

Read the hypothetical scenario below, then answer the question(s) that follow. You must take the facts, no matter how odd or unlikely they may seem, as they are given in the scenario. You may not change or make up additional facts. You may, however, make reasonable inferences from the facts based on common sense and experience, and include them in your analysis.

In *Gonzales v. Carhart* (2007), the U.S. Supreme Court upheld the constitutionality of the federal Partial-Birth Abortion Ban Act (PBABA) passed by Congress in 2003, which prohibits a method of late-term abortion referred to in the medical literature as intact dilation and extraction (D&X). Under this law, “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.” [These facts are excerpted from Wikipedia, which students may, but are not required to, consult and cite in their opinions.]

[Assume the facts below:] In response to recently-enacted state laws restricting women’s right to obtain abortions, several dozen free clinics offering no-cost abortions have popped up as part of a broader movement of such clinics across the U.S. These free clinics provide the exact same services and medical care as provided by other hospitals, but are funded solely and entirely by private donations; further, no government money is received.

Women who seek services from these free clinics pay nothing. Some women who use these free clinics travel across state lines because their own states may not provide them with adequate health care options. One free clinic in Idaho, specifically offers the D&X procedure to women whose medical conditions require that method of abortion, as determined by clinic physicians. Because this procedure is illegal under the federal PBABA, records of PBAs are difficult to access, so it is not known if other free clinics also offer PBAs.

The U.S. Attorney General is now prosecuting that clinic for violating the PBABA. In response, a group of pro-choice advocacy organizations see this case as an opportunity to renew their challenge to the constitutionality of the PBABA. This time, however, these organizations base their legal challenge on federalism and the Commerce Clause, arguing that Congress, by enforcing the PBABA against this single free clinic in Idaho, is exceeding its Commerce Clause power because: (1) the clinic’s activities are not part of inter-state commerce; (2) providing free abortion services is by definition non-commercial activity; and (3) these activities have no substantial effect on interstate commerce, because even in the aggregate, the activities of all of these free clinics (let alone that of the one in Idaho) are insignificant compared to the billions of dollars spent on health care nationally.

Assume you are the judges deciding this case. (Use your W-ID no. for your name.) Write BOTH a majority opinion and a dissenting opinion in which you, applying the cases we have read concerning federalism and the Commerce Clause, rule on the constitutionality of the PBABA. [NOTE: Regardless of your own position on abortion, this case is NOT about the constitutionality of abortion, but about Congress’s powers under the Commerce Clause.]