doe 3 maintains privileges at that hospital.

Doe 2 also said he had no intention of applying to Minden Hospital because it was "very close to the [geographic] limits," is "a smaller hospital," and he "[doesn't] really know anyone there." Though a smaller hospital and close to the thirty-mile limit, Minden is a qualifying hospital under the Act.

3. Delta Clinic

Delta, in Baton Rouge, has offered abortions since 2001. It provides medication and surgical abortions up to the seventeenth week. Between 2009 and mid-2014, it provided about 8,800 abortions. Two of those patients required direct hospital transfer, one because she "decided during a procedure that she no longer wanted to have the abortion," and "the physician had already begun the process." Delta employs one abortion doctor, Doe 5, who does not hold admitting privileges within thirty miles of Delta. Four qualifying hospitals are located within thirty miles of Delta.

Doe 5 is a board-certified OB/GYN who has performed abortions since April 2012, when he started working at the Delta and Women's clinics. He began working there after receiving a letter the clinics sent to all licensed physicians in Louisiana advertising the open position. Doe 5 is at Delta on Tuesdays and Thursdays but works additional days when necessary. It does not appear that Doe 5 maintains a separate OB/GYN practice.

In 2013, Doe 5 performed approximately 2,000 abortions at Delta. He has performed abortions up to 18 weeks' gestation but will
not go beyond that point. By week 18, the baby is formed to a certain degree that it is beyond what he "feel[s] comfortable looking at and dealing with." In a typical week, between both clinics, he performs "between 40 and 60 of the surgical abortions and 20 to 30 of the medical . . . abortions." Between the clinics, he believes he performs about 6 second-trimester abortions per week. No patient has required a direct hospital transfer.

Doe 5 has not secured qualifying privileges in Baton Rouge. He has applied to three hospitals: Woman's Hospital, Baton Rouge General Medical Center, and Lane Regional Medical Center. He has not heard back from the latter two but did receive a positive response from Woman's Hospital.

Woman's Hospital indicated that it would grant privileges to Doe 5 once he identified a doctor willing to cover his service when he is unavailable. In fact, Doe 5 explained that Woman's Hospital cannot deny him privileges once he does that because, "from what [he is] told, [he] meet[s] all the qualifications. And as long as [he] meet[s] those, they can't deny [his application]." Delta has a transfer agreement with a physician at Woman's Hospital, so Doe 5 asked that doctor whether he would be his covering doctor. That doctor refused because he did not want his information or relationship with the clinic to become public. Doe 5 does not appear to have reached out to anyone else, thus his application will remain pending until he takes further action.

Doe 5 has not followed up with the other two hospitals on the status of his applications. He says he is waiting for a complete denial from Woman's Hospital before doing so. But, as explained, Woman's Hospital marked his application as pending until he finds someone to serve as a covering physician. He has contrived a situation in which it is impossible for him to obtain privileges. Woman's Hospital will not grant or deny privileges until he takes action to find a covering physician—something solely within his control. Yet, he refuses to follow up with other hospitals until Woman's Hospital takes action, something it cannot do until after Doe 5 provides further information.

4. The Hope Clinic

Hope opened in 1980 and is located in Shreveport. It provides surgical and medication abortions through 16 weeks; it performs about 3,000 abortions per year. In the past 20 years, 4 patients at Hope required hospitalization, with 2 of those occurring in the past 5 years. The clinic offers abortions 3 days a week. On busy days, it provides up to 30 terminations, but its administrator, Kathaleen Pittman, testified that it could provide up to 60, though she thought that would be "quite a bit."

At the time of trial, Hope employed two doctors, Doe 1 and Doe 3, to perform abortions. Following the closures of Causeway and Bossier (which occurred after the trial concluded), Hope also employs Doe 2. Because Doe 2 began working at Hope post-trial, all estimates in the record for Hope encompass only Doe 1 and Doe 3.

Doe 3 had admitting privileges before the enactment of Act 620 and remains Hope's only abortion doctor who has privileges.
There are 4 qualifying hospitals within 30 miles of Hope.

a. Doe 1

Doe 1 is not an OB/GYN but, instead, is board certified in Family Medicine and Addiction Medicine. He has worked at Hope as a counseling physician since 2006 but began providing abortions only in 2008. He has never had a family-medicine practice. He is at Hope 3 days a week and provides about 71% of Hope's abortions. In a given month, Doe 1 generally performs 250-300 abortions. He performs medication abortions up to 8 weeks and surgical abortions up to 13 weeks. Between 2009 and 2014, he has had only one woman require hospitalization.

Doe 1 applied to three of the four qualifying hospitals: WKBC, Christus Health, and Minden. He originally applied to WKBC to receive privileges via their Addiction Department, as he maintains a private practice in addiction medicine. WKBC could not grant him privileges in that field because its bylaws require "successfully complet[ing] a residency training program . . . in the specialty in which" privileges are sought. Doe 1 did not complete a residency in addiction medicine because no such residency program existed when he graduated medical school.

Doe 1 then submitted a new application requesting privileges in Family Medicine. WKBC requested that he "submit documentation of hospital admissions and management of patients 18 years of age or older for the past 12 months." It also requested him to explain further the types of complications he expects to treat at WKBC. He responded with a list of all patients he treated when working at a hospital from July 2008 to May 2009. He indicated that he had not had to admit any patient for abortion-related complications in the preceding twelve months, though he has referred women to other doctors in a few situations. WKBC has not responded to that update.

Doe 1 corresponded with Christus Health at length. Christus requested additional information, and Doe 1 provided almost all such information. Christus requested Doe 1 come in to receive an ID badge to complete the application, but when he tried to do so, he was told that he could not receive the badge because he was not applying for the right privileges. He then received a letter saying his application remained incomplete for lack of a badge. That letter also said his application had been pending for 120 days, and applications pending for longer than 90 days were deemed withdrawn. Doe 1 admitted he waited until the very end of the 90-day period to try for the badge. He claims he was later told over the phone that he qualified only for a caregiver position, which would not include admitting privileges. That is not supported by documentation.

Minden Hospital informed Doe 1 that it had no "need for a satellite primary care physician." The one hospital to which he did not apply, University Health, extends privileges by invitation only. He spoke to the chair of the Family Medicine Department, and, although the chair indicated an invitation would be forthcoming, Doe 1 was later told that there was "resistance" to extending him an invitation.
b. Doe 2

Doe 2 provided abortions at Hope for a number of years before moving to the Bossier and Causeway clinics. Once those clinics closed, Doe 2 returned to Hope. He currently provides abortions at Hope when Doe 1 or Doe 3 is absent.

c. Doe 3

Doe 3 is a board-certified OB/GYN who has been performing abortions since 1981. He is the Chief Medical Officer at Hope. Of note, he has trained other doctors to provide abortions. Three of those are not OB/GYNs. One is a radiologist, another an ophthalmologist. The third, Doe 1, specialized in general family medicine. Doe 3 hired all three and was the only one to evaluate their credentials. He admits he neither performed background checks nor inquired into their previous training.

Doe 3 performs about 29% of the abortions at Hope. He provides both surgical and medication abortions two days a week. On average he sees 20-30 patients a week but has seen up to 64. If everything goes well, he can perform "about six procedures in one hour." Doe 3 says he cannot not devote any more time to Hope.

In the past twenty years, Doe 3 has had three patients require hospitalization, and he knows of a fourth from Doe 1. One woman had a perforated uterus, and Doe 3 accompanied her to the hospital and performed the necessary procedures. Another woman had heavy bleeding. The third had placenta accrete, "a very dangerous situation because you cannot get the bleeding to stop."

He implied that he also admitted her and performed her procedures. The fourth woman, Doe 1's patient, had a perforated uterus. Doe 3, who was on call at the hospital, admitted her and performed her procedures.

Doe 3 is active staff, with admitting privileges at WKBC and Christus Schumpert Hospital. He maintains those privileges on account of his private OB/GYN practice. In his declaration, Doe 3 stated that he will cease performing abortions "if he is the only provider in Louisiana with admitting privileges." Curiously, after Doe 5 obtained qualifying privileges in New Orleans—such that Doe 3 would no longer be at risk of being "the only provider in Louisiana"—Doe 3 testified that he does not "believe [he] will continue" if he is "the last physician providing abortions in Northern Louisiana" (emphasis added).

5. Women's Health

Women's Health, in New Orleans, began providing abortions in 2001. It performs abortions through the seventeenth week of pregnancy, and it offers both medication and surgical abortions. Between 2009 and mid-2014, about 7,400 abortions were performed there, with 2,300 in 2013 alone. Of those patients, 2 required direct hospital transfer.

Women's employs 2 abortion doctors, Doe 5 and Doe 6, neither of whom had admitting privileges at the time of Act 620's enactment. Doe 5 has since secured qualifying privileges at Touro Infirmary. There are 9 qualifying hospitals within 30 miles of Women's.

a. Doe 5
Doe 5 began working at Women's in 2012. He works two days a week unless it is busy, in which case he may come in extra days. In 2013, Doe 5 performed approximately 40% of the abortions provided by Women's, all of which were surgical procedures. As noted previously, Doe 5 has secured qualifying privileges at Touro, which is within thirty miles of Women's.

b. Doe 6

Doe 6 is a board-certified OB/GYN who has been performing abortions since 2002. He began working at Women's and Delta in 2002 and has been the medical director of both since 2008. In 2013, he provided about 60% of the abortions occurring at Women's, which represents the percentage of medication abortions performed there. In that year, Doe 6 provided approximately 1,300 medication abortions at Women's. In his ten years at these clinics, he has had two patients require direct hospital transfer.

Doe 6 has not secured privileges. He applied to only one hospital, East Jefferson General Hospital ("EJGH"), and has not received a response. He inquired at Tulane but claims he "was told that [he] should not bother to apply because they would not grant privileges to [him] because [he has] not had hospital admitting privileges since August 2005."

II.

On the above facts, the district court found that all doctors had put forth a good-faith effort to obtain privileges and that Doe 5 would be the sole remaining abortion provider in Louisiana were Act 620 to go into effect. Because it concluded that that would substantially burden a large fraction of women, the court invalidated the law.

We review the district court's legal conclusions de novo and its factual findings for clear error. A finding is "clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

A.

First we must resolve the appropriate framework for reviewing facial challenges to abortion statutes. As a general matter, "[f]acial challenges are disfavored." Louisiana says we should reverse because the district court used the wrong framework for evaluating a facial challenge and that we instead should follow United States v. Salerno, under which plaintiffs "must establish that no set of circumstances exists under which the [law] would be valid."

June Medical urges, to the contrary, that WWH foreclosed using the Salerno framework in the abortion context. In WWH, the Court, reviewing an as-applied challenge, reversed and invalidated the law in its entirety, finding that a large fraction of women would be substantially burdened.
Before *WWH*, this court viewed the standard for facial invalidation of abortion regulations as "uncertain." In *Lakey*, we explained that a plurality in *Casey*, had concluded that a regulation was facially invalid if, "in a *large fraction of the cases* in which it is relevant, it will operate as a substantial obstacle." Earlier decisions, however, had used the "no set of circumstances" standard.

In *WWH*, the Court eliminated the uncertainty and adopted the *Casey* plurality's large-fraction framework. As the Eighth Circuit explained, "For [facial] challenges to abortion regulations, however, the Supreme Court has fashioned a different standard under which the plaintiff can prevail by demonstrating that 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice.'"

Importantly, the Court in *WWH* clarified by limiting the "large fraction" to include only "those women for whom the provision is an actual rather than an irrelevant restriction." "[C]ases in which [the provision at issue] is relevant" is a narrower category than "all women," "pregnant women," or even "women seeking abortions* identified by the State." For a law regulating only medication abortions, for example, the relevant denominator is not all women seeking any type of abortion, but only those potentially impacted (i.e., those seeking a medication abortion). In *WWH*, the Court treated the denominator as all women seeking abortions, but only because the statute at issue, encompassed all types of abortions.

Here, too, the relevant denominator to determine a "large fraction" is all women seeking abortions in Louisiana, as Act 620 applies to providers of both medication and surgical abortions. Accordingly, to sustain the facial invalidation of Act 620, we would have to find that it substantially burdens a large fraction of all women seeking abortions in Louisiana.

B.

The parties present conflicting interpretations of the legal standard for finding an undue burden under *WWH*. June Medical frames *WWH*'s analysis as a balancing test: "Where an abortion restriction's burdens outweigh its benefits, the burdens are 'undue' and unconstitutional." Louisiana counters that *WWH* did not alter the well-known standard in *Casey*.

*WWH*'s analysis is rooted in *Casey*, which defined an "undue burden" as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The Court in *WWH* explained that *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."

In *WWH*, the Court relied on *Casey*'s analyses of the spousal-notification and parental-notification provisions. In parentheticals, it describes the decisional process as "balancing." Consequently, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an
abortion impose an undue burden on the right."

There is no doubt that *WWH* imposes a balancing test, and Louisiana errs in denying that. It is not reasonable to read the language in *WWH*, quoted above, as announcing anything but a balancing test, especially given the Court's express use of the word "balancing" to describe *Casey*.

Hewing to *WWH* and *Casey*, we recognize and apply a balancing test. Louisiana, however, is correct that it is not a "pure" balancing test under which any burden, no matter how slight, invalidates the law. Instead, the burden must still be substantial, as we will explain.

Quoting *Casey* as cited above, the *WWH* Court began by emphasizing that to fail constitutional scrutiny, a law must place "a substantial obstacle in the path of a woman seeking an abortion." *Casey* expressly allows for the possibility that not every burden creates a "substantial obstacle." Thus, even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion.

The proper reading of *WWH* is a combination of the views offered by June Medical and Louisiana: A minimal burden even on a large fraction of women does not undermine the right to abortion. To conclude otherwise would neuter *Casey*, and any reasonable reading of *WWH* shows that the Court only reinforced what it had said in *Casey*. Thus, we must weigh the benefits and burdens of Act 620 to determine whether it places a substantial obstacle in the path of a large fraction of women seeking abortions in Louisiana.

C.

We are of course bound by *WWH*’s holdings, announced in a case with a substantially similar statute but greatly dissimilar facts and geography. We begin by summarizing the Court's close, fact-bound balancing analysis of the benefits and burdens in *WWH*—an analysis that led the Court to conclude that Texas's admitting-privileges requirement was unduly burdensome.

1.

The Court began by examining the benefits the admitting-privileges requirement might provide. It noted that the purpose of Texas's law was to "ensure that women have easy access to a hospital should complications arise during an abortion procedure." The evidence the court examined to determine whether the law served its stated purpose included expert testimony and studies about abortions in the United States generally. The Court explained that there was "nothing in Texas' record evidence that shows that, compared to prior law (which required a 'working arrangement' with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health." The Court specifically noted that Texas could not point to "a single instance in which the new requirement would have helped even one woman obtain better treatment."

Further, the Court found that the privileges had no relationship to a doctor's ability. Instead, the privileges provision
looked to discretionary factors such as clinical data requirements and residency requirements. One abortion doctor who had practiced for 38 years was unable to obtain privileges at any of the 7 hospitals within the required 30-mile radius of the clinic. Therefore, "[t]he admitting-privileges requirement does not serve any relevant credentialing function."

2.

*WWH* identified four burdens imposed by the admitting-privileges requirement. Primarily, it caused the closure of 80% of Texas's abortion clinics. Only 7 or 8 of the 40 remained. The Court looked to the timing of the closures as evidence of causation. When H.B. 2 began to be enforced, the number of clinics dropped to half, from 40 to 20. The day the requirement took effect, 11 more clinics closed.

Part of the reason for the closures was the difficulty of obtaining privileges. Many Texas hospitals conditioned admitting privileges on having a minimum number of patient admissions per year. That created an almost-universal requirement that physicians with privileges maintain minimum annual admissions, constituting a *per se* bar to admission for most abortion doctors. The president of a Texas hospital testified that no doctor could get privileges near El Paso because not a single patient seeking an abortion had required transfer to a hospital in the past ten years. Thus, "doctors would be unable to maintain admitting privileges or obtain those privileges for the future."

Closures in Texas caused the third burden: increased driving distances. After the closures, the number of women living more than 150 miles from a clinic rose from 86,000 to 400,000, an increase of 350%. The number of women living more than 200 miles from a clinic increased from 10,000 to 290,000, an increase of 2,800%. The Court "recognize[d] that increased driving distances do not always constitute an 'undue burden,'" but stacking that burden on top of the others, "when viewed in light of the virtual absence of any health benefit," supported the finding of an undue burden.

The final burden was decreased capacity—"fewer doctors, longer waiting times, and increased crowding." The Court used "common sense" to conclude that the remaining clinics could not expand their capacity fivefold to meet the demand for abortions. The remaining clinics would need to expand from providing 14,000 abortions per year to providing 60,000-72,000 per year. The Court found that to be unrealistic because of the capacity currently carried by existing clinics and the lack of evidence that expansion was feasible.

III.

Mirroring the fact-intensive review that the Supreme Court performed in *WWH*, we do the same in-depth analysis of the instant record, weighing both the benefits and the burdens of Act 620. Unlike Texas, Louisiana presents some evidence of a minimal benefit. And, unlike Texas, Louisiana presents far more detailed evidence of Act 620's impact on access to abortion. In light of the more developed record presented to the district
court and to us, the district court—albeit with the best of intentions and after diligent effort—clearly and reversibly erred. In contrast to Texas's H.B. 2, Louisiana's Act 620 does not impose a substantial burden on a large fraction of women, so the facial challenge fails.

A.

The legislative history of Act 620 plainly evidences an intent to promote women's health. Specifically, the Act seeks to accomplish that goal by ensuring a higher level of physician competence and by requiring continuity of care.

Texas presented no evidence that the credentialing function performed by hospitals differed from the credentialing performed by clinics. The record for Louisiana contains testimony from abortion providers themselves, explaining that the hospitals perform more rigorous and intense background checks than do the clinics. The record shows that clinics, beyond ensuring that the provider has a current medical license, do not appear to undertake any review of a provider's competency. The clinics, unlike hospitals, do not even appear to perform criminal background checks.

Finally, Louisiana explains that the Act brings the requirements regarding outpatient abortion clinics into conformity with the "preexisting" requirement that physicians at ambulatory surgical centers ("ASCs") must have privileges at a hospital within the community. 48 LA. ADMIN. CODE § 4535(E)(1). Procedures performed at ASCs include upper and lower GI endoscopies, injections into the spinal cord, and orthopedic procedures.

Outpatient procedures such as dental surgeries and some D&C miscarriage-management procedures do not require the same admitting privileges. Those are governed by Title 46 of the regulatory code, whereas outpatient abortion facilities and ASCs are under Title 48. Louisiana's expert, who was involved in the drafting of Act 620, testified that the differential treatment was because of that grouping and did not single out abortion providers from other outpatient surgery centers. Thus, Louisiana was not attempting to target or single out abortion facilities.

In fact, it was just the opposite—the purpose of the Act was to bring them "into the same set of standards that apply to physicians providing similar types of services in [ASCs]." The benefit from conformity was not presented in WWH, nor were the reasons behind the conformity—continuity of care, qualifications, communication, and preventing abandonment of patients—directly addressed. Accordingly, unlike in WWH, the record here indicates that the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion.

Still, the benefits conferred by Act 620 are not huge. Though we credit Louisiana's more robust record on the benefits side of the ledger, the district court did not clearly err in finding that Act 620 provides minimal benefits, given the current standard of care in highly specialized hospital settings.
B.

In *WWH*, the Court identified four obstacles erected by Texas's requirement of admitting privileges: closure of facilities, difficulty in obtaining privileges, driving distances, and clinic capacities. The Court decided not that any burden individually was sufficient but that the four dominoed to constitute a substantial burden.

The near impossibility of obtaining privileges was the first domino to fall. Had that difficulty not loomed, there would have been no facility closures, no increased driving distances, and no issues regarding clinic capacities. Given the high minimum admissions requirement at most Texas hospitals, that first burden was unavoidable.

Originally, Texas had 40 facilities and numerous abortion doctors. Because the doctors could not obtain privileges, the number of clinics fell from 40 to only 7 or 8. Those closures undoubtedly burdened almost all women seeking abortions in Texas as a result of capacity issues and increased driving distances.

Thus, everything turns on whether the privileges requirement actually would prevent doctors from practicing in Louisiana. If that domino does not fall, no other burdens result. So we review the difficulty facing the abortion providers and trace them back to the patients to determine whether Act 620 substantially burdens a large fraction of women seeking abortions.

The paucity of abortion facilities and abortion providers in Louisiana allows for a more nuanced analysis of the causal connection between Act 620 and its burden on women than was possible in *WWH*. For one, we can examine each abortion doctor's efforts to comply with the requirements of Act 620. We also can look to the specific by-laws of the hospitals to which each applied. This more intricate analysis yields a richer picture of the statute's true impact, the sort of obstacle it imposed. And this methodology allows us to scrutinize more closely whether June Medical has met its burden.

We conclude that it has not. To the contrary, it has failed to establish a causal connection between the regulation and its burden—namely, doctors' inability to obtain admitting privileges. Specifically, there is insufficient evidence to conclude that, had the doctors put forth a good-faith effort to comply with Act 620, they would have been unable to obtain privileges. Instead, as discussed below, the vast majority largely sat on their hands, assuming that they would not qualify. Their inaction severs the chain of causation.

The district court inquired whether the doctors had put forth a good-faith effort, without which June Medical cannot establish the requisite causation between Act 620 and a doctor's inability to obtain privileges. And, as *WWH* emphasized, it is June Medical's burden to put forth affirmative evidence of causation. Were we not to require such causation, the independent choice of a single physician could determine the constitutionality of a law. Using this methodology, we conclude, given the entire weight of the evidence, that the district court clearly erred in saying that all doctors had put forth a good-faith effort to obtain privileges.
Unlike the litigants in *WWH*, who presented only generalities concerning admitting privileges, the parties here provide the bylaws for the relevant hospitals. The situation differs from the circumstances in *WWH* in that the majority of hospitals do not have a minimum number of required admissions that a doctor must have to maintain privileges. Instead, most hospitals have a competency requirement. Competency is evaluated either by requesting the doctor to provide information about recent admissions at any other hospital or by having a provisional admittance period during which the hospital can personally observe and evaluate him. Although the grant of privileges remains discretionary, the death knell to Texas’s H.B. 2 was the combination of discretion and minimum admission requirements—the latter of which is less prevalent in Louisiana.

1. Doe 1

The district court concluded that Doe 1 put forth a good-faith effort and could not obtain privileges. Doe 1 applied to three of four qualifying hospitals near Hope. WKBC has not responded. There appears to be an unresolved communication problem with Christus, so it is possible Doe 1 could obtain qualifying privileges there. The record is uncertain on this point, so we cannot say that the district court clearly erred in concluding that Doe 1 put forth a good-faith effort. Doe 1 was definitively rejected by Minden for reasons other than credentials. The fourth hospital, University Health, requires an invitation to apply, and the hospital declined to extend an invitation because of department resistance to staffing an abortion provider.

2. Doe 2

The district court erroneously concluded that Doe 2 put forth a good-faith effort. Doe 2, now a back-up abortion doctor at Hope in Shreveport, inquired about privileges at two hospitals within thirty miles of Hope. He claims that University Health refused to extend an invitation because of his abortion practice. WKBC required he submit documentation of OB/GYN procedures on whether he supplied documentation. At the very least, he explained to WKBC that he "performed the procedures [he is] requesting privileges for several hundred times" at the Bossier clinic. WKBC responded that that did not suffice—but the record does not establish whether the deficiency was his email response or actual documentation of the Bossier cases, performed within the past twelve months. Doe 2's testimony was contradictory.

It is possible that Doe 2 could obtain privileges at Christus, though he has not applied. He previously had privileges there, and Doe 3 currently maintains privileges there. Thus, Doe 2's theory that a Catholic hospital would not staff an abortion provider is blatantly contradicted by the record. Opposite to what the district court found, Christus and Minden remain open options.

3. Doe 3

Doe 3 already has privileges at two hospitals within thirty miles of Hope. Thus, the Act is not burdensome on him.

4. Doe 4
In order to return to retirement, Doe 4 has stopped pursuing privileges and came out of retirement to cover for a sick doctor. There is no evidence of causation, so we need not evaluate whether he could obtain privileges.

5. Doe 5

The district court erroneously concluded that Doe 5 put forth a good-faith effort in obtaining privileges for his practice at Delta. For his abortion practice at Women's, Doe 5 received admitting privileges at Touro, which is within thirty miles of Women's.

For his practice at Delta, Doe 5 applied to three nearby hospitals. Two have not responded, but, according to Doe 5, Woman's Hospital will grant him privileges once he finds a covering doctor. He mentions asking only one doctor to serve as his covering physician. That doctor declined, and Doe 5 provides no evidence that he has reached out, or intends to reach out, to other doctors. Though Woman's Hospital is awaiting Doe 5's further action, he inexplicably states he is waiting on Woman's Hospital's further action before following up on his other two applications. The most logical explanation for Doe 5's delay is that he is awaiting the result of this litigation before he acts.

As Doe 4 testified, finding a covering physician is not overly burdensome. Under the clear-error standard, looking to the entire weight of the evidence, we are left with the impression that Doe 5 is waiting for the outcome of this litigation to put forth an actual good-faith effort. That lackluster approach is insufficient for facial invalidation of the law. In light of Doe 5's failure to seek a covering physician, the district court clearly erred in finding that Doe 5 put forth a good-faith effort and that his application at Woman's Hospital was de facto denied. The Act is not overly burdensome on Doe 5.

6. Doe 6

The district court erroneously concluded that Doe 6 put forth a good-faith effort. Doe 6 applied to one hospital, EJGH, from which he has received no response. He was told by Tulane that his lack of recent admissions is likely a barrier, so he did not apply there.

But there are nine qualifying hospitals in the area. Moreover, he has not applied to Touro, where Doe 5 was able to obtain qualifying privileges. That lack of effort demonstrates the district court's clear error in finding that Doe 6 put forth a good-faith effort.

7. Conclusion

Given the evidence, only Doe 1 has put forth a good-faith effort to get admitting privileges. Doe 2, Doe 5, and Doe 6 could likely obtain privileges. Doe 3 is definitively not burdened.

At least three hospitals have proven willing to extend privileges. On the entire evidence, we are left with the definite and firm conviction that the district court erred in finding that only Doe 5 would be able to obtain privileges and that the application process creates particular hardships and obstacles for abortion providers in Louisiana.

C.
In Texas, the admitting-privileges law caused 32 of the 40 clinics to close. In dramatic contrast, under the record presented to us, there is no evidence that Louisiana facilities will close from Act 620. If the Act were to go into effect today, both Women's and Hope could remain open, though each would have only one qualified doctor. Delta would be the only clinic required to close, as its only Doctor, Doe 5, does not have admitting privileges within 30 miles. Because obtaining privileges is not overly burdensome, however, the fact that one clinic would have to close is not a substantial burden that can currently be attributed to Act 620 as distinguished from Doe 5's failure to put forth a good-faith effort. And, because Doe 5 has a pending offer and probably will be able to obtain privileges, the only permissible finding, under this record, is that no clinics will likely be forced to close on account of the Act.

Doe 3 initially indicated that he would cease practicing if he is the only remaining abortion doctor in the entire state. Once it became clear that at least one other doctor (Doe 5) had obtained privileges and would continue practicing, Doe 3’s story changed. He testified that he would now cease practicing were he the only remaining abortion provider in northern Louisiana. If he leaves the practice today, Hope would close because Doe 1 and Doe 2 do not currently have privileges. The closure, however, would also lack the requisite causation, as it rests on an independent personal choice. Doe 3's shifting preference as to the number of remaining abortion providers is entirely independent of the admitting-privileges requirement.

The district court's contrary findings are clearly erroneous. To attribute a doctor's cessation of practice to Act 620, his retirement must be caused by a direct inability to meet the legal requirements of the bill. Doe 5's inaction and Doe 3's personal choice to stop practicing cannot be legally attributed to Act 620. Departure from the standard of direct causation leads to a line-drawing problem that would allow unrelated decisions to inform the undue-burden inquiry. For the question of causation, although the "government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those obstacles."

In WWH, the majority rejected the dissent's theory that the clinic closures could be attributed to some other cause and not H.B. 2. It did so because there was no evidence of such alternative causes in the record; accordingly, the dissent's theories were mere "speculation." Here, by contrast, there was clear evidence in the record before the district court that various doctors failed to seek admitting privileges in good faith. Unlike in WWH, Act 620's impact was severed by an intervening cause: the doctors' failure to apply for privileges in a reasonable manner. Accordingly, there is an insufficient basis in the record to conclude that the law has prevented most of the doctors from gaining admitting privileges. Similarly, any clinic closures that result from the doctors' inaction cannot be attributed to Act 620.

D.

Although "increased driving distances do not always constitute an 'undue burden,'" they
can be, under the right facts, "one additional burden, which, when taken together with others . . . and when viewed in light of the virtual absence of any health benefit," can constitute an undue burden. Louisiana does not reflect such right facts. Because all three clinics could remain open, the Act will cause no increase in driving distance for any woman—an extremely important distinction from the record in Texas.

E.

Following the implementation of H.B. 2, the number of clinics in Texas decreased, as we have repeatedly noted, from 40 to only 7 or 8. The *WWH* Court expressed concern that open facilities would not be able to "meet the demand of the entire State." In Texas, each open facility would have had to increase its abortions from 14,000 to 60,000 or 70,000—"an increase by a factor of about five." The Court rejected the contention that facilities could expand to meet the demand absent facility-specific evidence. In Louisiana, however, because no clinics would close, there would be no increased strain on available facilities, as no clinic will have to absorb another's capacity.

Importantly, however, it will be nearly impossible for Doe 1 to obtain qualifying privileges. Therefore, we review the facts to determine whether the remaining abortion providers at Hope have the capacity to meet the demand Doe 1 currently satisfies.

Doe 1 practices at Hope alongside Doe 2 and Doe 3. Doe 1 testified that he performs about 2,100 abortions annually. Doe 2 fills in when Doe 1 or Doe 3 is unavailable. When Doe 2 served as the primary provider at Causeway and Bossier, he performed 1,000 abortions per year. Doe 3 performs somewhere between 870 and 1,250 per year.

If Doe 1 ceased performing abortions, Doe 2 could likely step in, as that is his current arrangement. Assuming Doe 2 performs at his previous capacity, there would be a gap of about 1,100 abortions at the Hope clinic. Split between Doe 2 and Doe 3, that is an additional 550 procedures per doctor per year. That is not overly burdensome, especially given Doe 3’s testimony that he has performed up to 60 procedures per week and regularly performs up to 30.

To put that number in perspective, the Court in *WWH* found unduly burdensome the expectation that 8 clinics could absorb the work of 40. Each remaining Texas abortion provider would have had to increase his capacity by a factor of 5. A fivefold increase for Doe 3 would mean performing 100-150 abortions per week instead of his usual 20-30.

In contrast, the loss of Doe 1 would require Doe 3 to perform only 5 extra procedures each day he currently works (2 days per week). Instead of performing 20-30 abortions per week, he would perform 30-40. It necessarily follows that a gap of 1,100 procedures per year—split between 2 doctors—does not begin to approach the capacity problem in *WWH* and is not a substantial burden.

Consider, for example, Doe 3’s testimony that he can perform up to 6 abortions per hour. Using that number, adding 1,100 abortions would require 183.3 hours per year, which is
an extra 3.6 hours per week, or about 1.8 hours per day, assuming a two-day work week for 50 weeks of work. Divided between two doctors, that is 54 minutes per day. Under that estimation based on the facts in the record, the extra 54 minutes of procedure time is unlikely to result in an undue burden on women. At the very least, June Medical did not produce sufficient evidence to evince such a burden.

To put it another way, Doe 2 and Doe 3 will each need to perform an additional 550 procedures per year. That amounts to six extra abortions each day that Doe 3 currently works. Using his testimony that he can perform six abortions an hour, that load would not result in a substantial increase in wait times. Common sense dictates that an hour cannot be a substantial burden.

F.

Though we have determined that no woman would be *unduly* and thus unconstitutionally burdened by Act 620, we additionally hold that the law does not burden a large fraction of women. To quantify the burden of eliminating Doe 1, the large-fraction standard requires us to determine what percentage of women seeking abortions in Louisiana would be affected by Act 620.

As an initial matter, *WWH* is less than clear on how to delimit the numerator and denominator to define the relevant fraction. The Supreme Court has limited the denominator to only individuals whose abortion rights are burdened by the statute: It encompasses "those [women] for whom [the provision] is an *actual* rather than an irrelevant restriction."

It is an open question whether the denominator is made up of those women who could potentially be burdened by the regulation or just those women who are actually burdened. Under the former, the numerator is then comprised of those women who are actually burdened by the regulation. Then we would review whether those women are substantially burdened and whether that fraction is large. Under the second interpretation, the numerator is comprised of those women who are substantially burdened by the regulation. And, then we would determine whether the resulting fraction is large.

We need not decide which interpretation is proper because June Medical failed to demonstrate that a large fraction of women are substantially burdened under either analysis.

1.

We start with the first interpretation—the reading most favorable for June Medical. There are approximately 10,000 abortions performed annually in Louisiana, 3,000 of which are at Hope, where Doe 1 currently works. Thus, only 30% (or, less than one-third) of women seeking an abortion would face even a potential burden of increased wait times were Doe 1 to cease practicing.

The Supreme Court has not defined what constitutes a "large fraction," and the circuit courts have shed little light. The Sixth Circuit determined that 12% was insufficient and that the large-fraction requirement is "more
conceptual than mathematical." It concluded that "a large fraction exists when a statute renders it nearly impossible for the women actually affected by an abortion restriction to obtain an abortion." In other words, as "[o]ther circuits" have found, "a large fraction [exists only] when \textit{practically all} of the affected women would face a \textit{substantial} obstacle in obtaining an abortion."

Thirty percent does not approach "practically all" women seeking abortions in Louisiana and cannot be deemed a large fraction for purposes of \textit{WWH} or Act 620. A superficial reaction might be to think, to the contrary, that 30\% is obviously large. A few easy examples show why that is not so. If 30\% of a law school class failed the bar, we would say that is a large fraction. Conversely, if 30\% passed the bar, we would think that small. Again, if 30\% of children had food to eat for lunch today, we would think that a small fraction. But if 30\% were without food, we would think that large. Thus what constitutes a large fraction requires identifying the starting point.

In every other area of the law, a facial challenge requires plaintiffs to establish a provision's unconstitutionality in every conceivable application. In other words, they must demonstrate an unconstitutional burden on 100\% of those impacted. Plaintiffs asserting abortion rights, however, are excused from that demanding standard and must show a substantial burden in only a large fraction of cases.

The shift from the usual standard to the large-fraction standard was intended to ease the burden on abortion plaintiffs relative to plaintiffs who bring challenges to other sorts of laws. There is a difference, however, between cracking the door and holding it wide open.

It cannot be that we force a plaintiff asserting his right to a fair trial, to freedom from unconstitutional searches and seizures, to associate freely, or to exercise his religion freely, to shoulder the burden of demonstrating that there is \textit{no possible} constitutional application of a law, while allowing an abortion plaintiff to succeed on a showing that the law is unconstitutional in less than one of three cases. Bearing a burden of 30\% compared to the typical burden of 100\% is not large. To conclude otherwise eviscerates the restrictions on a successful facial challenge.

Not only is 30\% not a large fraction for purposes of \textit{WWH} and Act 620, as already explained, any burden imposed by the Act is not substantial even on women within the 30\%. The burden is only potential: Doe 1's capacity can easily be absorbed by the remaining abortion doctors. Even were that potential burden of increased wait times to materialize, it would not be substantial.

June Medical's challenge thus fails under this interpretation at both critical points. It first fails to establish that the women potentially impacted suffer an unconstitutional burden. And it further fails to show that this group of women constitutes a large fraction. Instead of demonstrating an undue burden on a large fraction of women, June Medical at most shows an insubstantial burden on a small
fraction of women. That falls far short of a successful facial challenge.

2.

Under the second interpretation, June Medical fares even worse. The denominator of women actually burdened is limited to those 3,000 women who seek abortions annually at Hope Clinic. The numerator is limited to those women substantially burdened. Since we have already concluded that Act 620 effects no constitutional deprivation, the numerator encompasses no one. In other words, the statute imposes an undue burden on 0% of women. By definition, zero percent is not large. Thus, June Medical cannot succeed on its facial challenge under this interpretation either.

IV.

We are bound to apply *WWH*, which is highly fact-bound, and the records from Texas and Louisiana diverge in all relevant respects. Act 620 results in a potential increase of 54 minutes at one of the state's clinics for at most 30% of women. That is not a substantial burden at all, much less a substantial burden on a large fraction of women as is required to sustain a facial challenge. Despite its diligent effort to apply *WWH* faithfully, the district court clearly erred in concluding otherwise.

The judgment is REVERSED, and a judgment of dismissal is RENDERED.

HIGGINBOTHAM, Circuit Judge, dissenting:

Twenty-six years ago, the Supreme Court laid down the now familiar metric: "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden" on the exercise of that right. Yet the majority today fails to meaningfully apply the undue burden test as articulated in *Casey* and clarified in *Whole Woman's Health* and fails to give the appropriate deference to the district court's opinion, essentially conducting a second trial of the facts on this cold appellate record. With respect, I must dissent.

I.

We are to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." While the majority correctly rejects Louisiana's untenable position that *WWH* does not require balancing, it then misapplies that balancing. As I will detail, Act 620 will substantially burden women's access to abortion with no demonstrable medical benefit. In reaching a contrary conclusion, the majority accepts the district court's findings of a want of benefits but offers a starkly different view of the burdens imposed.

On a robust trial record after conducting a six-day bench trial, the district court documented its findings of benefits and burdens in a lengthy and detailed opinion. The divergence between the findings of the district court and the majority is striking—a dissonance in findings of fact inexplicable to these eyes as I had not thought that abortion cases were an exception to the coda that appellate judges are not the triers of fact. It is
apparent that when abortion comes on stage it shadows the role of settled judicial rules.

A.

While the majority correctly states that "the district court did not clearly err in finding that Act 620 provides minimal benefits," it also "credit[s] Louisiana's [claims of a] more robust record on the benefits side of the ledger" than the record of the Texas law's benefits in *WWH*. Louisiana contends that the purpose of the admitting privileges requirement is to facilitate care for women who experience complications during an abortion procedure that require admission to a hospital and to ensure the competence of physicians performing abortion procedures. The district court found that the law conferred no benefit and was "an inapt remedy for a problem that does not exist."

The record provides ample evidence for the district court's findings that Act 620 "confers only minimal, at best, health benefits for women seeking abortions." Nationally, nearly one million abortions are performed each year, approximately 90% of which occur in the first trimester. There are two types of abortion procedures: surgical and medication abortion. Surgical abortion is minimally invasive and does not require an incision or the use of general anesthesia but instead uses only mild or moderate sedation and/or local anesthesia. Complications of surgical abortions are rare and can generally be managed in the clinic setting. Patients rarely suffer complications requiring direct transfer from the clinic to the hospital. Medication abortion involves the combination of two drugs and requires no anesthesia or sedation.

The numbers are telling: the district court found that the prevalence of any complication in first trimester abortion in an outpatient setting is 0.8% and the prevalence of major complication requiring treatment in a hospital is 0.05%. The risk of complication requiring hospitalization in the second trimester is 1.0%. The district court made findings that the incidence of complications requiring direct transport to a hospital is similarly low at Louisiana clinics. At the Hope Clinic, which serves approximately 3,000 patients a year, only four patients have required direct transfer to a hospital in the past 23 years. Between 2009 and mid-2014, the Bossier Clinic performed 4,171 abortions with only two patients requiring direct hospital transfer and the Causeway Clinic performed 10,836 abortions, with only one patient requiring direct hospital transfer. Among doctors involved in the litigation, the district court found that Doe 2 performed approximately 6,000 abortions between 2009 and mid-2014, with only two patients requiring direct hospital transfer, Doe 5 has performed thousands of abortions at Women's Health and Delta Clinic in the past three years and has never had a patient requiring hospital transfer, and Doe 6 has performed thousands of abortions in the past ten years with only two patients requiring a direct hospital transfer. Summarizing the evidence, the district court concluded that hospital transport was required "far less than once a year, or less than one per several thousand patients."
Those findings mirror findings credited by the Supreme Court in *WWH* that "before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure."

The district court documents the protocol followed by physicians and clinics in the rare instances where direct transfer to a hospital is required. As the majority notes, the statutory scheme that was in place prior to Act 620's passage required abortion clinics to have "a written transfer agreement with a physician who has admitting privileges within the same town or city." There was testimony describing the process at the clinics for managing complications. For example, at Hope Clinic, if a physician determines that a patient needs direct transport to the hospital (a situation the district court found has presented for four patients in the past 23 years), emergency transport is called, the Clinic ensures that the chart is complete and sent to the hospital, and the physician contacts the hospital to alert the attending physician that the patient will be arriving and provides information about the complication.

The majority notes that Louisiana, in an attempt to emphasize the importance of continuity of care, highlights three instances where Doe 3, the one physician who had admitting privileges prior to the passage of Act 620, used those privileges to care for patients who experienced complications following abortion procedures. As the majority acknowledges, however, there is no evidence in the record that those patients would not have received proper treatment had Doe 3 lacked admitting privileges. It is significant that the record is devoid of any instance of a patient receiving substandard care or suffering any medical hardship after experiencing a complication requiring hospital transfer at the hands of a physician without admitting privileges. The majority concedes this lack of evidence, and aptly refuses to credit a purported health benefit.

The majority does credit Act 620 with assisting in the credentialing of physicians. First, the majority contends that, unlike the Texas law at issue in *WWH*, Act 620 serves a credentialing function, filling a purported void created by the clinics' failure to perform a review of a provider's competency or to conduct criminal background checks. The district court made no such finding. Instead, the majority appears to rely on Doe 3's testimony that, as medical director at Hope, he was responsible for hiring new physicians for the clinic and, in that capacity, did not perform criminal background checks on two physicians he hired. In his testimony, Doe 3 describes the differences between the hiring process at Hope Clinic and at hospitals where Doe 3 has previously been involved in hiring, including Bossier Medical Center, Willis-Knighton Bossier, and Doctor's Hospital. Doe 3 testified that he sat on committees of those hospitals that approve admitting privileges requests and he answered affirmatively when asked if those committees consider the applying doctors' training, education, experience, and criminal backgrounds. In contrast, Doe 3 compared hiring at Hope Clinic to "setting up a private practice." He testified that there was no "committee" responsible for hiring because "there aren't that many physicians at Hope."
Doe 3 did not run background checks and was the only person to consider their qualifications because, as medical director, he had sole responsibility for hiring. There is no dispute that hiring at clinics functions differently than hiring or consideration of admitting privileges at hospitals. The majority ascribes a benefit to that difference, a finding not made by the district court and not evident in the record. Doe 3 acknowledges that he trained the two physicians he hired to perform abortion procedures because they had previously practiced as an ophthalmologist and radiologist. The record is devoid of any finding that a single physician with a criminal history has been hired by Hope (or any of the other clinics providing abortion services in Louisiana), that any physician that has performed abortions was incompetent to provide such services, or that any patient has suffered for want of physician competence. On this record the "credentialing function" benefit is "a solution in search of a problem," one for which the majority is the main proponent.

B.

Having determined the absence of evidence that Act 620 will provide any benefit, we ask whether the burden imposed by the statute is "undue." It is beyond strange that it is necessary to remind that "[i]t is not our task to re-try the facts of the case; this is especially true where the lower court's findings are based on oral testimony and the trial judge has viewed the demeanor and judged the credibility of the witnesses." We cannot "reverse the findings of the trial judge simply because we are convinced that we would or could decide the case differently." Yet, on the burdens side of the ledger, it is apparent that the majority here swiftly retries the case failing to credit findings that were not "clearly erroneous."

Louisiana disputes the district court's findings that two of the doctors would stop performing abortions if Act 620 went into effect. First, that the limited privileges Doe 2 obtained from Tulane qualify under Act 620 and the district court erred in concluding otherwise. Next, that the district court erred in finding that Doe 3 will no longer provide abortions in Louisiana if Act 620 takes effect because of a "well-founded concern for his personal safety" if he is the last remaining provider in either Louisiana or northern Louisiana, rejecting the district court's conclusion that Doe 3's "personal choice to stop practicing" can be legally attributed to Act 620.

Louisiana does not appear to dispute that: (1) Does 1 and 6 were unable to obtain privileges despite their good-faith efforts to do so; (2) Doe 2 was unable to obtain privileges other than the limited privileges obtained from Tulane (which appellant argues qualify under Act 620); and (3) that Doe 5 was unable to obtain privileges at a hospital within 30 miles of Delta Clinic. The state did not challenge the district court's findings that Does 2, 5, and 6 each put in a good-faith effort to obtain admitting privileges—a plain waiver. Undeterred, the majority simply finds the opposite.

1. Doe 1
Doe 1 provides medication abortions through 8 weeks and surgical abortions through 13 weeks, six days at Hope Clinic in Shreveport, where he provides approximately 71% of the 3,000 abortions performed each year. The district court found that Doe 1 had put forth a good-faith effort to secure admitting privileges, documenting his attempts to secure privileges at five different hospitals and his inability to do so for reasons unrelated to his competence.

Doe 1 contacted the Family Medicine Department at University Health in Shreveport (where he had done his residency in family medicine) but was told by the department director that he would not be offered a position due to staff objections to his work at Hope Clinic. In another attempt to obtain privileges, Doe 1 applied to Minden Medical Center, but the staff coordinator rejected the application, stating "[s]ince we do not have a need for a satellite primary care physician at this time, I am returning your application and check." Hope's administrator contacted a third hospital, North Caddo, on Doe 1's behalf and was told they did not have the capacity to accommodate transfers. Doe 1 applied to WKBC as an addiction medicine specialist because he has a board certification in addiction medicine and the hospital has an addiction recovery center. His application was denied because he had not undergone a residency program in addiction medicine (a program which did not exist at the time he received his board certification). He reapplied as a family practice specialist, at which time WKBC requested documentation of hospital admissions from the last 12 months. Because abortion procedures rarely result in complications requiring hospitalization, he had not admitted any patients in that timeframe so instead provided information about his training and procedures. The application remained pending neither approved nor denied by the hospital and the district court found that, under those circumstances, the application was de facto denied. The district court concluded that a fifth application, to Christus, was also de facto denied. Doe 1 submitted his application to Christus in July 2014 and subsequently provided additional information to Christus on two occasions when it was requested. When the administrator for the Hope Clinic called to make an appointment for Doe 1 to get an ID badge (also a requirement of the application process), the administrator was told Doe 1 had submitted the wrong type of application and needed to submit a "non-staff care giver" application (a type of privilege that would not qualify under Act 620). Doe 1 then received a letter stating that his application was incomplete for failing to obtain an ID badge, and would be deemed withdrawn. Doe 1 reached out to the hospital, and was again told that he would need to apply for non-staff care giver privileges, which would not qualify under Act 620.

The majority credits the district court's finding that Doe 1 has been unable to secure admitting privileges despite good-faith efforts to do so and agrees that Doe 1 will be required to stop providing abortions if Act 620 goes into effect.

2. Doe 2

Doe 2 provides medication abortions through 8 weeks and surgical abortions up to the legal
limit of 21 weeks, 6 days. In the year prior to trial, Doe 2 performed 550 abortions at Bossier Clinic and 450 abortions at Causeway Clinic, or a total of 1,000 abortions. Since Bossier's closure, Doe 2 has entered into a working agreement with Hope to provide abortion services when Hope's primary physicians are unavailable to perform abortions.

The district court found that Doe 2 has been unsuccessful in his good-faith efforts to obtain active admitting privileges within 30 miles of the Bossier Clinic and that the limited privileges he obtained at Tulane were insufficient under Act 620 because those privileges did not allow him to "provide diagnostic and surgical services to [admitted patients]" consistent with the requirements of Act 620.

The district court documents Doe 2's attempts to secure admitting privileges at three separate hospitals. Doe 2 previously had admitting privileges at University Health while he was on staff as an Assistant Clinical Professor of Medicine with a general OB/GYN practice. After leaving the staff in 2004, Doe 2 maintained consulting privileges that did not allow him to admit patients. After the passage of Act 620, Doe 2 attempted to upgrade his privileges but was told by the head of the OB/GYN department that the hospital would not upgrade his privileges because of his abortion practice.

Doe 2 also applied for privileges at WKBC in the summer of 2014. The OB/GYN department wrote to Doe 2 asking for more information including "operative notes and outcomes of cases performed within the last 12 months for the specific procedures you are requesting on the privilege request form." In his testimony before the district court, Doe 2 stated that it was impossible to submit information about procedures performed in hospitals because he had not "done any in-hospital work in ten years, so there is no body of hospitalized patients that [he had] to draw from." Instead, Doe 2 testified that he submitted cases that he had done at the clinic in Bossier. At that point, WKBC sent a second letter, stating in relevant part: "The data submitted supports the procedures you perform, but does not support your request for hospital privileges. In order for the Panel to evaluate and make recommendations for hospital privileges they must evaluate patient admissions and management, consultations, and procedures performed. Without this information your application remains incomplete and cannot be processed."

Doe 2 also applied for admitting privileges at Tulane, a qualifying hospital under Act 620 within 30 miles of Causeway in Metairie. After a circuitous process, during which Doe 2 was told by a doctor at Tulane that his request would need to be discussed with the hospital's lobbyists and that there were faculty who were concerned that having an abortion provider on staff would hurt their referrals, Doe 2 was granted limited privileges which would allow him to admit patients but not provide care for the patients.

Louisiana contends that the limited privileges Doe 2 was granted by Tulane are sufficient under Act 620. The majority rejects that argument, agreeing with the district court that the Tulane privileges do not satisfy the unambiguous requirements of Act 620.
Louisiana does not argue on appeal that Doe 2 failed to put forth a good-faith effort to secure privileges elsewhere, instead relying on its interpretation of the Tulane privileges to argue that his limited privileges are sufficient under Act 620. Despite the fact that the state never makes the argument, the majority concludes that Doe 2's efforts with respect to securing privileges elsewhere were insufficient and that the district court's conclusion that Doe 2 had put forth a good-faith effort was clearly erroneous.

The majority notes without comment that Doe 2 claims University Health refused to extend him an invitation to apply because of his abortion practice. With respect to WKBC, the majority states that "it remains unclear whether Doe 2 sent a list of cases." The majority continues, stating that the record does not establish whether WKBC found fault with the completeness of Doe 2's response to its inquiry or the actual documentation provided about cases at the Bossier Clinic. The majority's suggestion that Doe 2 was merely unresponsive to WKBC is belied by WKBC's own November letter to Doe 2—cited by the district court—stating that "the data submitted supports the procedures you perform, but does not support your request for hospital privileges." More importantly, Doe 2 testimony—supported by WKBC's letter—highlights the principal conundrum with his attempts to get admitting privileges: Doe 2 cannot provide documentation of in-patient procedures performed (information required by WKBC) because the nature of providing abortion services makes hospital admissions rare on account of the rarity of complications associated with the those services. To the extent the majority deems clearly erroneous the district court's finding that Doe 2 put forth a good-faith effort with respect to WKBC, it defies logic to suggest that Doe 2 could be awarded privileges if he had just "tried harder;" the hospital required information that did not exist. Furthermore, it is unclear how Doe 2's experience applying to WKBC differs from Doe 1's application to that hospital which the district court found to be de facto denied, a finding the majority appears to credit in one case, and reject in the other.

The majority next suggests that, "opposite to what the district court found," it is possible that Doe 2 could obtain privileges at Christus or Minden. While the district court did not make specific findings as to Christus or Minden, the record indicates that Doe 2 did not apply to either hospital. With respect to Minden, Doe 2 testified that applying for admissions privileges was a "long, tedious and not inexpensive process and [he] wanted to . . . apply to hospitals that [he] knew had good care and that had a close geographic location to the clinic and where [he] knew people might feel more comfortable." He stated that he chose WKBC, for example, because it was a good hospital, close to the clinic, whereas Minden is a smaller hospital, very close to the 30-mile limit, and he did not know anyone there. There is nothing in the record that indicates Doe 2 would have received privileges at Minden or that the district court's finding that Doe 2 was putting forth a good-faith effort—despite not applying to Minden—was clearly erroneous.

With respect to Christus, the majority concludes that it is possible that Doe 2 could
obtain privileges there because he previously had privileges there and Doe 3 currently maintains privileges there, "contradicting" Doe 2's theory that a Catholic hospital would not staff an abortion provider. The majority ignores the fact that Doe 3's privileges at Christus are contingent on his admitting at least 50 patients a year, a requirement he is able to meet only because of his OB/GYN practice. confirmed in his testimony that he previously had admitting privileges at Christus because of his OB/GYN practice and that those privileges were terminated after he ceased to have a private practice affiliation. There is no support in the record for the conclusion that Christus would potentially award Doe 2 privileges, especially where, like Minden, Doe 1's application to the hospital was de facto denied. Putting aside hostility abortion providers face in the state, basic economics make clear why hospitals have no incentive to grant and every disincentive to deny privileges to an abortion provider who does not maintain a separate OB/GYN practice: by virtue of the safety of the procedures performed at the clinics, abortion providers admit very few—if any—patients to a hospital and risks loss of business by doing so. That principle is consistent with the experience at Christus described by Does 2 and 3, that privileges at Christus are contingent on a physician's ability admit a certain number of patients, which Does 2 and 3 are (and were) only able to do by virtue of their general OB/GYN practice.

3. Doe 3

Doe 3 provides medication abortions through eight weeks and surgical abortions through 16 weeks, six days. He performs approximately 20-30 abortions a week at Hope Clinic on Thursday afternoons and all day on Saturday and also maintains an active general OB/GYN practice. Doe 3 had privileges at Christus and WKBC before the passage of Act 620 because of his private OB/GYN practice. When asked if Doe 3 was able to increase his capacity of services provided at Hope, he stated that he could not. As Doe 3 points out, if he gave up his private practice to devote more time to Hope to compensate for the providers who would no longer be able to practice, ironically, he would "probably lose [his] admitting privileges" and would no longer be able to provide abortion services.

The district court found that "[a]s a result of his fears of violence and harassment, Doe 3 had credibly testified that if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions." The majority concludes that that finding was clearly erroneous because of Doe 3's "shifting story," at one point claiming he would stop practicing if he was the only provider left in Louisiana then, after Doe 5 obtained privileges in southern Louisiana, if he was the only provider left in northern Louisiana. In the majority's view, "Doe 3's shifting preference as to the number of remaining abortion providers is entirely independent of the admitting-privileges requirement," again a trial de novo finding by an appellate court.

4. Doe 4

Doe 4 performed abortions at Causeway Clinic in Metairie until January 2016, where
he provided approximately 75% of the total abortions at the clinic. Prior to Causeway's closure, Doe 4 applied for privileges at Ochsner, where he did not receive a response, and testified at his deposition that he did not apply for admitting privileges at Touro Infirmary or LSU New Orleans because he had been unable to find an OB/GYN to cover for him, a requirement of both hospitals. Causeway closed in January 2016. Because of Causeway's closure, Doe 4 is no longer pursuing privileges.

5. Doe 5

Doe 5 provides medication abortions through eight weeks and surgical abortions through 16 weeks. He is one of two physicians providing abortion services at Women's Health in New Orleans, where he provides approximately 40% of the abortions, and the only physician at Delta Clinic in Baton Rouge. Since the passage of Act 620, Doe 5 has obtained active admitting privileges within 30 miles of Women's Health, at Touro Infirmary, but not within 30 miles of Delta Clinic.

The district court found that Doe 5 had put forth a good-faith effort to obtain admitting privileges at a hospital within 30 miles of Delta Clinic but was unable to do so for reasons unrelated to his competence. Doe 5 applied for admitting privileges at three hospitals in Baton Rouge: Woman's Hospital, Lane Regional Medical Center, and Baton Rouge General Medical Center. None of the applications submitted by Doe 5 have been denied or granted and all remain technically "pending", leading the district court to conclude they had been de facto denied. In his declaration, Doe 5 states that, after Act 620 was enacted, he reviewed bylaws and spoke to people in the medical communities in New Orleans and Baton Rouge to determine which hospitals would potentially grant him privileges. For example, Doe 5 describes some hospitals that require a physician to admit a certain number of patients per year to obtain privileges which he is unable to do. Doe 5 chose, therefore, to apply to hospitals where "[he] believed that [he] had a realistic chance of obtaining admitting privileges" and did not apply to hospitals where he did not have a good shot, in part because of the adverse professional consequences of having an application for admitting privileges denied. Doe 5 states that Woman's Hospital has expressed concern that Doe 5 resides too far from the hospital to obtain privileges and mentions that a doctor he spoke with at Woman's Hospital—one of the doctors with whom Delta Clinic has a transfer agreement—declined to be Doe 5's covering physician for his Woman's Hospital application due to fear of threats and the possibility that protesters will picket outside of his private practice.

The district court found that Doe 5 put forth a good-faith effort to obtain admitting privileges within 30 miles of Delta Clinic. The majority concludes that finding was clearly erroneous. It faults Doe 5 for failing to present evidence that he reached out to additional doctors after the physician at Woman's Hospital refused to act as a covering physician and attributes his lack of follow-up with those hospitals to foot-dragging. The majority concludes from this that "[t]he most logical explanation for Doe 5's delay is that he is awaiting the result of
this litigation before he acts." The majority also imports testimony from Doe 4 (who was also unable obtain privileges before Causeway's closure) which the majority paraphrases as Doe 4 stating "that finding a covering physician is not overly burdensome." Based on the absence in the record of evidence documenting follow-up by Doe 5 to the three hospitals to which he applied and the testimony of another doctor on the topic of covering physicians in the abstract, the majority concludes that the district court clearly erred in finding that Doe 5 put forth a good-faith effort to obtain privileges at a qualifying hospital near Delta Clinic.

6. Doe 6

Doe 6 provides medication abortions and is one of the two clinic physicians at Women's Health. Doe 6 had admitting privileges at various hospitals in New Orleans from 1973 until 2005, during which time he maintained an active OB/GYN practice. When Act 620 passed, Doe 6 contacted Tulane to inquire about admitting privileges but was told he would not be granted privileges because he had not had admitting privileges at any hospital since 2005. Doe 6 also applied for privileges at East Jefferson Hospital in New Orleans and, shortly thereafter, provided additional information that the hospital had requested. Since that time, the hospital has taken no action on his application. The district court concluded that his application had been de facto denied. In his declaration, Doe 6 states that, after the passage of Act 620, he researched hospitals and learned that many required that a physician admit a certain number of patients per year to obtain admitting privileges, which he could not do because the nature of his abortion practice. He applied at a hospital where he believed he had a realistic chance of obtaining privileges and knew that he was unlikely to obtain privileges at other hospitals that required a certain number of admitted patients.

The majority concludes that the district court's finding that Doe 6 put forth a good-faith effort to obtain privileges was clearly erroneous. It faults Doe 6 for not submitting more applications for admitting privileges, especially where there are 9 qualifying hospitals in the area including Touro, where Doe 5 was able to secure admitting privileges. The majority determines that Doe 6's "lack of effort" makes the district court's finding clearly erroneous. The majority does not address Doe 6's statement in his declaration that he chose to apply to hospitals where he thought he had a "realistic chance" of obtaining privileges or his claim that he reviewed hospital bylaws and spoke with others in the medical community to determine where he could obtain admitting privileges without documentation of admitting patients since 2005.

7. Summary of the Burdens

After documenting the status of each of the six doctors who provided abortion services at the outset of the litigation, the district court made summary findings about the effects of Act 620. The court determined that Does 1, 2, 4, and 6 would be unable to provide abortions in Louisiana because of their inability to obtain admitting privileges, despite their good-faith efforts to do so. As to Doe 5, the court determined that he would be unable to
provide abortion services at Delta in Baton Rouge because he was unable to obtain qualifying privileges at a hospital in that area, but would be able to provide abortions at Women's Health in New Orleans because he had obtained privileges there. With respect to Doe 3, the court found that he would be the only remaining provider in Northern Louisiana and, due to a well-founded concern for his safety, would no longer provide abortions in the state.

In summary, the district court found that Doe 5 would be the only remaining abortion provider in the state and only one clinic, Women's Health, would remain open. Because Doe 5 performed approximately 2,950 abortions in 2013 at Delta and Women's, if he provided that number of abortions at Women's (the only clinic which would remain open on account of Doe 5 not obtaining privileges within 30 miles of Delta), approximately 70% of the 9,976 women in Louisiana seeking an abortion annually would be unable to get one.

The district court made alternative findings, determining that, "[e]ven if one were to conclude that Doe 3 will not quit or that his quitting is legally irrelevant, Act 620 will nonetheless result in a substantial number of Louisiana women being unable to obtain an abortion in this state." If Doe 3's decision to quit due to fear of providing abortions as the last remaining physician in northern Louisiana was not attributed to Act 620's passage, two clinics would remain open: Hope and Women's Health. Doe 3 sees approximately 20-30 abortion patients per week, or roughly 1,000-1,500 per year, and has testified that, because of his full-time OB/GYN practice, cannot expand his capacity to provide abortions. Assuming Doe 3 and Doe 5 continue providing abortions, the district court found that approximately 5,500 women in Louisiana seeking an abortion would be unable to get one.

The district court notes that, although the closure of Causeway and Bossier has not been attributed to Act 620, the existence of two fewer abortion clinics (notwithstanding the court's finding that no doctor who was employed at those clinics was able to obtain admitting privileges) would amplify the burdens attributable to Act 620. Furthermore, the only physician who provides abortions up to the legal limit of 21 weeks, 6 days, Doe 2, will be unable to provide abortions, preventing any woman seeking an abortion at that stage from exercising her constitutional right to do so in Louisiana. The district court concluded that the burdens of Act 620 would fall most heavily on low-income women in the state, one of the poorest in the country, because of increased travel distances and associated cost. Finally, the court made the "commonsense inference" that increased wait times (on account of the decreased number of providers) would lead to women seeking abortions in later gestational ages, decreasing the number of women for whom medication abortion would be an option and making it difficult for women to obtain an appointment before 16 weeks.

The majority reaches different conclusions. On its determination of the facts, only Doe 1 has put forth a good-faith effort to get admitting privileges, Does 2, 5, and 6 "could likely obtain privileges," Doe 3 "is definitively not burdened," and all three
clinics could remain open. Because there was clear evidence in the record that doctors failed to seek admitting privileges in good faith, the majority says, any negative impact on women is attributable to an intervening cause: the inaction of the doctors rather than the statute. It proceeds to weigh the impact of what it determines to be the burden: the near impossibility of Doe 1 to obtain qualifying privileges. On that reading of the effects of Act 620, the majority concludes that the 2,100 abortions that Doe 1 had performed annually could be covered by Does 2 and 3 and, accordingly, no woman would be unduly burdened. From there, the majority concludes that there will not be a large fraction of women facing a substantial burden: at most, 3,000 out of 10,000, or 30%, of women seeking abortions in Louisiana would be burdened by potentially longer wait times if Doe 1 was unable to practice, and that is only a potential burden because Doe 1’s capacity will "easily be absorbed."

In sum, the district court found that 70% of women seeking an abortion in Louisiana would be unable to obtain one and the majority found that a maximum of 30% of women would be burdened with increased wait times, but that the burden of increased wait times was only potential. The district court's findings are well-supported in the record and not clearly erroneous.

II.

I turn now to the application of the Casey standard to those facts. Numbers and calculations aside, the task is straightforward: we are to identify the stated justification of Act 620, determine the extent to which Act 620 advances that interest, and compare the benefits it provides with the burdens it imposes on abortion access. It is noted that Louisiana has a legitimate interest in ensuring the health and safety of patients seeking an abortion in the state. However, even a statute which furthers a valid state interest cannot be a permissible means of serving legitimate ends if that statute "has the effect of placing a substantial obstacle in the path of a woman's choice." At the same time, "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden" on the exercise of that right.

At the outset, I fail to see how a statute with no medical benefit that is likely to restrict access to abortion can be considered anything but "undue." As I have explained, the majority draws conclusions for which there is no support in the record and rejects the district court's well-supported findings. The findings of the district court that Does 1, 2, 5 (with respect to privileges near Delta), and 6 were unable to obtain privileges despite good-faith efforts to do so, for reasons unrelated to their competence, is plausible and well-supported. Moreover, it is logical. The district court received evidence that many hospitals require doctors to admit a certain number of patients annually to maintain privileges or require documentation of admitted patients in the 12 months preceding an application to award privileges. At the most basic level, even where a hospital does not have an explicit requirement conditioning privileges on minimum annual admissions, hospitals have no incentives to offer privileges to a doctor who provides only
abortion services, because the doctor is unlikely to admit any patients or, in other words, to bring the hospital any business and, being associated with abortion brings the concomitant risk of losing business. Instead, the majority determines that the effort of the physicians was lackluster and that any burdens imposed would be a result of the physicians' mediocre efforts (or gamesmanship) rather than a direct result of the statute.

The Court in 
_\text{WH}_ \text{H}
 addressed causation head-on, there rejecting the dissent's suggestion that, because some of the clinics may have closed for reasons unrelated to the statute, they should not "count" the burdens resulting from those closures against the statute. The Court noted that the district court credited evidence of causation as well as "plausible inferences to be drawn from the timing of the clinic closures" and concluded from that evidence that the statute "in fact led to clinic closures." As in _WHH_, the district court here found that the statute will cause three doctors to cease providing abortions in Louisiana altogether because of their inability to get admitting privileges despite their good-faith efforts to do so, another doctor to limit his work to one clinic for the same reason, and a final doctor to stop performing abortions out of fear of practicing as the sole remaining provider in northern Louisiana. The majority here distorts the causation analysis by casting aside the district court's findings that the physicians made "good-faith efforts" to obtain privileges, concluding that an intervening cause—the physicians' lackluster efforts to obtain privileges—will be responsible for any burden, not the statute itself. But the majority in _WHH_ did not require proof that every abortion provider in Texas had put in a good-faith effort to get privileges and had been unable to do so. Instead, the majority credited the district court's findings that the requirements imposed by the statute led to clinic closures.

There is no question that, if the statute went into effect today, Doe 3 and Doe 5 will be the only remaining providers. The other providers do not currently have admitting privileges. The effect of the statute would be to close one of the three remaining clinics (Hope), to prevent three of the remaining five doctors from practicing as abortion providers (Does 1, 2, and 6), and to prevent Doe 5 from practicing at one of the two clinics where he regularly works. The majority today essentially holds that, because private actors (the physicians) have not tried hard enough to mitigate the effects of the act (a conclusion contradicted by the district court's factual findings), those effects are not fairly attributable to the act. That position finds no support in _WHH_.

Contrary to the majority's conclusion, the effect of the Act will be to place a substantial obstacle in the path of a woman's choice. Even setting aside the district court's finding that Doe 3 will stop practicing if he is the sole remaining provider in the northern part of the state, only two of the six doctors that previously provided abortions were able to obtain admitting privileges and one of the three remaining clinics will close. Numerically, Doe 5 provides approximately 2,000 abortions at Delta and 950 abortions at Women's. Because he does not have privileges near Delta, Doe 5 will be restricted
to providing abortions at Women's (and Delta will close). If he provides all 2,950 abortions he had previously provided at two clinics per year at Women's and Doe 3 continues to provide 1,500 abortions per year, they could cover approximately 4,450 abortions per year, or less than half of the total demand in the state.

Because the effect of Act 620 is to place a substantial obstacle in the path of a woman's right to seek an abortion, without a discernable offsetting medical benefit, I would affirm the district court's determination that the burden is undue. Inherent in the concept of "undue" is the reality that where the medical grounds of a statute are weak (or nonexistent), the burden is more likely to be disproportionate. The Supreme Court has previously admonished this court for "imply[ing] that a trial court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." By failing to meaningfully balance the burdens and benefits here, the court repeats its mistakes and leaves the undue burden test devoid of meaning.

A brief pause now on the majority's heralding of the Supreme Court's "large fraction" language. In WWH, the Court explained that, in Casey, the phrase "large fraction" was used "to refer to 'a large fraction of cases in which [the provision at issue] is relevant,' a class narrower than 'all women,' pregnant women,' or even 'the class of women seeking abortions' identified by the state." In other words, "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." The "large fraction" language does not require the court to engage in rote mathematical calculations but instead directs the court to focus its inquiry on those who will be actually restricted by the law and determine whether the law will operate as a substantial obstacle for that population. In other words, will the law pose a substantial obstacle to a woman's choice for a large fraction of those affected.

The elaborate "mathematical" calculations attempted by the majority are improper. Indeed, the Supreme Court rejected this court's attempt to require precise mathematical calculations in WWH. In that case, after weighing the benefits and burdens, the district court determined that a "significant, but ultimately unknowable" number of women would be unduly burdened by the challenged provisions. This court reversed, in part because the district court had not numerically calculated that a "large fraction" of women would be burdened. The Supreme Court rejected that approach, emphasizing that the district court had developed a sufficient record to support its finding that weighing the benefits and burdens demonstrated that the restrictions represented an undue burden. Neither Casey nor WWH calculated a numerical fraction of women who would be burdened before invalidating statutory provisions. Such a calculation is not required.

The relevant question here is, for those women actually restricted by Act 620, will that restriction amount to a substantial obstacle for a significant number of women. For those actually restricted, there is no
question that the obstacle will be substantial. Over 5,000 women seeking abortions in Louisiana will be unable to obtain one within the state. Because Doe 2 has been unable to obtain privileges, no woman seeking to exercise her right to decide to seek an abortion after 16 weeks will be able to do so in Louisiana.

Even accepting the majority's incorrect supposition that only Doe 1 will stop performing abortions and accepting their premise that the Supreme Court requires a numerical calculation of the fraction of women for whom the provision represents a substantial obstacle (which it does not), the calculations are flawed. If Act 620 causes only one doctor to stop performing abortions at Hope Clinic, then the women for whom the law is "an actual rather than irrelevant restriction" will be women seeking abortions at Hope Clinic. As was the case in Texas, those are the women who will be subjected to "fewer doctors, longer waiting times, and increased crowding." The question then becomes whether Act 620 will "operate as a substantial obstacle" to a large fraction of women seeking abortions at Hope Clinic. The majority's assumptions that (1) Doe 2 will step in to be a full-time provider at Hope and (2) Doe 3 will have the capacity to increase his patient load are unsupported (and in the case of Doe 3, contradicted) by the record. Even if Doe 1 were the only provider to stop performing abortions, it would create a substantial obstacle for women seeking abortions at Hope in the form of increased wait times and the inability for some women to get an appointment before they passed the appropriate gestational stage. In short, even accepting the majority's requirement of precise numerical calculations on its own terms—and I do not—the calculations are flawed.

III.

I disagree with the majority's application of the undue burden test. Act 620 will have the effect of placing a substantial obstacle in the path of women seeking to exercise their constitutional right. Its significant burdens are not counteracted by any discernable health benefit and the majority errs in holding otherwise. But perhaps the more fundamental misstep here is that the majority fails to respect its role as an appellate court and the role of our district courts. These roles are structural, that is, case neutral.

There remains another fundamental flaw in Louisiana's joining with Texas and other states in regulating abortion services, one that also requires that the judgment of the district court be affirmed. Although it is enough under Casey to find an undue burden where Act 620 will have the effect of placing a substantial obstacle in the path of women seeking abortions in the state, that is also the law's purpose. If courts continue to brush past the purpose prong of Casey, that prong will cease to have meaning. Casey directs us to examine the means chosen by the state to further its interest and warns that those means must be calculated to further that interest, not hinder it. As in other areas of constitutional law, courts are capable of determining whether the means chosen by the state match the legitimate ends. Indeed, it remains central to much of our constitutional doctrine. While motive of a legislative body cannot for pragmatic reasons index the legitimacy of its
work, legislative purpose can. At that level of abstraction, there can be little disagreement.

Despite judicial struggle with *Casey*, it must be acknowledged that the Court redefined, but did not abandon those basic principles. It moved away from the analytical construct of tiered scrutiny to "undue burden" but left intact examination of purpose by deploy of the familiar doctrinal tool of ends and means, allowing courts to identify legislative efforts to frustrate a woman's autonomy—her right to choose. As the misfit of means and ends grows so also does the permissible inference that the state's invocation of legitimate ends is disingenuous, that the statute is instead "designed to strike at the right itself." While everyone agrees that promoting women's health is a legitimate goal, Act 620 does not further that purpose. Here the means need not be judged normatively, but rather present as a practice the efficacy of which is determinable empirically: the data make plain that the requirement of admitting privileges to the end of women's health cannot be defended. For as the claimed benefits of Act 620 are objectively determinable to be virtually nil, so the burdens are determined to be undue. In the absence of fit between the means (requiring admitting privileges) and the ends (ensuring women's health), I am left to conclude that, viewed objectively, there is an invidious purpose at play. I recall these familiar principles to make plain that while the effects prong of "undue burden" does the work here, an examination of *Casey*’s legislative purpose reaches the same end. Act 620 was enacted to frustrate a woman's right to choose.

That the Supreme Court found it necessary so recently to remind this court that a rational basis test, appropriate in review of state economic regulation, cannot be deployed to review regulation of a protected personal liberty is only confirming that when abortion shows up, application of the rules of law grows opaque, a phenomenon not unique to this court. Today's case is not a close call by either path offered by *Casey*. The opinion of my colleagues, with respect, ought not stand.
Chief Justice John G. Roberts Jr. joined with the Supreme Court’s liberals Thursday night to block a Louisiana law that opponents say would close most of the state’s abortion clinics and leave it with only one doctor eligible to perform the procedure.

The justices may yet consider whether the 2014 law — requiring doctors at abortion clinics to have admitting privileges at nearby hospitals — unduly burdens women’s access to abortion. The Louisiana law has never been enforced, and the Supreme Court in 2016 found a nearly identical Texas law to be unconstitutional.

“The Supreme Court has stepped in under the wire to protect the rights of Louisiana women,” said Nancy Northup, president and CEO of the Center for Reproductive Rights, which represented the law’s challengers.

“The three clinics left in Louisiana can stay open while we ask the Supreme Court to hear our case. This should be an easy case — all that’s needed is a straightforward application of the court’s own precedent.”

The court’s four most conservative members would have allowed the law to take effect. Justice Brett M. Kavanaugh said there was a dispute about whether the doctors could obtain admitting privileges, and that a 45-day grace period would have given time to settle that question.

“The parties have offered, in essence, competing predictions” about whether several doctors can obtain privileges, Kavanaugh wrote.

“If we denied the stay, that question could be readily and quickly answered without disturbing the status quo or causing harm to the parties or the affected women, and without this court’s further involvement.”

Justices Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch would have allowed the law to go into effect, but they did not join Kavanaugh’s dissent.

But the abortion providers in their briefs had said just the prospect that the law would go into effect was already affecting services.

“Scheduled medical procedures are being cancelled, physicians and clinic staff are preparing to be out of work, and patients seeking to exercise their constitutional right to abortion are being turned away or sent to other states,” their brief stated.

The majority, as is custom, did not give a reason for granting the stay. But it seems likely the full court will now grant the case a full briefing and review, and perhaps
reexamine its earlier decision, which was made by a very different Supreme Court.

In the court’s 2016 decision, it said the admitting-privileges requirement “provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”

Hospitalization after an abortion is rare, all sides agree, and the lack of admitting privileges by the doctor who performed the procedure is not a bar to the woman getting needed medical care.

But last fall, a panel of the U.S. Court of Appeals for the 5th Circuit upheld the Louisiana law in a 2-to-1 vote, finding factual distinctions between how the restriction played out in Texas and Louisiana. The full court, considered one of the most conservative of the regional appeals courts, voted not to reconsider the panel’s decision.

Dissenting judges said their colleagues in the majority ignored requirements set out in the Supreme Court’s 2016 decision and seemed intent on giving the high court reason to reconsider that precedent, called Whole Woman’s Health v. Hellerstedt.

The Whole Woman’s Health decision was the court’s most important one on abortion in a quarter-century. But it was decided by an eight-member Supreme Court in the wake of conservative Justice Antonin Scalia’s death.

Justice Anthony M. Kennedy joined the court’s liberals to strike down the Texas provisions. Roberts, Thomas and Alito dissented.

Those three have been joined by President Trump’s choices, Gorsuch and Kavanaugh, both of whom were supported by antiabortion activists who said they hoped that the court’s new conservative majority might one day overturn the fundamental right to abortion the court advanced in Roe v. Wade.

The doctors and clinics who challenged the Louisiana law said allowing it to go into effect would provide a way for states to undermine the right to abortion without overturning Roe.

At stake “is not just the constitutional rights of Louisiana women to abortion access,” wrote Julie Rikelman and Travis J. Tu of the Center for Reproductive Rights.

“The Fifth Circuit panel majority’s decision undermines the rule of law by flouting binding precedent from this Court. Such a ruling has implications for the country and the judicial system as a whole.”

Judge Jerry E. Smith, writing for the two-member appeals court majority, said that the court complied with the Supreme Court’s decision in Whole Woman’s Health by taking a painstakingly close look at the details.

“Unlike in Texas, the [Louisiana law] does not impose a substantial burden on a large fraction of women,” he concluded.

He said the closing of some clinics in Louisiana, as opposed to Texas, would not dramatically increase driving distances, and that it was easier for doctors in Louisiana to obtain admitting privileges. The “vast majority” of the six doctors who performed abortions in Louisiana “largely sat on their
hands” instead of working hard to procure the credential, Smith wrote.

He concluded that “at most, only 30 percent of women” seeking abortions in Louisiana would be affected.

“The record here indicates that the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the well-being of women seeking abortion,” Smith wrote.

Still, he acknowledged, the benefits are “not huge.” In a footnote, Smith wrote that “the state did not provide any instance in which a worse result occurred because the patient’s abortion doctor did not possess admitting privileges.”

Dissenting judges and the challengers said it was a fundamental mistake to approve a law that imposes any burden on a woman’s right to an abortion when it provides no corresponding benefit for the woman’s health.

Hospitalization occurs in only 0.05 percent of abortions in the first trimester and approximately 1 percent in the second trimester, the challengers said. Hospital care, when needed, is provided regardless of whether the doctor performing the abortion has admitting privileges.

The appeals court rejected a district judge’s finding that the law would affect about 70 percent of women seeking abortions in the state. After a trial, that judge found that two of the remaining three abortion clinics in the state would have to close because they would not have a doctor who could obtain admitting privileges.

The only remaining clinic with an eligible doctor would be in New Orleans, the district court said, and would be incapable of meeting the demand of approximately 10,000 abortions.

The case is June Medical Services v. Gee.
“Supreme Court Blocks Louisiana Abortion Law”

The New York Times

Adam Liptak

February 7, 2019

The Supreme Court on Thursday blocked a Louisiana law that its opponents say could have left the state with only one doctor in a single clinic authorized to provide abortions.

The vote was 5 to 4, with Chief Justice John G. Roberts Jr. joining the court’s four-member liberal wing to form a majority. That coalition underscored the pivotal position the chief justice has assumed after the departure last year of Justice Anthony M. Kennedy, who used to hold the crucial vote in many closely divided cases, including ones concerning abortion.

The court’s brief order gave no reasons, and its action — a temporary stay — did not end the case. The court is likely to hear a challenge to the law on the merits in its next term, which starts in October.

Justices Clarence Thomas, Samuel A. Alito Jr., Neil M. Gorsuch and Brett M. Kavanaugh said they would have denied the stay. Only Justice Kavanaugh published a dissent, taking a middle position that acknowledged the key precedent and said he would have preferred more information on the precise effect of the law.

For Chief Justice Roberts, it was something of a turnaround, at least for now. He dissented in the court’s last major abortion case in 2016, voting to uphold a Texas law essentially identical to the one at issue in Thursday’s case.

Abortion rights advocates welcomed the court’s order, which came around 9:30 p.m., only hours before the law was to go into effect.

“The Supreme Court has stepped in under the wire to protect the rights of Louisiana women,” Nancy Northup, the president of the Center for Reproductive Rights, said in a statement. “The three clinics left in Louisiana can stay open while we ask the Supreme Court to hear our case. This should be an easy case — all that’s needed is a straightforward application of the court’s own precedent.”

Chief Justice Roberts’s overall voting record has been conservative, and this was not the first time in recent months he has disappointed some of his usual allies. In December, he joined the court’s four-member liberal wing — Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — to reject a request from the Trump administration in a case that could upend decades of asylum policy.

That same month, he drew sharp criticism from three conservative colleagues for voting
to deny review in two cases on efforts to stop payments to Planned Parenthood. But Chief Justice Roberts joined the court’s four conservative members on Thursday night in a 5-to-4 ruling allowing the execution of a Muslim inmate in Alabama whose request for his imam to be present was denied by prison officials.

Chief Justice Roberts has voted to sustain other laws restricting abortion. And his vote to grant a stay on Thursday, in other words, does not mean he will vote to strike down the Louisiana law when the case returns to the court.

The court is likely to confront other abortion cases, too, as several state legislatures have recently enacted laws that seem calculated to try to force the Supreme Court to consider overruling Roe v. Wade, the 1973 decision that established a constitutional right to abortion.

The Louisiana law, enacted in 2014, requires doctors performing abortions to have admitting privileges at nearby hospitals. In 2017, Judge John W. deGravelles of the Federal District Court in Baton Rouge struck down the law, saying that such doctors were often unable to obtain admitting privileges for reasons unrelated to their competence and that the law created an undue burden on women’s constitutional right to abortion.

The law, Judge deGravelles ruled, was essentially identical to one from Texas that the Supreme Court struck down in a 2016 decision, Whole Woman’s Health v. Hellerstedt. Justice Breyer, writing for the majority in that decision, said courts must consider whether the claimed benefits of laws putting restrictions on abortion outweigh the burdens they placed on the constitutional right to the procedure.

There was no evidence that the Texas law’s admitting-privileges requirement “would have helped even one woman obtain better treatment,” Justice Breyer wrote. But there was good evidence, he added, that the requirement caused the number of abortion clinics in Texas to drop to 20 from 40.

The vote in the 2016 decision was 5 to 3, with Justice Kennedy in the majority. The case was decided by an eight-member court after the death of Justice Antonin Scalia that February.

Justice Kavanaugh replaced Justice Kennedy last fall, shifting the Supreme Court to the right. Around the same time, a divided three-judge panel of the United States Court of Appeals for the Fifth Circuit, in New Orleans, reversed Judge deGravelles’s decision and upheld the Louisiana law, saying its benefits outweighed the burdens it imposed.

“Unlike Texas, Louisiana presents some evidence of a minimal benefit,” Judge Jerry E. Smith wrote for the majority. In particular, he wrote, “the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the well-being of women seeking abortion.”

He added that the Louisiana law “does not impose a substantial burden on a large fraction of women.” Judge Smith faulted doctors seeking to provide abortions in the state for not trying hard enough to obtain
admitting privileges and said abortions would remain available after the law went into effect.

In dissent, Judge Patrick E. Higginbotham wrote that the majority’s ruling was impossible to reconcile with the Supreme Court’s 2016 decision in the Texas case and with its landmark 1992 ruling in Planned Parenthood v. Casey, which banned states from placing an “undue burden” on the constitutional right to abortion.

“I fail to see,” Judge Higginbotham wrote, “how a statute with no medical benefit that is likely to restrict access to abortion can be considered anything but ‘undue.’”

The full Fifth Circuit refused to rehear the case by a 9-to-6 vote. In dissent, Judge Stephen A. Higginson wrote that the Louisiana law was “equivalent in structure, purpose and effect to the Texas law” invalidated by the Supreme Court in 2016.

“I am unconvinced that any justice of the Supreme Court who decided Whole Woman’s Health would endorse our opinion,” Judge Higginson wrote. “The majority would not, and I respectfully suggest that the dissenters might not either.”

The clinic and doctors challenging the law filed an emergency application in the Supreme Court asking it to block the law while they pursued an appeal.

“Louisiana is poised to deny women their constitutional right to access safe and legal abortion with an admitting-privileges requirement that every judge in the proceedings below — the District Court, the panel majority and the dissenters — agrees is medically unnecessary,” the challengers wrote in their application in the case, June Medical Services v. Gee, No. 18A774.

One doctor at one clinic cannot possibly meet the needs of approximately 10,000 women who seek abortion services in Louisiana each year,” they wrote. “Some of these women will attempt self-managed abortions, seek out unlicensed or unsafe abortions or be compelled to carry an unwanted pregnancy to term.”

Lawyers for the state responded that the law would be administered in a cautious way, with no immediate changes. The challengers were wrong, the state said, to assert that “Louisiana abortion providers will immediately be forced to cease operations, with dire consequences.” The law will take effect, the state’s lawyers said, as part of “a sensitive regulatory process that should begin in an orderly way.”

The challengers disputed that, saying that doctors without admitting privileges would risk immediate civil, criminal and professional liability if they performed abortions after the law became effective.

“Given the number and severity of the law’s penalties, no clinic or doctor without admitting privileges will continue to provide abortions” once the law becomes enforceable, they wrote. “Irreparable harm to women in Louisiana, therefore, is imminent.”

In his dissent on Thursday, Justice Kavanaugh said he would have provisionally denied the stay to let the factual questions be sorted out. Notably, he said that the Texas
decision was “the governing precedent for purposes of this stay application.”

The Fifth Circuit, he wrote, had predicted that the four doctors who provide abortions at three clinics could obtain admitting privileges. There was no dispute as to one of the doctors, he wrote, leaving questions about three of them.

If those doctors can obtain privileges, Justice Kavanaugh wrote, “the new law would not impose an undue burden” under the Texas decision.

“By contrast, if the three doctors cannot obtain admitting privileges,” Justice Kavanaugh wrote, “then one or two of the three clinics would not be able to continue providing abortions. If so, then even the state acknowledges that the new law might be deemed to impose an undue burden for purposes of Whole Woman’s Health.”

The right solution, he wrote, would have been to deny the stay and let the challengers return to court if the doctors could not obtain privileges.
“Abortion Case provides an unexpected quick test for Supreme Court conservatives”

The Washington Post

Robert Barnes

January 31, 2019

Abortion providers in Louisiana have asked the Supreme Court for an emergency stay of a state law they say would leave only one doctor eligible to perform the procedure, an unexpectedly quick test on the issue for the court’s strengthened conservative majority.

The Louisiana law — passed in 2014 but never allowed to go into effect — requires any physician providing abortion services to have admitting privileges at a hospital within 30 miles of the procedure.

Even Louisiana acknowledges that the requirement is virtually identical to a Texas law that the Supreme Court voted 5 to 3 to strike down in 2016. The court said the admitting privilege requirement, along with additional standards for clinics, “provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”

But a panel of the U.S. Court of Appeals for the 5th Circuit upheld the Louisiana law in a 2-to-1 vote, finding factual distinctions between how the restriction played out in Texas and Louisiana. The full court, considered one of the most conservative of the regional appeals courts, voted not to reconsider that decision.

Dissenting judges practically accused their colleagues of trying to set up the Supreme Court to reconsider its Texas decision, Whole Woman’s Health v. Hellerstedt, with one saying the appeals court relied on “strength in numbers rather than sound legal principles in order to reach their desired result in this specific case.”

Another said the majority had simply ignored the Supreme Court precedent.

“I am unconvinced that any justice of the Supreme Court who decided Whole Woman’s Health would endorse our opinion,” Judge Stephen A. Higginson wrote in his dissent.

“The majority would not, and I respectfully suggest that the dissenters might not either. As Justice [Clarence] Thomas wrote, ‘unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.’”

Higginson’s theory will be put to the test quickly. The law is scheduled to go into effect Feb. 4 unless the Supreme Court intervenes.

The Whole Woman’s Health decision was the court’s most important one on abortion in a
quarter-century. But it was decided by a very different Supreme Court, in the wake of the death of conservative Justice Antonin Scalia.

Justice Anthony M. Kennedy joined the court’s liberals to strike down the Texas provisions. Chief Justice John G. Roberts Jr., Justice Samuel A. Alito Jr. and Thomas were in dissent.

But those three have since been joined by President Trump’s choices, Justice Neil M. Gorsuch and Brett M. Kavanaugh, both of whom were supported by antiabortion activists who said they hoped that the new court majority might one day overturn the fundamental right to abortion the court advanced in Roe v. Wade.

Jennifer Dalven, director of the American Civil Liberties Union’s Reproductive Freedom Project, said laws like Louisiana’s provide a way to sharply limit the availability of abortion without taking on the precedent of Roe.

“If the Supreme Court lets a law like this take effect, it sends a very dangerous signal to state legislators” that the way to limit abortion is to pass restrictive laws on the operation of clinics and doctors who provide the service.

But Louisiana tells the Supreme Court that the challengers have not pointed to any mistakes in the fact-specific majority opinion, and that allowing the law to go into effect would not create an emergency that warrants the high court’s intervention.

“All of Plaintiffs’ claims of irreparable harm rest on the premise that Louisiana will move aggressively to enforce the challenged law, potentially shutting down abortion clinics overnight,” Louisiana Attorney General Jeff Landry wrote. “But that is not correct. Louisiana envisions a regulatory process that begins, logically, with collecting information from Louisiana’s abortion clinics and their doctors.”

Judge Jerry E. Smith, writing for the two-member appeals court majority, said that he was bound by the Supreme Court’s decision in Whole Woman’s Health, but that included taking a painstaking look at the details.

“Unlike in Texas, the [Louisiana law] does not impose a substantial burden on a large fraction of women,” he concluded.

He said the closing of some clinics in Louisiana, as opposed to Texas, would not dramatically increase driving distances, and that it was easier for doctors in Louisiana to procure admitting privileges. He said that “at most, only 30 percent of women” seeking abortions in Louisiana would be affected.

“The record here indicates that the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion,” he wrote.

Still, he acknowledged, the benefits are “not huge.” In a footnote, he wrote that “the state did not provide any instance in which a worse result occurred because the patient’s abortion doctor did not possess admitting privileges.”

Challengers of the law contend that is because abortions performed in Louisiana clinics seldom result in hospitalization: only
0.05 percent for abortions in the first trimester and approximately 1 percent in the second trimester. Hospital care when needed is provided regardless of whether the doctor performing the abortion has admitting privileges.

The panel rejected a lower court’s finding that the law would affect about 70 percent of women seeking abortions in the state. After a trial, that judge found that two of the remaining three abortion clinics in the state would have to close because they would not have a doctor who could obtain admitting privileges.

The only remaining clinic would “be unable to meet the annual demand for roughly 10,000 abortions in the state.”

“The 5th Circuit brazenly ignored recent U.S. Supreme Court precedent squarely on point,” said Nancy Northup, president and CEO of the Center for Reproductive Rights, which is representing the challengers and also successfully fought the Texas law. “There is no way this law can stand under the Supreme Court ruling in Whole Woman’s Health.”

The Supreme Court seems to have taken a low-key approach to this term, after an unwelcome moment in the political spotlight during the partisan brawl over Kavanaugh’s nomination.

But cases such as this one often forces its hand. The court is not being asked to consider the merits of the case just now, but whether the law should be put in place while it is appealed.

What it decides about the stay will be closely watched by both sides. Abortion rights supporters will view a decision to allow the law to go into effect, as Northup indicated, as a troubling sign that the court is no longer willing to stand by its precedent in the Texas case, decided less than three years ago.

Those opposed to abortion, on the other hand, would be disappointed by a Supreme Court reinforced with conservatives stepping in to stop a law that an appeals court has approved.

The case is June Medical Services v. Gee.
Late Thursday night, the Court put a Louisiana abortion statute on hold. The 5–4 order in June Medical Services v. Gee has been perceived as a victory for abortion rights—but I’m not sure it is. The stay is purely to allow the Court to decide whether to hear the case. And the Court’s four solid conservatives voted to allow the law to take effect right away, even though it runs directly contrary to the Court’s most recent abortion decision. Chief Justice John Roberts voted to stay the law; but this does not mean he will vote to strike it down.

If Thursday’s order was a win for abortion rights at all, it was a minor and probably temporary one.

June Medical Services is a challenge to Louisiana Act 620, which requires abortion providers in the state to have “admitting privileges” at a licensed hospital within 30 miles of the clinic at which they practice. That precise requirement in a Texas statute had been struck down in Whole Woman’s Health v. Hellerstedt. In that 2016 case, a district court found that the “privileges” requirement provided no genuine health benefit to pregnant women. However, combined with a strict set of physical regulations for clinics, it would in fact cause the closure of most of the state’s licensed abortion clinics; thus, it constituted an “undue burden” on a pregnant woman’s constitutional right to have an abortion.

A federal district court in Louisiana considered the Louisiana law in light of the Hellerstedt decision, and struck it down. In seven pages of Kafkaesque factual findings, the court detailed the current providers’ futile efforts to get admitting privileges—which were blocked for reasons that had little to do with competency and much to do with deep-red Louisiana’s opposition to abortions. Of the six current providers, it found, Act 620 would put four completely out of business, and restrict one to performing abortions at only one of the two locations where he currently practices. The sixth doctor, the court found, would simply stop performing abortions if that happened, out of “a well-founded concern for his personal safety.” If Act 620 took effect, the court concluded, “approximately 70 percent of the women in Louisiana seeking an abortion” would be unable to get one in the state.

But then a strange thing happened: The U.S. Court of Appeals decided that the district judge just didn’t understand the facts, and ruled that Act 620 could go into effect.

The court-of-appeals decision is one of the most remarkable federal opinions I have ever
read. To understand why, let’s look at the basic rules for the federal court system. The system has three levels. District courts conduct trials, hear testimony, sift evidence, and “find” facts. Then they apply court-of-appeals and Supreme Court precedent to those facts, and render a judgment. Courts of appeals, except in very unusual circumstances, do not “find” facts. Instead, they ask whether the trial court correctly applied the law to the facts it found. To decide that, they apply Supreme Court precedent, and, if there is none, precedent from the appeals courts. After the appeals court decides, the Supreme Court can step in if it thinks the lower courts got it wrong.

To repeat: Trial courts “find” the facts; appeals courts primarily decide the law. Appeals courts cannot set aside factual findings unless the trial judge committed “clear error.” Even if an appeals panel is “convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently,” the Supreme Court has said, it should not second-guess the trial judge unless it has “a definite and firm conviction that a mistake has been committed.”

But the Fifth Circuit in essence decided that the trial judge had been wrong about virtually every factual question in the case. Whatever might have been the case in Texas, in Louisiana there were hitherto unsuspected benefits to the “admitting privileges” requirement. As for the doctors who hadn’t gotten admitting privileges, they were lying. They had, the appeals court decided, “sat on their hands” and probably really could get admitting privileges somewhere, if they just got off their lazy behind and gave it a real try.

And even if some of the doctors were eliminated, the others could just work a few more hours a week and everything would be tickety-boo for the women seeking abortions.

As a result, the Fifth Circuit said, the case in *June Medical Services* is totes different from the identical case of *Hellerstedt*. And thus it is totes constitutional too.

It’s hard to believe that the Fifth Circuit’s opinion was even intended to pass the straight-face test. There are two reasons for that suspicion. First, the Fifth Circuit decision was written by Judge Jerry E. Smith. Smith, a Ronald Reagan appointee, during his three decades on the bench has displayed some tendencies toward assuming an authority not strictly warranted by his commission.

Smith was the author of a 1996 affirmative-action case called *Hopwood v. University of Texas*. In that case, he wrote for a majority that a previous Supreme Court case, *Regents of the University of California v. Bakke*, was no longer binding in the Fifth Circuit. The Supreme Court had not said so, but Smith thought the decision was a bad one; he didn’t think the Supreme Court liked it either and thought it was about time the high court reversed it. (The Supreme Court, in fact, later reaffirmed *Bakke.*) Smith’s self-confidence verged on megalomania in 2012 when he ordered the attorney general of the United States to write him a letter explaining political comments by President Barack Obama about a case that was not before Smith’s court, and to which Obama was not a party.
So we might call Smith’s judicial philosophy freewheeling—or, to be more precise, lawless. In his June Medical Services opinion, he in essence overruled the Supreme Court’s decision in *Hellerstedt*. That level of hubris is probably explained by the true difference between *Hellerstedt* and *June Medical Services*.

The facts on the ground in Louisiana and Texas are roughly the same, but the facts on the ground of the Supreme Court are not. That is to say: Justice Anthony Kennedy, who provided the fifth vote in *Hellerstedt*, is no longer on the Court. His seat is now filled by Justice Brett Kavanaugh.

The message of the Smith opinion is: *We’ve got the votes now. Hellerstedt, and then Planned Parenthood v. Casey, and then Roe v. Wade, are finished. I can write any nonsense in this opinion and you can’t do anything about it.*

Is he right? Kavanaugh’s dissent may be the real news here. He notes the supposed factual discrepancy and suggests that the court should just allow the law to go into effect. The lazy doctors could try again to get admitting privileges. The state has promised not to enforce Act 620 “aggressively,” he says, so no one will be hurt.

His argument, in essence, is: Trust a government regulator with your rights. What could go wrong? This is, let’s say, an uncharacteristic argument for a conservative.

After the temporary stay of Act 620, the Court has a few choices. It could issue an unsigned opinion saying that *Hellerstedt*—only three years old—is still the law. It could also grant full-scale review and ask the parties to argue whether it should reconsider *Hellerstedt*. That would suggest a cavalier view of precedent, but at least the Court would be leveling with the country.

The worst choice would be to engage with Smith’s claim that Act 620 is somehow different from the Texas law. Finely parsing nonsense leads to nonsensical law. But I suspect that Kavanaugh is not the only conservative on the Court who would like to take that route. Bogus factual distinctions offer an appealing way of getting rid of *Hellerstedt*—and then *Planned Parenthood v. Casey*, and then *Roe v. Wade*.

The key vote on Thursday’s order was that of Roberts. He dissented in *Hellerstedt*, which suggests that he believes admitting-privilege requirements are fine, regardless of their impact. Does he respect precedent enough to, in effect, rule against his beliefs? More likely, his inner struggle is only about expediency and timing. Is this a politic time for the Court to reconsider its precedents frankly? Would it be better for the Court to stand by its precedents for a decent interval before making the foreordained assault on *Roe* and *Casey*? Or should the Court take the easy route suggested by Kavanaugh, and undo abortion rights while pretending it’s doing nothing of the sort?
No, I wasn’t surprised last week, as most people apparently were, when Chief Justice John Roberts cast the deciding fifth vote to preserve access to abortion in Louisiana for at least a little while longer. In fact, I had predicted it (and I have witnesses).

Why? Not because I think the chief justice has developed a soft spot in his heart for the right to abortion. He has not. Not because he wants to minimize the Supreme Court’s role as a combatant in the culture wars. I think he does, but that’s not the point.

Rather, circumstances compelled the chief justice to stand up to a stunning act of judicial defiance.

The phrase summons the image of Gov. George Wallace standing in the schoolhouse door. What Chief Justice Roberts had on his hands was something less tangible but equally threatening to the rule of law: not defiance of judges but defiance by judges.

The voluminous commentary on what happened at the court last week has for the most part not fully conveyed the blatant nature of the lower court’s decision, on which the Supreme Court put a temporary hold to afford the plaintiffs — an abortion clinic and its doctors — the chance to file a formal appeal.

The court is the United States Court of Appeals for the Fifth Circuit, based in New Orleans and covering Texas and Mississippi along with Louisiana. Not surprisingly given its territory, it has been the location of numerous legal battles over abortion. The Trump administration has been spectacularly successful in filling seats on the Fifth Circuit. Five of the 16 active judges are Trump appointees. That places the Fifth Circuit at the leading edge of the coming wave of Trump judges (sorry, Chief Justice Roberts, I’m afraid that’s what they are), so it’s important to understand what is going on there.

The Louisiana law at issue, June Medical Services v. Gee, was enacted in 2014 as the Unsafe Abortion Protection Act. It requires doctors who perform abortions to have admitting privileges at a hospital within 30 miles of the location where they practice.

If this sounds familiar, it’s because it is. Texas had passed the same law, part of the legislative arsenal amassed by a leading anti-abortion organization, Americans United for Life. These laws are enacted with the knowledge that doctors who perform abortions can almost never get admitting privileges, either because of objections to abortion by the hospital or the surrounding community or because so few abortion
patients ever need hospitalization that the doctors can’t meet the minimum number of hospital admissions that some credentialing committees require. (It’s 50 per year in the case of one Louisiana hospital, while the doctors involved in the case went years without needing to hospitalize a single abortion patient.) The whole point of these laws is to destroy the abortion infrastructure — in the name of protecting women’s health.

The Texas law, upheld by the Fifth Circuit, succeeded in closing half the abortion clinics in the state before the Supreme Court declared it unconstitutional in Whole Woman’s Health v. Hellerstedt, decided in June 2016 by a vote of 5 to 3. While the Louisiana law was being drafted, one anti-abortion leader in the state observed in an email to the bill’s sponsor that the Texas law was having “tremendous success in closing abortion clinics and restricting abortion access.” In signing the bill into law, Gov. Bobby Jindal declared it part of the effort “to make Louisiana the most pro-life state in the nation.”

Justice Stephen Breyer’s majority opinion in Whole Woman’s Health was a pointed rebuke to the Fifth Circuit for failing to subject the Texas law to adequate scrutiny. The appeals court had simply deferred to the Legislature’s claimed objective of protecting women’s health and had in fact barred any consideration of whether the law would actually do so. In fact, Justice Breyer wrote, the law conveyed minimal if any health benefit and would actually harm women by forcing longer waits and more crowded conditions in the remaining clinics that could meet the needless admitting privileges requirement.

Judge John W. deGravelles of Federal District Court in Baton Rouge applied the reasoning of Whole Woman’s Health in issuing a permanent injunction against Louisiana’s identical law. His ruling followed a six-day trial at which he took testimony on the sustained but fruitless efforts by the doctors to get admitting privileges; evidence on this point takes up 14 of the 63 pages of his opinion, issued in April 2017. Observing that it “provides no benefits to women and is an inapt remedy for a problem that does not exist,” Judge deGravelles concluded that this law, like the Texas law, placed an undue burden on women’s access to abortion.

The Fifth Circuit’s 2-to-1 decision overturning that ruling is a breathtaking piece of work. “We are of course bound by Whole Woman’s Health’s holdings, announced in a case with a substantially similar statute but greatly dissimilar facts and geography,” Judge Jerry Smith wrote for himself and Judge Edith Clement. What can that sentence — indeed, that premise — possibly mean? That Whole Woman’s Health concerned Texas while this case was about Louisiana? That’s like saying that the Supreme Court’s decision in Obergefell v. Hodges, recognizing a constitutional right to same-sex marriage, applied only to male couples and not to lesbians because it was a male couple who brought the case. (It’s worth noting that in the immediate aftermath of Whole Woman’s Health, the Alabama attorney general dropped the state’s appeal of its admitting privileges law, which had been
struck down in Federal District Court. “While I disagree with the high court’s decision, there is no good faith argument that Alabama’s law remains constitutional in light of the Supreme Court ruling,” was the state’s lawyer’s honest appraisal of the situation.)

The Fifth Circuit’s contorted explanation for why the Supreme Court’s “close fact-bound balancing analysis” in Whole Woman’s Health wasn’t relevant to Louisiana succeeded only in showing that Louisiana women would in fact be worse off than the women in Texas, where most major cities still have at least one abortion clinic (many Texas clinics did not reopen after the Supreme Court’s ruling). The two judges who formed the Fifth Circuit majority also tried to show that the doctors could have obtained admitting privileges if only they had tried harder, a conclusion flatly refuted by the findings at trial but embraced by Justice Brett Kavanaugh in his opinion last week, dissenting from the Supreme Court’s vote to grant a stay of the Fifth Circuit’s decision. Justice Kavanaugh said the doctors should keep trying.

The dissenter on the Fifth Circuit panel, Judge Patrick Higginbotham, dissected the majority’s opinion and said the appeals court was repeating the very mistakes for which the Supreme Court had called it out in the Texas case. When the full Fifth Circuit took up the question of whether to rehear the case as a full court, six judges said yes and nine said no. Four of the nine were recent Trump appointees (the fifth Trump appointee on the court, Kyle Duncan, was recused). The law was scheduled to take effect last week. It will remain on hold for some months, as least, as the plaintiffs, represented by the Center for Reproductive Rights, file their formal Supreme Court appeal and the state gets the chance to respond.

While it takes the votes of five justices, a majority of the court, to grant a stay, as it did in this instance, adding a case to the court’s docket for a decision on the merits requires only four votes. It’s highly likely the court will grant review; if it doesn’t, the stay dissolves automatically and the law takes effect.

How will the Supreme Court decide the case? Despite my boast at the start of this column, I don’t claim omniscience about what comes next. The chief justice voted to grant the stay, in my estimation, because to have silently let the Louisiana law take effect without Supreme Court intervention would have been to reward the defiance that I’ve described here. When it comes to a full review on the merits, it’s a different game.

Chief Justice Roberts was in dissent in Whole Woman’s Health, along with Justices Samuel Alito and Clarence Thomas (Justice Antonin Scalia having died four months before). The deciding vote in the majority was cast by Justice Anthony Kennedy. Justice Kennedy’s successor, Justice Kavanaugh, chose sides last week. He might have provided some cover for the chief justice, but chose not to. We now know all we need to know about him.

We still don’t know all we would like to know about John Roberts, who remains an ambiguous figure after more than 13 years at the head of the American judicial system.
With the lower courts moving rapidly even to his right, and the Trump administration beating at the Supreme Court’s door in one high-profile case after another, Chief Justice Roberts is entering a time of great testing, both of himself and of the institution he heads. Maybe his vote last week was a harbinger. Maybe it will come to be seen as an anomaly. In the space between those two possibilities, the country waits, holding its breath.
The Supreme Court handed down its first abortion decision of the year on Tuesday, with a mixed result that clearly signaled the conservative majority is not ready to reconsider the right to abortion set in Roe vs. Wade.

By a 7-2 vote, the justices upheld an unusual provision of an Indiana law that requires clinics to bury or cremate the remains of a fetus. This mostly symbolic rule does not violate a woman’s right to choose abortion or put an “undue burden” on those who do so, the justices said in a brief, unsigned opinion.

At the same time, the court, without a dissent, rejected the state’s effort to revive a significant restriction on abortion. The justices left in place lower court rulings that blocked an Indiana law that would make it illegal for women to end a pregnancy because of the race or gender of the fetus or if they received a diagnosis of Down syndrome.

Since Justice Brett M. Kavanaugh won confirmation, social conservatives have hoped -- and many liberals have feared -- that the high court with two appointees of President Trump would move to overturn the 1973 Roe decision, or at least significantly limit abortion rights. With their eyes on that possibility, Republican lawmakers in at least a half-dozen conservative states have enacted abortion bans this year.

But Tuesday’s outcome, after weeks of internal debate, suggests that the justices are inclined to move slowly and cautiously on the abortion issue and that Chief Justice John G. Roberts Jr. and his fellow conservatives are not ready to directly confront abortion rights, at least during a presidential election year. Had the high court agreed to hear the Indiana case, it would have been argued in the fall and decided by June 2020.

The decision not to hear Indiana’s appeal provides further evidence that the justices will not be eager to consider the even more sweeping abortion bans recently adopted by Alabama and other conservative states.

The spotlight has been on Kavanaugh. He replaced Justice Anthony M. Kennedy, who had joined with the court’s liberals, starting in 1992, to uphold the right to abortion. Neither Kavanaugh nor Justice Neil M. Gorsuch wrote separately on Tuesday in favor of hearing the Indiana case.

Social conservatives suffered a second setback on Tuesday, on another controversial issue — the treatment of transgender individuals. The justices refused to hear a
right-to-privacy challenge to the decision by a Pennsylvania school district that allowed a transgender student to use the boys’ locker room. Lawyers for the Alliance Defending Freedom sued on behalf of a high school boy who said he “felt embarrassed” about possibly seeing the other student in his underwear.

Two lower courts rejected the suit, and the justices said they would not hear the case of Doe vs. Boyertown Area School District. Asaf Orr, an attorney for the Transgender Youth Project, called the court’s action “a major victory for transgender youth and their families.”

“The vast majority of people in this country support equal treatment of all students, including those who are transgender,” Orr said.

Since early January, the justices had debated Indiana’s appeal in Box vs. Planned Parenthood during their weekly conferences. Only four justices would have needed to vote to grant review of Indiana’s appeal for the court to hear arguments on it. Instead, the justices denied the state’s case with no registered dissents.

At the same time, the justices voted 7-2 to uphold the fetal-remains part of Indiana’s law, an issue they had not previously ruled on. Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented.

In upholding that portion of the law, the justices in the majority said that states can legitimately regulate the burial of fetal remains. But they noted that their ruling did not alter previous decisions on whether state efforts to limit abortion itself amount to an “undue burden” on a woman’s right to choose to end a pregnancy.

The fetal-remains law “does not implicate our cases applying the undue burden test to abortion regulations,” they wrote.

Lower courts had struck down Indiana’s law as unconstitutional under Roe vs. Wade. Under that decision, a woman and her doctor, not the state, have the right to choose whether to end an early or midterm pregnancy.

The Indiana law, adopted in 2016 and signed by then-Gov. Mike Pence, sought to prohibit abortions entirely in some situations.

Its “non-discrimination” provision said “Indiana does not allow a fetus to be aborted solely because of the fetus’s race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability.”

The law had a narrow exemption for a lethal condition that “will with reasonable certainty result in the death of the child not more than three months after the child’s birth.”

A federal judge in Indiana and the U.S. 7th Circuit Court of Appeals in Chicago blocked the entire law from taking effect and ruled it was unconstitutional, saying that the “nondiscrimination” provision violated Roe vs. Wade and that the fetal-remains part of the law had no legitimate purpose.

Last year, the 7th Circuit split 4-4 on whether to reconsider that ruling. The dissenters included Judges Amy Coney Barrett from Indiana and Diane Sykes from Wisconsin,
both of whom were considered by Trump for a Supreme Court nomination.

Indiana appealed to the Supreme Court in October, a week after Kavanaugh was sworn in.

In siding with the lower courts on the main part of the law, the justices wrote that the decision not to hear Indiana’s appeal “expresses no view on the merits” of the issue, “whether Indiana may prohibit the knowing provision of sex-, race- and disability-selective abortions by abortion providers.”

That issue has so far only been considered by one appellate court, the 7th Circuit, and the justices said they would wait until other appeals courts have looked at similar laws before jumping in to consider it.

Justice Clarence Thomas, writing for himself, said in a 20-page opinion that the court “will soon need to confront the constitutionality of laws like Indiana’s” because of “the potential for abortion to become a tool of eugenic manipulation.”

“From the beginning, birth control and abortion were promoted as a means of effectuating eugenics,” he wrote, in an unusual, lengthy attack on early supporters of women’s access to contraception and abortion.

ACLU lawyers who had sued to block the Indiana law called the outcome a “mixed ruling.”

The high court “let another unwarranted restriction on abortion stand. While the ruling is limited, the law is part of a larger trend of state laws designed to stigmatize and drive abortion care of out of reach,” said Jennifer Dalven, director of the ACLU’s Reproductive Freedom Project.

An antiabortion group, Students for Life of America, said the court got it “half-right” in the Indiana case.

“The justices got it right that aborted infants need to be buried and cremated respectfully as they are human beings, not trash,” said Kristan Hawkins, the group’s president.

Carol Tobias, president of the National Right to Life Committee, said her group “applauds Justice Thomas for using this opportunity to expose Planned Parenthood’s eugenic legacy and for highlighting the need to protect unborn children from being exterminated based on their race, sex or level of disability.”

The justices are still likely to consider some aspects of abortion law in the months ahead. This month, the court has been considering another appeal from Indiana. This one seeks to revive a regulation that would require women to undergo an ultrasound test and then wait at least 18 hours before having an abortion.

The 7th Circuit blocked that law on the grounds it would put an undue burden on low-income women who had to travel hours to reach an abortion facility and stay there for two days.

The justices are likely to take up a Louisiana law that would require abortion facilities to have a doctor on their staff who has admitting privileges at a nearby hospital. In February,
the court, with Chief Justice Roberts in the majority, issued a 5-4 order to block that law from taking effect while the high court weighs an appeal.

The justices seem likely not to grant review of that case, June Medical Services vs. Gee, until the fall. That, in turn, means a decision would probably not come before June 2020.
“New Louisiana anti-abortion law on hold as doctors challenge recent court ruling”

The Advocate

Mark Ballard

October 8, 2018

Enforcement of new anti-abortion restrictions will have to wait as the physicians who challenged Act 620’s constitutionality asked for a review of an appellate court decision upholding the law.

The doctors argue in June Medical Services, et al., v. Dr. Rebekah Gee, et al., that requiring them to have admitting privileges at a hospital within 30 miles of the abortion clinic would likely require two of the state's three facilities to close and leave only one doctor with the proper credentials to perform the medical procedure that ends pregnancies.

They want the 16 members of the 5th U.S. Circuit Court of Appeals to review the split decision by a three-judge panel before allowing the state to enforce the law.

Two of three 5th Circuit judges on the panel – Jerry Smith, of Houston, and Edith Brown Clement, of New Orleans – found Sept. 26 that Louisiana's Unsafe Abortion Protection Act, Act 620 of 2014, didn’t cause an undue burden on women largely because the physicians didn’t try too hard to get hospital admitting privileges.

The third judge, Patrick Higginbotham of Austin, scolded his colleagues for retrying the facts of the case and essentially overturning a 2016 U.S. Supreme Court finding that a virtually identical Texas law had unconstitutionally created a “substantial obstacle” to the right of abortion.

Wednesday was the deadline for the five doctors in the challenge to request a rehearing, which stops the state from enforcing the law beginning Oct. 18.

“Our priority here is to keep clinics open,” T.J. Tu, who recently took over the legal team representing the Louisiana doctors, said in an interview last week while the lawyers for the New York-based Center for Reproductive Rights were considering their options.

“A woman’s constitutional right to access abortion is on the verge of extinction and that's not hyperbole. That is a reality,” he said.

The Center claims the 2-1 panel’s decision violated Supreme Court precedent.

State officials, who last week weren’t sure how to go about applying the law, won’t have to worry about enforcement for many months more.

The Louisiana Department of Health is responsible for licensing facilities and ensuring compliance. Generally, physicians with admitting privileges must submit a letter from the hospital saying so.
Is that what would happen in this case?

“The procedure will be determined by the lawyers with the A.G., who have been involved in the litigation,” LDH press office wrote in an email.

Over at the Attorney General’s Office, the press office in an email pointed to Attorney General Jeff Landry’s earlier statement praising the 5th Circuit’s decision and stating that administering the law is up to the Louisiana Department of Health.

State Rep. Katrina Jackson, D-Monroe, introduced the bill that would become Act 620 as a way of protecting women’s health by ensuring if anything went wrong during the termination procedure, a hospital would be on call. “If you are going to perform abortions in the state of Louisiana, you’re going to do so in a safe environment and in a safe manner that offers women the optimal protection and care of their bodies,” she said in March 2014.

The legislation largely tracked the wording of a bill that Texas made a law in 2013.

The U.S. Supreme Court overturned the Texas law in June 2016 because so many Lone Star doctors couldn’t obtain admitting privileges that all but eight of 40 clinics closed. The difficulty obtaining privileges, long drives and long wait times at the remaining clinics created an undue burden, the high court ruled in what many called the most significant abortion decision in a generation.

After a six-day trial in 2017, U.S. District Judge John deGravelles, of Baton Rouge, followed the Supreme Court’s reasoning to find the Louisiana law likewise was unconstitutional.

But Louisiana is not Texas, Smith wrote in his 45-page majority opinion.

When Act 620 was signed by then Gov. Bobby Jindal, Louisiana had five abortion clinics and six doctors. Two of the clinics have since closed.

Because of the numbers – three abortion clinics and about five physicians – the panel’s majority felt they could drill down into the difficulties each physician had in obtaining privileges, which is at the heart of the Supreme Court’s decision.

What they said they found was that the process wasn’t that onerous. Only one doctor “put forth a good-faith effort.” Three others likely could have obtained the privileges had they not “largely sat on their hands,” Smith wrote.

Higginbotham wrote in his dissent that the panel majority had no business retrying the facts of the case – that’s the job of the district court. Appellate courts decide if the law was applied accurately.

“The divergence between the findings of the district court and the majority is striking—a dissonance in findings of fact inexplicable to these eyes as I had not thought that abortion cases were an exception to the coda that appellate judges are not the triers of fact,” Higginbotham wrote.

He also noted that abortions are a safe procedure that require hospital care in less
than 1 percent of the more complicated pregnancies and nearly none at all when the terminations happen early, as most do.

All three of the panel judges were nominated by Republican presidents, are in their 70s, and have often been mentioned during their long careers as candidates when openings occurred on the U.S. Supreme Court.

Five of the 16 members of the 5th U.S. Circuit Court of Appeals were appointed by Democrats. Among the other 11 is a judge, Kyle Duncan of Baton Rouge, who when in private practice represented the state in this case.
“Supreme Court Will Not Hear Bid to Revive Alabama Abortion Ban”

The New York Times

Adam Liptak

June 28, 2019

The Supreme Court on Friday turned down an appeal asking it to revive an Alabama law that would have banned the procedure used in the vast majority of second-trimester abortions.

As is their custom, the justices gave no reasons for declining to hear the case. Justice Clarence Thomas issued a concurring opinion that called the procedure gruesome and unconstitutional. “This case serves as a stark reminder,” he wrote, “that our abortion jurisprudence has spiraled out of control.”

The procedure, known as dilation and extraction, involves dilating the woman’s cervix and removing the fetus in pieces. Opponents of abortion call it “dismemberment abortion.”

Justice Thomas adopted that terminology. “The notion that anything in the Constitution prevents states from passing laws prohibiting the dismembering of a living child is implausible,” he wrote.

The Alabama law, enacted in 2016, was blocked by lower courts. It would have affected 99 percent of abortions performed in the state after 15 weeks.

In defending the law, Alabama officials said it fell short of a complete prohibition.

“Although the law is a procedure ‘ban,’” the state told the Supreme Court, “its only practical requirement is that a doctor kill the unborn child through a medically appropriate procedure before removing the unborn child’s body from the woman.”

The state proposed three methods of terminating fetal life before extraction: injecting potassium chloride into the fetus’s heart, cutting the umbilical cord and injecting digoxin, a heart-failure drug, into the amniotic fluid. Lower courts ruled that these methods were not safe, effective or available, and they struck down the law as inconsistent with Supreme Court precedent.

Quoting a 2016 Supreme Court decision, Chief Judge Ed Carnes of the United States Court of Appeals for the 11th Circuit, in Atlanta, said problems with “the fetal demise methods — their attendant risks; their technical difficulty; their untested nature; the time and cost associated with performing them; the lack of training opportunities; and the inability to recruit experienced practitioners to perform them — support the conclusion that the act would ‘place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’ ”
“So does the fact,” he added, “that every court to consider the issue has ruled that laws banning dismemberment abortions are invalid and that fetal demise methods are not a suitable workaround.”

Chief Judge Carnes’s opinion was notable for its reluctance.

“Some Supreme Court justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion,” Chief Judge Carnes wrote for the majority. “If so, what we must apply here is the aberration.”

Eight other states have similar laws, Alabama said in its brief seeking Supreme Court review of the case, Harris v. West Alabama Women’s Center, No. 18-837.

In another development on Friday, the court agreed to decide whether Montana is free to exclude religious schools from a state scholarship program.

The state’s constitution bars using government money to aid schools affiliated with churches. Three mothers who sought scholarships from the state program to send their children to a Christian school sued, saying the state constitution violated provisions of the United States Constitution on religious freedom and equal protection.

The Montana Supreme Court rejected the challenge and shut down the entire scholarship program.

The case, Espinoza v. Montana Department of Revenue, No. 18-1195, will give the United States Supreme Court an opportunity to explore the limits of its 2017 decision in Trinity Lutheran Church v. Comer. That decision said Missouri could not exclude religious institutions from a state program to make playgrounds safer even though the state’s Constitution called for strict separation of church and state
The Supreme Court on Tuesday sidestepped part of a major abortion case, a new sign that the court is not yet moving aggressively to test the constitutional right to abortion established in Roe v. Wade.

In an apparent compromise in a case from Indiana, the justices turned down an appeal that asked the court to reinstate a state law banning abortions sought solely because of the sex or disability of a fetus. But the court upheld part of the same law requiring abortion providers to bury or cremate fetal remains.

The case, Box v. Planned Parenthood of Indiana and Kentucky, No. 18-483, had been closely watched because it could have given the Supreme Court its first chance to consider the constitutionality of a state law restricting abortion since Justice Brett M. Kavanaugh replaced Justice Anthony M. Kennedy last year.

Justice Kennedy had been a cautious supporter of abortion rights, while Justice Kavanaugh’s limited record on the subject as an appeals court judge suggested some skepticism.

The modest move on Tuesday left for another day the consideration of state laws limiting abortion that were enacted, at least partly, to challenge Roe v. Wade. Such laws are being enacted at a brisk pace, including one in Alabama banning almost all abortions in the state, without exceptions for rape and incest, and others that bar the procedure after doctors can detect what the measures call a “fetal heartbeat,” which happens around six weeks of pregnancy.

The new laws are intended to give the Supreme Court an opportunity to reconsider Roe.

The court’s decision on Tuesday, issued without briefing on the merits or oral arguments, was unsigned and just three pages long. The court stressed that its decision on fetal remains was not a ruling about abortion rights.

In declining to hear an appeal on the law banning abortions sought for specific reasons, the court said it was expressing no views on the constitutionality of such laws. A split among lower courts is ordinarily required for Supreme Court review, and in this case, the court noted, there was no such disagreement.

Justices Ruth Bader Ginsburg and Sonia Sotomayor said they would have denied review of both issues in the case.
The Indiana law was enacted in 2016 and signed by Gov. Mike Pence, now the vice president. It prohibited all abortions, at any time during a pregnancy, solely sought based on the fetus’s sex, or because it had been diagnosed with Down syndrome or “any another disability,” listing conditions like scoliosis, albinism, dwarfism and “physical or mental disease.” The law also barred abortions sought because of characteristics like race or national origin.

The state law also imposed limits on the disposal of fetal remains, though it allowed mass cremations and did not impose any restrictions on women who disposed of the remains themselves.

A statement issued by Mr. Pence’s office on Tuesday said he “commends the Supreme Court for upholding a portion of Indiana law that safeguards the sanctity of human life by requiring that remains of aborted babies be treated with respect and dignity.”

“We remain hopeful,” the statement said, “that at a later date the Supreme Court will review one of numerous state laws across the U.S. that bar abortion based on sex, race or disability.”

A three-judge panel of the United States Court of Appeals for the Seventh Circuit, in Chicago, unanimously struck down the provision limiting permissible reasons for having an abortion, though one judge said he did so reluctantly and only because he was bound by Supreme Court precedent.

In 1992, in Planned Parenthood v. Casey, the Supreme Court ruled that states may not prohibit abortions or place substantial obstacles in the way of women seeking them before fetal viability. Judge William J. Bauer, writing for the majority on the Seventh Circuit, said that ruling doomed the law’s restrictions.

“These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability, which the Supreme Court has clearly held cannot be imposed by the state,” he wrote in the decision issued by the appeals panel.

Judge Daniel A. Manion voted with the majority in that case, but did not adopt its reasoning. “Indiana has a compelling interest in attempting to prevent this type of private eugenics,” he wrote. “But the fact remains that Casey has plainly established an absolute right to have an abortion before viability.”

“That today’s outcome is compelled begs for the Supreme Court to reconsider Roe and Casey,” he wrote.

The Seventh Circuit panel had divided 2 to 1 on the part of the law concerning fetal remains. Judge Bauer, writing for the majority in that decision, said the distinctions in the law were not rational, noting that it allowed women to dispose of remains as they saw fit but required abortion providers to treat them largely as they did other human remains.

In dissent, Judge Manion wrote that Indiana was entitled to insist on “the dignified and humane disposal of the remains of unborn children.”

The full Seventh Circuit initially agreed to rehear the panel’s ruling on the fetal remains
provision but later announced that it had deadlocked after a judge recused himself.

Dissenting from the full court’s decision not to rehear the case, Judge Frank H. Easterbrook, joined by three other judges, wrote that both parts of the panel’s decision were misguided.

“Casey and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child,” he wrote of the provision on permissible reasons. “But there is a difference between ‘I don’t want a child’ and ‘I want a child, but only a male’ or ‘I want only children whose genes predict success in life.’”

As for the fetal remains law, Judge Easterbrook wrote that “the panel has held invalid a statute that would be sustained had it concerned the remains of cats or gerbils.”

In urging the Supreme Court to hear the case, lawyers for the state said fetal remains were worthy of respectful treatment.

“The fetal disposition provision expands on long-established legal and cultural traditions of recognizing the dignity and humanity of the fetus,” the state’s brief said. It added that advances in genetic testing and concerns about sex-selective abortions justified the provision restricting permissible reasons for the procedure.

Lawyers for Planned Parenthood said the provision governing fetal remains was not rational.

“Indiana claimed that it sought to treat embryonic and fetal tissue like human remains,” the group’s brief said. “But the challenged statute permits a woman to dispose of the tissue in whatever way she chooses, so long as she takes it from the medical facility when she departs.”

In a 20-page concurring opinion on Tuesday, Justice Clarence Thomas echoed and amplified Judge Easterbrook’s dissent. The Indiana law, Justice Thomas wrote, furthered the state’s “compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”

“Whatever else might be said about Casey,” Justice Thomas wrote, “it did not decide whether the Constitution requires states to allow eugenic abortions.”

In its brief opposing Supreme Court review, Planned Parenthood said the restrictions on permissible reasons also made no sense. “Indiana’s view would lead to perverse results,” the group’s brief said. “It would mean that even though states cannot compel a woman to continue a healthy pregnancy, it could compel her against her will to continue a pregnancy where it is virtually certain that the child will die in infancy.”