

Student Exam Number _____

Final Examination
Constitutional Law, Professor Leslie Griffin
University of Houston Law Center
May 10, 2010
1 to 5 p.m.

**THESE EXAMINATION QUESTIONS AND THE CONSTITUTION MUST BE
RETURNED AT THE END OF THE EXAM.**

This examination is **CLOSED BOOK, NO NOTES**. You may not consult any other materials or communicate with any other person. You are bound by the Law Center's Honor Code. **Don't forget that it is a violation of the Honor Code to discuss the exam's contents with any student in this class who has not yet taken it.** I recommend that you not talk about the contents of the exam until finals period is over.

Write your student exam number in the blank on the right side of the top of this page. If you are handwriting your examination, write your examination number on the cover of *each* of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are handwriting, please **do not use pencil**. If you write your exam, use ONE SIDE of a page only, and SKIP LINES.

If you are using a computer, please follow the directions that you learned at the training session. If the system fails, you should immediately start writing in your bluebooks. You **do not** need to write your exam number on the flash drive.

At the end of the exam, you **MUST** turn in this copy of the examination and the Constitution. Please do not write your name, Social Security number or any other information that provides me with your identity.

This exam is EIGHT pages long, with THREE questions. Question I is worth 30 points. Question II is worth 40 points. Question III is worth 30 points. I recommend that you spend 60 minutes on Question I, 75 minutes on Question II, and 60 minutes on Question III.

Your job is to analyze the facts in each question. Do not make up facts or fight the facts given. If you need more information to resolve a difficult question, state what information you would need and how it would affect your answer. Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor. **The questions may be similar to current events. You must answer the questions based on the facts given in the question and not what you read in the newspaper.**

Honor Code. It is a violation to use ANY aid in connection with this examination; to fail to report any such conduct on the part of any other student that you observe; to retain, copy, or otherwise memorialize any portion of the examination; or to discuss its contents with any student in this class who has not yet taken it. By placing your exam number in the PLEDGE blank below, you are representing that you have or will comply with these requirements. If for any reason you cannot truthfully make that pledge, notify me as soon as possible. **Sign your number and not your name.**

PLEDGE: _____

Question I (30 points, 60 minutes)

State Legislature passed the following Abortion Act of 2010:

A. Any abortion provider who knowingly performs any abortion shall comply with the requirements of this section.

B. In order for the woman to make an informed decision, at least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform or induce the abortion, or the certified technician working in conjunction with the physician, shall:

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;
2. Provide a simultaneous explanation of what the ultrasound is depicting;
3. Display the ultrasound images so that the pregnant woman may view them;
4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable; and
5. Obtain a written certification from the woman, prior to the abortion, that the requirements of this subsection have been complied with; and
6. Retain a copy of the written certification prescribed by paragraph 5 of this subsection. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

C. Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her. Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images.

D. Any woman who gives birth to a disabled baby may not sue the doctor or any other medical personnel who withheld information about the baby's birth defects or disability while the child was in the womb.

E. All clinics or other medical facilities performing abortions must post signs stating that a woman cannot be forced to have an abortion.

F. It is illegal for any woman to have an abortion because of the sex of her child.

Parties who have standing challenge the constitutionality of the legislation. What arguments will they give in opposition to the statute? How will the state defend it? What will be the result of their case in the Supreme Court of the United States? Why?

Question II (45 points, 90 minutes)

Beginning in the 1970s, gays and lesbians began to seek change and equality through the legislative process in State. That effort was met with resistance. For example, several same-sex couples sought marriage licenses in the mid-1970s from the county clerks in a number of State counties, but their applications were denied. Then, in 1977, the State Legislature enacted State Family Code § 300, which defined marriage as “a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.”

Nonetheless, gays and lesbians continued to press for the recognition of their right to equal treatment and were successful in making some gains. One such gain was the creation of domestic partnerships by the State Legislature in 1999. The 1999 legislation defined “domestic partners” as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” To qualify for domestic partnership, a couple must share a common residence, each be at least 18 years of age and unrelated by blood in any way that would prevent them from being married to each other, not be married or a member of another domestic partnership, be capable of consenting, and either both be persons of the same sex or include at least one person more than 62 years of age. Domestic partnership enables same-sex couples to obtain many of the substantive legal benefits and privileges that State law provides to married couples, but denies them access to civil marriage itself. It also treats same-sex couples differently in other respects, including but not limited to the following:

(1) To qualify for domestic partnership, both partners must have a common residence at the time the partnership is established, but there is no such requirement for marriage; (2) both individuals must be 18 years of age to enter into a domestic partnership, but a person under 18 may be married with the consent of a parent or guardian or court order; (3) to become domestic partners, both individuals must complete and file a Declaration of Domestic Partnership with the Secretary of State, who registers the declaration in a statewide registry, but a couple who wishes to marry must obtain a marriage license and certificate of registry of marriage from the county clerk, have the marriage solemnized by an authorized individual, and return the license and certificate of registry to the county recorder, who transmits it to the State Registrar of Vital Statistics; (4) the marriage laws establish a procedure through which an unmarried man and woman who have been living together as husband and wife may enter into a “confidential marriage” in which the marriage certificate and date of marriage are not made available to the public, but the domestic partnership law contains no such provision; (5) State Constitution grants a \$1,000 property tax exemption to an “unmarried spouse of a deceased veteran” who owns property valued at less than \$10,000, but not to a domestic partner of a deceased veteran; and (6) domestic partners may initiate a summary dissolution of a domestic partnership without any court action, whereas a summary dissolution of a marriage becomes effective only upon entry of a court judgment.

After enactment of the domestic partnership law, gays and lesbians again experienced a backlash, this time through the ballot initiative process. In 2000, a majority of State voters approved Proposition 22, codified at State Fam. Code § 308.5, which provided that “[o]nly marriage between a man and a woman is valid or recognized in State.”

In 2008 the State Supreme Court held Family Code sections 300 and 308.5 unconstitutional with a ruling that recognized a state constitutional right to gay marriage.

In response to the State Supreme Court’s ruling, 200 same-sex couples married in county offices around the State.

Because of the State Supreme Court’s ruling, however, opponents of same-sex marriage began an effort to put an initiative on the ballot that would overturn the State Supreme Court’s decision by amending the State Constitution to ban same-sex marriage. The proponents of the ban submitted petitions with enough signatures to place Proposition 8 on the ballot. The General Election Voter Information Guide stated that Proposition 8 would “change the State Constitution to *eliminate the right* of same-sex couples to marry in State.”

Two MegaChurches encouraged their members to vote for Proposition 8 and contributed \$1,000 to the Proposition 8 campaign. The churches then spent \$500,000 running ads against Proposition 8. State Law requires all contributions and expenditures for State ballot initiatives to be reported to the Secretary of State, who then posts all the donors and monetary totals on the State Website.

On Election Day, Proposition 8 won, and the State Constitution was amended to read “Only marriage between a man and a woman is valid or recognized in State.”

In response to a constitutional challenge to Proposition 8, the State Supreme Court issued a two-part ruling. First, it concluded that Proposition 8 was constitutional and that the State Constitution now bars same-sex marriages. Second, the Court then ruled that the 200 same-sex marriages performed in response to the Court’s ruling and before Proposition 8 passed would remain valid.

Three same-sex Couples (“the Couples”) then went to the county office, where they were denied marriage licenses and told they could be domestic partners under State law.

Harry and Sally, who are in love but whose religion teaches them that marriage is sinful, filed to become domestic partners but their application was rejected because they are both 35 years old.

Identify and analyze possible constitutional lawsuits by the Couples, Harry and Sally, and the MegaChurches. How will the State respond? How will the U.S. Supreme Court resolve the cases?

Question III (30 points, 60 minutes)

Is the following legislation constitutional? Why or why not? Include in your answer an analysis of how the Supreme Court of the U.S. (not including any individuals nominated to the Court after this exam was photocopied on May 6, 2010) would rule on the bill's constitutionality.

Shared Responsibility for Health Care
PART I—INDIVIDUAL RESPONSIBILITY
SEC. 1501. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL
COVERAGE

(a) FINDINGS.—Congress makes the following findings:

(1) IN GENERAL.—The individual responsibility requirement provided for in this section is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) EFFECTS ON THE NATIONAL ECONOMY AND INTERSTATE COMMERCE.—The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from \$2,500,000,000,000, or 17.6 percent of the economy, in 2009 to \$4,700,000,000,000 in 2019. Private health insurance spending is projected to be \$854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide.

(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(F) If there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.

PART II: THE REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL HEALTH INSURANCE COVERAGE

(a) An applicable individual shall for each month beginning after 2011 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential health care coverage for such month.

(b) If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2011, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c). Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return for the taxable year that includes such month.

(c) AMOUNT OF PENALTY.—The penalty determined under this subsection for any month with respect to any individual is an amount equal to 1/12 of the applicable dollar amount for the calendar year. The applicable dollar amount is \$750 for 2011, \$950 for 2012, and \$1,350 for 2013.

(d) An “applicable individual” includes every citizen and legal resident of the United States over 18 years of age. Applicable individual does not include an individual who is a member of a recognized religious sect and has membership in a Health Care Sharing Ministry, whose members share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs, and whose members retain membership even after they develop a medical condition. Congress believes these members do not need health insurance because they have their religion to protect them.

(e) All state departments of insurance shall keep records of all applicable individuals living within their state. Those records must contain the individual's name, address, Social Security number, and the type of health care coverage possessed by the individual. The states must determine if these individuals have health insurance and record that status of insured or uninsured in the file. Files containing this information shall be sent to the federal Department of Health and Human Services monthly.

(f) The federal government shall provide \$5,000 per enrollee for a state to create an insurance exchange through which individuals may purchase the minimum essential health care coverage. That \$5,000 per enrollee shall be given to the state governments. If the state wishes not to participate in the state exchange program, it shall provide

insurance coverage for all persons living in the state who do not have insurance and whose income is less than or equal to the federal poverty level. The exchanges shall offer approved policies to interested buyers, in the same way that a food co-op offers food at different prices to members.

Is the legislation constitutional? Why or why not? Include in your answer an analysis of how the Supreme Court of the U.S. (not including any individuals nominated to the Court after this exam was photocopied on May 6, 2010) would rule on the bill's constitutionality.

Exam Memo, Constitutional Law, Spring 2010
Professor Griffin

Your letter grades in this course were based on the following point totals from the final examination and were awarded according to the mandatory UH grading curve for first year courses, which requires that the class average fall between 2.9 and 3.1. The class average was 3.07. The number in parentheses is the number of students that received each letter grade. The exams varied greatly in quality.

90-100 A (2)
87-89 A- (2)
80-86 B+ (20)
66-79 B (41)
60-65 C+ (4)
55-59 C (2)

This is the first exam in my experience in which no one left before the four hours were over and everyone worked hard and wrote a lot. Many of you wrote excellent answers. The highest grades went to the students who 1) spotted the relevant constitutional challenges and 2) wrote the best analysis. Good analysis requires you to *apply the law to the facts*. There were many facts in all the questions. If you wrote about the case law without analyzing the facts, you got a lower grade than the students who just *answered the question*.

Thus in Question I it was important that you subject the whole statute to the undue burden standard of *Casey* and not just summarize *Casey*. *Carhart II* is the current law of abortion, so you lost points if you did not mention it where appropriate (e.g., that the state may be able to regulate a pre-viability abortion, that the Court may defer to the state's interest in life, that the state may be concerned that the mother regrets her decision to abort, or in figuring out Justice Kennedy). Although there may be non-abortion challenges to sections D and F of the statute, those sections also had to be analyzed under abortion law. Because Section F in particular seems the least constitutional—an absolute ban on abortion—it had to be discussed in detail.

Most (but not all) of the statute was taken from a recent Oklahoma abortion bill, so you may find out in the future what the courts think about the ultrasound.

Question II contained many issues and lawsuits: disclosure for Megachurches; religious freedom and equal protection (age) for Harry and Sally, and equal protection and substantive due process for the Couples. Most of the points were lost under EP and SDP. Several of you still don't know the difference. In addition, the Couples' EP challenge had many levels. *First*, you could consider whether Couples were subjected to political animus: "The General Election Voter Information Guide stated that Proposition 8 would 'change the State Constitution to *eliminate the right* of same-sex couples to marry in State.'" Use the facts from the question to support your argument! *Second*, sexual orientation is not a suspect class, and so the state legislation must be subjected to

rational basis scrutiny. RB scrutiny is different from animus. You must compare marriage and domestic partnership to see if the difference survives RB scrutiny. That is why the facts were there! *Third*, the non-married gays should also challenge their different treatment from the married gays. Is there any rational basis for having this distinction? You had to argue that point. Most of you did not consider the difference between married and non-married gays, even though the question explicitly said: “Second, the Court then ruled that the 200 same-sex marriages performed in response to the Court’s ruling and before Proposition 8 passed would remain valid.” Facts matter. Because of the time we spent on EP and SDP in class, most of the points in Question II belonged to those issues. If you missed them, you were in trouble.

A lawsuit based on similar facts is underway in State (obviously California) so we will see whether the federal courts recognize a constitutional right to gay marriage.

I am happy to tell you that everyone noticed that Question III was about the Commerce Clause. More points were given to answers that *applied Raich, Morrison and Lopez* to the facts of the bill, and not just to students who summarized the case law. Is the bill closer to *Raich, Morrison or Lopez*? Facts matter.

You should have considered whether Health Care Sharing Ministry violated the Establishment Clause.

You needed to consider whether this provision:

(e) All state departments of insurance shall keep records of all applicable individuals living within their state. Those records must contain the individual’s name, address, Social Security number, and the type of health care coverage possessed by the individual. The states must determine if these individuals have health insurance and record that status of insured or uninsured in the file. Files containing this information shall be sent to the federal Department of Health and Human Services monthly.

violated *Printz* (by commandeering the executive) or if it was purely ministerial. You can’t just cite *Printz*; you have to decide if this action is executive and if the government was really commandeered.

For the following section f, you needed to consider the Spending Clause (*Butler, Dole, New York*) and whether there was legislative commandeering under *New York v. United States*.

(f) The federal government shall provide \$5,000 per enrollee for a state to create an insurance exchange through which individuals may purchase the minimum essential health care coverage. That \$5,000 per enrollee shall be given to the state governments. If the state wishes not to participate in the state exchange program, it shall provide insurance coverage for all persons living in the state who do not have insurance and whose income is less than or equal to the federal poverty

level. The exchanges shall offer approved policies to interested buyers, in the same way that a food co-op offers food at different prices to members.

Of course these are all issues related to the Tenth Amendment, which is always in play when Congress and the states are involved. If you noticed Congress' powers over tax and bankruptcy, that was good too!

The best student answers are pasted below. Please be sure to read them over and compare them to your exam before making an appointment to ask me about your grade.

Question -1-

Parties have standing.

Parties will argue that there is a violation of their 14th Amd substantive due process right to abortion.

14th Amendment SDP Right to Abortion Violation

Parties will start out by tracing the long line of cases that has led to the recognition of the right to abortion, starting with *Griswold v. Connecticut*, which recognizes a right to privacy (emanating from the penumbras of the Bill of Rights) in childbearing decisions and decisions on using contraceptives, leading to *Eisenstadt v. Baird*, in which Brennan recognizes that the right inheres in a married couple but is really about two individuals and their right to make decisions about matters as fundamental as whether or not to have a child. Parties will cite *Roe*, in which the Court finally recognized the fundamental right to an abortion. Parties will use the current standard from *Casey*, which says that before viability, the decision of abortion is left entirely up to a woman and her doctor, but throughout the pregnancy, the state may regulate in the interests of potentiality of life and for the health and life of the mother, as long as there is no undue burden on a woman seeking the abortion of a non-viable fetus. After viability, the

state may regulate and even proscribe abortion. Parties will emphasize that an undue burden exists when the purpose of the regulation is to place a substantial obstacle in the path of a woman seeking an abortion (Casey).

State will argue that there is no fundamental right to an abortion because it is unenumerated. This is unlikely to work (see all the cases above leading up to Casey). Under the standard in Casey, State will argue that any regulations by the state should be deferred to if they are in the interests of potentiality of life and for the health of the mother. State will argue that Casey states that it may enact regulations to persuade the mother to choose childbirth over abortion as long as there is no undue burden on the woman seeking an abortion.

Section B and C

Parties will argue that Section B is an undue burden on a woman. It requires that at least 1 hour prior to the woman having an abortion, the physician must perform an obstetric ultrasound to display the fetus clearly, provide a simultaneous explanation of what the ultrasound is depicting, display the ultrasound images so the woman can see them, and provide a medical description of the images. Parties will argue that these provisions are meant to place substantial obstacle in the path of a woman seeking an abortion because they force the woman through a battery of tests before allowing her to have the abortion. They will also argue that together with Section C, the provisions are clearly coercive because they force the woman to look at the fetus that she is about to abort and morally guilt her into having the baby instead. Parties will argue that the timing (1 hour before the inducement of the abortion) is a last ditch effort to get the woman to change her mind before the abortion rather than an effort to help the woman make an informed

decision. In addition, Provisions 5 and 6 require written consent from the woman prior to the abortion, and require a retention of the written certification. Parties will argue that this is a substantial obstacle for women because the recording requirement might dissuade some women from having an abortion - together with all the other provisions, it places many steps in what might be a difficult decisions for them to make, thus turning them away from the decision altogether. Parties will also argue an undue burden on minors, which is not permissible because the court found in Carey that minors were afforded the same privacy rights, and the State could not ban the sale of contraceptives to them. State will argue that Sections B and C are not an undue burden on women. State will cite Casey, in which all the provisions but one were upheld by the Court. In Casey, the Court did not find the 24 hour waiting period to be an undue burden. That burden was arguably greater than the burden here, which involves only an ultrasound procedure before the final abortion. State will remind the Court that Casey allows the State to persuade a woman to choose childbirth over abortion as long as it does not place an undue burden on the woman. Here, State can argue that there is no undue burden because there is one procedure and a written certification. Both of these do not place an additional cost on the woman (not stated in the facts, but assumed), and are simply information and recordkeeping provisions which Casey has upheld. The State is regulating in the interest of the health of the mother, and the ultrasound provisions are merely to enable the woman to make an informed decision. State may also argue that Section C, which requires the mother to look at the fetus, is simply a provision to ensure that the mother is taking into account all the medical information available to her. The State is allowed to do this because it relates to the interest in the potentiality of life - the state wants to make sure

that such a grave decision is made wisely (see Kennedy in Carhart). In addition, the state imposes no penalties on the physician or the woman if she refuses to look at the ultrasound images. Therefore, this does not constitute an undue burden. In effect, the provision merely makes more medical information available to the mother. State will cite Casey to support Section C, in which the Court upheld recordkeeping provisions, and Thornburgh, which struck down recordkeeping requirements but was overruled by the Court in Casey. The written certifications are related to the State's interest in the health of the mother, because it enables better records and statistics on abortion.

Section D, E and F

Parties will argue that Sections D, E and F an undue burden on the woman. Section D prevents the woman from suing any doctors who withhold information about the baby's birth defects while the child is in the womb. Parties can argue that this was meant to place a substantial obstacle in the path of a woman seeking an abortion. It effectively insulates the doctors when they withhold from the woman the information she needs to make the choice to terminate a pregnancy. Parties can argue that doctors will then be able to force women into having pregnancies simply by withholding information from them. Parties will argue that this should be found an undue burden under Casey because it clearly presents a substantial obstacle for the woman - if she is not even told of the very reason she might want to have an abortion, it prevents her from having an abortion altogether. Parties will also argue that Section E is an undue burden because the medical facilities are putting up a sign stating that women cannot be forced to have an abortion. Parties will argue that it borders on coercive because the signs are at all clinics and medical facilities providing abortions.

Parties will argue that the State is trying to insert itself into a woman's decisionmaking process, something that should be left entirely up to the woman. Section F is arguably an undue burden because it eats into the line that Casey draws - Casey says that before viability, the state may not ban abortion, the choice is left entirely up to the woman and her doctor. In banning abortion based on the sex of the child, the state is effectively going against Casey. State will argue that unlike Carhart, which banned only ONE type of abortion, and other types of abortion were still available for the mother to use, this provision bans ALL abortions based on the sex of a child and does not specify that it is only post-viability that it may be banned. Parties will argue that the State is taking a fundamental right to abortion away from all woman who wish to abort based on the sex of their child. Casey does not specify that pre-viability, the woman must have specific reasons for wanting an abortion. It leaves it ENTIRELY up to the woman and her doctor to decide whether or not an abortion is appropriate. In addition, the statute does not contain a health exception for women for whom the sex of a child may directly affect their health.

State will argue that Sections D, E and F are not an undue burden. Once again, Casey allows the state to persuade a woman into choosing childbirth over abortion, and Section E is therefore not an undue burden on a woman. The 24 hour waiting period in Casey, which was arguably a greater burden on women than having clinics put signs up, was not found to be an undue burden. State can argue that section D is not an undue burden because it is merely a provision to protect doctors who may have withheld disabilities that had a very low chance of occurring, or that were minor. However, this is unlikely to work. It does not seem as though the State has a good argument for why this is

related to the potentiality of life or the interest in a woman's health. State will argue that Section F is not an undue burden. State will cite Casey and Gonzales v. Carhart, which uphold the State's ability to regulate in the interest of the potentiality of life - in Carhart, the Court allowed the ban on D&X because the state's interest in promoting respect for life by banning an inhumane abortion method was justified. Similarly, the State here is promoting the respect of life by banning any abortions based merely on the sex of the child. In addition, similar to Carhart, the State is not banning all abortions, they are still allowing abortion based on other reasons. There is no proof that a health exception is ever needed for a gender-based abortion, therefore, it will not affect the health of a woman if we ban gender-based abortion.

The case will be a 5-4 case in the Supreme Court
Kennedy, Roberts, Scalia, Thomas, Alito: Due weight must be given to the State's interests in the potentiality of life and the health of the mother. The state has a strong interest in making sure that its citizens are not callous and desensitized to life, and banning gender-based abortion serves that interest. Also, does not cover all abortions, a woman may still choose to abort based on other reasons and it will not affect her health.

Scalia: This correctly applies Casey's jurisprudence, but I do not believe in the right to an abortion - it is not enumerated in the Constitution.

Thomas: Same as Scalia.

Alito: I do not believe any of these provisions are an undue burden. I did not believe the spousal notification requirement in Casey was an undue burden, and none of these are either.

Roberts - hard to tell, he has not sat in on these cases. But he will likely side with Kennedy and co.

Ginsburg: The Act places an undue burden on women, particularly provision F which bans all abortions based on the sex of a child. Casey clearly states that pre-viability abortion should be left entirely up to the woman. That line must not be blurred. In addition, Section C suggests that there are stereotypes at work here which assume that the woman has merely made an emotional decision without considering the full ramifications of a decision. This is paternalistic. In addition, there is no health exception for women for whom the gender of the child may affect her health. There is an equal protection violation, there is no basis to treat the minors differently.

Stevens: The state must not insert itself into the decisionmaking process of a woman. The provisions are an undue burden on women. I stated in Casey that all the provisions should be found unconstitutional, and the provisions here are similar to those.

Breyer: Agrees with Stevens and Ginsburg.

Sotomayor: She will probably side with Ginsburg and co.

Question -2-

Standing

Couples: Couples likely have standing to sue. They have suffered an injury-in-fact because their marriage licenses have been denied. There is causation, because the State's law is the reason their licenses were denied. There is also redressability, because the Court's decision in finding a violation could redress the situation.

Harry and Sally: Harry and Sally likely have standing as well, their application was rejected and they have suffered an injury-in-fact. There is causation and redressability because the law was the reason their application was denied, and there is redressability because the Court's decision in finding a violation could redress the situation.

Megachurches: Megachurches likely have standing to sue because they have donated ads for Proposition 8 and now have to place their totals on the state Website. State may argue that there is no standing because it is too generalized, however, the church can argue that simply putting their names on the lists is an injury in itself because it engenders bad publicity.

All likely have standing.

Same sex couples will bring 14th Amd EP case because heterosexuals are allowed to obtain marriage licenses whereas homosexuals are not, and because the same sex marriages performed before Prop 8 were valid, whereas no marriages performed after Prop 8 are valid. They will also bring a 14th Amd SDP case.

The MegaChurches will allege that the disclosure requirements are in violation of their free speech rights in campaign finance.

Harry and Sally will likely argue a 14th Amd EP case based on the domestic partnership requirements, and a Free Exercise Clause argument.

Same-sex couples

14th Amd EP (classification based on same-sex vs. heterosexual)

Couples will argue that there is a classification based on sexual orientation. Proposition 8 bans same-sex marriages while allowing heterosexual marriages. Couples will argue that homosexuals are a discrete and insular class and therefore the legislation should be afforded strict scrutiny. However, given the ruling in *Romer v. Evans*, this is unlikely to work. Classifications based on sexuality get only rational basis scrutiny. Couples will argue that the legislation cannot pass even under a rational basis scrutiny. Firstly, they may argue that it is based on animus - animus is never rational. They may argue that there is an inference of animus because of the history - beginning in the 1970s, there was great resistance against marriages for same-sex couples, and the state legislature has repeatedly tried to define marriage such that it is only available to a man and a woman. The Court found in *Romer* that the legislation was unconstitutional because it was based on animus. Couples will argue that the legislation is overbroad and identifies all couples by only one characteristic - that they are of the same sex - then denies them marriage across the board. Couples will argue that there is no rational basis for this - there is no rational distinction between same sex couples and opposite sex couples, apart from their gender. They are both able to support families, each individual person has the same liberty interests, etc.

State will argue that there is no animus at work here, that the State is simply regulating in the interest of morality - and morality has been a legitimate interest in upholding laws against bestiality, etc. Couples might say here that *Lawrence v. Texas* (though an SDP case) recently held that morality was not a legitimate interest. State will point out that that was under strict scrutiny, whereas this is simply a

rational basis test. State will argue that under a rational basis as used in *Romer v. Evans*, morality is a legitimate interest which the state may use. In addition, the state may argue that there is a legitimate interest in preserving traditional nuclear families. They may argue that it is rationally related to the legislation here, because unlike opposite-sex couples, same-sex couples are not able to procreate, and this is essential to a functioning marriage. Couples will reply and say that the ability to procreate is not a distinction that is rationally related to the ban on marriage for same-sex couples, marriage is not solely about procreation, it is about the commitment of two people to each other. On these grounds, there is no basis for distinguishing same-sex couples from opposite sex couples.

State may then argue that under a rational basis test, there is no need for a least restrictive means analysis, and the State here has provided an alternative for same-sex couples in the form of domestic partnerships. State may argue that domestic partnerships provide the same basic legal benefits and privileges as civil marriages, and are therefore an acceptable substitute for marriage. Couples will argue here that separate is not equal (although this was used in the context of race discrimination in *Brown*, *Sweatt*, *Oklahoma* and gender discrimination in *VMI*) - civil partnerships are not equivalent to marriage. They are not viewed similarly in society, and do not have the same traditional ceremonies, etc. In addition, the requirements to enter into a domestic partnership are considerably more stringent than the requirements for marriage. Therefore, there is still a 14th Amd EP violation. For example, under provision 1, both partners must have a common residence to qualify for domestic partnership, whereas there is no such requirement for marry. Provisions 2 - 6 also treat domestic partnerships differently from civil marriages. Parties may argue that

there is no rational basis for the classifications. There is no rational basis for requiring a minimum age for domestic partnerships, but allowing under-18s to get married with parental consent. If the interest advanced here is the interest in making sure the decision is wisely made, then the State should allow couples to enter domestic partnerships if they are under 18 and have parental consent.

14th Amd EP violation for classifying based on pre and post Prop 8
Couples may also argue a 14th Amd EP violation because the law allows the 200 pre Prop 8 marriages to remain valid, while treating all post Prop 8 marriages as invalid. State will likely win this argument because there is a rational basis for distinguishing between pre and post Prop 8 marriages. If the state had to apply laws retroactively, society would be chaos and there would be no certainty in laws. Therefore, pre and post- Prop 8 marriages are not similarly situated, and the classification should pass a rational basis scrutiny.

14th Amd SDP right to marriage violation

Couples may argue that the state Constitution and laws violate their substantive due process right to marriage. They will cite *Loving v. Virginia*, which recognized a fundamental right to marriage, and *Turner v. Safely*, in which even prisoners have a right to marry. This is a right implicit in the concept of ordered liberty, and is a traditional and historic right. Couples may argue that strict scrutiny is therefore warranted, and the State has no compelling interest in denying them the right to marriage - morality is not a compelling interest (see *Lawrence v. Texas*). Couples may argue that the Supreme Court has already recognized that the fundamental right to sexual intimacy applies across

the board, regardless of sexuality. Couples will argue that the same should hold true for the fundamental right to marriage, which has even older precedents (*Loving v. Virginia*). State will argue that there is no fundamental right to marriage for same-sex couples. Under the 14th Amd SDP test, a fundamental right must be historic and traditional, and viewed at the most specific level of generality (see Scalia's opinion in *Michael H.*) - there is no history and tradition of same sex marriages, and therefore it is not historic and traditional. State may also argue that even if there is a fundamental right to marriage, there is a compelling interest in banning same-sex marriages because they want to preserve traditional family units, and the end is narrowly tailored because it allows domestic partnerships - providing many of the same legal benefits - whilst banning same-sex marriages.

Harry and Sally

14th Amd EP violation based on sexual orientation

Harry and Sally have a 14th Amd claim as well. Within domestic partnerships, the law classifies domestic partnerships differently based on whether the couple is same-sex or opposite sex. Once again, a rational basis test applies for classifications based on sexual preference. Harry and Sally may argue that there is no rational basis for allowing same-sex couples of any age to marry but requiring opposite sex couples to have at least one person be 62 years old. Both couples are similarly situated apart from gender, and the age requirement is not rationally related to an interest in promoting marriages (if that is the State's interest). State may argue that there is a rational basis because they would like to preserve traditional family units, and therefore they would like to encourage opposite-sex couples to get married. The law is therefore rationally related to a

legitimate end because it encourages younger couples who are able to bear children to enter into marriages.

Free Exercise

Harry and Sally have a free exercise claim. The state is burdening the practice of their religion by essentially requiring them to go through marriage instead of having a domestic partnership. Harry and Sally will argue that because their fundamental right to marriage is implicated (see *Wisconsin*, implicating the fundamental right to raise children, see *Sherbert*, implicating welfare benefits), the Court should apply the *Sherbert* test, in which if there is a substantial burden on the exercise of religion, the law is invalid as applied unless the state has a compelling interest and has used the least restrictive means possible to advance that interest. Harry and Sally will argue that the state does not have a compelling interest in requiring one person to be at least 62. Even under a least restrictive means analysis, if the State wishes to encourage marriage, the age requirement is not the least restrictive means possible to do so.

State will argue that the *Smith* test applies - it is the current test. Under the *Smith* test, a neutral law of general applicability will be upheld even if it places a burden on the exercise of religion. Here, the law is neutral because it was not designed to discriminate against opposite-sex couples, and it is generally applicable because it applies to all opposite-sex couples. Therefore, the law should be upheld.

MegaChurch

Campaign Finance

Megachurch may argue that the disclosure requirements violate their free speech rights. Under *Buckley*, regulations on expenditures get

strict scrutiny and regulations on contributions get heightened scrutiny (though not as strict). The Court has always held (since Buckley) that the anticorruption interest is sufficient to justify contribution limits or regulations on contributions, and the disclosure requirements for the \$1000 contribution will likely not be a problem. Megachurch will argue that under Buckley and Citizens United, the disclosure requirements for the \$500,000 expenditure unconstitutionally burdens free speech. Megachurch will cite Bellotti, in which money for ballot initiatives were considered 'soft money' and the restrictions on them were therefore struck down. Similarly, the disclosure requirements for expenditures on ballot initiatives should be struck down. In addition, the Court held in MACL that the requirement of a separate PAC for MACL's expenditures was unconstitutional because the group was more like a non-profit advocacy group than a corporation (may be irrelevant now that Citizens has held that it does not matter whether or not a corporation is involved). Church's strongest argument is that thus far, there have been no compelling interests that justify regulations on expenditures. The antidistortion rationale was struck down in Citizens United. Church may also argue, as Thomas did in his concurrence in Citizens, that the disclosure requirements may unconstitutionally burden free speech. They may lead to targeted protests from groups, and an overall effort by those groups to silence unpopular speech. Thomas pointed out in Citizens United that this was exactly what happened in Prop 8 when a theatre director lost his job. State will point out that disclosure requirements have always been upheld - from Buckley to McConnell to Citizens United.

This will likely be a 5-4 decision for the equal protection,

substantive due process and free exercise claims, and an 8-1 decision for the disclosure requirements.

Kennedy, Stevens, Breyer, Ginsburg, Sotomayor: In *Lawrence v. Texas* we decided that the right to sexual intimacy was a fundamental right for all, regardless of sexual orientation. Here, the right to marriage is similarly a fundamental and traditional right that should be accorded to all. Several nations around the world would agree.

Stevens (concur): In addition, I believe that there is only one EP clause, and therefore there should only be one standard. Certain characteristics will be relevant to the inquiry in some cases, and irrelevant in others. Here, there is no rational basis for distinguishing same-sex couples from opposite sex couples.

Breyer (concur): Yes, and what makes the difference to the EP violation is that there is animus at work here (as in *Romer* and *Olech*).

Ginsburg (concur): Separate can never be equal! As I said in the *VMI* case, the school set up for women was not equivalent to *VMI*. A domestic partnership can never be equivalent to marriage, and the State's classification is unconstitutional.

Roberts, Alito, Scalia, Thomas: Under a rational basis test for classifications based on sexual orientation, the provisions pass because the state has a legitimate interest in preserving the traditional family unit. There is no fundamental right to same-sex marriage.

Scalia (concur): Leave it up to the legislature and the democratic process - here the people have decided that marriage should be between a man and a woman. There is no substantive due process right to marriage for homosexuals because it is not traditional and historic, in addition, morality is a legitimate interest for the State to justify a

ban on same-sex marriage. There are no equal protection violations.

Thomas (concur): It is an uncommonly silly law/amendment, this involves a private act between two people. However, I do not find in the Constitution any enumerated right for homosexuals to marry, therefore, I cannot say that there is a fundamental right violated here. Under a rational basis test, there is no violation.

All: The disclosure requirements will be upheld because they do not unduly infringe on the right to free speech.

Scalia (concur): Agree, but restrictions on contributions should get strict scrutiny.

Thomas (dissent): There is a large burden on free speech as applied here, and the anticorruption interest is not sufficient to justify the burden on speech. Although I have always upheld disclosure requirements, I feel in this case that it would be too much of a burden and would have a silencing effect on speech.

Question -3-

Challengers to the Shared Responsibility for Health Care Act ("the Act) will argue the Act is not within the scope of Congress' Commerce Power (Article I, Section 8, Clause 3), violates principles of federalism, and violates the Establishment Clause. Supporters of the Act will argue the Act is squarely within the scope of Congress' Commerce power, does not violate principles of federalism, and does not violate the Establishment Clause. Their respective arguments for those propositions are detailed below.

Commerce Clause

Challengers will argue the Act is outside the scope of Congress' Commerce Power because it does not seek to regulate instrumentalities of commerce, channels of commerce, of intrastate activities substantially affecting interstate commerce. *Challengers* will rely on *US v. Lopez* for the proposition that while instruments part of health care (supplies, ambulances, et cetera) may travel through interstate commerce, the regulation at issue here seeks to regulate health insurance policies, which are stagnant within a given state and do not affect interstate commerce as policies. In *US v. Lopez*, the Court held there was insufficient evidence to demonstrate how guns, although purchased through and a part of interstate commerce, affected interstate commerce to such a degree as to require the Gun-Free School Zones Act. The Gun-Free School Zones Act prohibited the possession of a gun within a school zone. The *Lopez* Court found there was insufficient evidence to demonstrate how the presence of guns in school zones affected interstate commerce such that it fell within Congress' Commerce Power. The *Lopez* Court struck down the Gun-Free School Zones Act as outside of Congress' Commerce power. *Challengers* will argue the Act at issue here is similarly outside of Congress' Commerce Power because although medical insurance provides the economic modality required for most people to receive medical treatment, the medical insurance policy itself does not affect interstate commerce. *Challengers* will argue medical insurance is similar to the guns in *Lopez* in that once the medical insurance policies (the "guns") come into being (enter the school zone) there is insufficient evidence to demonstrate their effect on interstate commerce, although the medical industry absolutely runs through interstate commerce. *Challengers* will argue that Congress' findings only point to the affect on interstate commerce of the modalities of medical treatment. *Challengers* will argue

regulation is different from that upheld in *Gonzalez v. Raich* because it is not a commodity that moves, literally, within a market. In *Gonzalez*, the Court held that an intrastate activity of home-grown marijuana could be regulated because it was bought and sold on a market. The Court held it could be taken in the aggregate to demonstrate its effects on interstate commerce because it was an economic activity. Challengers will distinguish *Raich* because the medical insurance policies at issue here are not bought and sold on a market similar to the marijuana in *Raich*. The policies are intangible goods. Therefore, challengers will argue the effect of one individual's lack of a medical insurance policy should not be taken in the aggregate to determine its effect on interstate commerce. Challengers will argue the item regulated by the Act is not a channel of interstate commerce, not an instrumentality of interstate commerce, and is not an intrastate activity sufficiently demonstrated to substantially affect interstate commerce.

The government will argue the Act is within the scope of Congress' Commerce Power because it seeks to regulate an intrastate activity that substantially affects interstate commerce. The government will distinguish between the outcome of *Lopez* by arguing medical insurance policies are instrumentalities, or even channels, of interstate commerce and medical insurance policies are almost required in order to stomach the high cost of medical treatment in this country. By acting as a financial proxy to medical treatment, medical insurance policies constitute instrumentalities of interstate commerce, the government will argue, and therefore, are within the scope of Congress' Commerce Power, the outcome in *Lopez* notwithstanding. The government will point out the difference between the guns of *Lopez* and the medical insurance policies of the Act. In *Lopez*, the Court could not find a

nexus between guns in school zones and interstate commerce. The two were not connected and Congress could not demonstrate such a connection. Here, the government will argue, there is such a nexus because of the affect medical insurance policies have on the ability of individuals to receive medical treatment, thereby increasing the need for shipments of supplies, medicines, doctors, and other instrumentalities of the interstate commerce of medicine. The government will also point to *US v. Morrison* to demonstrate the reality that the legislation is, in fact, regulating economic activity. In *Morrison*, the Court struck down legislation because it attempted to reach individual actors and because it attempted to regulate noneconomic activity. The government will distinguish between *Morrison* because here, the policies are part of a greater market involved in commerce, as opposed to the violence attempted to be regulated in *Morrison*. Finally, the government will argue the aggregate effects of medical insurance policies on interstate commerce bring the policies within the scope of Congress' Commerce power similar to the item to be regulated in *Raich*. The Court in *Raich* found that since the home-grown marijuana was part of a market, its effects on interstate commerce could be taken in aggregate to demonstrate a substantial effect on interstate commerce. The government will argue the effect on interstate commerce of one individual not having a medical insurance policy may be taken in the aggregate to demonstrate the effect of many individual's without insurance policies on interstate commerce (See also *Wickard v. Filburn*). The government will argue the Act is within Congress' Commerce Power because it regualtes an instrumentality of interstate commerce.

SCOTUS

Challengers to the Act can expect a 2-4 vote in favor of

upholding the law, with 3 votes up for grabs from Roberts, Alito, and Sotomayor.

Rehnquist, O'Connor, Scalia, and Thomas will vote to strike down the law as outside the scope of Congress' Commerce Power. Scalia will argue the federal government cannot pass this legislation pursuant to the Commerce Power or the Necessary and Proper Clause, as it is outside the scope of Congressional regulation. Rehnquist would argue the legislation seeks to regulate something that is too distant from interstate commerce, despite the fact that it may appear in interstate commerce. However, since Rehnquist and O'Connor are no longer on the Court, their votes are up for grabs.

Stevens, Souter, Ginsburg, Breyer, and Kennedy will vote to uphold the law as within Congress' Commerce Power. These justices will uphold the regulation as long as Congress can demonstrate a legitimate interest in so legislation. Stevens will require Congress demonstrate its *actual* purpose is rationally related to the legislation's means. As long as Congress can demonstrate its actual purpose is rationally related, Stevens likely will vote to uphold the law. The other three justices will uphold the law as long as there is any conceivable legitimate governmental purpose to the law. Kennedy will vote to uphold the law as medical insurance policies are purchased and sold on a market, similar to his reasoning in *Gonzalez v. Raich*. In *Gonzalez*, Kennedy reasoned the activity was within the scope of Congress' Commerce Power because it was bought and sold on a market, albeit an illegal or suspicious market. Kennedy also reasoned that the economic activity in *Raich* could be taken in the aggregate, as in *Wickard v. Filburn*, to demonstrate its effect on interstate commerce. As Souter is no longer on the Court, however, his vote is up for grabs.

Tenth Amendment Limitations on Commerce Power

Challengers will argue that, even if the Act is within Congress' Commerce Power, the Act violates principles of federalism found in the Tenth Amendment of the Constitution. *Challengers* will argue the Tenth Amendment acts as a limit on Congress' Commerce Power as Congress may not commandeer state legislatures or executives. *Challengers* will argue the Act does both.

Challengers will argue Part II, section e requires the state to do the exact same thing found impermissible by the Court in *Printz v. US*. In *Printz*, the federal government was found to have violated principles of federalism inherent in the Tenth Amendment because it attempted to commandeer the state executives by requiring police officers to perform background checks prior to the sale of a hand gun, pursuant to the Brady Hand Gun legislation. The Court found that the law commandeered the state executive because Congress was attempting to use the state executives to enforce federal legislation. *Challengers* will argue Part II, section e of the act impermissibly commandeers the state executives by requiring them to keep records of all individuals in the state and to determine whether those individuals have health insurance. Further, section e of Part II of the Act requires the state to maintain a record of individual insurance status, which also must be sent to the federal Department of Health and Human Services on a monthly basis. *Challengers* will argue that, not only does this requirement place an onerous burden on the state executive, it also commandeers the state executive in an attempt to force the state executive to enforce federal regulations. *Challengers* will argue the requirement of police officers to perform background checks of prospective gun purchases in *Printz* is exactly similar to the

requirement that state agencies maintain and report records of individual insurance statuses here, as the state would be forced to aid the federal government in its enforcement of federal regulation.

Challengers will also argue Part II, section f is an impermissible commandeering of the state legislature by requiring the state to enact regulations and legislation to comply with section f's requirements. Challengers will argue section f's requirements are similar to those in *NY v. US*, in which the Court held the federal government cannot commandeer state legislatures into regulating pursuant and in line with federal legislation. In *NY v. US*, federal legislation required states to "take title" to radioactive waste that was disposed of within a certain amount of time pursuant to federal requirements. The Court founds the "take title" requirement commandeered the state legislatures because it required state legislatures to regulate their citizens a certain way, otherwise they would be liable to "take title" to radioactive waste and suffer penalties and fines from the federal government. Challengers will argue section f requires the State to provide medical insurance (or "take title" to the medical needs of its citizens) to those unable to purchase insurance due to lack of adequate funds. Challengers will argue that such a requirement is similar to the requirement in *NY v. US* because if the state legislature does not take part in the "state exchange program," they are still required to legislate pursuant to the Act and therefore, are required to regulate and enforce the federal legislation, which violates principles of federalism inherent in the Tenth Amendment.

The government will argue Part II, section e does not commandeer the state executives because the requirement is not enforcement of the regulation, but merely an aid to the federal government in enforcing

the regulations encompassed in the Act. The government will argue the requirement of Part II, section e is distinguishable from the requirements in *Printz* because the requirements in *Printz* required the executive to take affirmative steps to ensure hand guns were not being purchased by those who probably should not own handguns, perhaps due to past crimes or perhaps due to psychological concerns. Here, the government will argue, the federal government is simply asking the state executives to prepare material to aid the federal government in its own enforcement of the regulation. The government will argue the state executive is not enforcing anything against these individuals, such as denying an application to purchase a hand gun as in *Printz*. The government will argue the state's role pursuant to the Act is actually very passive and therefore, is not being commandeered as an arm of the federal government.

The government will argue Section f of Part II of the Act does not violate principles of federalism inherent in the Tenth Amendment of the Constitution because the section is a permissible use of the Spending Power, which may be used to urge the states to regulate in a certain manner. State will argue the facts of *South Dakota v. Dole* are controlling here as the *South Dakota v. Dole* Court upheld a conditional grant of funding to the states. In *South Dakota*, the legislation at issue conditioned 5% of federal funding on whether states changed the legal drinking age to at least 21 years of age or not. The *South Dakota* Court found this an acceptable use of the Spending Power because the condition only indirectly regulated an issue and did not coerce the states into certain regulation. The government will argue section f is similar because it provides a \$5,000 per enrollee incentive for the state to participate in the regulation, but does not threaten to withhold funds already slated for the states. The government will argue

the incentive is not coercive as states cannot expect to receive this money otherwise as part of a general federal funding package. The government will also argue the regulation does not commandeer the state legislatures and is distinguishable from *NY v. US* because the provision at issue here does not require the state to take on any personal liabilities pursuant to the Act. Thus, the government will argue the federal legislation does not commandeer state legislatures because it is simply conditioning the receipt of federal funds on participation in an optional state program, which is permissible under *South Dakota v. Dole*. The voluntary nature of the program, the government will argue, destroys any hint of commandeering of the state legislatures.

Challengers will counter the government's arguments regarding the commandeering of the state legislatures, however, by arguing the section does not allow for a voluntary participation by the state governments because if the state wishes not to participate in the funded program, they still must provide insurance for certain citizens of their state. Challengers will argue this commandeers the state legislatures because they must institute regulations and legislation to provide for the requirements of section f should they choose not to participate in the state exchange program.

SCOTUS

Challengers to the Act under federalism grounds can expect a 3-3 vote with three votes up for grabs in Roberts, Alito, and Sotomayor.

Rehnquist, O'Connor, Kennedy, Scalia, and Thomas would vote to strike down the Act as it commandeers the state executives and legislatures. Kennedy will argue that by requiring the state executives and legislatures to enforce and regulate pursuant to the federal legislation, citizens of the states will not know who to hold accountable for any problems or issues arising from the regulation.

Kennedy feels that appropriate accountability requires the federal government to not be able to commandeer the state executives and legislatures. However, as Rehnquist and O'Connor are no longer on the Court, their votes are up for grabs.

Souter, Stevens, Ginsburg, Breyer would likely vote to uphold the Act and its use of the state governments due to the basis in history of the federal government's use of state governments to enforce federal legislation and regulations. However, since Souter is no longer on the Court, his vote is up for grabs.

Roberts, Alito, and Sotomayor are new justices to the Court and their votes will be the deciding votes of this case.

Establishment Clause

Challengers will also argue Part II, section d violates the Establishment Clause of the First Amendment because it has the purpose of conveying a message of endorsement of religions or has the effect of conveying a message of endorsement of religions, especially since the provision exempts religions covered by the provision from the requirements of the regulation (See *Lynch v. Donnelly*). *Challengers* will argue this is similar to the display struck down in *McCreary* because the provision has the effect of conveying a message of endorsement of religion. In *McCreary*, the state government began posting framed versions of the Ten Commandments. The Court found this an impermissible display because it, arguably, had the purpose of conveying a message of endorsement of Christianity and also had the effect of conveying such a message to a reasonable observer. *Challengers* will argue that by exempting certain religions from the requirements of the regulation, the government is similarly conveying

the message of endorsing religion as a suitable substitute for government-mandated health insurance. Indeed, challengers will point to Act's language that "Congress believes these members do not need health insurance because they have their religion to protect them." This statement alone, challengers will argue, has the purpose and effect of conveying an endorsement of religion as a suitable option for medical treatment. Challengers will argue this is similar to *McCreary*, despite the difference in facts, because of the purpose of the government's action and the effect of the government's action. Challengers will argue there is no functional difference between a display of the Ten Commandments and an exemption from regulation granted to members of particular religious groups.

The government will argue Part II, section d does not violate the Establishment Clause of the First Amendment because it treats various religions equally and therefore, does not have the purpose or effect of conveying a message of religious endorsement. The government will argue the provision is more similar to the Christmas Tree-Menorah display upheld in *Allegheny*. In *Allegheny*, the Court upheld a Christmas Tree-Menorah display because it did not have the effect of conveying a message of endorsement of one religion over the other. The government will argue the provision similarly does not have the effect of conveying a message of endorsement of one religion over the other because the provision exempts all members of certain religious sects who also have membership in a Health Care Sharing Ministry. The government will argue this is similar to the display upheld in *Allegheny* because the government is accommodating all religions and does not single out one religion to exempt or to exclude from exemption.

SCOTUS

Challengers to the Act on Establishment Clause grounds can expect

a 3-3 vote, with three votes up for grabs from Roberts, Alito, and Sotomayor.

Kennedy, Rehnquist, Scalia, and Thomas probably would vote to uphold the provision because it does not have the effect of coercing individuals into participating in a certain religion. Scalia would argue the government is not prohibited from favoring religion generally and therefore, this would absolutely not be a violation of the Establishment Clause. Thomas would argue the provision does not amount to legal coercion, which he argues is what the Establishment Clause was intended to prevent against by the Framers. While not at issue here, Thomas would argue the Establishment Clause should not be incorporated against the states. However, since Rehnquist is no longer on the Court, his vote is up for grabs.

O'Connor, Souter, Stevens, Ginsburg, and Breyer would vote to strike down the provision because it has the effect or purpose of conveying a message of endorsement of religion over non-religion, because it exempts members of religious groups from the requirements and penalties of the federal regulation. While Stevens, Ginsburg, and Breyer generally extend the Establishment Clause to prohibit the placement of religious symbols in, on, or around the seat of government, this is not necessarily at issue here and they would therefore, apply O'Connor's endorsement test. Since O'Connor and Souter are not longer on the Court, their votes are up for grabs.