2024

Conflicts of Law and the Abortion War Between the States

Paul S. Berman
George Washington University Law School, pberman@law.gwu.edu

Roey Goldstein

Sophie Leff

Recommended Citation
172 U. PA. L. REV. 399 (2024).

ARTICLE

CONFLICTS OF LAW AND THE ABORTION WAR BETWEEN THE STATES

PAUL SCHIFF BERMAN,† ROEY GOLDSTEIN,†† AND SOPHIE LEFF†††

On the subject of abortion, the so-called "United" States of America are becoming more disunited than ever. The U.S. Supreme Court's precipitous decision in Dobbs v. Jackson Women's Health Organization *overturned the nationwide framework for abortion rights that had uneasily governed the country for fifty years. In the immediate aftermath of that decision, it is becoming increasingly clear that states governed by Republicans and those governed by Democrats are moving quickly and decisively in opposite directions. Since the U.S. Supreme Court issued its decision, at least nineteen states have increased restrictions on abortion access, while at least twenty states and the District of Columbia have adopted new legal regimes focused on protecting the right to an abortion.*

These partisan and geographic divides create perhaps the biggest set of nationwide conflicts of law problems since the era of the Fugitive Slave Act before the Civil War. Indeed, practically every aspect of the new abortion legal landscape is now characterized by uncertainty, creating potential constitutional and federal preemption questions, state versus state conflicts of law issues, and new concerns based on various forms of private regulation related to abortion access.

This Article seeks to provide a comprehensive survey of the current state of the law with regard to how such conflicts of law questions might be resolved in the

† Walter S. Cox Professor of Law, The George Washington University Law School.

†† Law Clerk, Chambers of Judge Leslie Southwick, U.S. Court of Appeals for the Fifth Circuit.

††† J.D., The George Washington University Law School, Class of 2022. The authors thank Lea Brilmayer, Jonathan Cedarbaum, William Dodge, and Ilan Wurman for useful comments on earlier drafts. We also thank Payal Majmundar, Angela Seeger, Emily Fallin, Maggie Lee, Victoria Neiman-Vigo, and Lorna Strachan for excellent research assistance in the preparation of this manuscript. Note that this article was drafted prior to the time Goldstein and Leff began judicial clerkships.

abortion context. Part I surveys the widely divergent state laws being debated or enacted in the country in the wake of Dobbs*. Part II discusses potential constitutional challenges to the extraterritorial application of these abortion statutes. If statutes criminalize or impose civil liability on the actual pregnant person seeking the abortion, such statutes might be challenged under the Privileges and Immunities Clause of Article IV specifically, or as a violation of the constitutional right to travel more generally. Alternatively, if statutes seek to impose criminal or civil penalties on out-of-state healthcare providers or other actors, those statutes may be vulnerable to a challenge under the Commerce Clause of Article I, Section 8. Part III turns to potential federal preemption of state anti-abortion laws under the Food, Drug, and Cosmetics Act or the Emergency Medical Treatment and Active Labor Act. Part IV addresses the question of whether states can impose civil liability on out-of-state acts or actors—even beyond the right to travel and Commerce Clause concerns—focusing on the classic conflicts of law doctrines of jurisdiction, choice of law, and judgment recognition. Finally, Part V considers the activities of private actors as sources of regulatory authority that create conflicts questions. We discuss the degree to which a state may prevent employers from covering abortion-related expenses as part of their health insurance plans, the privacy concerns that arise when private actors collect data that might be used in criminal prosecutions or civil suits regarding abortions, and the possibility that private religious groups might invoke the First Amendment to claim exemptions from state anti-abortion laws.*

INTRODUCTION

On the subject of abortion, the so-called "United" States of America are becoming more disunited than ever. The U.S. Supreme Court's precipitous decision in *Dobbs v. Jackson Women's Health Organization* overturned the nationwide framework for abortion rights that had uneasily governed the country for fifty years.[1] In the immediate aftermath of that decision, it is becoming increasingly clear that states governed by Republicans and those governed by Democrats are moving quickly and decisively in opposite directions. Indeed, since the U.S. Supreme Court issued its decision, at least nineteen states have increased restrictions on abortion access,[2] while at least twenty states and the District of Columbia have adopted new legal regimes focused on protecting the right to an abortion.[3]

---

1 142 S. Ct. 2228, 2242-43 (2022).

2 *Where Abortion Laws Stand in Every State a Year after the Supreme Court Overturned Roe,* *ASSOCIATED PRESS* (June 22, 2023, 12:05 AM), https://apnews.com/article/abortion-status-list-state-protection-ban-4466aefe6141745b71c824522aac47b9 [https://perma.cc/RLC2-YXDJ].

3 *Id.* Twenty-two states plus Washington, D.C. protected abortion rights either by law or the state constitution before *Dobbs*: Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington. In response to *Dobbs*, 20 states created new protections: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited Nov. 4, 2023). There are also four states that allow access to abortion, though that access is

These partisan and geographic divides create perhaps the biggest set of nationwide conflicts of law problems since the era of the Fugitive Slave Act before the Civil War.[4] Indeed, practically every aspect of the new abortion legal landscape is now characterized by uncertainty. Out-of-state abortion activity may give rise to in-state criminal prosecutions, as anti-abortion states attempt to punish those seeking abortions beyond their borders or those who perform the procedures.[5] Anti-abortion states are also seeking to ban the provision of abortion pills to in-state residents, a growing issue given that medication abortions now account for over half the abortions in the United States.[6] In addition, citizen "bounty hunters" may now bring civil suits against patients, abortion providers, their staff, and anyone who has "aided or abetted" an abortion, especially those associated with abortion funds.[7] These suits, whether criminal or civil, will be brought in the courts of anti-abortion states, but many of the defendants will either reside in another state or will have committed the acts giving rise to liability while in another state.

---

not explicitly protected by state law. These states are New Hampshire, New Mexico, Pennsylvania, and Virginia. *Id.* For further discussion, see *infra* Part I.

4 Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864). For a discussion of many cases in which courts addressed fugitive slave issues as technical conflicts of law questions rather than tackling broader constitutional or moral questions about slavery, see generally, e.g., H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133 (2012).

5 John Kruzel, *Battle Lines Emerge Over Out-of-State Abortion*, THE HILL (July 14, 2022, 5:15 AM), https://thehill.com/regulation/3558330-battle-lines-emerge-over-out-of-state-abortion/ [https://perma.cc/J7RY-QLSM]; Ava Sasani, *Is it Legal for Women to Travel Out of State for an Abortion*, N.Y. TIMES, https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html [https://perma.cc/3TQQ-T2B6] (June 27, 2022).

6 Rachel K. Jones et al., *Medication Abortion Now Accounts for More than Half of All US Abortions*, GUTTMACHER INST., https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions [https://perma.cc/AW39-UBJY] (Dec. 1, 2022); *see also* Christine Vestal, *Abortion Medications Set to Become Next Legal Battlefield*, STATELINE (July 13, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/13/abortion-medications-set-to-become-next-legal-battlefield [https://perma.cc/87D3-C9PT] ("[M]ost patients are receiving abortion medications through an international organization . . . . Abortion opponents want to put an end to that and other online sources of abortion medications."); Kimberlee Kruesi, *Tennessee Advancing Bill Banning Abortion Pills by Mail*, ASSOCIATED PRESS (Apr. 4, 2022, 4:12 PM), https://apnews.com/article/abortion-health-business-tennessee-medication-6b230381b71f55e778a75104a9bccocd [https://perma.cc/8KHG-9QCB] ("Tennessee Republicans are advancing legislation that would strictly regulate the dispensing of abortion pills, including imposing harsh penalties on doctors who violate them.").

7 Irin Carmon, *Abortion Funds Are a Lifeline. And a Target. The Right's Attacks on Grassroots Groups Have Already Begun*, N.Y. MAG. (May 7, 2022), https://nymag.com/intelligencer/2022/05/roe-v-wade-abortion-funds.html [https://perma.cc/63XZ-G3TJ] (discussing abortion fund donors' and workers' potential legal liability in post-*Roe* America); *see also, e.g.*, Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How it Works.*, N.Y. TIMES, https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html [https://perma.cc/4EAE-M9UD] (last updated Nov. 1, 2021) (describing a Texas law that permits ordinary citizens to sue abortion providers, drivers who take patients to receive abortions, and insurance companies that pay for abortions).

Meanwhile, on the other side of the divide, pro-access states are enacting provisions seeking to block such extraterritorial criminal and civil enforcement of abortion bans or to allow their citizens to file retaliatory suits against those who file out-of-state suits against them.[8]

All of this legal activity will create a complex set of conflicts of law questions. To begin, there are potential "vertical" conflicts between state and federal law. Courts will be forced to probe the extent to which the U.S. Constitution restricts state extraterritorial enforcement of these various civil and criminal schemes, under either the rubric of the equal treatment guarantee of the Privileges and Immunities Clause of Article IV,[9] the right to travel more broadly,[10] or the so-called "Dormant" Commerce Clause of Article I, section 8.[11] In addition, federal preemption may prevent states from limiting or prohibiting the use of the abortion drug mifepristone for its Food and Drug Administration ("FDA")-approved purpose, and provisions of the federal Emergency Medical Treatment and Active Labor Act ("EMTALA") might require hospitals even in anti-abortion states to provide emergency abortion care to patients experiencing pregnancy-related complications and other emergency medical conditions, potentially in conflict with their own state law.[12]

Turning to "horizontal" conflicts of law questions,[13] statutes that allow civil suits against out-of-state entities inevitably raise questions of legal jurisdiction, as courts in anti-abortion states seek to assert legal authority over activity taking place entirely beyond their territorial borders. Next, choice of law problems may arise from the differences between the legal regimes of the state asserting jurisdiction over such suits and the state where the relevant activity occurred. And, assuming judgments are actually issued against out-of-state actors, further questions emerge: Will those judgments be enforced

8 *See Tracking Abortion Bans*, N.Y. TIMES (last updated Sept. 29, 2023), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/7KCZ-WEPS] (last updated Nov. 7, 2023) (detailing twenty states' newly enacted shields from the laws of other states for those who seek or provide abortions). For New York's approach, including legislation providing for retaliatory suits, see *Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All*, GOVERNOR KATHY HOCHUL (June 13, 2023), https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive [https://perma.cc/3E79-HUKR].

9 U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *see infra* Part II.A.i.

10 *See infra* Part II.A.ii.

11 *See infra* Part II.B.

12 *See infra* Part III.

13 See *infra* Part IV.

in other states? And are statutes authorizing retaliatory suits permissible under the U.S. Constitution's Full Faith and Credit Clause?[14]

Finally, as legal pluralists have long observed,[15] non-state actors—in addition to formal legal entities—make decisions that regulate behavior.[16] In the abortion context, for example, employers' choices regarding whether to provide health care coverage for abortion and related expenses matter a great deal. Can an employer that chooses to provide coverage for such costs do so despite state civil or criminal laws to the contrary? In addition, given that private companies now routinely collect online search, location, and health data, how will conflicts among state abortion laws impact data privacy for people seeking abortions? And will private religious organizations be able to claim exemption from either anti-abortion or pro-access state laws by invoking the First Amendment?[17]

The answers to most of these questions are not at all clear under current law. And this uncertainty has serious consequences. Already, both medical providers and abortion funds across the country have felt compelled to curtail their operations even when care is provided only in states where abortion is legal. For example, Planned Parenthood of Montana ("PPMT") announced that it would no longer provide medication abortion to residents of various states that had banned abortion.[18] PPMT made this change to shield providers and staff from potential civil or criminal liability in an out-of-state patient's home state. In an email to staff, PPMT President and CEO Martha Fuller wrote, "The risks around cross-state provision of services are currently less than clear, with potential for both civil and criminal action for providing abortions in states with bans."[19] The issue for PPMT is that medication abortions are usually administered using two different drugs; one, mifepristone, is generally taken at a clinic, and the other, misoprostol, is taken at home twenty-four hours later.[20] Thus, if a patient from a state such as

14 U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

15 For a summary of some of the vast scholarly literature on legal pluralism, see Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. OF L. & SOC. SCI. 225 (2009).

16 *See infra* Part V.

17 U.S. CONST. amend. I.

18 Nicole Girten, *Planned Parenthood of Montana Halts Medication Abortions or Patients from "Trigger Law" States*, IDAHO CAPITAL SUN (July 1, 2022, 4:00 AM), https://idahocapitalsun.com/2022/07/01/planned-parenthood-of-montana-halts-medication-abortions-for-patients-from-trigger-law-states/ [https://perma.cc/HG25-VPF4].

19 *Id.*

20 *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (June 1, 2023), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ [https://perma.cc/65CU-S3C6].

South Dakota, where abortions are illegal in almost all circumstances,[21] received a medication abortion from PPMT in Montana, South Dakota might treat the abortion as having occurred in South Dakota rather than Montana and therefore pursue legal action against PPMT under its abortion ban. In theory, South Dakota's existing abortion ban law applies within its borders only, but characterizing or localizing abortion expansively could allow the state to widen the scope of abortions impacted by their law. PPMT's response demonstrates how care can be paralyzed by confusion about what law governs abortion-related conduct. The same is true for services that assist patients in obtaining abortions.

Abortion funds—private charitable organizations that provide monetary and logistical support to individuals who need help obtaining abortions—face similar challenges. These funds are more important than ever because when residents of anti-abortion states are forced to travel to obtain abortions, they will need more financial and logistical help than if they obtained an abortion locally. They will need to pay for travel, care, and often lodging because many states require multiple visits across multiple days before a person can obtain an abortion. Anti-abortion states, however, are likely to create liability for conduct that "aids and abets" abortion, even if that abortion occurs elsewhere. In Texas, for example, leaders of various Texas abortion funds have been sued under Senate Bill 8 ("SB 8") for "aiding and abetting" abortion.[22] In response, some abortion funds operating in anti-abortion states have begun to curtail their operations.[23]

This Article seeks to provide a comprehensive survey of how the various conflicts of law questions summarized above might be addressed in the abortion context.[24] Part I surveys the widely divergent state laws being

21 S.D. CODIFIED LAWS § 22-17-5.1 (2023) ("Any person who administers to any pregnant female . . . any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.").

22 Carmon, *supra* note 7.

23 *See* Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, Their Leaders Fearing Jail Time if They Help Texans*, THE TEX. TRIB. (June 29, 2022, 4:00 PM), https://www.texastribune.org/2022/06/29/texas-abortion-funds-legal/ [https://perma.cc/2CGK-B2G4] (observing that the work of Texas abortion funds has come to a "screeching halt"); Sarah Swetlik, *Alabama Abortion Organizations Pause Services Amid Review of Law*, ADVANCE LOC. ALA. (June 29, 2022, 4:51 PM), https://www.al.com/news/2022/06/alabama-clinics-pause-referrals-some-services-amid-review-of-abortion-law.html [https://perma.cc/9LKE-CUGQ] (describing a similar trend in Alabama).

24 We are grateful for, and seek to build upon, an initial work covering some of these same questions. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023). For other recent articles that describe the conflicts of law problems raised by the abortion issue, see generally Roger Michalski, *How to Survive the Culture Wars: Conflict of Laws Post-Dobbs*, 72 AM. U. L. REV. 949 (2023); Joseph Singer, *Conflict of Abortion*

debated or enacted in the country in the wake of *Dobbs*. Part II discusses potential constitutional challenges to the extraterritorial application of anti-abortion statutes. If statutes criminalize or impose civil liability on the actual person seeking the abortion, those statutes might be challenged under the Privileges and Immunities Clause of Article IV specifically, or as a violation of the constitutional right to travel more generally.[25] Alternatively, if statutes seek to impose criminal or civil penalties on out-of-state abortion providers or other actors, those statutes may be vulnerable to a challenge under the Commerce Clause.[26] Part III turns to potential federal preemption of state anti-abortion laws under the Food, Drug, and Cosmetics Act and EMTALA.[27] Part IV addresses the question of whether states can impose civil liability on out-of-state acts or actors—even beyond the right to travel and Commerce Clause concerns—focusing on the classic conflicts of law doctrines of jurisdiction, choice of law, and judgment recognition.[28] Finally, Part V considers the activities of private actors as sources of regulatory authority that create conflicts questions.[29] We discuss the degree to which a state may prevent employers from covering abortion-related expenses as part of their health insurance plans, the privacy concerns that arise when private actors collect data that might be used in criminal prosecutions or civil suits regarding abortions, and the possibility that private religious groups might invoke the First Amendment to claim exemptions from state anti-abortion laws.

I. THE NEW ABORTION LEGAL LANDSCAPE

The new abortion legal landscape is increasingly fragmented as a result of the partisan and geographic divides that tend to define twenty-first century America.[30] On one side of this divide, many states enacted "trigger laws" as early as 2005 to ban and criminalize abortion immediately upon the U.S. Supreme Court's reversal of a constitutionally recognized abortion right, and states continue to introduce similar legislation.[31] Some states have also

Laws, 16 Northeastern U. L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4492015.

25 *See infra* Part II.A.

26 *See infra* Part II.B.

27 *See infra* Part III.

28 See *infra* Part IV.

29 See *infra* Part V.

30 For a broader discussion of these demographic shifts and the problems they cause for American democracy, see generally Paul Schiff Berman, Neal S. Mehrotra & Kathryn C. Sadasivan, *Democracy and Demography*, 24 U. PA. J. CONST. L. 766 (2022).

31 Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When* Roe *is Overturned*, GUTTMACHER INST. (Jan. 1, 2022),

authorized civil suits, leaving enforcement of anti-abortion statutes to individual bounty hunters.[32] On the other side, pro-access states are not only guaranteeing access to abortion within their borders, but also responding directly to anti-abortion states by opening their borders to out-of-state abortion seekers.[33] Some pro-abortion states are also creating causes of action to retaliate against plaintiffs who sue in-state abortion providers and others under out-of-state laws.[34]

A. *The Anti-Abortion States*

Abortion travel has been on the rise since at least the dawn of the twenty-first century, when a wave of restrictive abortion laws closed clinics and forced patients to travel farther and farther away from home for abortion care. But this trend has exploded in the post-*Dobbs* era, as dozens of clinics have shuttered in response to state abortion bans.[35]

After 1992, when the U.S. Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* allowed a greater range of anti-abortion regulation,[36] state legislatures focused their efforts on regulating abortion both in the name of potential life, and "maternal health."[37] *Casey* itself "dealt principally with regulations justified as protecting unborn life" by regulating

---

https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned [https://perma.cc/65XH-BD97].

32 Elizabeth Nash, Lauren Cross & Joerg Dreweke, *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, GUTTMACHER INST., https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion [https://perma.cc/7J7Q-Q4TT] (May 26, 2022).

33 *See* sources cited in *supra* note 8 for discussion of these developments.

34 *Id.*

35 Isaac Maddow-Zimet et al., *New State Abortion Data Indicate Widespread Travel for Care*, GUTTMACHER INST. (Sept. 7, 2023), https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care [https://perma.cc/JH4H-XLP6]; Selena Simmons-Duffin & Shelly Cheng, *How Many Miles Do You Have to Travel to Get Abortion Care? One Professor Maps It*, NPR (June 21, 2023, 5:01 AM), https://www.npr.org/sections/health-shots/2023/06/21/1183248911/abortion-access-distance-to-care-travel-miles [https://perma.cc/8UQB-WK37]; *A Year After* Dobbs*, More People Than Ever Are Traveling For Abortion Care*, NAT'L ABORTION FED'N (June 7, 2023), https://prochoice.org/a-year-after-dobbs-more-people-than-ever-are-traveling-for-abortion-care/ [https://perma.cc/J5KB-C4WR].

36 505 U.S. 833, 878 (1992) (setting forth the "undue burden" test for determining the constitutionality of a state's regulation of abortion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

37 *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1430 (2016) ("Many recently enacted laws restrict abortion not in the name of protecting unborn life, but in the name of protecting women's health."); Dawn Johnsen, *"TRAP"ing* Roe *in Indiana and a Common-Ground Alternative*, 118 YALE L.J. 1356, 1384 (2009) ("The President of Indiana Right to Life told *USA Today* that the [abortion restriction] ordinances would . . . protect women's health.").

patient behavior to discourage and prevent abortion.[38] The restrictions at issue in *Casey* included requirements that patients receive extensive counseling, undergo a twenty-four-hour waiting period prior to an abortion, and notify parents and spouses.[39] The Court left all but the spousal notification provision intact.[40] What remained are still common elements of state law today, even in states that are relatively hospitable to abortion rights.[41] Not content with this regulatory scheme, anti-abortion legislatures shifted their approach and began to directly regulate abortion providers and clinics themselves, rather than patients.[42]

Such regulations, called Targeted Regulation of Abortion Provider ("TRAP") laws, imposed onerous conditions on abortion providers, such as requiring extensive physical plant specifications and difficult-to-obtain admitting privileges for physicians.[43] Indeed, complying with these requirements was so difficult and expensive that many clinics were forced to close.[44] And the more scarce abortion providers have become as a result of these laws, the farther patients have had to travel for care, both within and outside their state of residence.[45] As of 2017 patients leaving their state of residence for abortions accounted for around 8–10% of all abortions nationwide.[46] That figure has swelled in the wake of *Dobbs*, as some states

38 Greenhouse & Siegel, *supra* note 37, at 1438.

39 *Casey*, 505 U.S. at 844.

40 *Id.* at 901.

41 *See An Overview of State Abortion Laws*, GUTTMACHER INST. (Aug. 31, 2023), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/27EX-ST54] (describing various abortion restrictions that fit the post-*Casey* mold).

42 *See* Greenhouse & Siegel, *supra* note 37, at 1449-51 ("In recent years, states have enacted laws that impose increasingly burdensome health restrictions on abortion providers."); Johnsen, *supra* note 37, at 1361]("[U]nder the guise of health-related building standards, [one bill] would have ended the provision of abortion services at every clinic operating in the state.").

43 *Targeted Regulation of Abortion Laws*, GUTTMACHER INST. (Aug. 31, 2023), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws [https://perma.cc/YL8K-JLUN].

44 *See* Greenhouse & Siegel, *supra* note 37, at 1449-1451 (discussing examples of post-*Casey* restrictions, their impact on abortion providers, and judicial intervention in cases alleging that the restrictions created an "undue burden"); *see, e.g.*, Manny Fernandez, *Decision Allows Abortion Law, Forcing 13 Texas Clinics to Close*, N.Y. TIMES (Oct. 2, 2014), https://www.nytimes.com/2014/10/03/us/appeals-court-ruling-closes-13-abortion-clinics-in-texas.html [https://perma.cc/U5QN-S4GU] (describing the Fifth Circuit's decision in *Whole Woman's Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2273 (2022), which allowed a restrictive Texas abortion law to take effect).

45 *See, e.g.*, Fernandez, *supra* note 44 ("[D]ata provided by one of the plaintiffs' experts [in *Hellerstedt*] . . . suggested that about one out of six Texas women seeking an abortion would live more than 150 miles from the nearest clinic if the surgical-center rules went into effect.").

46 *See* Mikaela H. Smith et al., *Abortion Travel Within the United States: An Observational Study of Cross-State Movement to Obtain Abortion Care in 2017*, 10 LANCET REG'L HEALTH—AMS., June 2022, at 4 (finding that in 2017, 8% of patients obtained an abortion outside their state of residence);

have moved to ban or severely restrict abortion while others have increased abortion access.[47]

Broad abortion restrictions are currently or soon will be in effect in nineteen states.[48] These states restrict abortion by (1) criminalizing medical procedures that are performed purposefully or knowingly to terminate a pregnancy;[49] (2) criminalizing the administration, prescription, or sale of medicine, drugs, and substances with intent or knowledge that they will terminate a pregnancy;[50] and (3) subjecting those who purposefully or knowingly seek, aid, abet, or perform an abortion to potential civil liability.[51]

The abortion restrictions in each of the nineteen states apply to varying classes of individuals. Some states focus on "licensed healthcare professional[s]" or "physician[s]," seeking to prevent them from intentionally or knowingly performing or attempting to perform an abortion,[52] while other state laws have a broader scope, sweeping in "any person"[53] who intentionally or knowingly performs or attempts to perform an abortion. Most anti-abortion states have thus far resisted authorizing the criminal prosecution of

---

Jeff Diamant & Besheer Mohamed, *What Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/ [https://perma.cc/NGV2-V85Z] (finding that in 2019 and 2020, respectively, 9.3% and 9.7% of patients obtained an abortion outside their state of residence).

47 *See* Claire Cain Miller & Margot Sanger-Katz, Despite State Bans, Legal Abortions Didn't Fall Nationwide in Year after Dobbs, N.Y. TIMES: THE UPSHOT (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/upshot/abortion-numbers-dobbs.html [https://perma.cc/A2QY-5DPU] ("[After *Dobbs*] [t]he biggest increases in legal abortions occurred in states that border those with bans, suggesting that many patients traveled across state lines.").

48 See ALA. CODE § 13A-13-7 (2023) (Alabama); ARIZ. REV. STAT. ANN. §§ 36-2321 to 36-2326 (2022) (Arizona); ARK. CODE ANN. § 5-61-404 (West 2021) (Arkansas); FLA. STAT. ANN. § 390.0111 (West 2023), *amended by* 2023 Fla. Sess. Law Serv. Ch. 2023-21 (West) (Florida); IDAHO CODE ANN. § 18-622 (West 2020) (Idaho); IOWA CODE ANN. § 146E.2 (West 2023) (Iowa); KY. REV. STAT. ANN. § 311.772 (West 2019) (Kentucky); LA. STAT. ANN. § 40:1061 (2022) (Louisiana); MISS. CODE ANN. § 41-41-45 (West 2007) (Mississippi); MONT. CODE. ANN. § 188.017 (West 2019) (Montana); N.D. CENT. CODE ANN. § 12.1-19.1-02 (West 2021) (North Dakota); S.D. CODIFIED LAWS § 22-17-5.1 (2022) (South Dakota); TENN. CODE ANN. § 39-15-213 (West 2022) (Tennessee); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (Texas); UTAH CODE ANN. § 76-7a-201 (West 2022) (Utah); W. VA. CODE ANN. § 61-2-8 (West 1882) (West Virginia); WIS. STAT. ANN. § 940.04 (West 1849) (Wisconsin); WYO. STAT. ANN. § 35-6-123 (West 2023) (Wyoming).

49 *See, e.g.*, WYO. STAT. ANN. § 35-6-123(a)(ii) (West 2023).

50 *See, e.g.*, KY. REV. STAT. ANN. § 311.772 (West 2019).

51 *See, e.g*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to .211 (West 2021), *amended by* 2021 Tex. Sess. Law Serv. Ch. 62 (West); IDAHO CODE ANN. § 18-8807 (West 2022); H.B. 480, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

52 *See, e.g.*, IDAHO CODE ANN. § 18-8805 (West 2022); ARIZ. REV. STAT. ANN. § 36-2322 (2022); FLA. STAT. ANN. § 390.0111 (West 2023), *amended by* 2023 Fla. Sess. Law Serv. Ch. 2023-21 (West).

53 KY. REV. STAT. ANN. § 311.772 (West 2019); ALA. CODE § 13A-13-7 (2019).

the actual person seeking an abortion,[54] although a recent report suggests that from 2000 to 2020 at least 61 people were criminally investigated or arrested for ending their own pregnancies or helping someone else do so, and from 2006-2020, more than 1,300 people were arrested in relation to their conduct during pregnancy.[55] Given the increase of restrictive laws and the ongoing rhetoric that describes the fetus as an "unborn child,"[56] it appears more possible than ever that prosecutions will increase and that mothers and other pregnant persons may be held criminally or civilly liable for aborting a pregnancy or for crossing state lines in order to do so.[57]

Criminal penalties in anti-abortion states range from four months[58] to ninety-nine years[59] in prison and may include felony fees that range from $4,000[60] to $100,000.[61] Additionally, healthcare professionals in five of these nineteen states can be charged with professional misconduct that may result in a suspended or revoked license.[62]

The laws in each of these nineteen states—like state laws generally—apply to acts performed within the state. However, amendments introduced by Rep. Mary Elizabeth Coleman to a legislative bill banning abortion in Missouri go farther and aim to prevent Missouri residents and citizens from seeking such services across state borders.[63] Specifically, the amendments seek to ban

---

54 *See, e.g.*, MISS. CODE ANN. § 41-41-45 (West 2007); N.D. CENT. CODE ANN. § 12.1-13-12 (West 2021).

55 CRIMINALIZATION AND PUNISHMENT FOR ABORTION, STILLBIRTH, MISCARRIAGE, AND ADVERSE PREGNANCY OUTCOMES, HUM. RTS. & GENDER JUST. CLINIC, IF/WHEN/HOW, PREGNANCY JUST., CENT. FOR REPROD. RTS., BIRTHMARK DOULLA COLLECTIVE, CHANGING WOMAN INITIATIVE & WE TESTIFY, (Sep. 12, 2023) at 4-5, https://www.law.cuny.edu/wp-content/uploads/media-assets/2023_Clinic_HRJG_REPORT-U.S.-Criminalization-of-Abortion-and-Pregnancy-Outcomes.pdf [https://perma.cc/Q7XJ-JKKR].

56 *See* Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES, https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/674L-YZEB] (June 21, 2023) (discussing post-*Dobbs* state bills and laws that use the language of "unborn child" to refer to a fetus).

57 *See* Jaclyn Diaz, *Pregnant? Georgia Says that Fetus Counts as a Dependent on Your Taxes*, NPR (Aug. 2, 2022), https://www.npr.org/2022/08/02/1115204443/georgia-fetus-pregnant-dependent-taxes [https://perma.cc/7KU5-624G] (citing guidance from the Georgia Department of Revenue that declares Georgia will now "recognize any unborn child with a detectable human heartbeat" as a dependent for tax purposes).

58 ARIZ. REV. STAT. ANN. §§ 13-702, 36-2324 (2022).

59 TEX. PENAL CODE § 12.32 (2023); TEX. HEALTH & SAFETY CODE § 170A.004 (2023).

60 S.D. CODIFIED LAWS §§ 22-17-5.1, 22-6-1(9) (2023).

61 ARK. CODE ANN. § 5-61-404 (West 2021); LA. REV. STAT. ANN. §§ 40:1061, 40:1061.29 (2018), amended by 2022 La. Sess. Law Serv. Act 545 (West).

62 ARIZ. REV. STAT. ANN. §§ 36-2321 to -2326 (2022); IDAHO CODE ANN. § 18-8805 (West 2022); LA. REV. STAT. ANN. §§ 40:1061, 40:1061.29 (2018); MO. ANN. STAT. § 188.017 (West 2019); UTAH CODE ANN. § 76-7-314(5) (West 2023).

63 *See* H. Amend. 4488H03.01H, H.B. 2012, 101st Gen. Assemb., Reg. Sess. (Mo. 2022); H. Amend. 4488H03.21H, H.B. 2012, 101st Gen. Assemb., Reg. Sess. (Mo. 2022) (stating that the bans will apply "regardless of where" the abortion is or will be performed).

transportation to and from abortion clinics and transportation of abortion-inducing drugs, along with communication over the telephone and through internet websites for the purpose of obtaining an elective abortion or abortion-inducing drugs.[64] Other anti-abortion states could follow Missouri's lead and introduce similar legislation, particularly if their criminal legislation already allows for prosecution even when some elements of a crime occur out-of-state.[65]

In addition to criminalizing abortion, states are creating civil liability not only for the person performing an abortion, but also for anyone who "aids and abets" an abortion, and some lawmakers and the Attorney General in Texas, for example, are attempting to apply their laws even to those who aid and abet out-of-state abortions.[66] Such laws permit any individual to bring a civil action against those who perform an abortion, those who knowingly "aid or abet[]" an individual in obtaining an abortion, and those who simply have the intent to do either.[67] Some states are also targeting insurance companies that may reimburse costs for abortion services, common carriers such as busses that knowingly transport pregnant individuals to abortion providers, and individuals who provide funds to help defray abortion-related costs.[68] These states, however, exclude civil action against the pregnant individuals who obtained or attempted to obtain an abortion.[69]

64 H. Amend. 4488H03.01H, H.B. 2012; H. Amend. 4488H03.21H, H.B. 2012. The latter provides an affirmative defense for engaging in speech protected by the First Amendment. H. Amend. 4488H03.21H, H.B. 2012.

65 Cohen et al., *supra* note 24, at 30 ("An aggressive prosecutor or other state official would not need any specific law governing extraterritorial abortions if existing state law could be applied to legal, out-of-state abortions or to travel to obtain them."). For example, state criminal laws often provide for criminal jurisdiction when any element of the crime or a conspiracy to commit the crime occurs within the state, even if other aspects of the crime take place outside its borders. *Id.* at 32–33.

66 TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to .211, *amended by* 2021 Tex. Sess. Law Serv. Ch. 62 (West); IDAHO CODE ANN. § 18-8807; H.B. 480, 134th Gen. Assemb. (Ohio 2021); *see also* Eleanor Klibinoff, *Texas AG's Office Sends Mixed Signals about Whether it can Fine Nonprofits that Pay for Out-of-State Abortions*, TEX. TRIB. (Sept. 27, 2022), https://www.texastribune.org/2022/09/27/texas-abortion-funds-out-of-state-ken-paxton/ [https://perma.cc/SL9T-HFDU] (detailing threats to criminally or civilly prosecute abortion funds and employers such as the law firm Sidley Austin for helping people travel outside of Texas for abortion care).

67 *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.208, *amended by* 2021 Tex. Sess. Law Serv. Ch. 62 (West).

68 *See, e.g.*, *id.*

69 TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.211, *amended by* 2021 Tex. Sess. Law Serv. Ch. 62 (West); IDAHO CODE ANN. § 18-8807.

B. *The Pro-Access States*

Abortion services are currently legal in twenty-four states and the District of Columbia with limited gestational restrictions.[70] Of these twenty-four states, twenty have enacted laws or introduced legislation to declare that laws in another state authorizing criminal and civil action against individuals who assist in, provide, or seek an abortion do not apply in those twenty state courts.[71] The enacted laws and introduced legislation in these states seek to protect continued access to abortion within their borders regardless of the individual's place of residence or state citizenship.

Currently, five states have express commitments that they will not cooperate with investigations and proceedings initiated in another state against individuals who assist in, provide, or seek abortion services.[72] Such states may refuse to issue a summons in another state's prosecution of abortion,[73] decline requests by another state to arrest or surrender an individual for prosecution,[74] refuse to authorize interstate extradition,[75] or refuse to enforce subpoenas issued by another state for information in anti-abortion civil actions.[76]

Additionally, four states have introduced bills explicitly protecting healthcare professionals and facilities against licensing repercussions for providing abortion services to out-of-state individuals.[77] These statutes are meant to ensure that physicians, nurses, physician assistants, hospitals, clinics, and private medical practices are not charged with professional misconduct that could result in suspended or revoked licenses.

Finally, as anti-abortion states continue to create civil liability for abortion related conduct, some pro-access states have addressed the growing possibility that an out-of-state civil action may be brought against individuals

---

70 *See Tracking Abortion Bans*, *supra* note 8.

71 See *id.*; *see also* CAL. HEALTH & SAFETY CODE § 123467.5 (West 2022); 2022 CONN. PUB. ACT NO. 22-19; DEL. CODE ANN. tit. 24 § 1922(d) (West 2022); H.B. 1464, 102d Gen. Assemb., Reg. Sess. (Ill. 2022); Me. Exec. Order No. 4 (July 5, 2022); H.B. 4954, 2022 Leg., 192nd Gen. Ct. (Mass. 2022); H.B. 5090, 2022 Leg., 192nd Gen. Ct. (Mass. 2022); MASS. GEN. LAWS ANN. ch. 12, § 11I12 (West 2022); N.J. REV. STAT. § 2A:160-14.1 (2022); N.Y. EDUC. LAW §§ 6531-b, 6505-d (McKinney 2022); R.I. Exec. Order No. 22-28 (July 5, 2022); H.B. 1469, 2023 Leg., 68th Leg. Assemb., Reg. Sess. (Wash. 2023).

72 DEL. CODE ANN. tit. 10, § 3928 (West 2022); Me. Exec. Order No. 4; Mass. Gen. Laws Ann. ch. 12, § 11I12 (West); H.B. 5090, 2022 Leg., 192nd Gen. Ct. (Mass. 2022); N.J. REV. STAT. § 2A:160-14.1 (2022); R.I. Exec. Order No. 22-28 (July 5, 2022).

73 DEL. CODE ANN. tit. 10, § 3928(b)(2) (West 2022).

74 Me. Exec. Order No. 4.

75 N.J. REV. STAT. § 2A:160-14.1 (2022); R.I. Exec. Order No. 22-28.

76 DEL. CODE ANN. tit. 10 § 3928(b)(3) (West 2022).

77 H.B. 1464, 102d Gen. Assemb., Reg. Sess. (Ill. 2022); H.B. 4954, 2022 Leg., 192nd Gen. Ct. (Mass. 2022); H.B. 5090, 2022 Leg., 192d Gen. Ct. (Mass. 2022); N.Y. EDUC. LAW §§ 6531-b, 6505-d (McKinney 2022); R.I. Exec. Order No. 22-28.

who assisted in, provided, or sought abortion services that took place within a pro-access state.[78] These states aim to allow civil defendants in such out-of-state actions to file a separate suit seeking injunctive, monetary, or appropriate relief against the party that brought the original lawsuit.[79]

C. *Practical Impacts*

As discussed above, the growing divergence between anti-abortion states and pro-access states means that people seeking abortions are increasingly likely to seek them outside their home state.[80] For example, Texas's notorious SB 8, which went into effect in 2021, not only prohibited all abortions performed after approximately six weeks from the time of conception,[81] but also empowered private citizens to bring civil suits against those who aid, abet, or perform an abortion.[82] Data show that after Texas SB 8 went into effect, the number of Texans who received out-of-state abortions skyrocketed.[83] In 2019, about 514 Texas patients travelled out of state for

78 *See* 2022 CONN. PUB. ACT NO. 22-19 (establishing protections for individuals facing liability in another state based on reproductive health services permitted in Connecticut); DEL. CODE ANN. tit. 10, § 3929 (West 2022); H.B. 4954, 2022 Leg., 192d Gen. Ct. (Mass. 2022) (enacting limitations safeguarding individuals from out-of-state actions arising from reproductive care); H.B. 5090, 2022 Leg., 192d Gen. Ct. (Mass. 2022) (affirming access to reproductive health in Massachusetts); CAL. HEALTH & SAFETY CODE § 123469 (West 2023) (establishing a private right of action for parties whose reproductive rights are interfered with by another state); DEL. CODE ANN. tit. 10, § 3929 (West 2022); 69 D.C. Reg. 014641 (Dec. 2, 2022) (prohibiting the expense of public time or resources in furtherance of an out-of-state investigation or action against persons seeking, receiving, or performing, with patient consent, abortions); 2023 Ill. Leg. Serv. 102-1117 (West) (protecting healthcare professionals who engage in health care services lawful in Illinois, regardless of the patient's residency); H.B. 5090, 2022 Leg., 192d Gen. Ct. (Mass. 2022).

79 *See supra* note 8 (surveying state statutes); see also, *e.g.*, 2022 CONN. PUB. ACT NO. 22-19 (allowing civil defendants to recover damages and costs); CAL. HEALTH & SAFETY CODE § 123469 (West 2023) (making the denier of reproductive rights liable for civil penalties of $25,000 to the civil defendant and assuring further preventative relief); DEL. CODE ANN. Tit. 10, § 3929 (West 2022) (giving the civil defendant the right to recover damages and costs associated with defending the out-of-state action).

80 See *supra* note 47 and accompanying text.

81 TEX. HEALTH & SAFETY CODE ANN. §171.203(b) (banning abortions when physicians can detect a "fetal heartbeat"). Medical professionals find the term "fetal heartbeat" to be misleading, but the provision seems to apply based on the time some cardiac activity is detectable via ultrasound, which is approximately six weeks from conception. See Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on "Fetal Heartbeat." Doctors Call that Misleading*, NPR (May 3, 2022, 4:55 PM), https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion, [https://perma.cc/B6BL-469U*]* (describing the controversy over the law's definition).

82 TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to .21, , *amended by* 2021 Tex. Sess. Law Serv. Ch. 62 (West).

83 *See* Kari White, Asha Dane'el, Elsa Vizcarra, Laura Dixon, Klaira Lerma, Anitra Beasley, Joseph E. Potter & Tony Ogburn, *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8*, TEX. POL'Y EVALUATION PROJECT (Mar. 2022),

abortions between September and December. In the same period in 2021, after SB 8 went into effect, 5,574 patients travelled for abortion.[84] Indeed, the total number of abortions provided to Texas residents decreased by only 10%, suggesting that the primary effect of Texas's abortion ban was to push patients out of state, not to reduce the total number of abortions.[85]

Not surprisingly, a major effect of SB 8 was a dramatic change in the patient population at clinics in surrounding states. Almost half of patients displaced by SB 8 obtained abortions at just four facilities in Oklahoma.[86] The number of Texans seen by the Oklahoma clinics each month after SB 8 was more than double the average *total* number of abortions performed each month in the state before the law went into effect.[87] One in four Texans obtaining abortion care out of state did so in New Mexico.[88] The number of Texans seen per month in New Mexico in the post-SB 8 months exceeded the average total number of New Mexico abortions performed per month in 2019.[89] These data suggest that when abortion becomes illegal in one state, clinics in surrounding states will suddenly have much more contact with residents of the anti-abortion state.[90]

To give a sense of what is happening around the country, consider the three abortion clinics operating near the Illinois/Missouri border: in Missouri, Planned Parenthood St. Louis, and in Illinois, Hope Clinic for Women and Planned Parenthood Fairview Heights. The clinic on the Missouri side is the state's only remaining abortion clinic and is subject to increasingly onerous abortion regulation.[91] Conversely, the two on the Illinois

https://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf [https://perma.cc/6GFV-XT7S] [hereinafter *Travel After SB 8*] (finding an over ten-fold increase in the number of Texans who sought out-of-state abortions during a four-month period in 2019, before SB 8, and 2021, after SB 8 went into effect); Margot Sanger-Katz, Claire Cain Miller & Quoctrung Bui, *Most Women Denied Abortions by Texas Law Got Them Another Way*, N.Y. TIMES: THE UPSHOT, https://www.nytimes.com/2022/03/06/upshot/texas-abortion-women-data.html [perma.cc/HJ9H-RCDR] (June 22, 2023) (finding the overall number of abortions obtained by Texans decreased only slightly following SB 8 due in part to travel to obtain out-of-state abortions).

84 *Travel After SB 8*, *supra* note 83.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 For more on the effects of *Dobbs* on state border towns, see Shia Kapos, *America's Abortion Access Divide Is Reshaping Blue-State Border Towns*, POLITICO (Jan. 11, 2023, 4:30 AM), https://www.politico.com/news/2023/01/11/abortion-access-blue-state-border-towns-00077367 [https://perma.cc/A94L-QYEJ].

91 *See* Jordan Smith, *Crossing the Abortion Line: The Interstate Tug-of-War Over Reproductive Freedom*, THE INTERCEPT (June 18, 2022, 7:00 AM), https://theintercept.com/2022/06/18/abortion-roe-state-laws-missouri-illinois/ [https://perma.cc/C8ZF-NBDS] (describing increasingly stringent regulation of abortion clinics in Missouri in the years leading up to *Dobbs*).

side are beneficiaries of Illinois's efforts to expand abortion access. The three are less than a twenty-minute drive from one another.[92] They share providers, and the St. Louis clinic and Fairview Heights clinics are even operated by the same Planned Parenthood affiliate.[93] Recently the Illinois clinics partnered to open a "Regional Logistics Center," which operates out of the Fairview clinic and caters directly to Missouri patients:

> [T]he RLC was designed as a one-stop shop for any patient traveling to Illinois. Patients calling for appointments at either facility are connected to the nation's network of financial aid and practical support groups; case managers help arrange transportation and lodging or line up cash for food and child care.[94]

Naturally, these services have spurred a backlash from anti-abortion forces within the Missouri legislature. In March 2022 Republicans introduced HB 1987, which—like the Texas statute—would allow private citizens to sue anyone who aids a Missouri resident in obtaining an abortion, including out-of-state physicians.[95]

All of this extraterritorial regulatory activity creates uncertainty across the nation about how the various jurisdictional, choice of law, and judgment recognition battles will play out in the coming years. And this uncertainty itself carries extreme health risks for patients seeking an abortion. Indeed, even within one state (Texas), a qualitative survey of physicians practicing under the state's six-week abortion ban revealed:

> Health systems and clinicians caring for patients with complex pregnancies will have diverse interpretations of the laws' narrow exemptions, which will result in unequal access to care. Patients without the resources to travel will assume the risks of continuing their pregnancy and term delivery, until they are deemed "sick enough" to receive care. In states where abortion remains legal, clinicians will need to care for people who can travel but have had to assume other health risks, such as sepsis, hemorrhage, or delivery en route. . . . [A]llowing politicians and fear to determine what care can be provided is dangerous for patients and clinicians alike.[96]

---

92 *Id.*

93 *Id.*

94 *Id.*

95 *See* H. Amend. 4488H03.21H, H.B. 2012, 101st Gen. Assemb., Reg. Sess. (Mo. 2022) (extending Missouri's ban to out-of-state abortions performed, induced, or attempted upon Missourians).

96 Whitney Arey, Klaira Lerma, Anitra Beasley, Lorie Harper, Ghazaleh Moyedi & Kari White, *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 5 NEW ENG. J. MED. 387, 390 (Aug. 4, 2022).

Likewise, doctors treating patients suffering from entirely unrelated conditions may discontinue the use of useful medications just because those medications might also be used in abortions, and the doctors therefore fear that they might be prosecuted should patients miscarry while on the drugs.[97] The lack of clarity about how and when these anti-abortion laws apply is therefore inhibiting the provision of health care even unrelated to abortion. And, of course, the additional uncertainty about how out-of-state laws might be applied increases the likelihood that doctors will be forced to turn away patients out of fear of prosecution or civil liability.

Therefore, courts, abortion rights advocates, medical providers, and patients will benefit from a thorough analysis of the various constitutional and conflicts of law questions surrounding both state restriction and protection of abortion. It is to that analysis that this Article now turns.

II. CONSTITUTIONAL RESTRICTIONS ON EXTRATERRITORIAL ABORTION REGULATION

Concurring in *Dobbs*, Justice Kavanaugh suggested that states could not, under the U.S. Constitution, ban their residents from leaving the state to obtain an abortion.[98] The Justice even went so far as to say that the issue was

97 *See* Kristin Della Volpe & Nikki Kean, *How Will Abortion Bans Affect Women's Health?*, CLINICAL ADVISOR (May 20, 2022), https://www.clinicaladvisor.com/home/topics/ob-gyn-information-center/abortion-ban-womens-health-roe-v-wade/ [https://perma.cc/89L9-HW5V] (speculating that women of childbearing age may not be able to take teratogenic or abortifacient medications for other medical purposes because of strict abortion restrictions); Jamie Ducharme, *Abortion Restrictions May Be Making It Harder for Patients to Get a Cancer and Arthritis Drug*, TIME (July 6, 2022, 5:48 PM), https://time.com/6194179/abortion-restrictions-methotrexate-cancer-arthritis/ [https://perma.cc/5VPD-YH8U] (explaining how abortion restrictions will limit access to methotrexate, an antimetabolite that can be used to perform medical abortion but that is used more often for other purposes); Lisa Jarvis, *Abortion Pill Won't Be the Only One Restricted by State Bans*, BLOOMBERG (July 7, 2022), https://www.bloomberg.com/opinion/articles/2022-07-07/-abortion-pill-mifepristone-won-t-be-the-only-drug-restricted-by-state-bans [https://perma.cc/68Q6-44ZX] (reporting that women with autoimmune diseases have been denied prescription refills because of abortion restrictions). These same concerns will likely impact emergency contraception drugs and other non-abortion medical interventions. *See, e.g.*, Savannah Hawley, *Major Health System Stops, then Resumes Plan B Amid Missouri's Abortion Ban Ambiguity*, NPR (June 29, 2022, 5:40 PM), https://www.npr.org/sections/health-shots/2022/06/29/1108682251/kansas-city-plan-b [https://perma.cc/M47S-Y33B] (describing the Missouri health system's suspension and then resumption of providing Plan B because of the state's abortion restrictions); Emily Woodruff, *As an Abortion Ban Is Reinstated Doctors Describe "Chilling Effect" on Women's Care*, NOLA.COM (July 10, 2022), https://www.nola.com/news/healthcare_hospitals/article_238af184-ff02-11ec-9bce-dfd660a21ce1.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share [https://perma.cc/DBU9-KYGC] (reporting on Walgreen's refusal to fill a prescription for Cytotec, a drug used to ease pain during IUD insertion that is also used in medical abortions).

98 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

"not especially difficult as a constitutional matter."[99] In this Part, we examine whether the question of extraterritorial abortion regulation is quite as clear as Justice Kavanaugh suggests. Presumably, the Justice was referring to the Privileges and Immunities Clause of Article IV of the Constitution, which has been interpreted both to require the equal treatment of citizens as they cross state borders as well as to protect the right to interstate travel more broadly.[100] Accordingly, we consider these two potential ways in which state anti-abortion regulation may implicate constitutional concerns. First, states penalizing the out-of-state activities of their citizens may effectively deny those citizens the right to be treated the same as all other citizens of the state to which they are traveling. Second, restrictions on extraterritorial abortion may be treated as tantamount to a restriction on the ability of those citizens to travel out of state.[101]

It is worth emphasizing, however, that Justice Kavanaugh's statement likely extends only to regulation of the person *obtaining* the abortion, rather than to regulation of out-of-state residents who *perform* or *help facilitate* the abortion.[102] And the Privileges and Immunities Clause has not traditionally protected those engaged in interstate business from the reach of extraterritorial legislation.[103] Because of that limitation, we also need to consider the Court's jurisprudence surrounding the "Dormant" Commerce Clause, which derives from Chief Justice Marshall's opinion in *Gibbons v.*

---

99 *Id.*

100 *See infra* text accompanying notes 107–18.

101 These rights likely also extend to legally resident non-citizens. Although the U.S. Supreme Court has never directly addressed whether the right to interstate travel applies to non-citizens, cf. Graham v. Richardson, 403 U.S. 365, 375 (1971) ("The Court has never decided whether the right [to travel] applies specifically to aliens, and it is unnecessary to reach that question here."), strict scrutiny generally applies to any state classifications based on immigration status that impinge on fundamental rights. *See id.* at 371-72 ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."). Given that the Court has applied strict scrutiny to state prohibitions on aliens from working as lawyers, *In re* Griffiths, 413 U.S. 717, 722-27 (1973), or receiving welfare benefits, *Graham*, 403 U.S. at 376, one would think the same logic would apply to the right to travel, which is arguably even more fundamental. *See infra* text accompanying notes 137–62 (describing the various constitutional sources of this fundamental right). In any event, a discussion of how these rights apply to various classes of non-citizens present in a state is beyond the scope of this Article.

102 *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) ("For example, may a State bar a resident of that State from traveling to another State to obtain an abortion?").

103 *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177-80 (1868) (explaining that corporations are not "citizen[s]" within the meaning of the Privileges and Immunities Clause), *overruled on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944); United Bldg. & Const. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 220 (1984) ("It is discrimination against out-of-state residents on matters of fundamental concern which triggers the [Privileges and Immunities] Clause, not regulation affecting interstate commerce.").

Ogden.[104] That doctrine generally prohibits state laws from impermissibly regulating interstate commerce.[105] Nevertheless, as with any constitutional provision, the limitations imposed by the Dormant Commerce Clause are not absolute, and the U.S. Supreme Court's most recent pronouncement in this area has left the jurisprudence murky.[106] Thus, it remains to be seen how the Dormant Commerce Clause might be applied to limit the extraterritorial application of state anti-abortion laws.

A. *The Privileges and Immunities Clause of Article IV*

As many scholars have noted, any state-based abortion regulation that has an extraterritorial effect could potentially violate the Privileges and Immunities Clause of Article IV.[107] Simply reading the text of the Clause, however, one might initially wonder why it is relevant to the new wave of abortion regulations at all. The Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[108] This text seems to set forth only a simple command: in enforcing their laws, states may not discriminate against out-of-state residents.[109] In other words, whatever "privilege" or "immunity" is "entitled"

---

104 22 U.S. (9 Wheat.) 1 (1824); *see also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459-60 (2018) (tracing the Dormant Commerce Clause's roots to *Gibbons*).

105 *See infra* Part II.B.

106 *See generally* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023); *see also infra* Part II.B.

107 *See, e.g.*, Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 508-19 (1992) (arguing that the Privileges and Immunities Clause of Article IV, the Fourteenth Amendment's Privileges and Immunities Clause, and the nature of national citizenship prevent a state from impeding its citizens from obtaining an abortion in another state); Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 635 (2007) (noting Professor Kreimer's interpretation of the Privileges and Immunities Clause as "plausible"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1538 (2007) (["[A] state's regulation of its residents' extraterritorial activities is certainly a practical intrusion on their Article IV right to travel to another state and be treated the same as that state's residents.").

108 U.S. CONST. art. IV, § 2.

109 *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 262 (1992) ("Article IV . . . provides that citizens of one state shall be treated like citizens in other states."). It is important to note that whatever courts say about rights under the Privileges or Immunities Clause of the Fourteenth Amendment has no necessary bearing on the rights protected under the Privileges and Immunities Clause of Article IV. The Privileges *and* Immunities Clause of Article IV is distinct from the Privileges *or* Immunities Clause of the Fourteenth Amendment. The Privileges and Immunities Clause is "an equality right"—-that is, one that affords residents of other states the same rights as locals within the state. *Id.* The Privileges or Immunities Clause, on the other hand, decrees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1, cl. 2. This Clause produces "substantive right[s]" because they are guaranteed "without regard to how any other person is treated." Laycock,

to the citizens of a State by law, the same must be entitled to out-of-state citizens when they are within that State.[110] Thus, cases brought under the Clause generally focus on whether states are imposing some penalty on visitors from out of state.[111] In the abortion context, the U.S. Supreme Court held in *Doe v. Bolton* that Georgia could not prohibit out-of-state residents from obtaining an abortion in the state given that in-state residents were allowed to do so.[112] The Court held, "Just as the Privileges and Immunities Clause protects persons who enter other States to ply their trade so must it protect persons who enter Georgia seeking the medical services that are available there."[113]

Extraterritorial anti-abortion laws, however, do not on their face discriminate by placing in-state residents in a different position from those traveling from out of state.[114] Indeed, these laws are in many respects the *reverse* of the law in *Doe v. Bolton*, which struck down a law prohibiting out-of-state residents from accessing services that were lawful in Georgia for Georgia residents.[115] States imposing extraterritorial abortion bans, by contrast, seek to ban the procedure for their residents when their residents travel to *another* state. Within the borders of an anti-abortion state, all are treated equally: residents and out-of-state visitors alike are barred from obtaining abortions. Indeed, the purportedly neutral character of extraterritorial abortion bans has led some commenters to dismiss the whole idea that the Privileges and Immunities Clause could pose any kind of barrier to statutes of this sort.[116]

---

supra, at 262. Thus, "the Article IV clause created equality rights; the Fourteenth Amendment clause created substantive rights." *Id.*

110 *See* Toomer v. Witsell, 334 U.S. 385, 395 (1948) ("[The Privileges and Immunities Clause] was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.").

111 *See, e.g.*, Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 314-15 (1998) (striking down a New York tax statute for discriminating against nonresidents); Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 70 (1988) (holding that Virginia's residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause); Austin v. New Hampshire, 420 U.S. 656, 665-67 (1975) (invalidating a New Hampshire tax on commuters from Maine); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430-32 (1870) (striking down a Maryland statute that taxed in-state sales of goods from out-of-state traders at a higher rate than in-state traders).

112 410 U.S. 179, 200 (1973), *abrogated on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

113 *Id.* (citations omitted).

114 *See supra* notes 48–69 and accompanying text (describing current state abortion restrictions).

115 *Doe*, 410 U.S. at 200.

116 *See, e.g.*, C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 91 n.22 (1993) (arguing that an "extraterritorial abortion statute would not discriminate" and thus would not implicate the Privileges and Immunities Clause).

Nevertheless, we contend that the Privileges and Immunities Clause cannot be so easily dismissed. Indeed, despite their seemingly nondiscriminatory nature, extraterritorial abortion bans may still run afoul of the Privileges and Immunities Clause in at least two ways. First, criminal or civil penalties for extraterritorial activities may have the unconstitutional effect of denying to some people who are located within a state the privileges of abortion access that the state extends to all others in that state. Second, the threat of penalties for activities conducted in another state may constitute a violation of the right to travel.[117] Both issues implicate the fundamental structural importance of the Privileges and Immunities Clause as "first and foremost a national unity provision, eliminating a source of interstate divisiveness."[118] And because these aspects of the Privileges and Immunities Clause focus on interstate relations, it is irrelevant whether or not the underlying conduct is itself deemed to be a right protected by the federal Constitution.

1. The Right to Equal Treatment

To begin, it should be noted that the privileges and immunities question can be avoided in some cases by invoking the general presumption against extraterritorial application of statutes.[119] Thus, many cases need not address the Privileges and Immunities Clause at all because the state law in question is read not to apply to behavior taking place outside the state. In the abortion context, a district court in Texas did indeed refuse to imply a legislative attempt to regulate out-of-state activity.[120] Nevertheless, should a state include language in its statute explicitly penalizing out-of-state behavior, the Privileges and Immunities Clause question would be squarely presented, given that the presumption against extraterritoriality is only a presumption and can be overridden by an explicit statutory provision.[121]

---

117 As noted below, although we locate the general right to travel in Article IV, both courts and scholars have also found a right to travel in other provisions of the U.S. Constitution and the very structure of the document itself. *See infra,* text accompanying notes 152–62; *see also* Cohen et al., *supra* note 24, at 39–40 (arguing that Justice Kavanaugh's *Dobbs* concurrence supports interpreting the Due Process Clause to provide a right to travel).

118 Laycock, *supra* note 109, at 263.

119 *See* William S. Dodge, *Presumption Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1405-07 (2020) (describing the states that have adopted the presumption).

120 *See, e.g.*, Fund Tex. Choice v. Paxton, 658 F. Supp. 3d 377, 398 (W.D. Tex. 2023) ("[I]f Chapter 245 did include abortions taking place outside of Texas, then every abortion facility outside the state would necessarily be covered by Texas law. This is not a plausible interpretation . . . so the Court will not create extraterritorial effect where it does not exist.").

121 *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1175 (2023) (Kavanaugh, J., concurring in part and dissenting in part) ("Under this Court's precedents, one State's efforts to effectively regulate farming, manufacturing, or production in other States could raise significant

As noted above, although the Privileges and Immunities Clause prohibits states from discriminating against nonresident travelers, it offers no explicit guidance regarding the reach of a state's law on its citizens who travel *out* of the state. Two competing approaches to the issue present themselves.

First, the Privileges and Immunities Clause could be interpreted narrowly to have no relevance at all to the question of whether a state may regulate out-of-state activity. Under this narrow interpretation, the Clause would only be implicated if an anti-abortion state denied to travelers into the state the privileges and immunities extended to residents *within* its borders. From this perspective, the Clause would prevent a state from discriminating against foreigners operating in the state, but would have nothing to say about in-state citizens operating elsewhere.[122]

This seems to us an overly limited reading of the Privileges and Immunities Clause. As the U.S. Supreme Court recognized as far back as the nineteenth century, the Privileges and Immunities Clause of Article IV is far more expansive in its application. Under this more expansive reading, the Clause is understood to broadly "place the citizens of each State upon the same footing with citizens of other States" by "reliev[ing] them from the disabilities of alienage in other States."[123] From this perspective, the Privileges and Immunities Clause works in tandem with the Fourteenth Amendment's Citizenship Clause,[124] which ensures that national citizenship is "paramount and dominant instead of being subordinate and derivative" to state citizenship.[125] To be a national citizen means to have freedom of movement throughout the country and, further, that a state cannot impose burdens on its citizens when they are elsewhere.

Thus, the Privileges and Immunities Clause is best understood as a "norm of comity"[126] that is not subject-specific. It prevents states from interfering with the legal entitlements provided in other states. The "disabilities of alienage" are, of course, most apparent when a host state discriminates against out-of-state citizens by preventing them from exercising all of the privileges

questions under [the Privileges and Immunities] Clause."). For further explanation of how the presumption against extraterritoriality can be overcome, see Dodge, *supra* note 119, at 1406-07.

122 *See, e.g.*, Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 897-99 (2002) ("[T]he Privileges and Immunities Clause does not apply to a State's regulation of its own citizens, but rather applies to the regulation of states' relationships with . . . citizens of other states . . . .").

123 Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).

124 U.S. CONST. amend. XIV, § 1, cl. 1.

125 Aver v. United States (*Selective Draft Cases*), 245 U.S. 366, 389 (1918); *see also* Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) ("[The Fourteenth Amendment's Citizenship Clause] was adopted to make United States citizenship the dominant and paramount allegiance among us.").

126 Austin v. New Hampshire, 420 U.S. 656, 660 (1975).

and immunities of state law on the same basis as locals.[127] It is therefore unsurprising that the U.S. Supreme Court's Privileges and Immunities Clause jurisprudence has developed predominantly in this context. Indeed, we know of no case in which the Court has directly addressed the application of the Privileges and Immunities Clause to the question at issue here: a person traveling from one state to another for purposes of doing what is legal in the latter, but not in the former.[128] Yet when citizens are forced to "carry around on their backs" the legal system of their home state which penalizes them for accessing the privileges and immunities offered by other states, they are branded with the same badge of alienage.[129] The home state is effectively imposing a scarlet letter on its citizens when they travel to another state to engage in legal, and in many cases protected, activities by exposing them to civil or criminal punishments upon their return home.

From this perspective, anti-abortion states would violate the Privileges and Immunities Clause when they, either directly or indirectly, forbid their residents from enjoying the privileges and immunities available under the law and within the borders of pro-abortion states—namely, the right to terminate a pregnancy. This is because the very idea of national citizenship requires that a person "entitled" to an abortion in a host state cannot be denied this entitlement by the laws of their home state.[130] Efforts by a home state to prevent its residents from obtaining an abortion in states where it is legal thereby prevent the home state's citizens from exercising the same privileges and immunities "upon the same footing" as citizens of the host state.[131] If all aspects of a state's law were to follow its citizens when they cross state lines, those citizens would carry the "disabilities of alienage" into their host state, solely by virtue of their foreign citizenship.[132] As Seth Kreimer has argued, if "a California citizen is entitled, under the California Constitution's right of

127 *See supra* notes 111–13 and accompanying text.

128 The Court arguably came close in *Bigelow v. Virginia*, 421 U.S. 809 (1975). In Virginia, it was a crime to publish anything that could "encourage or prompt the procuring of abortion or miscarriage," even if the procurement occurred in other states where such acts were not illegal. *Id.* at 812-13. Yet, the Court held that a Virginia newspaper editor could not be convicted for printing advertisements for an abortion referral service in New York. Because the editor had not physically travelled to New York, the question presented was not quite the same. However, the logic of the opinion would likely apply even more strongly in such a case.

129 Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 152 (1999).

130 *See* Kreimer, *supra* note 107, at 509-10 (arguing that if California citizens are entitled to abortions in California, then that same entitlement must also apply to residents of other states who are present in California).

131 *Id.* at 511.

132 *Id.*

privacy, to obtain an abortion, Utah cannot reduce the Utah citizen who visits California to second class alien status."[133]

This interpretation of the Privileges and Immunities Clause protects the sovereignty of each state to extend those privileges and immunities the state deems appropriate to all within its borders. Citizens traveling outside of their state of residence, in turn, receive the protection of each state's privileges and immunities, extended to them on "the same footing" as they are to locals.[134] Of course, after *Dobbs*, no state is *required* by the federal Constitution to allow access to abortion, but *Dobbs* itself recognizes that each state may decide how to regulate abortion as it sees fit, because "[o]ur Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[135] Extraterritorial abortion laws that criminalize conduct deemed legal by the state where it occurs hamstring a state's ability to define for itself the privileges and immunities granted within its borders. This in turn usurps the constitutionally determined balance of equal power among the several states, critical to the peace and stability of the Union.

2. The Right to Travel

In considering some of the downstream legal consequences of *Dobbs*, Justice Kavanaugh opined:

> [A]s I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another

133 *Id.* at 509-10. As noted above, courts often presume that laws do not apply extraterritorially, thereby avoiding the need to analyze the Privileges and Immunities Clause. However, at least two nineteenth century state court decisions explicitly adopted this more expansive reading of the Clause in order to block local prosecutions that were based on out-of-state activity. In *People v. Merrill*, the court ruled that the State of New York could not prosecute New York residents who sold free black slaves in Washington, D.C. 2 Parker's Crim. Rep. 590, 605 (N.Y. Sup. Ct. 1855). According to the court, under the Privileges and Immunities Clause, "It was never intended that a legislature should violate state comity, or national rights . . . to punish as a felony, a sale of property in a state or district where the right exists, by the laws of the locality . . . ." *Id.* Likewise, a North Carolina law forbidding bigamy was not applied to a bigamous marriage in South Carolina even though the bigamous couple subsequently co-habited in North Carolina. According to the North Carolina Supreme Court, "[T]he constitution of the United States gives to citizens of all the states the immunities and privileges of its own citizens, and of their guaranteed right, under the interstate commerce clause, to pass through another state without arrest and inquiry into their accountability for offenses against their own sovereignty." *State v. Cutshall*, 15 S.E. 261, 263-64 (N.C. 1892).

134 Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868); *see also* Bradley W. Joondeph, The "Horizontal Separation of Powers" After National Pork Producers Council v. Ross 19-29, 61 San Diego L. Rev. (forthcoming 2024) (discussing limitations on extraterritoriality based on notions of state-to-state equality).

135 Dobbs v. Jackson Women's Health Org, 142 S. Ct. 2228, 2257 (2022).

> State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.[136]

This pronouncement raises several questions: What is the right to travel? Where does it come from? Is it really so obvious that a state may not bar its residents from traveling to another state to obtain an abortion? Unfortunately—and despite Justice Kavanaugh's assurances to the contrary—these questions are not so easy to answer.

When it comes to the constitutional right to interstate travel, two things seem clear: everyone recognizes that the right exists, but there is little agreement as to precisely where it is located in the Federal Constitution.[137] The right to travel is generally thought to have originated in the Articles of Confederation, which stated in Article IV that, "[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union . . . the people of each state shall have free ingress and regress to and from any other state."[138] Although this language was not ultimately imported into the Constitution, the U.S. Supreme Court has suggested that the right to travel was omitted from the Constitution's text only because it was "a right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."[139] Despite the lack of constitutional textual support, the right to travel was explicitly recognized, albeit in a dissenting opinion, as far back as 1849,[140] when Chief Justice Taney wrote:

> [E]very citizen of the United States . . . is entitled to free access . . . . We are all citizens of the United States; and, as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[141]

This position was later adopted in Justice Miller's 1868 majority opinion in *Crandall v. Nevada*,[142] when the Court struck down a state statute on the basis that it violated the right to travel. The Court specifically relied on the reasoning from Justice Taney's dissent, ruling that Nevada's tax on people as

---

136 *Id.* at 2309 (Kavanaugh, J., concurring).

137 *See* Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 458 (1995) ("[N]o Supreme Court justice in American history has voiced opposition to the general concept of a right to travel.").

138 ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 2. At one point, the Court even linked the right to travel to the Magna Carta. *See* Kent v. Dulles, 357 U.S. 116, 125 (1958) ("In Anglo-Saxon law [the right to travel] was emerging at least as early as the Magna Carta.").

139 United States v. Guest, 383 U.S. 745, 758 (1966).

140 Smith v. Turner (*Passenger Cases*), 48 U.S. (7 How.) 283 (1849).

141 *Id.* at 492 (Taney, C.J., dissenting).

142 73 U.S. (6 Wall.) 35 (1868).

they left the state was "inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain."[143]

Since the nineteenth century, the U.S. Supreme Court has regularly struck down federal[144] and state laws,[145] and even private actions,[146] that were deemed to interfere unconstitutionally with the right to travel between states. The Court has noted that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution,"[147] and that "the right to migrate is firmly established and has been repeatedly recognized by our cases."[148] It is beyond the scope of this Article to provide a complete recitation of the Court's right-to-travel jurisprudence.[149] Instead, it is sufficient to say, as others have,[150] that if there were ever a right so "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty,"[151] it would be the right to travel.

Despite this largely uncontested history, the actual textual source of the right to travel in the Constitution remains a mystery. Although we focus on Article IV in accordance with some U.S. Supreme Court precedent,[152] the Court has at various times also located the right to travel in the Commerce

143 *Id.* at 49 (quoting *Passenger Cases*, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting)).

144 *See, e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500, 514 (1964) (striking down an act that prohibited American members of communist organizations from acquiring or using their U.S. passports).

145 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[T]he purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible."), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

146 *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel is constitutionally protected . . . and is assertable against private as well as governmental interference.").

147 United States v. Guest, 383 U.S. 745, 758 (1966).

148 Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986).

149 For such a recitation, see, e.g., Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 639, 641-48 (2014).

150 *See, e.g.*, Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367, 1381 (2021) ("[The right to trave] represents one of the rare fundamental rights that the Court has continuously acknowledged.").

151 Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted).

152 *See, e.g.*, Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 261 (1974) ("[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."); Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) ("The right of a citizen of one state to pass through . . . any other state . . . [is one] of the particular privileges and immunities of citizens [under Article IV] . . . clearly embraced by the general description of privileges deemed to be fundamental . . . .").

Clause,[153] the First Amendment,[154] the Due Process Clause of the Fifth Amendment,[155] the Thirteenth Amendment,[156] the Privileges or Immunities Clause of the Fourteenth Amendment,[157] and the Due Process Clause of the Fourteenth Amendment.[158] The Court has also recognized that the right has "been inferred from the federal structure of government" itself.[159] Similarly, scholars have identified "no less than ten possible sources for the right" to interstate travel.[160] Indeed, the Court has at times been reluctant to tie the right to travel to any one constitutional provision.[161] As Justice Brennan wrote in his concurring opinion in *Zobel v. Williams*,[162] the right to travel's

153 *See* Edwards v. California, 314 U.S. 160, 173, 175-76 (1941) (invalidating a California law that prohibited "the 'bringing' or transportation of indigent persons into California" because such activity "clearly falls within [the] class of subjects" governed by the Commerce Clause). Although this may not seem like a "right of interstate travel" case on its face, the Court has subsequently described it as such. *See* United States v. Guest, 383 U.S. 745, 758 (1966) (describing *Edwards* as a "reaffirmation of the federal right of interstate travel").

154 *See* Aptheker v. Sec'y of State, 378 U.S. 500, 507 (1964) (finding that the statutory denial of passports to Communists violated the right to travel via an impermissible restriction on the freedom of association guaranteed in the First Amendment).

155 *See* Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

156 *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993) (recognizing that the Thirteenth Amendment protects the right to interstate travel from purely private, as well as state, actions).

157 *See* Saenz v. Roe, 526 U.S. 489, 502-03 (1999) ("[I]t has always been common ground that [the Privileges or Immunities] Clause protects the . . . [right of] travelers who elect to become permanent residents [of another State] . . . to be treated like other citizens of that State."); *see also Edwards*, 314 U.S. at 173, 178 (Douglas, J., concurring) ("The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and [sic] immunities clause of the Fourteenth Amendment against state interference.").

158 *See* Williams v. Fears, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.").

159 Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986) (plurality opinion).

160 Christopher S. Maynard, Note, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RSRV. L. REV. 297, 314 (2000).

161 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); Oregon v. Mitchell, 400 U.S. 112, 237-38 (1970) ("From whatever constitutional provision this right may be said to flow, both its existence and its fundamental importance to our Federal Union have long been established beyond question.").

162 457 U.S. 55, 67 (1982) (Brennan, J., concurring). Of course, the constitutional source of the right might matter in some contexts. For example, if the right is based in the Privileges or Immunities Clause of the Fourteenth Amendment, then Congress would have the power to prevent states from infringing it. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). If, however, the right to travel is located in the Privileges and Immunities Clause of Article IV, then congressional authority becomes, at the very least, ambiguous. *See* Metzger, *supra* note 107, at 1475 ("Article IV's text is ambiguous when it comes to the question of *congressional* authority."). Although we place the right to travel

"unmistakable essence [lies] in that document that transformed a loose confederation of States into one Nation."

Given its deep-rooted and relatively uncontroversial status as a right, the next question is to determine what the right to travel actually protects. Although the Court has never fully explained the entire scope of the right to travel, it provided its most comprehensive iteration in *Saenz v. Roe*.[163] At issue in that case was a California law that limited newly-arrived residents to the welfare benefits they had obtained in their previous home state.[164] In holding that the California statute violated the constitutional right to travel, the Court established that the right is made up of "at least three different components."[165] These components are: (1) "the right of a citizen of one State to enter and to leave another State," (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[166] The Court identified constitutional protection of components (2) and (3) in the Privileges and Immunities clause of Article IV, and further held that component (3) was protected by the Privileges or Immunities Clause of the Fourteenth Amendment.[167] At issue in *Saenz* was component (3); the

within our discussion of Article IV, our argument does not depend on the precise source of the right, nor does it depend on Congress's ability to protect that right.

163 526 U.S. 489 (1999).

164 *Id.* at 493-94, 498.

165 *Id.* at 500.

166 *Id.* Some circuit courts appear to have taken an unduly rigid view of the three components to the right to travel expressed in *Saenz*. *See, e.g.*, Minn. Senior Fed'n Metro. Region v. United States, 273 F.3d 805, 809 (10th Cir. 2001) ("Appellants' right-to-travel claims do not fall within the three components identified in *Saenz*."). This is a curious result given *Saenz*'s express qualification that there are "*at least* three different components" of the right to travel. 526 U.S. at 500 (emphasis added). Indeed, other circuits have recognized that there may be additional components to the right beyond those expressed in *Saenz*. *See, e.g.*, Matsuo v. United States, 586 F.3d 1180, 1184 (9th Cir. 2009) ("While the right might have other components, being provided with the same federal benefits after moving as before isn't among them."); Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 100 (2d Cir. 2009) (recognizing a right to *intra*state and interstate travel); Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002) ("[W]e hold that the Constitution protects a right to travel locally through public spaces and roadways.").

167 *Saenz*, 526 U.S. at 501-04. The significance of the use of the Privileges or Immunities Clause of the Fourteenth Amendment as a source of the right, or a component of the right, should not be overlooked. This is because just after the Fourteenth Amendment was enacted, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) "sapped the Clause of any meaning." *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting). Thus, the Clause lay dormant for nearly 130 years until it was resurrected in *Saenz*. *See generally*, Kevin Maher, Comment, *Like a Phoenix from the Ashes:* Saenz v. Roe*, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH. L. REV. 105 (2001) (discussing the Clause's dormancy in the intervening years between the *Slaughter-House Cases* and *Saenz*). Although the case has not yet led to a resurgence in Privileges or Immunities Clause jurisprudence, it cemented the fact that the right to travel is a right of national citizenship protected by the Clause. Tribe, *supra* note 129, at 129 ("For those who may have thought

challenged California statute created different classes between long-time California residents and those who had resided in the state for less than a year, and created further sub-classes of the latter based on the location of their prior residence.[168] Applying a higher level of scrutiny than "mere rationality [or] some intermediate standard of review," the Court held that the statute discriminated among equally eligible citizens, that "the discriminatory classification is itself a penalty," and that the state's supposed financial interests could not constitutionally justify this discrimination.[169]

Unlike *Saenz*, the components of the right to travel most relevant to our discussion are component (1) (the right of ingress and egress) and, perhaps to a lesser extent, component (2) (the right to sojourn). Because component (1) was not at issue in *Saenz*, the Court did not identify the constitutional source of "the right of a citizen of one State to enter and to leave another State,"[170] nor did the Court elaborate on what this component protects other than the "'free ingress and regress to and from' neighboring States."[171] Thus, there remains debate about whether this component would preclude extraterritorial abortion bans and prosecution of the traveler upon return to the home state.[172]

It seems beyond dispute that component (1) of *Saenz* prevents states from establishing "actual barriers to interstate movement."[173] Most plainly, this

---

that the Privileges or Immunities Clause of the Fourteenth Amendment was emptied of all content by the *Slaughter-House Cases*, Justice Stevens . . . issued a much-needed corrective reminder . . . ."). For further discussion of how the Fourteenth Amendment in general—and the Privileges or Immunities Clause in particular—changed the fundamental character of the U.S. Constitution, see generally Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47 (1995).

168 *Saenz*, 526 U.S. at 505.

169 *Id.* at 504-07.

170 *Id.* at 500; *see id.* at 501 ("For the purposes of this case . . . we need not identify the source of [the right to free interstate movement] in the text of the Constitution.").

171 *Id.* at 501 (quoting ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1).

172 *Compare* Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 914-15 (1993) (arguing that if citizens were subject to the criminal laws of their home states even when in other states it would create "a disincentive to interstate travel" and expose individuals to criminal punishment by one state even after another had acquitted them), *with* Bradford, *supra* note 116, at 165 ("[I]f Roe is overruled, a state could constitutionally prohibit its own residents from exiting the state to obtain abortions, as long as it equally prohibited abortions within the state."). *See also* Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1689-92 (arguing that U.S. Supreme Court precedent does not "resolve the question of the limits imposed on the application of state law by the right to travel"); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 883 (1993) ("[T]he 'right to travel' by itself does not specify which law will apply once one gets to the other state. To decide this issue, we must consult the constitutional limits on extraterritorial application of local law . . . ."). As these articles confirm, this debate long predates *Saenz*.

173 Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)).

would bar a state from establishing physical obstacles to movement, such as walls or checkpoints to screen travelers entering and exiting the state.[174] If, in his *Dobbs* concurrence, Justice Kavanaugh referred merely to this prohibition, then assessing the constitutionality of such measures is, indeed, "not especially difficult as a constitutional matter."[175] But it is hard to imagine this was Justice Kavanaugh's true meaning, for none of the Court's major cases regarding the right to travel involved physical barriers to movement. Nor are such obstacles likely to be erected in the abortion context—though given the extreme rhetoric surrounding the issue, we allow for the possibility that one day physical border controls from state to state could become a reality.[176]

Nevertheless, since the erection of physical barriers is not currently at issue, the question becomes whether a home state's extraterritorial abortion ban operates as a *constructive* barrier. That is, can a state's threat to prosecute its own citizen in connection with an abortion obtained out of state be construed as an "actual barrier[] to interstate movement," albeit an intangible one?[177] The answer is far from simple, but we are inclined to say yes, it can be. Both U.S. Supreme Court precedent and the very structure of federalism lead us to the conclusion that, if a state punishes its citizens for traveling to another state to procure an abortion *after* they have returned to the state, such a prosecution would indeed violate the right to travel.

First, the precedents. The U.S. Supreme Court has held that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'"[178] Punishing citizens who cross state borders to receive an abortion deters such travel and imposes a "classification [that] serves to penalize" the traveler, scrutinizing both the

174 For analysis of this issue in the context of border patrol regulations responding to the coronavirus pandemic, see Smith-Drelich, *supra* note 150, at 1394-97.

175 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

176 Indeed, four Texas counties have now passed ordinances that purport to block travel through the county to help procure an out-of-state abortion. *See, e.g.*, *Texas Counties Trying to Prevent People from Using Roads to get an Abortion Grows*, ASSOCIATED PRESS (Oct. 24, 2023, 8:57 PM), https://apnews.com/article/abortion-travel-ban-roads-west-texas-3997304c4156f131ee90bb1363735ba3 [https://perma.cc/MKX9-7WLZ]. Likewise, in 2023 the Idaho legislature enacted a statute creating a felony for "abortion trafficking," which applies to "an adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion . . . or obtains an abortion inducing drug for the pregnant minor to use for an abortion by recruiting, harboring or transporting the pregnant minor within this state." Idaho Code § 18-623(1). In November 2023, a federal judge granted a motion for a preliminary injunction that temporarily blocks this statute from taking effect. *See* Matsumoto v. Labrador, ___ F. Supp. 3d ___, 2023 WL 7388852 (D. Idaho 2023).

177 *Bray*, 506 U.S. at 277 (1993) (quoting *Zobel*, 457 U.S. at 60 n.6 (1982)).

178 Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (citations omitted) (quoting Dunn v. Blumstein, 405 U.S. 330, 340 (1972)).

purpose of their travel and their acts while traveling. In addition, given its fundamental status, the right to travel is implicated by criminal and civil actions, whether those actions are initiated by the state or in a civil suit by a private "bounty-hunter."[179] Thus, whether the state itself imposes constructive barriers to free movement or delegates the task to private citizens, these cases suggest that broad protections from extraterritorial legislation are rooted in the right to travel.

However, it might be difficult to connect the punishment contained in these anti-abortion statutes with the right to travel itself. In *Bray v. Alexandria Women's Health Clinic*,[180] a majority of the Court held that private persons obstructing access to abortion clinics in the Washington, D.C. metropolitan area did not amount to a conspiracy to deprive women seeking abortions of their right to interstate travel and therefore did not violate 42 U.S.C. § 1985(3).[181] In finding that the defendants lacked the requisite intent to deprive women of their right to travel to Washington, D.C. to receive an abortion, the Court held that the abortion protesters did not "act at least in part for the very purpose of" denying the women's right to interstate travel.[182] Rather, the protesters simply "oppose[d] abortion, and it [was] irrelevant to their opposition whether the abortion [was] performed after interstate travel."[183] The Court further concluded that the right to interstate travel was not implicated because the only "actual barriers to . . . movement" posed by the demonstrators "would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another," which would be outside the scope of the right to interstate travel.[184] The Court's reasoning in *Bray* has led some scholars to dismiss the idea that the right to travel poses any sort of barrier to extraterritorial abortion bans.[185]

---

179 Griffin v. Breckinridge, 403 U.S. 88, 102-03 (1971) ("Our cases have firmly established that the right of interstate travel is . . . assertable against private as well as governmental interference."); *see also* United States v. Guest, 383 U.S. 745, 760 (1966) ("[I]f the predominant purpose of the [private] conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.").

180 506 U.S. 263 (1993).

181 *Id.* at 276. This federal statute provides a cause of action to any party injured by a conspiracy of two or more persons "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).

182 *Bray*, 506 U.S. at 275-76.

183 *Id.* at 276.

184 *Id.* at 277.

185 *See, e.g.*, Dellapenna, *supra* note 172, at 1691 (arguing, based on *Bray*, that states may have an interest in protecting fetuses from abortions that occur outside of the state).

Although the Court's holding in *Bray* may seem to present a hurdle for those arguing that extraterritorial abortion bans violate the right to travel, it is one that can be overcome. First, *Bray* was not interpreting the constitutionally based right to travel at all. Instead, it was a pure statutory interpretation case, interpreting the text of a particular federal statute permitting a cause of action penalizing conspiracies to deprive certain rights or privileges.[186] There is no reason to expand the holding of the case outside of that context. This is particularly true with regard to the Court's ruling that the "purpose" of a restrictive state statute or state action must be to "interfere with travel as such" in order to give rise to a cause of action under the federal statute.[187] Such a ruling may make sense as an interpretation of the intent provision of a statute, but as a constitutional matter it does not. After all, as the U.S. Supreme Court has frequently noted, "Constitutional rights would be of little value if they could be . . . indirectly denied."[188] Thus, even statutes that do not directly "interfere with travel as such" should receive strict scrutiny when it comes to enforcing a constitutional right such as the right to travel.

To be sure, there are several right-to-travel cases involving attempts to directly impede the right to interstate travel.[189] But the majority of right-to-travel cases "principally involved . . . [an] indirect manner of burdening the right."[190] In *Dunn v. Blumstein*, for example, the issue was whether Tennessee could require citizens to reside in Tennessee for one year prior to being able to vote in the state and three months before being able to vote in their county of residence.[191] Tennessee officials defended the law on the grounds that it did not specifically target interstate travel and that it did not actually deter anyone from traveling to the state.[192] According to the Court, however, that view "represents a fundamental misunderstanding of the law."[193] Instead, the Court clarified that, when evaluating whether the right to travel has been

186 *See Bray*, 506 U.S. at 274-75 (interpreting 42 U.S.C. § 1985(3)).

187 Dellapenna, *supra* note 172, at 1691.

188 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995) (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965)).

189 *See, e.g.*, Edwards v. California, 314 U.S. 160, 174 (1941) (finding that the California statute at issue has an "express purpose and inevitable effect . . . to prohibit the transportation of indigent persons across the California border"); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 39-40, 49 (1867) (invalidating a direct tax on all persons exiting Nevada via common carrier); *see also* R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws*, 34 PACE L. REV. 814, 875-77 (2014) (discussing what might be the first direct attempt to prohibit interstate travel in the Missouri Compromise).

190 Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (plurality opinion).

191 405 U.S. 330, 331-32 (1972).

192 *See id.* at 339 ("Thus, Tennessee seeks to avoid the clear command of *Shapiro* by arguing that durational residence requirements for voting neither seek to nor actually deter such travel.").

193 *Id.*

infringed, evidence of actual deterrence is not required.[194] All that is necessary to show an infringement is that the state law *penalizes* the exercise of the right to interstate travel.[195] These "durational residency"[196] cases, which fall under component (3) of *Saenz*'s tripart framework,[197] have found that the right to travel is violated when the targeted privileges include free medical care for indigent residents,[198] preference for civil service applicants,[199] tax exemptions for military veterans,[200] as well as general welfare benefits.[201] Importantly, in these cases, it was irrelevant whether the underlying benefit was itself a constitutional right or whether the explicit purpose of the statute was to deny travel. Instead, the key question was only whether the state, either in conferring benefits or exacting penalties, was burdening one group of people present in the state without burdening another.

---

194 *Id.* at 339-40, 340 n.9.

195 *See id.* at 341 ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied.'" (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965)).

196 Durational residency requirements seek to "treat established residents differently based on the time they migrated into the State" and are distinct from bona fide residency requirements, "which seek to differentiate between residents and nonresidents." *Soto-Lopez*, 476 U.S. at 903 n.3. The Court explained in *Martinez v. Bynum* that "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." 461 U.S. 321, 328-29 (1983). These requirements do not violate the right to travel because "any person is free to move to a State and to establish residence there" and "bona fide residence requirement[s] simply require[] that the person *does* establish residence before demanding that the services are restricted to residents." *Id.*

197 *See* Saenz v. Roe, 526 U.S. 489, 502-03 (1999) ("[The] third aspect of the right to travel [is the] the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State.").

198 *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 261 (1974) ("[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.").

199 *See Soto-Lopez*, 476 U.S. at 911-12 ("For as long as New York chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services."). This is an example of a "fixed point" durational residency requirement because the benefit afforded to New York veterans was based on the "fixed point" during which they served in the armed forces. *Id.* at 905.

200 *See* Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 619 (1985) ("The distinction New Mexico makes between veterans who established residence before May 8, 1976, and those veterans who arrived in the State thereafter bears no rational relationship to one of the State's objectives—encouraging Vietnam veterans to move to New Mexico."). This is an example of a "fixed date" durational residency requirement because the state granted tax exemptions only to veterans that established residency in the state before a certain date—in this case, May 8, 1976. *Id.*

201 *See Saenz*, 526 U.S. at 492-93, 498 (1999) (striking down a California statute that limited new residents to the same welfare benefits they received in their prior state of residence for up to a year after they established residency in California); Shapiro v. Thompson, 394 U.S. 618, 622-26 (1969) (invalidating various statutes in Connecticut, Pennsylvania, and the District of Columbia that conditioned receipt of welfare benefits on one year of residence in the jurisdiction).

Even outside this durational residency line of cases, the Court has similarly made clear that denying travel need not be the express purpose of a law for it to create sufficient barriers to interstate movement to violate the right to travel. For example, in *Edwards v. California*,[202] the statute at issue did not target the traveler directly, but rather made it a misdemeanor for any "person, firm or corporation" to help bring an indigent person to the state.[203] Nevertheless, the fact that the traveler was not directly targeted posed no obstacle for the Court in striking down the statute as unconstitutional.[204] And although the majority ultimately held that the California statute was unconstitutional under the Commerce Clause,[205] four of the nine justices would have preferred to base the decision on the right to travel.[206] In his concurrence, Justice Douglas rejected the majority's reliance on the Commerce Clause, expressing his opinion that "the right of persons to move freely from State to State occupies a *more protected* position in our constitutional system than does the movement of" interstate commerce.[207]

Thus, even if extraterritorial abortion bans do not explicitly block travel, they may still pose a constructive barrier to travel and therefore violate the right to travel (whether that right is deemed to reside in the Commerce Clause or the Privileges and Immunities Clause). Indeed, if we replace the word "indigent" in *Edwards* with the word "pregnant," and replace the destination state of California with the home state of Texas, it is difficult to distinguish the two cases. There is little reason, after all, to draw any meaningful distinction for purposes of the right to travel between a state trying to keep people *out*—by banning or burdening their transportation into the state—and a state trying to keep people *in*—by banning or burdening their transportation out of the state. Thus, if a state abortion ban prohibits its residents from traveling to another state to receive an abortion, where it is legal, and subjects them, along with anyone who aids or abets them, to criminal punishment upon their return, such a system would surely "obstruct[] or in substance prevent[]" such movement, especially given that

202 314 U.S. 160 (1941).

203 *Id.* at 171.

204 *Id.* at 173-74.

205 *See id.* at 177 ("[The statute] imposes an unconstitutional burden upon interstate commerce"). We discuss the Commerce Clause arguments in Part II.B, *infra*.

206 *See id.* at 177-81 (Douglas, J., concurring) ("The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and [sic] immunities clause of the Fourteenth Amendment against state interference.") (emphasis in original); *id.* at 182-86 (Jackson, J., concurring) (I turn . . . away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any State to abridge his privileges or immunities as such.").

207 *Id.* at 177 (Douglas, J., concurring) (emphasis added).

the potential criminal penalty to be imposed in the abortion context is far more severe than the misdemeanor penalty at issue in *Edwards* itself.

Indeed, recall that *Crandall*, which is the fount of the Court's right-to-travel jurisprudence, invalidated a Nevada statute taxing people *leaving* the state.[208] The position of the state vis-à-vis the flow of movement (either into or out of the state) seems to make no difference in analyzing a right-to-travel case. Likewise, it is irrelevant that extraterritorial abortion bans only target travel into another state for the specific purpose of procuring an abortion.[209] The *Edwards* Court made clear that the state of being indigent "is neither a source of rights nor a basis for denying them,"[210] and it is difficult to see why the state of being pregnant should be treated differently, unless the Court wishes to wade into the question of whether the fetus itself has constitutional rights, a debate the Court has thus far avoided.[211] Indeed, Justice Kavanaugh stressed in his *Dobbs* concurrence that "the Constitution is neutral on the issue of abortion."[212] Accordingly, being pregnant is, like indigency, a "neutral fact—constitutionally an irrelevance, like race, creed, or color."[213]

All of this leads us to the conclusion that even when travel itself is not the object of a state statute, extraterritorial abortion bans erect constructive barriers to the exercise of the right to travel. This is supported by the Court's precedents described above. But it is also intrinsic to the Constitution's federalist structure.

Once *Dobbs* cleared the way for states to regulate abortion at any stage, states were left to perform their role "as laboratories for experimentation"[214]

---

208 Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 39 (1867).

209 *See Edwards*, 314 U.S. at 184 (Jackson, J., concurring) ("Does 'indigence' as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? . . . 'Indigence' in itself is neither a source of rights nor a basis for denying them."); Jones v. Helms, 452 U.S. 412, 426 (1981) (holding that constitutionality of a law creating a penalty for leaving the state did not turn on the fact that the statute omitted a wrongful intent requirement).

210 *Edwards*, 314 U.S. at 184 (Jackson, J., concurring).

211 *See, e.g.*, Benson v. McKee, 273 A.3d 121, 131 (R.I. 2022), *cert. denied sub nom.*, Doe *ex rel.* Doe v. McKee, 143 S. Ct. 309 (2022) (denying a petition for certiorari from a Rhode Island Supreme Court case holding that the "unborn" have no standing to challenge the state's law codifying the right to an abortion).

212 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring).

213 *Edwards*, 314 U.S. at 185 (Jackson, J., concurring).

214 United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). The idea of the states as laboratories is usually traced to Justice Brandeis' dissent in *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

to either further restrict or further protect access to the procedure.[215] In order for states to fulfill this "vital function,"[216] however, people must be able to move freely among laboratories so that they may determine their own legal and political climate, protect their liberties, and actually vote with their feet (as well as ballots) by moving around and thereby informing states of the level of support for different experiments.[217] As William Blackstone observed, "[P]ersonal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[218]

Fully aware of this fundamental liberty, the Founders "structure[d] a federal union under the Constitution to create a strong political union and a common market composed of sovereign states," the success of which depends on the right to travel.[219] As one scholar has argued, "the Framers saw the structure of government as the best protection of individual rights."[220] In order to preserve liberty through the Founders' federalist structure, however, citizens must be allowed to "move from a state where they feel unduly restrained to one with less restrictive laws."[221] Thus, criminalizing extraterritorial abortions not only infringes on the personal, national rights of Americans to travel,[222] but also infringes on the structural limits federalism

---

215 *See supra* notes 48–79 and accompanying text (describing state statutes restricting or protecting abortion access).

216 Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 859 (2015) (Thomas, J., dissenting) (criticizing the majority opinion, in an election law case, for being insufficiently accepting of the states' "vital functions" as "laboratories of democracy").

217 *See* Patrick M. Garry, *The Constitutional Lynchpin of Liberty in an Age of New Federalism: Replacing Substantive Due Process with the Right to Travel*, 45 BRANDEIS L.J. 469, 486-87 (2007) ("[T]he right to travel facilitates a more flexible and democratic notion of liberty that allows people to determine their own climate of individual liberty."); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) ("The consequence [of federalism], of course, is that the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."). Political movement, or "voting with one's feet," has been deemed a bedrock of horizontal interstate competition that serves to protect the people from tyranny at all levels of government. *See, e.g.*, John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. L. REV. 89, 107-12 (2004) (arguing that "foot voting" can be more effective than traditional voting in protecting one's interests).

218 1 WILLIAM BLACKSTONE, COMMENTARIES 130 (Wilfrid Priest ed., 2016) (1753).

219 Sobel, *supra* note 149, at 647-48.

220 Garry, *supra* note 217, at 473; *see also* New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."); Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

221 Garry, *supra* note 217, at 473.

222 *See* Edwards v. California, 314, U.S. 160, 183 (1941) (Jackson, J., concurring) ("This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the

places on states in order to preserve civil liberties and national unity.[223] To subject any citizen to criminal prosecution or civil liability for participating in activities that the state deems to be lawful while within the state's territory would be to frustrate the equal status of states to each other, their role as laboratories of experimentation for difficult social, political, and moral issues, and the citizens' ability to limit tyranny through travel.[224] As the Court has announced in the context of punitive damages, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[225]

Finally, an originalist analysis also yields a robust right to travel. The right to travel was included in the Magna Carta,[226] recognized by Blackstone as an attribute of "personal liberty,"[227] was expressly included in the Articles of Confederation,[228] and was considered "broad and plenary" by the Founders.[229] With the exception of southern slave codes and plantation law

establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.").

223 *See* Tribe, *supra* note 129, at 147 ("[S]uch a law is at odds with the postulates of our constitutional nationhood that structure how the several states relate to one another, and how each state relates to its own citizens.").

224 *Id.* at 152 ("No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct (at least vis-á-vis the world in general), including rules enforced through criminal prosecution, as they travel to other states in order to satisfy their needs or preferences or simply to sample what the rest of the nation may have to offer."); *see also* McGinnis & Somin, *supra* note 217, at 108 ("The citizenry's ability to exit makes their political leaders more responsive to them and less apt to show favor to interest groups whose objectives conflict with those of the majority of citizens.").

225 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."); Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound."); Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

226 *See* Kent v. Dulles, 357 U.S. 116, 125 (1958) (observing that the Magna Carta contained a right to travel).

227 1 WILLIAM BLACKSTONE, COMMENTARIES 130 (Wilfrid Priest ed., 2016) (1753).

228 ARTICLES OF CONFEDERATION of 1781, art. IV.

229 Sobel, *supra* note 149, at 647; *see also* Thomas Jefferson, *Argument in the Case of* Howell vs. Netherlands, *in* 1 THE WORKS OF THOMAS JEFFERSON 470, 474 (Paul Leicester Ford ed., 1904) (1770) ("Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and is given him by the author of nature, because necessary for his own sustenance.").

that restricted slaves' movement,[230] the right to interstate travel was well understood during the Antebellum Period.[231] And when anti-travel laws were passed during this period, they were primarily dependent on a person's status under state law (e.g., as a slave or pauper),[232] distinctions that were rendered

230 *See, e.g.*, Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233, 258-62 (2006) (describing the regulation of "[B]lack travel" during the Antebellum South); *see also* KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR 144-46 (2d ed. 2009) (describing the role of slave codes in controlling the status and movement of slaves).

231 In fact, as one scholar notes, a defining feature of freed slaves was their ability to travel freely throughout the United States—a freedom that was assumed for whites but had to be proven for Blacks. *See* JOHN D. COX, TRAVELING SOUTH: TRAVEL NARRATIVES AND THE CONSTRUCTION OF AMERICAN IDENTITY 64-67, 74, 81, 89 (2005); *see also* James Grossman, *Migration, Black*, *in* 3 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE 179, 181 (Charles Reagan Wilson ed., 2006) ("Movement [after the Civil War] became as central to southern [B]lack life as it has been to the American experience in general. Because [B]lacks for so long had been unable to move freely, however, it acquired a special mystique manifested as a major theme in [B]lack music and symbolized by the recurrent image of the railroad as a symbol of the freedom to move and start life anew.").

232 *See* Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM HISTORICAL TO CONTEMPORARY 105, 126 (Jean Allain ed., 2012) (describing laws using state law to determine slave status and allowing slave owners to seize and relocate their slaves, wherever they might be). The indigent, for example, were subject to several restrictions on their ability to travel outside of their state or local community. *See* KRISTIN O'BRASSILL-KULFAN, VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC 17-25 (2019) (describing American anti-migratory policies and their effect on the poor). Such laws were upheld as "precautionary measures" against the physical and moral "pestilence" of indigent travelers. *See, e.g.*, New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837). Similarly, anti-travel laws were passed targeting free Black persons as tools to scrutinize their free status. *See* ELIZABETH STORDEUR PRYOR, COLORED TRAVELERS: MOBILITY AND THE FIGHT FOR CITIZENSHIP BEFORE THE CIVIL WAR 48-49 (2016). But these laws were also controversial at the time. For example, free Black sailors were prohibited from entering many southern ports, causing "considerable interstate, federal-state, and international problems." PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 109 n.28 (1981). When Missouri attempted to exclude all free Black and mixed-race people from settling in its territory upon its entry into the Union, it "caused an uproar in the divided Senate," and resulted in a compromise that attached a "strange caveat" to Missouri's constitution that prohibited the state from restricting the travel of any "citizen" of any other state into and out of its territory. Chan, *supra* note 189, at 875-77. Furthermore, at both the state and federal levels, courts continued to recognize the right to travel as either being fundamental, Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230); Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45 (N.Y. 1831) (recognizing that when there is a compelling public interest, citizens are equally entitled to enjoy new instrumentalities of travel that emerge with new technologies, such as railroads), or a barrier to extraterritorial jurisdiction, Lemmon v. People, 20 N.Y. 562, 608-10 (1860) (upholding a lower court decision freeing slaves owned by Virginia residents upon entry to New York under New York law because travelers have the same rights afforded by the state in which they are present, not those afforded by their home state); People v. Merrill, 2 Parker Crim. Rep. 590, 596 (1865) (dismissing criminal indictments of New York residents who sold slaves in the District of Columbia because "it cannot be pretended or assumed that a state has jurisdiction over crimes committed beyond its territorial limits"); *see also* JOSEPH STORY, CONFLICTS OF LAW § 20 (8th ed. 1883) ("Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or

"constitutionally an irrelevance" by the adoption of the Fourteenth Amendment.[233] Indeed, Justice Thomas, in a separate opinion in *Saenz*, recounted the history of the Privileges and Immunities Clause of Article IV and its relationship to the Privileges or Immunities Clause of the Fourteenth Amendment, linking the two through Justice Washington's "landmark opinion" in *Corfield v. Coryell*.[234] That case specifically recognized "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise" as a fundamental right protected under Article IV.[235] As Justice Thomas makes clear, cases such as *Corfield* "indisputably influenced the Members of Congress who enacted the Fourteenth Amendment."[236] And by 1868, numerous state constitutions contained specific provisions protecting the right to travel, including rights to immigration, emigration, and protection of in-state property when temporarily absent from the state.[237]

Given the history, tradition, precedents, and structural importance of the right to travel, courts should, and to a large extent have, viewed the right as the Founders conceived: both "broad and plenary."[238] That being said, states may perhaps infringe on the right to travel if the infringement can survive strict scrutiny by showing that the law at issue is "necessary to further a compelling state interest."[239] But that would require the Court to determine

---

others . . . .[F]or it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.").

233 Edwards v. California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring).

234 Saenz v. Roe, 526 U.S. 489, 523-26 (1999) (Thomas, J., dissenting) (citing *Corfield*, 6 F. Cas. at 551-52).

235 *Corfield*, 6 F. Cas. at 552; *Saenz*, 526 U.S. at 521-28 (Thomas, J., dissenting).

236 *Saenz*, 526 U.S. at 526; *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992) (noting that Senator Lyman Trumbull, before the ratification of the Fourteenth Amendment, argued for an extension of the Privileges and Immunities Clause to the states with an "obligatory quotation from *Corfield*"). Even if one has a more limited conception of what should count as a privilege or immunity of national citizenship for purposes of interpreting the Fourteenth Amendment, the right to travel in order to obtain contracted medical services likely qualifies. *Cf.* Ilan Wurman, *Reconstructing Reconstruction Era Rights*, 109 U. VA. L. REV. 885, 890 (2023) (arguing that the privileges or immunities of national citizenship excludes political rights and public privileges).

237 *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 92-93 (2008) (describing the emergence of protections of the right to travel in state constitutions).

238 Sobel, *supra* note 149, at 647.

239 Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 904 n.4 (1986) (plurality opinion); *see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 258

whether the state's "legitimate interest in protecting 'potential life'"[240] overcomes the burden the state's law places on the right to travel.[241] In *Dobbs*, the Court made clear that it is not in a position to conduct such a balancing inquiry, explicitly stating that it "has neither the authority nor expertise to adjudicate . . . [the] weighing of the relative importance of the fetus and mother."[242] Thus, there is likely no basis, at least under traditional strict scrutiny analysis, for allowing state anti-abortion laws to abridge the constitutional right to travel.

B. *The "Dormant" Commerce Clause of Article I, Section 8*

Although we conclude that extraterritorial enforcement of state anti-abortion laws might violate the right to travel and the Privileges and Immunities Clause of Article IV, that is not the end of the discussion because the right to travel is only implicated to the extent the anti-abortion laws are targeting the actual person traveling out of state to obtain an abortion.[243] Yet, as described above, the state anti-abortion laws in effect or being proposed are not exclusively focused on the person obtaining the abortion.[244] Regulations of those who *aid or abet* an abortion would not implicate the right

(1974) ("[A] classification which 'operates to penalize those persons . . . who have exercised their constitutional right of interstate migration,' must be justified by a compelling state interest.") (quoting Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, J., dissenting in part)). There is some disagreement regarding the level of scrutiny to be applied when the right to travel is at issue, and whether the level of scrutiny changes depending on the type of burden the state imposes. *See, e.g.*, *Soto-Lopez*, 476 U.S. at 906 n.6 (discussing a dispute among Justices on the proper method to determine the appropriate level of scrutiny to apply to right to travel challenges); Zobel v. Williams, 547 U.S. 55, 60 (1982) (declining to clarify what level of scrutiny applies to right to travel challenges where the challenged state policy could not rationally further any state interest); *see also* Garry, *supra* note 217, at 486 n.111 (noting that the Justices in *Saenz* disagreed on what level of scrutiny to apply to right to travel challenges). Without wading into the debate extensively, we think that strict, or at least heightened, scrutiny is appropriate due to the right's status as a fundamental right of national citizenship, the history and tradition of the right, and its role in establishing the structural limitations of federalism. *See id.* 486-87 (arguing that strict scrutiny should be applied to the right to travel because of its longtime acceptance by the Court, its status as a fundamental right, and its support of the system of federalism); Tribe, *supra* note 129, at 123 ("[A] suitable structural analysis might convincingly show that this right to travel is fundamental with respect to judicial scrutiny of government obstacles to unfettered personal mobility, whether the right to travel is viewed as a means of exploring alternative legal, cultural, and physical environments or is regarded as an aspect of the citizen's right to select a political home.").

240 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022) (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

241 *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity.").

242 142 S. Ct. at 2277.

243 *See supra* notes 102–06 and accompanying text.

244 *See supra* notes 48–69 and accompanying text (describing state abortion bans).

to travel because the aider or abettor would not necessarily have traveled in order to facilitate the abortion. However, extraterritorial enforcement of anti-abortion laws against such persons might violate a different constitutional provision: the Commerce Clause of Article I, section 8.

To some extent, the holding in *Edwards*, discussed above, may offer protection to those who aid travelers in procuring an abortion.[245] Recall that in *Edwards* the statute at issue did not target the traveler, but rather made it a misdemeanor for any "person, firm or corporation" to help bring an indigent person to the state.[246] Because *Edwards* based its analysis on the Commerce Clause, as opposed to the Privileges and Immunities Clause or the personal right to travel, the Commerce Clause may be better suited to defend against extraterritorial regulation of abortion with regard to these "aiders and abettors."

The Dormant Commerce Clause is an implied restriction on the States that is derived from the Commerce Clause of Article I. The Constitution's Commerce Clause gives the U.S. Congress sole authority to "regulate Commerce . . . among the several States."[247] The U.S. Supreme Court has long recognized that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce."[248] In other words, the Commerce Clause restricts states' ability to directly or indirectly regulate interstate commerce because the Federal Constitution allocates that power solely to Congress. Although not explicitly stated in the Commerce Clause, this restriction lies "dormant" until a state violates it.

The Dormant Commerce Clause idea has been applied to a wide variety of state actions, including civil and criminal statutes.[249] Irrespective of the criminal or civil nature of the regulation, the Court's Dormant Commerce Clause analysis proceeds along similar lines, though this analysis has "not always been easy to follow."[250] Generally, the Court has employed a two-tiered approach.

The first level of inquiry seeks to eliminate economic protectionism among the states. As the Court has made clear, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is

245 *See supra* notes 202–07 and accompanying text.

246 Edwards v. California, 314 U.S. 160, 171 (1941).

247 U.S. CONST. art I, § 8, cl. 3.

248 Healy v. Beer Inst., Inc., 491 U.S. 324, 326 n.1 (1989).

249 *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DEN. L. REV. 255, 258-59 (2017) (collecting cases). As others have noted, for better or worse, "[t]he Commerce Clause has been 'generally ignored' in the civil choice-of-law context." Bradford, *supra* note 116, at 148 (quoting Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 807 (1971)). Choice of law doctrines are further examined in Part IV.B., *infra*.

250 CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987).

to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."[251] In such cases, the Court will apply a "virtually *per se* rule of invalidity."[252] The Constitution's prohibition on economic protectionism among the states was born from the failures of the Articles of Confederation to prevent interstate trade wars that arose after the Revolutionary War.[253] This type of state regulation, however, is unlikely to arise in the abortion context, as anti-abortion laws will likely not have either the purpose or effect of advancing economic protectionism.[254] Thus, in most if not all cases, extraterritorial abortion statutes will need to be reviewed under the Dormant Commerce Clause's second test.

If a state law is not discriminatory and thus not virtually per se invalid, then courts "examine[] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."[255] As the Court stated in *Pike v. Bruce Church, Inc.*,[256] "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Thus, courts undertake a case-specific inquiry to determine whether "a legitimate local purpose is found" in the state's regulation and whether such an interest "could be promoted . . . with a lesser impact on interstate activities."[257] The relevant question is "one of degree."[258] Where the burden on interstate commerce is great, the local interest of the state must also be great and must be of a nature that cannot be promoted by less burdensome means.[259]

Known sometimes as a "burden review" or application of the "*Pike* doctrine,"[260] the Court's inquiry is often deferential to the interests of the

---

251 Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

252 City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

253 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018); *see also Healy*, 491 U.S. at 335-36 (noting that the guiding principles of the Court's Dormant Commerce Clause jurisprudence "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres").

254 *See* Bradford, *supra* note 116, at 149; Dellapenna, *supra* note 172, at 1691-92.

255 *Brown-Forman*, 476 U.S. at 579.

256 397 U.S. 137, 142 (1970).

257 *Id.*

258 *Id.*

259 *Id.*; *see also* Raymond Motor Transp. v. Rice, 434 U.S. 429, 441 (1978) ("Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.").

260 Francis, *supra* note 249, at 266.

states, particularly when the state law at issue is aimed at health and safety.[261] Because of this deference, some scholars have dismissed the possibility that the Dormant Commerce Clause could ever be used successfully as a basis for challenging most extraterritorial anti-abortion laws.[262] We believe the next few years of abortion-related litigation is likely to test this theory, both with regard to drug manufacturers and to abortion providers.

Take, for example, Mississippi's attempt to ban mifepristone, one of the FDA-approved medications for abortion.[263] GenBioPro, the generic manufacturer of the drug, sued to enjoin enforcement of the state's ban, arguing that it excessively burdens interstate commerce.[264] Although the Mississippi statute does not favor domestic production of mifepristone over out-of-state producers,[265] it is, in effect, a ban on all abortion medications, including mifepristone.[266]

Such total bans on articles of commerce have faced mixed results under the Dormant Commerce Clause.[267] Challenges to such laws under the

---

261 *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956 (1982) ("[A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens . . . is at the core of its police power . . . . [W]e have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other."); City of Phila. v. New Jersey, 437 U.S. 617, 623-24 (1978) ("[I]ncidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.").

262 *See* Dellapenna, *supra* note 172, at 1691-92 (concluding that prohibitions on abortion would be upheld as outweighing their effects on interstate commerce due to the "[s]pecial weight" given to local health and safety concerns).

263 MISS. CODE ANN. § 41-41-45(1) (West 2022). Mississippi's attempt to ban mifepristone and the federal preemption implications of the FDA's authorization are discussed in greater detail in Part III.A. *infra*.

264 *See* Complaint at 28, GenBioPro, Inc. v. Dobbs, No. 20-CV-00652 (S.D. Miss. filed Oct. 9, 2020) [hereinafter GenBioPro's Complaint] (alleging that Mississippi's restrictions on mifepristone interfere with the FDA's uniform system of regulation and harm out-of-state patients seeking health care providers in the state).

265 *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (noting that state statutes that "favor in-state economic interests over out-of-state interests" are usually invalidated); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342 (2007) (finding that local waste ordinances that "treat[] all private companies exactly the same" are not discriminatory).

266 MISS. CODE ANN. § 41-41-45(1) (West 2022).

267 In some of these cases, the Court found that by banning the in-state sale of an article in commerce, states were implicitly favoring in-state producers while burdening out-of-state producers on the basis of the article's origin. *See, e.g.*, City of Phila. v. New Jersey, 437 U.S. 617, 629 (invalidating under the Commerce Clause New Jersey's ban on imports of waste to "slow[] the flow of refuse into New Jersey's remaining landfill sites" because it "saddle[d] those outside the State with the entire burden" of accomplishing the New Jersey legislature's goal); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 337, 350-51 (1977) (holding that North Carolina discriminated against Washington apple producers by prohibiting apples displaying out-of-state grades). Some circuit courts have found that total bans on products that do not distinguish between products based on their state of origin are not discriminatory and therefore do not violate the Dormant Commerce Clause. *See, e.g.*, Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry, 476 F.3d 326, 335-37

doctrine have been most successful when the state statutes at issue regulate a market that requires national uniformity, although those cases have largely focused on regulation of the vehicles used in interstate commerce—trucks and trains—rather than the actual products being sold.[268] Nevertheless, there are compelling arguments that the market for federally-approved medications requires such uniformity and that excessive state regulation could disrupt that uniformity, leading to a successful Commerce Clause challenge.[269]

In an early case, *Schollenberger v. Pennsylvania*,[270] the U.S. Supreme Court held that states cannot rely on their police powers to enforce an "absolute [criminal] prohibition of an unadulterated, healthy, and pure article" of commerce. At issue in the case was a Pennsylvania statute banning the import or sale of oleomargarine (margarine), which was at the time "newly invented."[271] Even though Pennsylvania's regulation of margarine was based

(5th Cir. 2007) (upholding Texas's ban on the production and sale of horsemeat because it "treats both intrastate and interstate trade of horsemeat equally by way of a blanket prohibition"); Pacific Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994) (rejecting arguments that Washington's import ban on shark fins is a per se violation of the Dormant Commerce Clause because such a ban "simply effectuates a complete ban on commerce in certain items [and therefore] is not discriminatory"). *But see* Dorrance v. McCarthy, 957 F.2d 761, 765 (10th Cir. 1992) (adopting a per se rule of invalidity with regard to import bans because they "discriminate[] against interstate commerce on [their] face"). The U.S. Supreme Court's recent decision in *National Pork Producers Council v. Ross* may give further support to these circuits, but the relevant portion of the decision calling for limits on the use of the *Pike* doctrine only received the votes of three justices. *See* 143 S. Ct. 1142, 1159-61 (2023) (plurality opinion) (Gorsuch, J., joined by Thomas, J. and Barrett, J.) (arguing that judges cannot invalidate nondiscriminatory state regulations based on an analysis of the cost to out-of-state actors and the benefits to the state).

268 *See* Ray Motor Transp., Inc. v. Rice, 434 U.S. 429, 443-45 (1978) (concluding that Wisconsin's prohibition on trucks longer than fifty-five feet impermissibly burdened interstate commerce); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959) (finding that Illinois' regulation of mudguards was "one of those cases . . . where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce"); S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 779-80 (1945) (rejecting Arizona's argument that its police powers enabled it to regulate the size of rail cars because "a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation").

269 *See, e.g.*, Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L. REV. 845, 849, 860 (2017). After all, Congress has already passed several laws regulating health products based on the need for national uniformity. *See* 21 U.S.C. § 379r (providing for national uniformity over nonprescription drugs); 21 U.S.C. § 343-1 (requiring national uniformity in nutrition labeling). Arguments in favor of national uniformity of FDA-approved medications tend to sound in preemption rather than in the Dormant Commerce Clause. *See, e.g.*, James M. Beck, Phillip W. Danziger, Sarah B. Johansen & Andrew R. Hayes, *Federal Preemption and the Post-*Dobbs *Reproductive Freedom Frontier*, 78 FOOD & DRUG L.J. 109, 134-39 (2023) (making a preemption argument). Nevertheless, excessive state-level regulation of prescription drugs also creates significant Dormant Commerce Clause concerns.

270 171 U.S. 1, 13 (1898).

271 *Id.* at 6. This was Pennsylvania's characterization of margarine. The Court questioned this characterization because margarine's effects on health (mostly beneficial) were well known at the time, so its purported "newness" was not an adequate justification for Pennsylvania's ban. *See id.* at 14-15.

on health and safety, this justification was deemed inadequate to support the Commonwealth's "absolute prohibition" on margarine where health and safety concerns could be addressed in a more tailored, albeit more difficult, manner.[272]

Schollenberger can be seen as a precursor to the *Pike* balancing test for reviewing absolute prohibitions that are not discriminatory.[273] To the extent Mississippi's trigger law, and others like it, constitute an absolute prohibition on medication abortion pills, these restrictions would likely place a heavy burden on interstate commerce with respect to an article that is already regulated and approved at the federal level.[274] Furthermore, judicial approval of banning or second-guessing FDA-approved medications could significantly disrupt the national scheme for medication abortions, which the FDA has administered for over twenty years.[275] This burden on interstate

272 *Id.* at 14-15.

273 *See* Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (describing the balancing test for local laws with potentially discriminatory effects).

274 *See infra* notes 356–70 and accompanying text. To be sure, Mississippi's trigger law only creates a ban on medication abortions by prohibiting *all* abortions, including those performed via medication. *See* MISS. CODE ANN. § 41-41-45(1) to (2) (West 2022). This may be relevant because some circuit courts have interpreted the *Pike* balancing test to require that a regulation's burden on interstate commerce be *greater* than its regulation on intrastate commerce in order to invalidate it. *See* Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 502 (5th Cir. 2004) (holding that wastewater flow control ordinances survived the *Pike* test because they burdened intrastate waste contracts at least as much as interstate contracts); Automated Salvage Transp., Inc. v. Wheelabrator Env't Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998) ("[T]he minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it must have a disparate impact on interstate commerce."). Although a total ban on medication abortions in Mississippi may indicate equal burdens on inter- and intrastate commerce, the ban's effect should be viewed in light of the need for national uniformity in the regulations of prescription drugs. *See, e.g.*, Patricia J. Zettler, Annamarie Beckmeyer, Beatrice L. Brown & Ameet Sarpatwari, *Mifepristone, Preemption, and Public Health Federalism*, 9 J. L. & BIOSCIENCES 1, 19 (2022) (speaking of the need for national uniformity in the context of preemption); *cf.* Morgan v. Virginia, 328 U.S. 373, 386 (1946) (ruling against a Virginia statute that required segregation of interstate bus travelers on the basis of race in light of the "balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel").

275 *See infra* notes 356–70 and accompanying text; GenBioPro, Inc.'s Memorandum in Support of Its Motion for Leave to File Amended Complaint at 3, GenBioPro, Inc. v. Dobbs, No. 20-CV-00652 (S.D. Miss. filed July 21, 2022) [hereinafter GenBioPro's Amended Complaint] (arguing that Mississippi's Trigger Law amplifies a conflict between state regulations and "the FDA's intended access to and approved regimen for mifepristone"); *see also* Rachel Treisman, *How an Abortion Pill Ruling Could Threaten the FDA's Regulatory Authority*, NPR (Apr. 11, 2023, 2:30 PM), https://www.npr.org/2023/04/11/1169194827/abortion-pill-mifepristone-fda-authority-regulation [https://perma.cc/U3JX-KXT2] (noting that the FDA has approved and reevaluated mifepristone since 2000); Bobby Caina Calvan & Ken Miller, *Competing Abortion Pill Rulings Sow Broad Alarm, Confusion*, ASSOCIATED PRESS (Apr. 8, 2023, 5:32 PM), https://apnews.com/article/abortion-pill-ruling-mifepristone-misoprostol-5fd29a4678e7678a6538054eb75b6d15 [https://perma.cc/37QL-54HR] (observing that decisions by federal judges limiting the availability of abortion pills "are sowing alarm and confusion").

commerce is even greater if, for example, a state's law also banned even the *marketing* of medication abortions as a form of aiding and abetting illegal conduct.[276] Thus, although not discriminatory and presumably confined within the state's borders, it may be shown that state bans on FDA-approved medication significantly burden interstate commerce, especially considering the FDA's approval and national scheme for prescription drugs. This argument, of course, would be in addition to the possibility that federal law actually preempts the state law in this context, an argument that is discussed in greater detail in Part III.

Even without a pre-existing national regulatory regime, the U.S. Supreme Court has been critical of any state extraterritorial regulation that "exceeds the inherent limits of the enacting State's authority."[277] This limitation on extraterritorial state law is a natural extension of the Commerce Clause: the Commerce Clause allows only *indirect* regulation of interstate commerce. Where states regulate actions that are wholly outside of their borders they are *directly* regulating across state lines.[278] Although the U.S. Supreme Court has never recognized extraterritorial regulation as a distinct class of regulations for purposes of the Dormant Commerce Clause, nine of the thirteen circuit courts have.[279] These nine circuits have indicated that

276 *See* GenBioPro's Amended Complaint at 6-7 (acknowledging that the Mississipi ban forecloses selling, but not marketing, abortion pills). Mississippi's trigger law does not specifically subject to criminal punishment those who "aid and abet," but others do. *See, e.g.*, KY. REV. STAT. ANN. § 311.772 (West 2019) (making it a criminal offense for any person to knowingly "[a]dminister to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of *causing or abetting* the termination of the life of an unborn human being" (emphasis added)). Nevertheless, it is typical for states to make it a crime to aid and abet another person to commit a crime and thus medication abortion manufacturers and marketers may be subject to criminal penalties even if the statute does not explicitly say so. *See* Sequoia Carrillo & Pooja Salhotra, *Colleges Navigate Confusing Landscapes as New Abortion Laws Take Effect*, NPR (July 19, 2022), https://www.npr.org/2022/07/19/1112014281/abortion-laws-college-campus [https://perma.cc/E7UY-34G7].

277 Healy v. Beer Inst., Inc., 491 U.S. 324, 326, 336 (1989) (invalidating a Connecticut statute that required out-of-state beer shippers to affirm that their prices are no higher than prices they offer in neighboring states); *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582-83 (1986) (striking a New York statute that had the "practical effect" of setting liquor prices in other states); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (finding an Illinois statute regulating tender offers by out-of-state corporations unconstitutional due to its "sweeping extraterritorial effect" on out-of-state shareholders); Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 521 (1935) (holding unconstitutional New York's requirement that out-of-state milk producers abide by the same minimum prices charged to in-state distributors as was required of in-state milk producers).

278 *See* Francis, *supra* note 249, at 267-68 ("[A] state measure purporting to affect activities wholly outside the state . . . may be struck down.").

279 *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 645-46 (6th Cir. 2010) (joining the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits in recognizing extraterritoriality as a distinct tier of interstate commerce regulation, or at least as a category distinct from the usual *Pike* balancing test for nondiscriminatory regulation).

extraterritorial regulation is subject to the same or similar scrutiny as discriminatory regulation—that is, they are virtually per se invalid.[280]

In order to determine whether a state statute is extraterritorial and therefore highly likely to be declared invalid, the Court has repeatedly held that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[281] A statute that has such a "practical effect" on out-of-state commerce "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[282] Furthermore, the statute in question is not viewed in isolation. Instead, courts consider whether the challenged law "may interact with the legitimate regulatory regimes of other States" and what would result "if not one, but many or every, State adopted similar legislation."[283] This latter concern is a natural factor for courts to consider, even if hypothetical, because the Commerce Clause was intended to address the "central concern of the Framers" that state "tendencies toward economic Balkanization" would lead to interstate fission that would threaten the Union as a whole.[284] Accordingly, the Framers designed a federal system that preserved Congress's supremacy over interstate commerce, and thereby limited state autonomy to promulgate

280 *See* All. of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) ("A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state outstrips the limits of the enacting state's constitutional authority and, therefore, is per se invalid."); Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 219 (2d Cir. 2004) (characterizing extraterritorial regulation as "invalid per se under the Commerce Clause"); Cloverland-Green Spring Diaries, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 261 (3d Cir. 2006) (stating that discriminatory and extraterritorial regulations are subject to "heightened scrutiny" that "renders all but the most unusual statute invalid"); Carolina Truck & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 492 (4th Cir. 2007) (including in the virtual per se invalidity rule "those [statutes] with forbidden extraterritorial reach"); *Int'l Dairy Foods Ass'n*, 622 F.3d at 646 ("[A] state regulation is 'virtually per se invalid' if it is *either* extraterritorial *or* discriminatory in effect."); Dean Foods Co. v. Brancel, 187 F.3d 609, 616 (7th Cir. 1999) (noting that Seventh Circuit cases regarding extraterritorial regulation "have hewed to the per se rule" of invalidity under the Commerce Clause); Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is per se invalid when it has an 'extraterritorial reach.'" (quoting *Healy*, 491 U.S. at 336)); Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638, 640 (9th Cir. 1993) (finding that a Nevada statute that is "directed at interstate commerce and only interstate commerce" "violates the Commerce Clause per se"); KT&G Corp. v. Att'y Gen. of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008) ("[A] statute will be invalid per se if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." (quoting Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 168 (2d Cir. 2005))); Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002) ("In no event can the [state] law directly regulate extraterritorially.").

281 *Healy*, 491 U.S. at 336.

282 *Id.*

283 *Id.*

284 Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

extraterritorial regulation, while also protecting the states' local autonomy from usurpation by the extraterritorial regulation of other states.[285]

A recent case from the Eighth Circuit demonstrates how domicile- or residency-based regulation can impermissibly violate the extraterritoriality principle of the Commerce Clause by regulating wholly out-of-state conduct. In *Styczinski v. Arnold*,[286] the court struck down a Minnesota law requiring "any person" that participates in "Minnesota transactions" involving bullion (i.e., precious metals) to register with the Minnesota Commissioner of Commerce.[287] A "Minnesota transaction" is defined by the state statute as one that, amongst other things, is made between a "dealer and a consumer who lives in Minnesota."[288] As the court noted, this expansive definition, "under a plain reading of the statutory scheme," would include any transaction between a dealer and a Minnesota resident, even when the transaction occurs wholly out of state.[289] In other words, Minnesota's regulation attaches to all of its residents, even when those residents are out of state, and requires all those transacting with Minnesota residents to abide by Minnesota's laws, regardless of where the transaction takes place. The Eighth Circuit found that the extraterritorial reach of the statute was too broad. According to the court, "while Minnesota residents certainly subject themselves to certain obligations by residing in Minnesota, this does not give the State *carte blanche* to regulate all conduct of residents regardless of where it occurs."[290] A residency-based abortion ban would have the same extraterritorial reach and therefore should equally fail under the Eighth Circuit's extraterritoriality standard.

In a case more centered on abortion, *Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Nixon*,[291] the Supreme Court of Missouri reviewed a Missouri statute that prohibited anyone from "aid[ing] or assist[ing] a minor in obtaining an abortion without parental consent."[292] The statute in question also prohibited the affirmative defense that the abortion was "performed or induced pursuant to a consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or

285 *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) ("The law has had to respect a cross-purpose [of the Commerce Clause] as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy."); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be *equally free* to engage in any activity that their citizens choose for the common weal." (emphasis added)).

286 46 F.4th 907 (8th Cir. 2022).

287 *Id.* at 910-11.

288 *Id.* at 910.

289 *Id.* at 913.

290 *Id.* at 914.

291 220 S.W.3d 732 (Mo. 2007) (en banc).

292 *Id.* at 736 (citing MO. REV. STAT. § 188.250 (West 2005)).

induced."[293] The Missouri Supreme Court rejected the extraterritorial reach of the statute:

> Of course, it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri, and section 188.250 cannot constitutionally be read to apply to such wholly out-of-state conduct. Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect.[294]

The *Styczinski* and *Nixon* decisions suggest how the Dormant Commerce Clause might limit the application of extraterritorial anti-abortion statutes. The courts in both cases adopted a virtually per se rule invalidating extraterritorial regulation, as evidenced by the lack of any *Pike* or *Pike*-like balancing test.[295] This approach bypasses the difficult task of determining whether the state's interest in its regulation is outweighed by the burden placed on interstate commerce—a task that *Dobbs* makes even more complicated.[296] And significantly, the courts' decisions regarding these

---

293 *Id.* at 743 (quoting MO. REV. STAT. § 188.250.3 (West 2005)).

294 *Id.* at 742. In order to save the statute from violating the extraterritoriality principle of the Dormant Commerce Clause, the court, as it did elsewhere in the opinion, applied a "narrowing construction" of the statute to hold that it is valid "only to the extent that it provides that the legality of the conduct in the state or place where the abortion is performed or induced is no defense to a violation of the statute based on *conduct occurring in Missouri.*" *Id.* at 743 (emphasis added). The court was somewhat unclear as to whether its decision was based on the Commerce Clause or the Due Process Clause of the Fourteenth Amendment, which makes application of the decision challenging. *See* Cohen et al., *supra* note 24, at 29 ("*Nixon* . . . gives no clear guidance as to what is 'conduct that occurs wholly outside' the state, and has never been cited by any court for its discussion of extraterritorial application of state law."). The relevant section of the *Nixon* opinion is titled "Commerce Clause and Due Process," and the Court summarizes Planned Parenthood of Kansas's arguments under both clauses in the same section. *Nixon*, 220 S.W.3d at 742. As Judge Posner has explained, however, the concerns of the two clauses are distinct. The Due Process Clause governs the relationship between the State and the citizen and "protects persons from unreasonable burdens imposed by government, including extraterritorial regulation that is disproportionate to the governmental interest." Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668 (7th Cir. 2010). The Dormant Commerce Clause, on the other hand, "protects interstate commerce from being impeded by extraterritorial regulation," and such extraterritorial effect is compounded when a state's law is imposed "on transactions in another state," rather than solely within the enacting state. *Id.* These distinctions are important as they may lead to divergent results depending on the basis of the constitutional protection. *See, e.g.*, Comptroller of Md. v. Wynne, 575 U.S. 542, 557 (2015) ("Maryland's raw power [under the Due Process Clause] to tax its residents' out-of-state income does not insulate its tax scheme from scrutiny under the dormant Commerce Clause."). Nevertheless, the court in *Nixon* made no effort to distinguish between the Due Process Clause and the Dormant Commerce Clause, and there is nothing in the opinion that would suggest a different outcome if the basis for its decision were one clause versus another. *See* Nixon, 220 S.W.3d at 742-43.

295 *Nixon*, 220 S.W.3d at 742-43; *Styczinski*, 46 F.4th at 915 n.4 ("Because we find [Minnesota's statute] unconstitutional under the doctrine of extraterritoriality, it is unnecessary for us to determine whether [the statute] also imposes an undue burden on interstate commerce.").

296 *See infra* notes 332–35 and accompanying text.

extraterritorial statutes do not rely on any case or doctrine that might be called into question following *Dobbs*.[297]

Although the extraterritoriality principle may be sufficient to doom extraterritorial abortion laws, the related concerns regarding inconsistent regulation may also prevent anti-abortion states from achieving their goals. As the U.S. Supreme Court has made clear, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[298] The concern here is specifically that imposing liability extraterritorially on a person or entity in another state will cause the citizens of other states to be subject to conflicting legal obligations regarding the same act.[299]

Furthermore, the idea of inconsistent state regulation does not necessarily require that two different states impose literally opposite obligations. Instead, such regulation is potentially problematic whenever "nonuniform state regulations might impose compliance costs that are so severe that they counsel against permitting the states to regulate a particular subject matter."[300] The question is therefore whether compliance with the extraterritorial regulation would make it "effectively impossible . . . to engage in interstate commerce."[301] For example, in *Legato Vapors, LLC v. Cook*,[302] the Seventh Circuit found that Indiana's "remarkably specific security requirements" for e-cigarette manufacturing facilities could not be applied to out-of-state producers in light of the "obvious" concerns of similar, contrary state regulations and the availability of less intrusive alternatives to support Indiana's legislative goals.[303] As the court explained, where "direct regulation of out-of-state facilities and services has *effects* that are not comparable to mere incidental effects of a facially neutral law regulating labels," such state regulation risks controlling the conduct of out-of-state businesses and

297 *Nixon*, 220 S.W.3d at 742-43; *Styczinski*, 46 F.4th at 913-15. In fact, with regard to *Nixon*, the U.S. Supreme Court has long recognized that parental consent requirements for minors receiving an abortion are constitutional, even under *Roe*'s viability standard and before *Casey*'s undue burden standard. *See* H.L. v. Matheson, 450 U.S. 398, 407-10 (1981) (discussing several previous decisions in which the Court held that parental notice and consent requirements did not violate the constitutional rights of their minor children).

298 Healy v. Beer Inst., Inc., 491 U.S. 324, 336-37 (1989); *see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987) (noting the various cases in which the U.S. Supreme Court invalidated statutes that adversely affected interstate commerce through inconsistent regulation).

299 Bradford, *supra* note 116, at 149-50 (discussing an example of how a doctor providing abortion services to a patient could face inconsistent obligations if the doctor's state of residence has different requirements than the patient's state of residence).

300 Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806-07 (2001).

301 *Id.* at 807.

302 847 F.3d 825 (7th Cir. 2017).

303 *Id.* at 834-35.

therefore impermissibly extends the state's authority beyond its boundaries.[304]

As applied to out-of-state doctors performing an abortion, extraterritorial state regulation may likewise present problems of inconsistent regulation. First, pro-access states may adopt statutes that explicitly require healthcare providers who already provide abortion care to provide these services to out-of-state residents.[305] Such a requirement could be accomplished, for example, by prohibiting healthcare providers from denying abortion services based on the patient's state of residence.[306] If such measures were taken by pro-access states, a direct conflict would ensue under either the "irreconcilable"[307] or "practical effect[s]" understanding of what constitutes inconsistent regulation.[308] This is because complying with the in-state prohibition on discrimination against out-of-state patients would *require* that the healthcare provider violate the extraterritorial prohibition on performing abortions on residents of the anti-abortion state (and vice versa).

Second, even absent pro-access states requiring abortion services in this context, a legal regime that allows the law of the patient to travel with the patient to an out-of-state medical provider would render medical care exceedingly difficult and expensive. Imagine a large hospital with a national or international reputation. If liability could be imposed on medical providers based on the law of the patient's home jurisdiction, those medical providers would potentially need to adjust their pricing, their risk pools, their standards

---

304 *Id.* at 834 (emphasis added).

305 Forty-six states currently have statutes that, to varying degrees, allow healthcare providers to refuse to perform abortions, and federal law prohibits state and private entities from discriminating against these providers based on that decision. *See Refusing to Provide Health Services*, GUTTMACHER INST. (Aug. 31, 2023), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [https://perma.cc/6FUV-Z2SR] (compiling data about each state's refusal policy). Because these providers do not offer abortion services to begin with, any requirement imposed on physicians who provide abortion services presumably would not apply to them.

306 Such a statute, which mirrors anti-discrimination statutes, is easily imaginable for state healthcare providers, given that some state laws already prohibit the state from discriminating against, denying, or interfering with the exercise of the right to choose, where such a right is recognized. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2599-aa.3 (McKinney 2019) ("The state shall not discriminate against, deny, or interfere with the exercise of the rights set forth in this section in the regulation or provision of benefits, facilities, services or information."); CAL. HEALTH & SAFETY CODE § 123466(a) (West 2023) ("The state shall not deny or interfere with a woman's or pregnant person's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman or pregnant person.").

307 Instructional Sys., Inc. v. Comput. Curriculum Corp., 35 F.3d 813, 826 (3d Cir. 1994) ("On the other hand, state laws which merely create additional, but not irreconcilable, obligations are not considered to be 'inconsistent' for this purpose."); State v. Heckel, 24 P.3d 404, 412 (Wash. 2001) (en banc) (same).

308 Legato Vapors, LLC, v. Cook, 847 F.3d 825, 830-31 (7th Cir. 2017) ("Where the issue is the extraterritorial effect of a law, the focus is on its "practical effect.").

of care, and their informed consent procedures for every patient, depending on where the patient was from.

This is particularly problematic given that the practice of medicine is generally regulated on a state-by-state basis.[309] For example, if Maryland places limits on malpractice recoveries in order to lower medical costs but its medical providers are nevertheless exposed to liability under the laws of states without such controls, those medical providers will be forced to increase their fees in Maryland to cover the cost of expected liabilities to out-of-staters. As Judge Stephen Williams has recognized, "[t]his result thwarts not only the ability of each state to establish a policy and secure whatever benefits it may offer, but also the system's capacity to conduct and evaluate experiments in liability policy."[310] Indeed, "[f]or medical providers to screen out incoming patients [from other states] would completely destroy individuals' ability to seek out expert medical help throughout the United States."[311] This is precisely the sort of Balkanization with which the framers of the Constitution were principally concerned and against which the Dormant Commerce Clause protects.[312]

The U.S. Supreme Court recently muddied Dormant Commerce Clause jurisprudence further in *National Pork Producers Council v. Ross*.[313] There, the Court considered a California law that prohibits the sale of pork products within the state if those products do not meet certain requirements for how pigs, and specifically breeding pigs called "sows," are raised and housed.[314] Petitioners argued that because over 99% of the pork consumed in California comes from out-of-state producers, the California law was per se invalid under the extraterritoriality principle.[315] And despite the State's claim that the law was a health and safety measure, petitioners argued that the law was

309 *See Introduction*, *Guide to Medical Regulation in the United States*, FED'N OF STATE MED. BDS., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/introduction/#:~:text=To%20protect%20the%20public%20from%20the%20unprofessional%2C%20improper%20and%20incompetent,boards%20to%20regulate%20th [https://perma.cc/EA9M-84GB] (last visited Sept. 19, 2023) (explaining that each state has adopted its own Medical Practice Act to "define[] the requirements for the practice of medicine within their borders").

310 Bledsoe v. Crowley, 849 F.2d 639, 646 (D.C. Cir. 1988) (Williams, J., concurring).

311 *Id.* at 647.

312 *See* Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (noting that "a central concern of the Framers" when writing the Commerce Clause was that "the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

313 143 S. Ct. 1142 (2023).

314 *See id.* at 1149 (describing the California law).

315 *See* Brief for Petitioners at 21, 27, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) (arguing that, because of this almost entirely out-of-state production, the California law in effect regulated wholly out-of-state conduct in violation of the Dormant Commerce Clause).

more accurately classified as a moral or ethical regulation that could not be applied extraterritorially.[316] Thus, the connection to the abortion wars was apparent, and *amici* noted that if California's law were allowed to stand, states could impose economic barriers on the basis of other states' abortion policies as well.[317] At oral argument, several of the Justices inquired about how this case may relate to various contentious moral and policy issues that divide the states,[318] and differences in abortion policy was surely one of the contexts they had in mind. At one point, Justice Kagan rhetorically asked, "do we want to live in a world where we're constantly at each others' throats and, you know, Texas is at war with California and California at war with Texas?"[319]

Ultimately, the Court reached a fractured result that leaves the future scope of the Dormant Commerce Clause unclear.[320] All of the justices seemed to agree that there is no "almost *per se*" standard of invalidity under the extraterritorial principle.[321] But that is where the agreement between the justices ended. A majority of the Court allowed the California law to stand, but for different reasons: Justices Gorsuch, Thomas, and Barrett dispensed with *Pike* balancing and upheld the law because it is not directly discriminatory or protectionist[322]; Justices Gorsuch, Thomas, Kagan, and

316 See *id.* at 40 ("California's interest in preventing perceived animal cruelty is not a legitimate reason for regulating the production of goods outside its borders.").

317 *See* Brief of Indiana & 25 Other States at 33, *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) (No. 21-468) (giving examples of hypothetical "trade wars" that could ensue among the states if California's law were upheld, including a state law prohibiting the sale of products by producers who do not pay for their employees' abortion care or birth control).

318 *See, e.g.*, Transcript of Oral Argument at 99-100, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) (Kavanaugh, J.) ("[W]hat about a law that says you can't sell fruit in our state if it's produced–handled by people who are not in the country legally? . . . [S]o minimum wage, same answer?"); *Id.* at 102-03 (Alito, J.) ("Why doesn't that apply equally to . . . a law that says you can't bring any products into our state if they were produced by employees who did not have the right to . . . not to join a union?"); *Id.* at 130-31 (Roberts, C.J.) (asking why the Court should not be just as sensitive to other states' moral concerns about facilitating the availability of low-cost protein as they should be to California's moral concerns regarding the production process).

319 *Id.* at 95.

320 For one scholar's attempt to explain the outcome, see Josh Blackman, *How Did Justice Gorsuch Lose a Majority in* National Pork Producers*?*, REASON (May 12, 2023, 5:54 PM), https://reason.com/volokh/2023/05/12/how-did-justice-gorsuch-lose-a-majority-in-national-pork-producers/ [https://perma.cc/5P7F-8FQX].

321 *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1154-57 (2023) (majority opinion) (rejecting the petitioners "almost *per se*" argument); *id.* at 1167, 1170-71 (Roberts, C.J., concurring in part and dissenting in part) ("I also agree with the Court's conclusion that our precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."). It is unclear whether the justices would rule the same way if confronted with an *overtly* extraterritorial law rather than a state law that only bans in-state sales of a product.

322 *Id.* at 1153 (plurality opinion) (adopting the position taken in Petitioner's brief that "the dormant Commerce Clause . . . bar on protectionist state statutes that discriminate against interstate commerce . . . is not in issue here."). Although she argued against applying *Pike* balancing in

Sotomayor applied *Pike* balancing and concluded that petitioners did not sufficiently establish that California's law actually imposed "substantial burdens" on interstate commerce.[323] The dissent, however, also applied *Pike* and concluded that petitioners *did* establish such a "substantial burden."[324] Thus, there was no controlling reasoning for the majority, and its precedential effect is therefore uncertain.[325]

Significantly, however, it does appear that six justices continue to apply the *Pike* balancing test to state regulations that have an extraterritorial effect even if the regulations do not directly discriminate against out-of-state actors. Thus, it seems likely that a majority of the Court would apply *Pike* balancing, even in the abortion context.[326] Under *Pike*, the question is whether the burden imposed by a state law on interstate commerce is "clearly excessive in relation to the putative local benefits."[327]

State regulation of healthcare services provided out-of-state just because the patient is one of its citizens seems quite clearly to be an excessive burden

---

principle, Justice Barrett would have sided with petitioners had the Court solely relied on *Pike*. *Id.* at 1166-67 (Barrett, J., concurring in part).

323 *Id.* at 1161-63 (plurality opinion); *see also id.* at 1165-66 (Sotomayor, J., concurring in part) (defending *Pike* balancing). Justice Gorsuch is grouped under both rationales because he authored the majority opinion. Justice Thomas also joined both parts of the opinion rejecting and then applying *Pike* balancing, though he has strongly supported abandoning *Pike* balancing in the past. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619-20 (1997) (Thomas, J., dissenting) (arguing that the *Pike* balancing rule "invites [the Court], if not compels [the Court], to function more as legislators than as judges").

324 *Nat'l Pork Producers*, 143 S. Ct. at 1169-72 (Roberts, C.J., concurring in part and dissenting in part). In a nod to the more conservative members of the majority, Chief Justice Roberts stated that he "certainly appreciate[s] the concern" raised by them regarding *Pike* balancing's seemingly "impossible judicial task," but he responded by arguing that "sometimes there is no avoiding the need to weigh seemingly incommensurable values." *Id.* at 1168.

325 Justice Kavanaugh's separate opinion, which no other justice joined, was the only one to address the propriety of regulating economic transactions due to moral or ethical policy disputes between the states. *See id.* at 1172-76 (Kavanaugh, J., concurring in part and dissenting in part) (labeling Proposition 12 as an attempt to impose California's moral and policy preferences regarding pork production and pig farming onto the rest of the United States). Justice Kavanaugh's opinion specifically addressed restrictions on goods sold by producers that "pay for employees' . . . abortions" and cautioned that "[i]f upheld against all constitutional challenges, California's novel and far-reaching regulation could provide a blueprint for other States." *Id.* at 1174. Although he agreed with the Chief Justice that applying *Pike* is appropriate and that petitioners should prevail under that test, he also suggested, but did not fully endorse, that a similar statute regulating other moral issues could violate other provisions of the Constitution, such as the Import-Export Clause, Privileges and Immunities Clause, and the Full Faith and Credit Clause. *Id.* at 1173-76; *see also* Joondeph, *supra* note 134 (explaining the split decision in *National Pork Producers* and the possible Implications of the case).

326 It should be noted that none of the justices addressed the threat of inconsistent regulation. *See Nat'l Pork Producers*, 143 S. Ct. 1142. However, it seems likely that the Court would treat the concern about inconsistent regulation as simply a factor to be weighed in establishing the "burden" under *Pike*.

327 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

under this test. After all, the due diligence doctors would need to undertake to ensure that providing abortion services to out-of-state patients would not subject them to criminal or civil liability "would be enormous."[328] Doctors would be forced to screen each patient and potentially take additional actions to confirm the patient's state of residence, consult hospital lawyers to determine potential liability, and, if their initial assessment is wrong, expend resources defending themselves against out-of-state prosecution.[329] These costs are compounded if multiple states seek to apply different extraterritorial abortion bans because each state may have different requirements, restrictions, or exceptions.[330] It is noteworthy that even without express extraterritorial application, healthcare providers in states where abortion is legal are treading carefully, worried about their own legal safety as well as the safety of their patients.[331] Thus, the practical effect of extraterritorial abortion bans as applied to out-of-state healthcare providers would be significantly burdensome.

Accordingly, for a court to allow extraterritorial abortion bans without opening the door to extraterritorial regulation of healthcare more generally would require the court to "assess the strength of a state's interest in preserving fetal life within a balancing calculus,"[332] which is precisely what the U.S. Supreme Court said it could *not* do in *Dobbs*.[333] The Court listed legitimate interests states may have in regulating abortion, and held that the

328 Bradford, *supra* note 116, at 152.

329 *See id.* at 152-53 (describing the investigatory burden that abortion restrictions could place on doctors). Although some state abortion bans include exemptions for saving the life of the mother, others do so only as an affirmative defense. *See, e.g.*, MO. ANN. STAT. § 188.017.3 (West 2019) ("It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 2 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not."). Thus, even if an out-of-state doctor performs an abortion to save the life of the pregnant person, the doctor may still be charged and will need to expend significant resources to persuasively demonstrate that the abortion was, in fact, legal.

330 *See* Bradford, *supra* note 116, at 153 ("It would undoubtedly prove difficult and costly for doctors to keep up with various states' abortion laws and apply these different rules.").

331 *See* Selena Simmons-Duffin, *Doctors Weren't Considered in* Dobbs*, But Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines [https://perma.cc/AD8S-8Q6P] (explaining that doctors in states where abortion is legal worry about incurring legal liability via abortion bans passed in surrounding states).

332 Fallon, *supra* note 107, at 637.

333 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022) (faulting supporters of *Roe* and *Casey* for failing to "show that this Court has the authority to weigh" policy arguments regarding abortion); *id.* at 2272-74 (criticizing *Casey*'s undue burden test for requiring courts to weigh the benefits of abortion regulation with the undue burden imposed on abortion access); *id.* at 2277 ("[The Court] has neither the authority nor expertise to adjudicate . . . [the] weighing of the relative importance of the fetus and mother.").

proper constitutional standard for reviewing such laws is rational basis.[334] The Court did not, however, explain how much weight to give these interests in other contexts, such as a Dormant Commerce Clause or choice of law analysis.

Significantly, Justice Kavanaugh went out of his way in his *Dobbs* concurrence to say that "[b]ecause the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral."[335] But if the Court is to remain neutral on the issue of abortion, then it must either uphold all extraterritorial healthcare regulation—with potentially disastrous results for the nation's healthcare system—or strike down the extraterritorial application of abortion regulations to healthcare providers. There is no principled middle ground.

III. VERTICAL CHOICE-OF-LAW PROBLEMS AND FEDERAL PREEMPTION

Apart from the potential constitutional limitations on extraterritorial regulation discussed above, federal statutes and agency regulations can also create vertical choice-of-law problems, where courts must determine the extent to which state laws are preempted by federal law. Under the Supremacy Clause of the U.S. Constitution,[336] Congress has the power to preempt state law.[337] The key question is whether "Congress, in enacting the Federal Statute, intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State?"[338] This question may be answered by referencing explicit statutory language, or by looking at the structure and purpose of the statute.[339] There is, however, generally a presumption against preemption where the subject matter in question is traditionally regulated by the states.[340]

---

334 *Id.* at 2283-84 ("[R]ational-basis review is the appropriate standard for such challenges.").

335 *Id.* at 2305 (Kavanaugh J., concurring). Elsewhere, Justice Kavanaugh has suggested that state laws that regulate extraterritorially may also violate the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause of the United States Constitution. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1172 (2023) (Kavanaugh J., concurring in part and dissenting in part).

336 U.S. CONST. art. VI, § 2.

337 *See Preemption*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/supreme-court/preemption/#:~:text=Under%20the%20Constitution's%20Supremacy%20Clause,as%20%E2%80%9Cexpress%20preemption%E2%80%9D) [https://perma.cc/7XKU-HCCK] (last visited Nov. 12, 2023) ("Under the Constitution's Supremacy Clause, federal law is the 'supreme Law of the Land' and overrides conflicting state law.").

338 Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 30 (1996).

339 Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008); *see also* 23-34 94th St. Grocery Corp. v. N.Y. City Bd. of Health, 685 F.3d 174, 180-81 (2d Cir. 2012) (explaining that courts should first look for an express preemption clause and then analyze the structure and legislative history of a statute to determine whether Congress intended to preempt state law).

340 *See, e.g.*, Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001) (noting that the presumption against preemption in areas of traditional state regulation applies to family law).

There are three generally recognized types of preemption. *Express preemption* occurs when the language of federal law explicitly conveys congressional intent to preclude state control of the subject matter.[341] *Field preemption* implies congressional intent to preempt state law when Congress crafts a regulatory scheme so pervasive that it necessarily leaves no room for a state to supplement or where "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[342] Lastly, under so-called *obstacle or impossibility preemption,* federal law invalidates any state law that stands as an obstacle to the purpose or execution of federal law, or where it would be impossible to comply with both state and federal law.[343]

Here, we focus on two federal regulatory frameworks that may preempt state anti-abortion laws and that have already been the source of litigation. First, the FDA regulates mifepristone, a medication that is used to terminate a pregnancy.[344] Therefore, it may be that states cannot, consistent with federal law, deny access to federally approved medication. Second, EMTALA is a federal statute that requires hospitals to treat patients in emergency contexts and therefore might, in some cases, require hospitals to perform abortions even when such treatment is banned under state law.[345]

A. *FDA Regulation of Mifepristone*

1. The Federal Regulatory Scheme

Medication abortion is a regimen usually composed of two different medications.[346] Currently, medication abortion accounts for over half of all U.S. abortions, so its availability is of great consequence to overall abortion

341 United States v. South Carolina, 720 F.3d 518, 528 (4th Cir. 2013).

342 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

343 *See* Hillman v. Maretta, 569 U.S. 483, 490 (2013) ("State law is pre-empted . . . when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Arizona v. United States, 567 U.S. 387, 399 (2012) ("[Obstacle preemption] includes cases where 'compliance with both federal and state regulations is a physical impossibility.'" (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963))); Mutual Pharm. Co., Inc. v. Bartlett, 570 U.S. 472, 480 (2013) (concluding that a state law was pre-empted because parties could not possibly comply with both state-law and federal-law duties).

344 *See The Availability and Use of Medication Abortion*, *supra* note 20 (describing the use of mifepristone and the FDA approval of the drug in both generic and brand name forms).

345 42 U.S.C. § 1395dd(b)(1).

346 *See The Availability and Use of Medication Abortion*, *supra* note 20 ("The most common medication abortion regimen in the United States involves the use of . . . mifepristone and misoprostol.").

access.[347] The first pill, mifepristone, is a progesterone blocker that halts the development of a pregnancy.[348] The second pill, misoprostol, is taken 24–48 hours later and causes the uterus to contract, expelling the pregnancy.[349] This abortion method is approved for use during the first ten weeks of pregnancy and is highly safe and effective.[350] If prescribed at nine weeks' gestation or earlier, pregnancy is terminated successfully and without complications 99.6% of the time.[351] Misoprostol was first developed and approved for use in the prevention of ulcers.[352] It is prescribed off label for use in medication abortion.[353] Because of this alternate use, misoprostol is not subject to any special regulation and is more widely available.[354] If mifepristone is unavailable, misoprostol alone may be used at a higher dose, but it is slightly less effective than the two-drug regimen.[355]

Mifepristone has been heavily regulated since it first came to market in the United States in 2000.[356] The drug was initially approved under Subpart

---

347 *See* Jones et al., *supra* note 6 (noting that medication abortion accounted for 53% of all facility-based abortions in the U.S. in 2020). For a discussion of the increasing significance of medication abortion and the implications of this shift, see David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STANFORD L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735 [https://perma.cc/7FS6-4RMR].

348 *The Availability and Use of Medication Abortion*, *supra* note 20; *see also Medication Abortion Up to 70 Days of Gestation*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS 225 (Oct. 2020), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2020/10/medication-abortion-up-to-70-days-of-gestation [https://perma.cc/8BQ8-TSW4] (explaining how mifepristone acts as an antiprogestin).

349 *The Availability and Use of Medication Abortion*, *supra* note 20.

350 *Id.* ("[The two drugs] can be safely used up to the first 70 days (10 weeks) of pregnancy").

351 Luu Doan Ireland, Marry Gatter & Angela Y. Chen, *Medical Compared with Surgical Abortion for Effective Pregnancy Termination in the First Trimester*, 126(1) OBSTETRICS & GYNECOLOGY 22, 24 (2015).

352 *See* Marissa Krugh & Christopher V. Maani, *Misoprostol*, STATPEARLS (July 11, 2022), https://www.ncbi.nlm.nih.gov/books/NBK539873/#:~:text=Currently%2C%20misoprostol%20is%20FDA%20approved,gastric%20ulcers%20with%20other%20etiologies [https://perma.cc/4BTP-SXJH] ("[M]isoprostol is FDA approved only for the prevention and treatment of NSAID-induced gastric ulcers . . . .").

353 Rebecca Allen & Barbara M. O'Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2(3) OBSTETRICS & GYNECOLOGY 159, 159 (2009).

354 *See* IBIS REPROD. HEALTH, *Misoprostol-Alone Medication Abortion Is Safe and Effective* 1 (Nov. 2021), https://www.ibisreproductivehealth.org/publications/misoprostol-alone-medication-abortion-safe-and-effective [https://perma.cc/LW57-WR68] ("[M]isoprostol is widely available in many places over the counter without a prescription and at a low cost.").

355 *See* Elizabeth G. Raymond, Margo S. Harrison & Mark A. Weaver, *Efficacy of Misoprostol Alone for First-Trimester Medical Abortion: A Systematic Review*, 133(1) OBSTETRICS & GYNECOLOGY 137, 143-45 (2019) (finding that the rate of complete abortion increased after taking three doses of misoprostol rather than only one dose, but with effectiveness rates that were still somewhat lower than that of the combined regimen with mifepristone).

356 *See* Lars Noah, *A Miscarriage in the Drug Approval Process?: Mifepristone Embroils the FDA in Abortion Politics*, 36 5Y4Y00W5KMMDLRLB9 FOREST L. REV. 571, 579-80, 584-85 (2001) (discussing the FDA approval of mifepristone).

H, a regulatory framework implemented to expedite the approval of "new drug products that have been studied for their safety and effectiveness in treating serious or life-threatening illnesses."[357] Subpart H allowed the FDA to limit mifepristone to those prescribers who agreed to dispense mifepristone only in certain health care settings.[358]

The Federal Food, Drug, and Cosmetic Act ("FDCA") amendments of 2007 approved a new regulatory framework, dubbed Risk Evaluation and Mitigation Strategies ("REMS"), which apply to drugs with existing restricted-distribution programs.[359] The Amendments authorized drug dispensation restrictions under REMS where necessary to ensure that the benefits of a drug outweigh its risks.[360] The FDA approved the initial set of REMS for mifepristone in 2011,[361] and since then, dispensation of the drug has been governed by these REMS.[362] Today, REMS are fairly unusual, with only 76 of the over 19,000 FDA-approved drugs regulated in this manner.[363] In considering whether to promulgate a set of REMS, the FDA is statutorily bound to consider, among others, the following factors: the estimated size of the population likely to use the drug involved, the seriousness of the disease or condition that is to be treated with the drug, the expected benefit of the drug with respect to such disease or condition, the seriousness of any known

357 *Id.* at 580-81; 21 CFR § 314.500.

358 *See* Noah, *supra* note 356, at 584-85 (discussing various FDA regulations on mifepristone, including a prohibition on prescriptions for home use and restrictions on distribution to pharmacists); *see also* Laurie Sobel, Alina Salganicof & Mabel Felix, *Legal Challenges to the FDA Approval of Medication Abortion Pills*, KFF (Mar. 13, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-the-fda-approval-of-medication-abortion-pills/ [https://perma.cc/7Y3Y-3WVW] (noting that Subpart H was used to limit which healthcare providers could administer mifepristone and under what circumstances it could be administered).

359 *See* Food & Drug Admin. Amendments Act of 2007, Pub. L. No. 110-85, § 909(b)(1), 121 Stat. 823, 950-51 (explaining the elements and enforcement strategy for the REMS framework).

360 *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355-1(a), (f) (explaining the risk evaluation process for initial approval of proposed REMS strategies in order to provide safe access for patients to drugs with serious risks).

361 *See* FOOD & DRUG ADMIN., NDA 20-687 MIFEPREX (MIFEPRISTONE) TABLETS, 200 MG RISK EVALUATION AND MITIGATION STRATEGIES (REMS) (2011), https://www.fda.gov/media/164648/download [https://perma.cc/Y54M-WFZ9] (detailing the initial set of REMS for mifepristone).

362 *Information About Mifepristone or Medical Termination of Pregnancy Through Ten Weeks Gestation*, FOOD & DRUG ADMIN. (Jan. 19, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/33D5-WE7Q] (describing the FDA-approved REMS for mifepristone).

363 *See* Jill Kolesar & Lee Vermeulen, *US Food and Drug Administration REMS Program*, MCGRAW HILL MED. (Mar. 18, 2019), https://www.accessmedicinenetwork.com/posts/45781-us-food-and-drug-administration-rems-program [https://perma.cc/72NS-7KPR] ("[T]here are 76 REMS approved by the FDA"); *FDA at a Glance*, FOOD & DRUG ADMIN. (Aug. 2018), https://www.fda.gov/media/115824/download [https://perma.cc/ZV6F-93ZX] ("There are over 19,000 prescription drug products approved for marketing.").

or potential adverse events that may be related to the drug, and the background incidence of such events in the population likely to use the drug.[364] The statute expressly provides that requirements under the REMS must "not be unduly burdensome on patient access to the drug" and "be commensurate with the specific serious risk."[365]

Most REMS require that physicians and pharmacists report adverse events to the federal government, while a smaller portion impose additional, more specific, requirements on providers, known as "Elements to Assure Safe Use."[366] Mifepristone is in the latter category.[367] Before the COVID-19 pandemic and President Biden's election, the mifepristone REMS, as amended in 2016, required that mifepristone be dispensed in a clinic in the presence of a registered provider, though patients could take the medication and undergo their abortion at home.[368] The REMS thus prohibited the dispensation of mifepristone through the mail, even with a valid prescription obtained after an in-person or telehealth visit with a provider.[369] Some argue that, because mifepristone has an excellent record of safety and efficacy, it is not the type of drug that ought to be subject to a REMS at all.[370]

The COVID-19 pandemic put more pressure on the in-person dispensation requirement because such in-person visits were both more difficult and more dangerous during the height of the global health crisis.

---

364 21 U.S.C. § 355-1(a)(1).

365 21 U.S.C. § 355-1(f)(2)(A), (C).

366 *What's in a REMS?*, FOOD & DRUG ADMIN. (Jan. 26, 2018), https://www.fda.gov/drugs/risk-evaluation-and-mitigation-strategies-rems/whats-rems [https://perma.cc/8KG3-97HE].

367 *See Information About Mifepristone*, note 362 (describing the requirements of the Mifepristone REMS Program, as amended in 2023).

368 *See* FOOD & DRUG ADMIN., NDA 020687 MIFEPREX (MIFEPRISTONE) TABLETS, 200 MG RISK EVALUATION AND MITIGATION STRATEGIES (REMS) (Mar. 2016), https://www.fda.gov/media/164649/download [https://perma.cc/E89S-D5SQ] ("[Mifepristone] must be dispensed to patients only in certain healthcare settings . . . by or under the supervision of a certified prescriber").

369 *See id.* (prohibiting mifepristone distribution anywhere but in certain healthcare settings).

370 *See, e.g.*, Mifeprex REMS Study Group, *Sixteen Years of Overregulation: Time to Unburden Mifeprex*, 376 N. ENG. J. MED. 790, 790-92 (Feb. 23, 2017) ("[T]he distribution of [mifepristone] remains substantially and unnecessarily encumbered by a Risk Evaluation and Mitigation Strategy (REMS)"); *A Call to End the Excessive Regulation of Mifepristone*, BIXBY CTR. FOR GLOB. REPROD. HEALTH, https://bixbycenter.ucsf.edu/news/call-end-excessive-regulation-mifepristone [https://perma.cc/B7BQ-X9N9] (last visited Jan. 16, 2023) (describing the REMS regulations as "excessively burdensome"); *Improving Access to Mifepristone for Reproductive Health Indications*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Mar. 2021), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2018/improving-access-to-mifepristone-for-reproductive-health-indications [https://perma.cc/YML6-UUW4] (arguing that mifepristone's REMS requirements are "outdated and substantially limit access to this safe, effective medication").

After some litigation and a pandemic-related injunction on the REMS,[371] the Biden FDA in 2021 voluntarily dropped the in-person dispensation requirement from the REMS, allowing mifepristone to be sent to patients by mail.[372] President Biden issued an Executive Order directing the Secretary of Health and Human Services ("HHS") to submit a report that would identify "potential actions" to protect and expand access to abortion and other related services and protections within thirty days.[373] In compliance with that order HHS issued an "Action Plan to Protect and Strengthen Reproductive Care."[374] The report stated:

> FDA has [] undertaken a full review of the Mifepristone REMS Program and has determined that the in person dispensing requirement is no longer necessary to assure the safe use of mifepristone for medical termination of early pregnancy, provided all the other requirements of the REMS continue to be met and that dispensing pharmacies are certified.[375]

In January of 2023 the FDA finalized its modification of the REMS, allowing brick-and-mortar pharmacies to sell mifepristone to patients with a prescription from a certified provider.[376] Federal law is now more supportive of access to medication abortion than it has ever been.

---

371 *See* Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183, 233 (D. Md. 2020) (issuing a preliminary injunction to prevent enforcement or application of the in-person requirements in the mifepristone REMS as to medication abortion patients); *see also American College of Obstetricians and Gynecologists v. U.S. Food and Drug Administration*, AM. C.L. UNION (Feb. 12, 2021), https://www.aclu.org/cases/american-college-obstetricians-and-gynecologists-v-us-food-and-drug-administration [https://perma.cc/8BYU-WQBJ] (describing the ACLU's challenge to the FDA's in-person requirement during the COVID-19 pandemic).

372 *See* FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGIES (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG 1 (May 2021), https://www.fda.gov/media/164651/download [https://perma.cc/4WKB-H3JX] (allowing for mifepristone dispensation by certified pharmacies without an in-person requirement); Carrie N. Baker, *FDA Lifts Some Abortion Pill Restrictions, Leaves Others in Place*, MS. MAG. (Dec. 17, 2021), https://msmagazine.com/2021/12/17/fda-abortion-pill-medication-biden-mifepristone [https://perma.cc/T3PP-5MH6] (noting the new opportunity for patients to receive mifepristone via mail following a telehealth visit after the FDA permanently removed the in-person pill pick-up requirement).

373 Exec. Order No. 14076, 87 Fed. Reg. 42,053 (July 13, 2022).

374 *See* DEP'T OF HEALTH & HUM. SERVS., HEALTH CARE UNDER ATTACK: AN ACTION PLAN TO PROTECT AND STRENGTHEN REPRODUCTIVE CARE 1 (Aug. 2022), https://www.hhs.gov/sites/default/files/hhs-report-reproductive-health.pdf [https://perma.cc/8BQQ-ZKHT] (indicating that the report was a response to Executive Order 14076).

375 *Id.* at 7.

376 *See* FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGIES (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG 3-4 (Jan. 2023), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2023_01_03_REMS_Full.pdf [https://perma.cc/BKM3-B2K3] (noting that pharmacies can dispense mifepristone if they become specially certified); Ahmed Aboulenein, *U.S. FDA Allows Abortion Pills to Be Sold at Retail Pharmacies*,

2. Preemption of State Law

Many states have long restricted access to medication abortion even more assiduously than the REMS regime, especially after the post-pandemic changes to the REMS requirements described above. A common restriction prohibits the dispensation of mifepristone when a physician is not physically present in the same room as the patient.[377] One state even requires patients to consume the medication in the same room as the physician, a limitation that FDA guidance eliminated in 2016.[378] These laws aim to obstruct medication abortions via mail and telehealth, which federal regulations permit. Like Texas's six-week abortion ban, they may also ban all forms of abortion within the time period for which medication abortion is approved.[379] In a June 2022 press release, Attorney General Merrick Garland expressed the position that FDA regulations on mifepristone preempt these stricter state regulations, declaring that "the FDA has approved the use of the medication Mifepristone. States may not ban Mifepristone based on disagreement with the FDA's expert judgment about its safety and efficacy."[380]

The U.S. Supreme Court has, at least at times, found that FDA regulations do indeed preempt state law based on a theory of obstacle or impossibility preemption. For example, in *PLIVA, Inc. v. Mensing* the Court found that state tort laws requiring the defendant drug manufacturer to update the label of its generic drug were directly in conflict with FDA regulations that, the Court held, prevent manufacturers from independently changing the labels of such drugs to bring them into conformance with the challenged state law.[381] Justice Thomas wrote for the unanimous Court: "We find impossibility here. It was not lawful under federal law for the Manufacturers to do what state law required of them. And even if they had

---

REUTERS (Jan. 4, 2023), https://www.reuters.com/world/us/us-fda-says-abortion-pills-can-be-sold-retail-pharmacies-new-york-times-reports-2023-01-03/ [https://perma.cc/VG7F-UW3A] (reporting that retail pharmacies can offer abortion pills).

377 *Medication Abortion*, GUTTMACHER INST., https://guttmacher.org/state-policy/explore/medication-abortion (last visited Jan. 18, 2023) [https://perma.cc/7YXZ-MKGC].

378 *See id.* (noting that Indiana requires patients to take the first dose of the regimen in the presence of the physician); Rachel K. Jones & Heather Boonstra, *The Public Health Implications of the FDA's Update to the Medication Abortion Label*, HEALTH AFFAIRS: HEALTH EQUITY (June 30, 2016), https://www.healthaffairs.org/do/10.1377/hblog20160630.055639/ [https://perma.cc/3FRY-HJQW] (observing that a 2016 label change allowing patients to ingest the medication at home could counteract these requirements).

379 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.21, as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (detailing Texas's abortion ban).

380 Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022).

381 564 U.S. 604, 609, 611-12 (2011) (holding that Minnesota and Louisiana drug labeling laws were pre-empted by federal drug regulations).

fulfilled their federal duty to ask for FDA assistance, they would not have satisfied the requirements of state law."[382] Two years later, the Court considered a case with a nearly identical fact pattern, *Mutual Pharmaceutical Co. v. Bartlett*.[383] Again the Court found that because "federal law prohibited [defendant] from taking the remedial action required to avoid liability under [state] law," the state cause of action was preempted with respect to "FDA-approved drugs sold in interstate commerce."[384] Significantly, in response to the argument that the manufacturer could avoid liability without running afoul of federal law simply by choosing not to make the drug or sell it in the forum state at all,[385] Justice Alito wrote for the unanimous Court,

> We reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless." . . . In every instance in which the Court has found impossibility pre-emption, the "direct conflict" between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.[386]

This analysis suggests that, at least in other contexts, the Court has had little sympathy for state attempts to regulate FDA-approved drugs outside of the local market. And although the state laws at issue in these cases required actions federal law prohibited, federal preemption also applies in reverse situations—such as with mifepristone—where the state law prohibits that which federal law permits.[387]

Significantly, the statutory amendment that created the entire REMS framework does *not* contain any language eschewing federal preemption, and indeed the entire structure of REMS suggests the opposite: that Congress intended the REMS framework to operate through either field or obstacle

382 *Id.* at 618.

383 570 U.S. 472 (2013).

384 *Id.* at 486-87.

385 *Id.* at 488.

386 *Id.* (quoting *PLIVA, Inc.*, 564 U.S. at 621).

387 *See, e.g.*, Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 37 (1996) (holding that a federal statute permitting banks to sell insurance in small towns preempts a state statute prohibiting banks from selling most kinds of insurance); Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373, 374 (1954) (holding that a federal statute permitting national banks to receive savings deposits preempts a state statute prohibiting certain national banks from using the word "savings" in their advertising).

preemption to preempt state law.[388] Indeed, the REMS approach requires the FDA to perform a complex balancing calculus, weighing numerous considerations, both in determining whether a REMS is necessary at all, and in deciding what to include in a REMS once one is required.[389] Under the REMS framework, the FDA has determined that current restrictions on mifepristone are those required to assure safe use of an important treatment while also minimizing burdens on patient access. So, "a court might reasonably conclude that state requirements additional to those in an FDA-required REMS pose an obstacle to the FDA's responsibility to satisfy these Congressional objectives, particularly if courts increasingly view federal regulatory choices as an effort to find the optimal balance between competing policy goals."[390]

Accordingly, a fair reading of the statute and the U.S. Supreme Court's precedents suggest to us that FDA determinations regarding the availability of the drugs involved in medication abortions should preempt contrary state laws. Of course, the FDA could, in a future administration, take a far more restrictive approach to mifepristone that, if it survived arbitrary-and-capricious review,[391] would presumably also preempt pro-access states from making the drug more widely available.

Nevertheless, in November of 2022, a newly incorporated association of anti-abortion health care providers, dubbed the Alliance for Hippocratic Medicine, joined by other anti-abortion organizations and physicians, filed suit against the FDA, several FDA officials, and HHS secretary Xavier Becerra, challenging both the FDA's initial approval of mifepristone in 2000, as well as the more recent actions directed at increasing access to the drug.[392] Plaintiffs argued that the FDA's initial approval of mifepristone and changes to its regulatory scheme in the intervening years violated the Administrative Procedure Act (APA) because they were not supported by sufficient safety

388 *See* Patricia J. Zettler & Ameet Sarpatwari, *State Restrictions on Mifepristone Access—The Case for Federal Preemption*, 386 NEW ENG. J. MED. 705, 706 (2022)("While the mifepristone REMS remains in place, a strong case can be made that state-required measures that go beyond the conditions in the REMS . . . upset the complex balancing of safety and burdens on the health care system that federal law requires of the FDA when it imposes a REMS like the one for mifepristone.").

389 See *supra* notes 359–76 and accompanying text.

390 Patricia J. Zettler, *Pharmaceutical Federalism*, supra note 269, at 875; *see also* Zettler & Sarpatwari, *supra* note 388, at 705-06 (describing state-level mifepristone restrictions as "hamper[ing]" potential FDA elimination of the REMS).

391 *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

392 *See* Complaint at 1-7, All. for Hippocratic Med. v. FDA, ___ F. Supp. 3d ___, 2023 WL 2825871 (N.D. Tex. Nov. 18, 2022)(No. 22-223) (detailing the allegations and underlying facts in the case).

and efficacy evidence.[393] Plaintiffs also contended that the FDA's approval of mifepristone and subsequent regulatory actions violated the Comstock Act, an 1873 statute that makes it illegal to send "obscene, lewd or lascivious," "immoral," or "indecent" publications through the mail.[394] In the post-*Dobbs* world, where a complex and contradictory web of state and federal abortion regulation already creates confusion for patients and providers,[395] this case threatens to throw the country's abortion administration and regulation into greater tumult, possibly by removing mifepristone from the US market altogether.[396]

This litigation is ongoing. In August 2023, a Fifth Circuit panel ruled that, although plaintiffs' challenges to the original approval and all FDA action prior to 2016 were barred by the statute of limitations, the FDA's 2016 amendments to the REMS and 2021 decision to cease enforcing the in-person dispensation requirement were not time-barred and were likely arbitrary and capricious.[397] First, the court determined that the FDA had unlawfully failed to consider the cumulative effect of the 2016 amendments, which it referred to as a "significant[] loosen[ing] [of] mifepristone's conditions for use."[398] In light of this, the court wrote, it was also arbitrary and capricious for the FDA to cease collecting data on non-fatal adverse events associated with the drug, relying instead on the FDA Adverse Event Reporting System (FAERS), a database of self-reported adverse events.[399] The court concluded that the FDA had "ignored an important aspect of the problem and that its explanation of the basis for the change contains significant shortcomings."[400] Second, the court found that it was likely arbitrary and capricious for the FDA to rely on the FAERS database and "the published literature," which was "not inconsistent with" the conclusion that mifepristone could safely be prescribed remotely.[401] The court instead sought evidence that "affirmatively

393 *See id.* at 94-101 (detailing Plaintiffs' claim about the original approval of mifepristone in 2000).

394 *See id.* at 6-7, 107-08 (arguing that the FDA actions regarding mifepristone do not comply with the Comstock Act, 18 U.S.C. §§ 1461–62).

395 Vanessa Romo, *A Year after* Dobbs *and the End of* Roe v. Wade*, there's Chaos and Confusion*, NPR (June 24, 2023, 6:00 AM), https://www.npr.org/2023/06/24/1183639093/abortion-ban-dobbs-roe-v-wade-anniversary-confusion [https://perma.cc/7F49-P4Q7].

396 Chloe Atkins, *A Federal Judge Suspends FDA's Longtime Approval of an Abortion pill, But Gives the Government 7 Days to Appeal*, NBC NEWS (Apr. 7, 2023, 7:09 PM), https://www.nbcnews.com/news/us-news/abortion-pill-case-texas-judge-halts-access-mifepristone-rcna72117 [https://perma.cc/MP32-72BY].

397 Alliance for Hippocratic Med. v. FDA, 78 F.4th 210, 245-47 (5th Cir. 2023).

398 *Id.* at 247.

399 *See id.* at 246-47 (explaining that prescribers are not required to log non-fatal adverse events under the amended REMS).

400 *Id.* at 247 (internal citations and quotation marks omitted).

401 *Id.* at 248.

ma[de] the agency's case."[402] Because the court determined that the FDA's actions were unlawful, it did not need to address whether those rules would pre-empt contrary state law.

This decision, if it is ultimately affirmed, would return the regulation of mifepristone to the pre-2016 regime, which was far more restrictive.[403] However, in prior proceedings during this litigation the U.S. Supreme Court had entered a stay pending disposition of a writ of certiorari,[404] thus guaranteeing that mifepristone would remain available, regardless of the Fifth Circuit's ruling.[405] And certiorari has now been granted,[406] which means that the U.S. Supreme Court will likely have the last word in what may be its first abortion case of the post-*Dobbs* era. On the other hand, the Court need not reach either the merits of the FDA's actions or the preemption question because the plaintiffs' claims could easily be dismissed for lack of standing.[407]

---

402 *Id.* at 250 (quoting Sw. Elec. Power Co. v. EPA, 920 F.3d 999, 1018-19 (5th Cir. 2019)).

403 *See* CONG. RSCH. SERV., LSB10919, MEDICATION ABORTION: NEW LITIGATION MAY AFFECT ACCESS 3 (2023) ("[T]he court reinstated the former, more rigorous pre-2016 controls on mifepristone.").

404 *See* Danco Lab'ys, LLC v. All. for Hippocratic Medicine, 143 S. Ct. 1075 (2023) (staying the case until the U.S. Supreme Court can act on a petition for certiorari).

405 Amy Howe, *Court Allows Abortion Pill to Remain Widely Available While Appeals Proceed*, SCOTUSBLOG (Apr. 21, 2023, 7:50 PM), https://www.scotusblog.com/2023/04/court-allows-abortion-pill-to-remain-widely-available-while-appeals-proceed/ [https://perma.cc/ANA3-WZCV].

406 FDA v. All. for Hippocratic Medicine, 2023 WL 8605746 (cert. granted); Danco Lab'ys, LLC v. All. for Hippocratic Medicine, 2023 WL 8605744 (cert. granted).

407 Plaintiffs' allegations of harm are highly speculative and likely fail the U.S. Supreme Court's restrictive standard for standing established in *Clapper v. Amnesty International*, which requires plaintiffs to show that their future injury is "certainly impending." 568 U.S. 398, 409 (2013) (emphasis omitted). The Fifth Circuit relied on plaintiffs' conclusory assertion that their members may be required to provide emergency care to a mifepristone patient in the near future. *See All. for Hippocratic Med.*, 78 F.4th, at 240 (concluding that plaintiffs "have shown a substantial risk of injury due to the 2021 Non-Enforcement Decision"). Yet, such allegations of harm depend on many layers of speculation. As defendants pointed out, plaintiffs would need to establish that, "despite the rarity of serious adverse events associated with mifepristone," and the ubiquity of conscience protections, a complaining physician will "certainly" be required to treat a medication abortion patient in the future. Defendants' Opposition to Plaintiff's Motion For a Preliminary Injunction at 9-10, Alliance for Hippocratic Med. v. FDA, 78 F.4th 210 (5th Cir. 2023). Judge Ho, concurring in part and dissenting in part with the panel decision, went even further, concluding that plaintiffs had standing based on their "aesthetic" interest in unborn babies. *See* All. for Hippocratic Med., 78 F.4th, at 258-60. He wrote: "Unborn babies are a source of profound joy for those who view them. Expectant parents eagerly share ultrasound photos with loved ones. Friends and family cheer at the sight of an unborn child. Doctors delight in working with their unborn patients—and experience an aesthetic injury when they are aborted." *Id.* at 259. After decades of conservative efforts to limit grounds for establishing Article III standing in court, these radically expansive theories of standing doctrine in the abortion context are startling. *See* Scott R. Anderson, *Revisiting Standing Doctrine* 3-4, BROOKINGS INST. (Sept. 29, 2022), https://www.brookings.edu/wp-content/uploads/2022/09/BR_Standing_Doctrine_final.pdf [https://perma.cc/76MH-Q967] ("In recent decades, the strict application of standing requirements has become a widely accepted feature of the federal legal system. Many see this as a crowning accomplishment for legal conservatives, who have frequently advocated for a narrower view of standing.").

B. *Emergency Medical Treatment and Active Labor Act (EMTALA)*

In July 2022 the Biden Administration announced its position that EMTALA[408] preempts state abortion laws that would deny abortion care when required to stabilize a patient who comes to an emergency room with an emergency medical condition.[409] Anti-abortion states have since challenged the President's authority to preempt their state's laws by interpreting EMTALA in this way.[410] We analyze EMTALA below and conclude that it does preempt anti-abortion state law that would ban abortion when necessary to stabilize a person undergoing an emergency pregnancy complication.

1. EMTALA's Regulatory Scheme

EMTALA was enacted in 1986 as part of the Consolidated Omnibus Reconciliation Act ("COBRA") to prevent the practice of patient dumping, "in which uninsured patients were transferred, solely for financial reasons, from private to public hospitals without consideration of their medical condition or stability for the transfer."[411] As such, EMTALA has been called "one of the most comprehensive laws guaranteeing nondiscriminatory access to emergency medical care and thus to the health care system."[412]

EMTALA contains two different requirements, one involving mandatory screening at an emergency room, and one that requires patient stabilization.[413]

With regard to screening, if a hospital has an emergency department, then EMTALA requires it to provide "appropriate medical screening [] within [its] capability" to any individual who comes to the hospital and makes a request for "examination or treatment of [a] medical condition."[414] Because the law was targeted at eliminating discrimination based on financial means, it does

---

408 42 U.S.C. § 1395dd.

409 *See* Rachel Roubein, *The Administration Clarifies Emergency Room Laws Around Abortion*, WASH. POST (July 12, 2022), https://www.washingtonpost.com/politics/2022/07/12/administration-clarifies-emergency-room-laws-around-abortion [https://perma.cc/Z4D3-MKBT] ("Federal law trumps state abortion bans and protects clinicians' judgment when administering treatment, regardless of the state they're practicing in, HHS said.").

410 *See, e.g.*, Texas v. Becerra, 623 F. Supp. 3d 696 (N.D. Tex. Aug. 23, 2022) (analyzing EMTALA preemption with regard to Texas state law); United States v. Idaho, 623 F. Supp. 3d 1096 (D. Idaho 2022) (analyzing EMTALA preemption with regard to Idaho state law).

411 Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (EMTALA): What it Is and What it Means for Physicians*, 14(4) BAYLOR U. MED. CTR. PROC. 339, 339 (2001).

412 *Id*.

413 EMTALA also contains ancillary provisions regarding patient consent and transfer that are not relevant for our purposes. 42 U.S.C. § 1395dd(a), (c).

414 42 U.S.C. § 1395dd(a).

not itself prescribe a standard of care where screening is concerned.[415] Instead, a hospital's assessment of whether a patient actually has an emergency condition usually controls its obligations under EMTALA—even if that assessment turns out to be incorrect or even negligent—so long as the patient was provided with the same medical care that would have been provided to anyone presenting with the same symptoms.[416] Thus, a hospital complies with its duties under the screening requirement if it "utilizes identical screening procedures for all patients complaining of the same condition or exhibiting the same symptoms."[417]

In contrast to the screening requirement, however, EMTALA's stabilization requirement provides substantive standards of treatment. EMTALA's stabilization provision requires that a patient be given sufficient treatment to prevent clinical deterioration in their condition in a way that poses a risk to life or bodily function.[418] If a hospital discharges or transfers a patient before that patient receives treatment "necessary to assure . . . that no material deterioration of the condition is likely to result or occur during the transfer,"[419] the hospital will have committed an EMTALA violation, regardless of whether such a transfer would be within the hospital's normal policy.[420]

The Fourth Circuit underscored this assessment in its landmark decision in *In the Matter of Baby "K."*[421] The court held that a hospital was required to provide aggressive treatment, including mechanical ventilation, to a terminally ill infant even though hospital policy would have been to provide only warmth, nutrition, and hydration.[422] The court explicitly distinguished EMTALA's screening and stabilization requirements:

---

415 *See* Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1258 (9th Cir. 1995) ("The statutory language of the EMTALA clearly declines to impose on hospitals a national standard of care in screening patients.").

416 *See* Power v. Arlington Hosp. Ass'n, 42 F.3d 851, 856 (4th Cir. 1994) (quoting Brooks v. Maryland Gen. Hosp., 996 F.2d 708, 710 (4th Cir. 1993) ("The key requirement is that a hospital 'apply its standard of screening *uniformly* to all emergency room patients, regardless of whether they are insured or can pay. The Act does not impose any duty on a hospital requiring that the screening result in a correct diagnosis.'"); Summers v. Baptist Med. Ctr., 91 F.3d 1132, 1138 (8th Cir. 1996) ("Patients are entitled under EMTALA, not to correct or non-negligent treatment in all circumstances, but to be treated as other similarly situated patients are treated, within the hospital's capabilities.").

417 *In re* Baby "K," 16 F.3d 590, 593 (4th Cir. 1994).

418 42 U.S.C. § 1395dd(e)(3)(B).

419 *Id.* at § 1395dd(e)(3)(A).

420 *See id.* (providing no exception for violative acts falling within hospital policy).

421 16 F.3d 590 (4th Cir. 1994).

422 *Id.* at 594 (4th Cir. 1994). Transfer was not an option under the circumstances of the case. *Id.*

> [W]e conclude that the duty of the Hospital to provide stabilizing treatment for an emergency medical condition is not coextensive with the duty of the Hospital to provide an "appropriate medical screening." Congress has statutorily defined the duty of a hospital to provide stabilizing treatment as requiring that treatment necessary to prevent the material deterioration of a patient's condition.[423]

Indeed, to hold otherwise would allow covered hospitals to provide any level of treatment, even if it would permit patients to materially deteriorate, as long as the care provided to all similarly situated patients was uniform.[424] Instead, EMTALA's definition of stabilization is specifically provided by the text of the law and is defined with regard to objective standards, rather than the relative guideposts of the hospital's existing policy.[425]

2. EMTALA Preemption of State Anti-Abortion Law

Pregnancy complications, even the most serious ones, are common.[426] Thus, with regard to states with abortion bans, pregnancy complications are likely to create situations in which state law demands one course of action and EMTALA demands another.[427] And while many, though not all, state abortion bans include exceptions to protect the life and health of the pregnant

---

423 *Id.* at 595.

424 *Id.* at 596 ("The terms of EMTALA as written do not allow the Hospital to fulfill its duty to provide stabilizing treatment by simply dispensing uniform treatment.").

425 *See* 42 U.S.C. § 1395dd(e)(3)(A) and (B) (defining what counts as stabilizing a patient under the statute).

426 *See, e.g.*, *4 Common Pregnancy Complications*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/staying-healthy-during-pregnancy/4-common-pregnancy-complications [https://perma.cc/JH6Z-PFVP] (last visited Sept. 23, 2023) (discussing common pregnancy complications).

427 *See, e.g.*, Alicia Macklin, Julia Michael & Kerry Sakimoto, *Between EMTALA and State Abortion Restrictions: The Post-Dobbs Dilemma*, 4 HEALTH L. CONNECTIONS (Jan. 1, 2023), https://www.americanhealthlaw.org/content-library/connections-magazine/article/b7a49aa7-ec78-48dd-b254-be04e2db46f7/between-emtala-and-state-abortion-restrictions-the [https://perma.cc/4LND-6RLH] (describing current and future court battles over EMTALA's preemption of state abortion laws).

person,[428] the contours of such exceptions could be narrower than EMTALA's construction of what constitutes an emergency condition.[429]

This conflict arises partly because it is so difficult to determine precisely how much of a risk to life or health is sufficient to qualify under one of these state-law exceptions. In an essay for the New England Journal of Medicine, Dr. Lisa Harris explained that "it's unclear what, precisely, 'lifesaving' means. What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%?"[430]

EMTALA clearly answers this question. If a patient presents at the emergency room and, after undergoing the hospital's standard screening procedure, is determined to have an emergency medical condition and it is determined that abortion is necessary to prevent material deterioration, federal law does not just *permit*, but *requires* the hospital to provide abortion care. Where, for whatever reason, that condition would not qualify under a life or health exception to the state's abortion ban, complying with both federal law and state law would be impossible. This is the "direct conflict" that provides grounds for preemption, both under traditional preemption doctrine and under EMTALA's own terms. EMTALA should provide clarity where state abortion bans cause confusion and endanger patient health.

Physicians and researchers have noted that some pregnancy complications will always be fatal if not treated through abortion care. And yet, the post-*Dobbs* months saw various reports of patients with such conditions being

428 Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End it Legally?*, NBC (June 30, 2022), https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026 [https://perma.cc/69YA-PP2U] ("Most abortion bans . . . make exceptions for life-threatening situations that arise in pregnancy."); Maggie Koerth & Amelia Thomson-DeVeaux, *Even Exceptions to Abortion Bans Pit a Mother's Life Against Doctors' Fears*, FIVETHIRTYEIGHT (June 30, 2022, 6:00 AM), https://fivethirtyeight.com/features/even-exceptions-to-abortion-bans-pit-a-mothers-life-against-doctors-fears [perma.cc/AT4R-E9LE] (noting that exceptions for the life of the mother are common, "even in the strictest abortion bans"); Tina Reed, *Defining "Life-Threatening" Can Be Tricky in Abortion Law Exceptions*, AXIOS (June 28, 2022), https://www.axios.com/2022/06/28/abortion-ban-exceptions-women-medical-emergencies [https://perma.cc/P5KT-TEM2] ("[M]ost state abortion bans include some sort of exception when the life of the mother is at risk.").

429 *Compare* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2) (West 2021) ("The prohibition under Subsection (a) does not apply if . . . the pregnant female on whom the abortion is performed . . . has a life-threatening physical condition . . . that places [her] at risk of death."), *with* 42 U.S.C. § 1395DD(e)(1)(A) (defining "emergency medical condition" more broadly).

430 Lisa H. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of* Roe v. Wade, 386 NEW ENG. J. MED. 2061, 2061 (June 2022).

denied such care.[431] This is evidence of the confusion and paralysis inflicted on the medical system by unclear and inconsistent anti-abortion state law.

The paradigmatic example of such a condition is ectopic pregnancy, which most often occurs when a fertilized egg attaches to a fallopian tube instead of to the uterine lining.[432] Ectopic pregnancies are never viable—a fetus cannot develop in a fallopian tube—and if left untreated, they can be life-threatening.[433] Although this condition would almost certainly fall within the ambit of both EMTALA and most states' life or health exception, state abortion bans continue to cause fear among providers, which tends to freeze care.[434]

Indeed, in a letter to the Texas Medical Board, the Texas Medical Association relayed various instances where hospital administrators delayed or prohibited abortion care for women with ectopic pregnancies and other complications for fear of running afoul of the state's abortion laws.[435] Allegedly, one hospital instructed a provider not to treat an ectopic pregnancy until it ruptured.[436] A ruptured ectopic pregnancy causes severe internal

---

431 *See, e.g.*, Jammie Law, Michael Pillinger & Julie Nusbaum, *Termination is the Safest Course for some High-Risk Pregnancies.* Dobbs *Decision Threatens that Care*, STAT (Sept. 21, 2022), https://www.statnews.com/2022/09/21/termination-is-the-&safest-course-for-some-high-risk-pregnancies-dobbs-decision-threatens-that-care [https://perma.cc/R662-RWPV] (describing a maternal death caused by lupus and pulmonary hypertension, which are often fatal underlying conditions with regard to pregnancy); Elizabeth Cohen, *One Year After* Dobbs *Decision, Families Describe Terror, Trauma and Putting 'Pain to Purpose'*, CNN (June 22, 2023, 3:15 PM), https://perma.cc/J43U-7U8T (detailing stories from women who were refused abortion care despite life-threatening issues facing them and their fetuses). One of these stories, Amanda Zurawski's, resulted in a lawsuit against the state of Texas, which is ongoing at the Texas Supreme Court. *See* State of Texas v. Amanda Zurawski, No. 23-0629 (Tex. filed Aug. 7, 2023).

432 *Ectopic Pregnancy*, MAYO CLINIC (Mar. 12, 2022), https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/symptoms-causes/syc-20372088 [https://perma.cc/UC37-LLV3].

433 *See* Catherine Pearson, *What Is Ectopic Pregnancy?*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/article/ectopic-pregnancy-symptoms-treatment.html [https://perma.cc/S9GP-6PZD] ("A fertilized egg cannot survive outside of the uterus.").

434 *See* Arey et al., *supra* note 96, at 389 ("Patients with pregnancy complications or preexisting medical conditions that may be exacerbated by pregnancy are being forced to delay an abortion until their conditions become life-threatening and qualify as medical emergencies, or until fetal cardiac activity is no longer detectable."); Reese Oxner & María Méndez, *Texas Hospitals Are Putting Pregnant Patients at Risk by Denying Care Out of Fear of Abortion Laws, Medical Groups Says*, TEX. TRIBUNE (July 15, 2022, 1:00 PM), https://www.texastribune.org/2022/07/15/texas-hospitals-abortion-laws/ [https://perma.cc/7HRS-GNKV] (reporting that Texas medical providers have been "forced to delay or reconsider" treatment options for high-risk pregnancies in light of uncertain abortion laws).

435 *See* Allie Morris, *Texas Hospitals Fearing Abortion Law Delay Pregnant Women's Care, Medical Association Says*, DALL. MORNING NEWS (July 14, 2022, 7:49 PM), https://www.dallasnews.com/news/politics/2022/07/14/texas-hospitals-fearing-abortion-law-delay-pregnant-womens-care-medical-association-says/ [https://perma.cc/9CH8-C53A] (describing the letter to the Texas Medical Board). Neither the Texas Medical Board nor the Texas Medical Association made the full text of the letter public.

436 *Id.*

bleeding and requires surgery to treat, whereas prior to rupture the condition can be treated with an injection.[437] In response to such events, the Texas Medical Association wrote, "[d]elayed or prevented care in this scenario creates a substantial risk for the patient's future reproductive ability and poses serious risk to the patient's immediate physical wellbeing."[438]

Although this sort of condition should be treatable under both state and federal law, patients' lives are still being endangered by the fear and confusion created by the state abortion bans. Thus, the preemption of state anti-abortion law by EMTALA is a legal and practical imperative.

3. Litigation Involving EMTALA's Preemption of State Abortion Restrictions

On July 11, 2022, HHS Secretary Xavier Becerra wrote to covered health care providers, informing them that "[a]s frontline health care providers, the federal EMTALA statute protects your clinical judgment and the action that you take to provide stabilizing medical treatment to your pregnant patients, regardless of the restrictions in the state where you practice."[439] The letter expressed the administration's position that EMTALA's screening, stabilization, and transfer requirements preempt "[a]ny state laws or mandates that employ a more restrictive definition of an emergency medical condition" or "apply to specific procedures."[440] Thus, wrote Becerra, "if a physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment."[441] HHS's "Action Plan" reiterated its earlier guidance, declaring:

> [I]f a physician believes that a pregnant patient presenting at an emergency department . . . is experiencing an emergency medical condition as defined

437 Pearson, *supra* note 433.

438 Morris, *supra* note 435.

439 Letter from Xavier Becerra, Sec'y, Dep't of Health & Hum. Servs., to Health Care Providers 1 (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/RF3J-HNTW]. The agency also issued formal guidance. *See* Memorandum from Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Hum. Servs., to State Surv. Agency Dirs. 5 (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/7GGC-2BDL] ("Physicians and hospitals have an obligation to follow" EMTALA even when their actions would be in conflict with state laws.).

440 Letter from Xavier Becerra, Sec'y, Dep't of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/RF3J-HNTW].

441 *Id.*

> by EMTALA, and that abortion is the stabilizing treatment necessary to resolve the emergency medical condition, the physician must ensure that the patient receives that treatment. And when a state law directly conflicts with EMTALA because it prohibits abortion and does not include an exception for the life and health of the pregnant woman—*or draws the exception more narrowly than EMTALA's emergency medical condition definition*—that state law is preempted in the area of this direct conflict.[442]

The administration's position has resulted in two separate court battles over the federal preemption question, one initiated by the U.S. Department of Justice ("DOJ") in federal court in Idaho, and the other initiated by the State of Texas.[443]

a. *The Idaho Suit*

In August 2022 the DOJ brought suit requesting a declaratory judgment that Idaho's abortion ban was preempted by EMTALA "in situations where an abortion is necessary stabilizing treatment for an emergency medical condition."[444] At the time of the suit, Idaho's criminal abortion ban created an affirmative defense, rather than an exception, if the defendant physician "determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman."[445] Notably, this defense was considerably narrower than the administration's EMTALA guidance—and many other state abortion bans—not only because it placed the burden on the physician to plead and prove an affirmative defense, but also because it only permitted abortion where necessary to save a pregnant person's life, and not when necessary to prevent serious harm or substantial impairment of a major bodily function.[446]

---

442 HEALTH CARE UNDER ATTACK, *supra* note 374, at 12 (emphasis added).

443 *See* Press Release, Dep't of Justice, Justice Department Sues Idaho to Protect Reproductive Rights (Aug. 2, 2022), https://www.justice.gov/opa/pr/justice-department-sues-idaho-protect-reproductive-rights [https://perma.cc/2HVB-223V]. (discussing DOJ lawsuit against Idaho to "protect the rights of patients to access emergency medical care guaranteed by federal law"); State of Texas's Original Complaint at 1-2, Texas v. Becerra, 623 F. Supp. 3d 696 (N.D. Tex. 2022) (No. 5:22-cv-00185) (discussing lawsuit filed by Texas alleging an injury to its sovereign interest due to HHS guidance that EMTALA preempts state law).

444 Press Release, Dep't of Justice, Justice Department Sues Idaho to Protect Reproductive Rights (Aug. 2, 2022), https://www.justice.gov/opa/pr/justice-department-sues-idaho-protect-reproductive-rights [https://perma.cc/2HVB-223V].

445 IDAHO CODE ANN. § 18-622(3)(iii) (West 2020).

446 *See* Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services,* KFF (May 19, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services [https://perma.cc/W5HP-9HKW]

Judge B. Lynn Winmill of the District of Idaho issued a preliminary injunction prohibiting Idaho from enforcing its abortion ban as applied to medical care required by EMTALA.[447] The court found that the Idaho law criminalized treatment required by EMTALA and was therefore preempted under the doctrine of obstacle or impossibility preemption.[448] The court also wrote that the Idaho statute's affirmative defense did not cure the impossibility of complying with it and with federal law simultaneously.[449] An affirmative defense is "an excuse, not an exception," and requires a defendant to first admit that they have committed a crime before they may assert the defense.[450] A defendant would therefore have to undergo indictment, arrest, pretrial detention, and trial in order to raise the defense.[451] Although a defendant might escape conviction, the statute "still makes it impossible to provide an abortion without also committing a crime," even when such an abortion is required by federal law.[452]

Further, the court ruled, even if an affirmative defense could cure impossibility, "EMTALA requires abortions that the affirmative defense would not cover," namely those necessary to prevent "serious impairment to bodily functions, serious dysfunction of any bodily organ or part, or serious jeopardy to the patient's health."[453] Additionally, under Idaho law, death must be "imminent or certain absent an abortion," whereas EMTALA requires abortion when harm (short of death) is probable, or when the patient could be reasonably expected to suffer harm.[454] Therefore, the narrowness of Idaho's exception created an impossible conflict with EMTALA, whether structured as an affirmative defense or not.

Finally, according to the court, the Idaho law was also preempted because "Congress's clear purpose was to establish a bare minimum of emergency care that would be available to all people in Medicare-funded hospitals."[455] Because "Idaho's criminal abortion law will undoubtedly deter physicians from providing abortions in some emergency situations," it "stands as a clear obstacle to what Congress was attempting to accomplish with EMTALA,"

(noting that sixteen states with abortion bans currently have exceptions to preserve the health of the pregnant person).

447 United States v. Idaho, 623 F. Supp. 3d 1096, 1117 (D. Idaho 2022).

448 *Id.* at 1109-12 (noting that "neither the State nor the Legislature have convinced the Court that it is possible for healthcare workers to simultaneously comply" with both EMTALA and Idaho state law, and thus the latter should yield to the former).

449 *Id.* at 1109 ("The statute's affirmative defense does not cure the impossibility.").

450 *Id.*

451 *Id.*

452 *Id.*

453 *Id.* at 1109.

454 *Id.* at 1109-10 (explaining differences between Idaho's abortion ban and EMTALA).

455 *Id.* at 1111.

and "would obviously frustrate Congress's intent to ensure adequate emergency care for all patients who turn up in Medicare-funded hospitals."[456]

Subsequently, both the Idaho legislature and the Idaho Supreme Court clarified the statute in ways that addressed some of Judge Winmill's concerns. The legislature amended the statute both to make the exception for emergency abortions part of the statute (and not an affirmative defense)[457] and to make clear that treatment of ectopic pregnancies would not run afoul of the law.[458] And the Idaho Supreme Court adopted a limiting interpretation of the law to clarify that physicians can use their subjective judgment in assessing the need for an abortion.[459] Thus, if, in the physician's good faith judgment, an abortion is medically necessary, the Idaho statute would not be deemed to criminalize the abortion.[460] Moreover, the court made clear that there was no imminency requirement in the statute.[461] Instead, it explicitly held that the "necessary to save the life of the mother" language in the statute does not require certainty, a substantial risk of death, or any other particular probability level.[462] Nor is a "medical consensus on what is necessary to prevent the death of the woman . . . required . . . ."[463] As the Supreme Court of Idaho put it, "[t]he plain language of the [exception] leaves wide room for the physician's 'good faith medical judgment' on whether the abortion was 'necessary to prevent the death of the pregnant woman' based on those facts known to the physician at that time."[464]

Based in large part on these adjustments to the statute, a Ninth Circuit panel subsequently reversed the District Court decision.[465] According to the panel, the changes rendered most of the District Court's concerns about a conflict between state and federal law moot or inapplicable.[466] In addition, according to the appellate panel, EMTALA mandates no particular standard of care and "does not require the State to allow every form of treatment that *could conceivably* stabilize a medical condition solely because, as the government argues, a 'relevant professional determines such care is necessary.'"[467]

---

456 *Id.* at 1112.

457 *See* 2023 Idaho Sess. Laws 906, 908 (excluding abortions performed upon a doctor's good-faith belief "that the abortion was necessary to prevent the death of the pregnant woman").

458 2023 Idaho Sess. Laws 906 (listing exclusions from the statute's definition of "abortion").

459 Planned Parenthood Great Nw. v. Idaho, 522 P.3d 1132, 1203 (Idaho 2023).

460 *Id.*

461 *Id.* at 1203-04.

462 *Id.*

463 *Id.* at 1204 (internal quotation marks omitted).

464 *Id.* at 1203.

465 United States v. Idaho, 84 F.4th 1130, 1133-34 (9th Cir. 2023).

466 *See id.* at 1137-38.

467 *Id.* at 1136.

Likewise, the Ninth Circuit panel ruled that the Idaho law does not pose an obstacle to EMTALA's purpose. According to the court, EMTALA's purpose is not "to force hospitals to treat medical conditions using certain procedures," but instead only "to prevent hospitals from neglecting poor or uninsured patients with the goal of protecting 'the health of the woman' and 'her unborn child.'"[468] The court concluded that Idaho's "limitations on abortion services do not pose an obstacle to EMTALA's purpose because they do not interfere with the provision of emergency medical services to indigent patients."[469]

Nevertheless, it is important to note that the practical realities facing abortion providers are such that even the changed statutory language and the limiting interpretation adopted by the Idaho Supreme Court and relied upon by the Ninth Circuit panel may be insufficient to overcome the chilling effect perpetuated by criminal abortion bans. Such bans, even those with life/health exceptions, create a constant specter of criminal prosecution that can haunt the emergency room.[470] As a representative for the American College of Obstetricians and Gynecologists has said, "[r]egardless of the specific language, abortion bans scare health care providers into thinking that their profession is at risk, their freedom to provide the best possible care for their patients."[471] This is surely at odds with EMTALA's goal to secure equal access to emergency medical treatment. In addition, although the Ninth Circuit panel relied heavily on the congressional intent to ensure that indigent patients are not refused necessary care, the panel ignored the reality that state abortion bans interfere with this intent because poor people and people of color are most likely to experience serious pregnancy complications requiring

468 *Id.* at 1138 (quoting EMTALA, 42 U.S.C. § 1395ddI(1)(A)).

469 *Id.*

470 *See* Adam Piore, *Doctors: 'Chilling Effect' of Abortion Laws Imperils Women's Lives*, NEWSWEEK (Jul. 21, 2022, 5:00 AM*), https:*//www.newsweek.com/doctors-chilling-effect-abortion-laws-imperils-womens-lives-1726503; *see also* Sophie Novack *"You Know What? I'm Not Doing This Anymore*," SLATE (Mar. 21, 2023, 5:45 AM), https://slate.com/news-and-politics/2023/03/texas-abortion-law-doctors-nurses-care-supreme-court.html?sid=59d8511cff530aaf2f8b4a2e&email=54464b7b9067ba39bc16ec4d659afb9778b5a839b85d4233b08a93aeb9edfe6a&utm_medium=email&utm_campaign=traffic&utm_source=newsletter&utm_content=TheSlatest [https://perma.cc/67BC-YYRQ] (describing a possible exodus of Texas OB/Gyn and labor and delivery nurses from the state).

471 Christine Vestal*, Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, STATELINE (Sept. 1, 2022), https://stateline.org/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies/ [*https://perma.cc/YDA9-BFHP*].

emergency medical care.[472] Subsequently, the Ninth Circuit vacated the panel's decision and ordered rehearing en banc.[473]

b. *The Texas Suit*

In response to the HHS guidance on EMTALA preemption, the State of Texas filed a complaint on July 14, 2022, seeking a declaratory judgment blocking enforcement of the HHS guidance based on a variety of constitutional and administrative law claims.[474] With regard to federal preemption, Texas argued that EMTALA "does not authorize—and has never authorized—the federal government to compel healthcare providers to perform abortions."[475] Further, it is worth noting that the Texas abortion law permits abortions if

> the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death *or poses a serious risk of substantial impairment of a major bodily* function unless the abortion is performed or induced.[476]

Thus, a cautious court inclined to rule for the state could have done so on the ground that, depending on how the state law and EMTALA are interpreted, it may not in fact be impossible to comply with EMTALA and state law simultaneously, thereby avoiding a constitutional conflict.[477] This is

---

472 *See* Latoya Hill, Samantha Artiga & Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#:~:text=Research%20has%20documented%20that%20social,of%20mortality%20among%20Black%20infants [https://perma.cc/J9R4-6LAQ] (discussing the impact of socioeconomic inequities on pregnancy outcomes).

473 United States v. Idaho, 82 F.4th at 129.

474 *See* State of Texas's Original Complaint at 1-2, 11-18, Texas v. Becerra, 623 F. Supp. 3d 696 (No. 5:22-CV-185) ("Texas is entitled to a declaration that . . . violating the law and the Abortion Mandate is unlawful, unconstitutional, and unenforceable.").

475 *Id.* at 1-2 (characterizing the federal preemption conflict caused by EMTALA as forcing "hospitals and doctors to commit crimes and risk their licensure under Texas law").

476 TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b) (West 2022) (emphasis added).

477 It is, of course, an elementary principle of statutory interpretation that, when a law's language is unclear, courts should construe it to avoid a conflict with state or federal constitutions. *See, e.g.,* FTC v. Am. Tobacco Co., 264 U.S. 298, 305-307 (1924) (stating that "nothing short of the most explicit language" would lead the U.S. Supreme Court to interpret Congressional intent as conflicting with the Fourth Amendment); Clark v. Martinez, 543 U.S. 371, 381 (2005) (observing that the avoidance of deciding constitutional questions is a canonical method of statutory interpretation). This canon rests on the need to respect the separation of powers and on "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381-82.

largely the path taken by the Ninth Circuit in the Idaho case, as discussed above.

Instead, Judge James Wesley Hendrix of the Northern District of Texas issued a far more sweeping decision enjoining the HHS guidance.[478] First, the court interpreted EMTALA to create *equal* stabilization obligations to both the pregnant person and the fetus,[479] and thus held that the guidance was an impermissible construction of the statute because it would prioritize the stabilization of the pregnant person over that of the fetus.[480] For this reason, the court found the guidance to be an unauthorized exercise of agency power.[481] Second, the court concluded that EMTALA provides no guidance at all as to how maternal-fetal conflicts should be resolved.[482] Accordingly, the court concluded that EMTALA does not directly conflict with state law and has no preemptive effect, leaving state law to fill the gap allegedly left by EMTALA.[483] We believe this decision is erroneous for three reasons.

First, there is no evidence that EMTALA creates equal stabilization requirements for a pregnant person and fetus. Such a contention is contrary to the law's logic and legislative context. EMTALA does include in its definition of "emergency medical condition" any condition that "place[s] the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy."[484] This language, however, has never, to our knowledge, been held to foreclose abortion, much less at the expense of the pregnant person's health and well-being. Such an interpretation would mean that "every time a hospital emergency room terminated a pregnancy to save a pregnant patient's life, the hospital committed an EMTALA violation."[485] Surely, Congress would not have intended such a result without saying so explicitly. Indeed, Congress routinely makes explicit exceptions for abortion care from generally

478 *See Becerra*, 623 F. Supp. 3d at 727 ("EMTALA does not preempt Texas's abortion law.").

479 *Id.* at 726 ("[A] physician's duty to screen and to stabilize or transfer appropriately applies equally to the pregnant woman and her unborn child.").

480 *Id.* at 733 (ruling that by providing an abortion to a pregnant person, a doctor necessarily closes "his or her eyes to the unborn child's health," thereby violating the obligation of equal treatment under EMTALA).

481 *Id.*

482 *Id.*

483 *Id.* at 727. The court also ruled that, because the guidance established or changed a substantive legal standard, it should have been subject to notice and comment under the APA. *Id.* at 735. We do not address this argument because the administration may ultimately promulgate the same requirements through notice-and-comment rulemaking.

484 42 U.S.C. § 139I(e)(1)(A)(i). EMTALA also includes conditions that could reasonably be expected to result in "(ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part."

485 Memorandum in Support of Motion for a Preliminary Injunction at 13, United States v. Idaho, 623 F. Supp. 3d 1096 (D. Idaho Aug. 25, 2022) (No. 22-cv-329).

applicable rules; for example, in every budget the inclusion of the Hyde and Weldon Amendments respectively prohibit federal funding for abortion and discrimination against hospitals refusing to provide abortions.[486] Had Congress intended to prohibit abortion as a form of treatment for emergent pregnancy complications, it simply could have said so.

Instead, the inclusion of the language "unborn child" in EMTALA is better understood as an attempt to close loopholes in the stabilization requirement, rather than to create some expansive federal protection for unborn life. If unborn fetuses were not included in the statutory language, a hospital could potentially discharge or fail to stabilize a pregnant patient and escape sanction by arguing that it was the fetus, rather than the pregnant person, that was suffering the emergency medical condition. But this language has never, to our knowledge, been used to preserve fetal life when *inconsistent* with the stabilization or wellbeing of the pregnant person. As one health law scholar writes:

> A natural explanation is that Congress assumed that when continuing a pregnancy involved serious risk, the pregnant patient and the physician would decide what to do. Congress did not need to dictate whether abortion should be chosen—only that it must be provided if medically necessary and consented to by the patient.[487]

Several district courts have ruled that EMTALA requires abortion care and associated treatment in emergency settings.[488] For example, the Southern District of New York held that the Trump administration's "conscience rule," which broadly allowed individuals and entities to abstain from participating in medical procedures on account of religious or moral objection, violated EMTALA.[489] According to the court, the conscience rule could not be used to relieve physicians of their duty to perform abortions when required by

---

486 *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. H, tit. V, §§ 506–07, 134 Stat. 1182, 1622 (Hyde Amendment) ("None of the funds appropriated in this Act . . . shall be expended for any abortion" or made available to any federal or state agency or program that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide coverage of, or refer for abortions."); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, Div. B., § 507(d), 132 Stat. 2981, 3118 (2018) (same).

487 Michelle M. Mello, *Resuscitating Abortion Rights in Emergency Care*, 3(9) J. AM. MED. ASS'N F. 2 (Sept. 8, 2022).

488 *See* New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 538 (S.D.N.Y. 2019) (noting that a conscience rule that applies in emergency medical situations directly conflicts with EMTALA); Morin v. E. Me. Med. Ctr., 780 F. Supp. 2d 84, 96 (D. Me. 2010) (holding that EMTALA's protections for pregnant women do not depend on the viability of the fetus); *see also* California v. United States, No. 05-cv-328, 2008 WL 744840, at *4 (N.D. Cal. Mar. 18, 2008) (finding that EMTALA protects emergency abortion care).

489 *U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. at 513, 538.

EMTALA.[490] Clearly then, EMTALA can be interpreted to require physicians to perform emergency abortions.[491] These cases directly contradict the Texas court's conclusion that state law could prohibit such emergency abortions.

Second, interpreting EMTALA to create equal obligations to both the pregnant person and the fetus presupposes that, in an emergency setting, the medical needs of the pregnant person and fetus can be treated separately. Yet, in the type of situations that EMTALA covers—emergencies where the health and well-being of the pregnant person is at risk—the two are inextricably linked because the fetus depends on the pregnant person for its survival.

This leads to the third problem: the Texas court's ruling would permit states to mandate that hospitals let a pregnant person die so that they might try to stabilize the fetus. Indeed, the court's decision rests on the idea that EMTALA has nothing to say about what should be done if the interests of the fetus and pregnant person conflict, leaving a void to be filled by state law.[492] This interpretation, in addition to jeopardizing the accessibility of vital emergency treatment in conflict with EMTALA's purpose and basic logic, would permit an unprecedented state intrusion into private medical decisions. Under this interpretation, a state could ignore EMTALA and explicitly *require* doctors to let their patients die to preserve the life of an unborn fetus that may itself not survive.

Thus, a fair reading of EMTALA is that it preempts state law, at least to the extent that state law would ban abortions when required to stabilize a pregnant patient undergoing a medical emergency. Accordingly, so long as the state statutes are interpreted, as the Idaho Supreme Court did,[493] to allow a physician broad latitude to make a subjective judgment that an abortion is necessary for the woman's health, then federal preemption may be less of an issue. In contrast, there is no basis for concluding that EMTALA imposes an equal stabilization requirement as to the fetus, particularly if the life or health of the pregnant person is at risk. Such an interpretation makes little practical sense and would imperil the lives of pregnant people.

---

490 *Id.* at 538-39 ("[T]he absence of any exception in the Rule's mandates for providers confronted with emergency medical situations creates a clear conflict between the Rule and EMTALA . . . . The Court accordingly holds that the Rule is not in accordance with law, insofar as it conflicts with EMTALA.").

491 Such a requirement is still subject to the patient's consent. *See* 42 U.S.C. § 1395dd(b)(2) (discharging a hospital's duty when a patient refuses to consent to treatment).

492 Texas v. Becerra, 623 F. Supp. 3d 696, 726 (N.D. Tex. 2022) (noting that in such circumstances where "EMTALA leaves that conflict unresolved," doctors must resolve the conflict "in accordance with state law").

493 *See supra* text accompanying notes 459–64.

IV. CIVIL SUITS AND CONFLICTS OF LAW

Until recently, most, if not all, state abortion laws involved criminal or regulatory penalties imposed by the State through its police power.[494] In May of 2021, however, the Texas legislature enacted an unprecedented abortion restriction: SB8.[495] The law, which took effect on September 1, 2021, prior to the decision in *Dobbs*, banned abortion at approximately six weeks.[496] SB8 eschews all state enforcement and instead creates a private cause of action for individual citizens to bring civil suits in state court against anyone who performs an abortion in violation of the law or who "knowingly engages in conduct that aids or abets" an abortion.[497] "Paying for or reimbursing the costs of an abortion through insurance or otherwise" also constitutes aiding and abetting abortion under the law.[498] Private citizens successful in an action under SB8 may be awarded injunctive relief against the defendant, with statutory damages of not less than $10,000 for each successful action, plus costs and attorney's fees.[499] Thus, SB8 turns private citizens into "bounty hunters" and rewards them for serving as enforcers of an extraordinarily strict anti-abortion regime. Even before *Dobbs*, other anti-abortion state legislatures were preparing "copy-cat laws" that adopted SB8's civil enforcement scheme.[500] The SB8 framework will likely become the blueprint

494 *See, e.g.*, Alexandra Svokos, *How Unprecedented the Texas Abortion Law Is in Scope of History*, ABC NEWS (Sept. 23, 2021), https://abcnews.go.com/US/unprecedented-texas-abortion-law-scope-history/story?id=79793375 [https://perma.cc/LT5Y-4C9B] ("The Texas law is different from previous bans in that it prohibits the state from enforcing the ban, instead authorizing private citizens to bring civil suits against anyone who 'aids or abets' an abortion.").

495 TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.211 (West 2021), *amended by* S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

496 *See supra* note 81 and accompanying text (describing so-called "fetal heartbeat" provision of the Texas code).

497 *Id.* at § 171.208(a)(1-2). Because SB8 was enacted prior to *Dobbs*, this enforcement mechanism was designed to avoid judicial review of a law that was, then, unconstitutional on its face. Private civil enforcement aimed to remove state actors from enforcement, thereby frustrating preliminary judicial review of the statute. *See, e.g.*, Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html [perma.cc/2XHJ-SSRR] ("[T]he law, known as S.B. 8, was designed to escape judicial review in federal court."); JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10668, TEXAS HEARTBEAT ACT (S.B. 8) LITIGATION: SUPREME COURT IDENTIFIES NARROW PATH FOR CHALLENGES TO TEXAS ABORTION LAW 2 (2021) ("S.B. 8 expressly bars state officials from enforcing its prohibition and instead authorizes enforcement only through civil suits by non-state actors.").

498 TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (West 2021).

499 *Id.* at § 171.208(b).

500 *See, e.g.*, OKLA. STAT. tit. 63, § 1-745.39 (2022) (authorizing civil actions against those who perform, induce, aid, or abet abortions), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023); IDAHO CODE §§ 18-8804, 18-8807 (West 2022) (authorizing civil actions brought by certain relatives of the "preborn child"). Other states have discussed or introduced similar laws, but not yet adopted them. *See Twelve States and Counting Poised to Copy Texas' Abortion Ban*, REPROD.

for many new abortion bans and restrictions in the post-*Dobbs* era. By bringing abortion law into civil court, SB8 and its ilk create many new issues with which courts have not previously contended, including how the classic conflicts-of-law doctrines of personal jurisdiction, choice of law, and recognition of judgments apply in this context.

Of course, to the extent that civil suits are brought against state citizens who are actually seeking an abortion, these conflicts problems are mitigated. After all, there is little doubt that a person domiciled in a state can be subjected to personal jurisdiction in that state in a civil suit, even if the acts giving rise to the liability occurred elsewhere.[501] Likewise, as a matter of choice-of-law doctrine, a state's law generally can be applied against its own citizens. And judgment recognition is not an issue in such cases, at least so long as the defendant remains a citizen of the state.

But it is substantially less clear whether an anti-abortion state may exercise personal jurisdiction over out-of-state healthcare providers or others who act outside of the forum state, or whether the state may apply its anti-abortion statutes against such out-of-state actors. And on the flip side, it is uncertain whether pro-access states may authorize their citizens to file retaliatory suits against out-of-state citizens who have won judgments against them. This Part takes up these issues.

A. *Personal Jurisdiction*

As noted previously, Republicans in the Missouri legislature recently introduced a bill modeled on Texas SB 8 that subjects out-of-state abortion providers to potential civil suits in Missouri brought by private citizen bounty

---

FREEDOM FOR ALL (Oct. 20, 2021), https://reproductivefreedomforall.org/news/twelve-states-and-counting-poised-to-copy-texas-abortion-ban/ [https://perma.cc/8PDA-NPPC] (noting that lawmakers in twelve states "publicly said they intend to use Texas' vigilante-enforced ban on abortion as a blueprint to attack reproductive freedom through copycat legislation"). Although the Oklahoma Supreme Court subsequently ruled that the Oklahoma statute violated the state constitution, it did so on grounds unrelated to the civil suit provision. *See* Okla. Call for Reprod. Just., 531 P.3d at 122-23 (finding that the statute violated a woman's inherent right under the Oklahoma constitution to have an abortion when it is necessary to save her life).

501 *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction . . . ."); Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile . . . ."); *see also* Leah Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 729-30 (1988) ("Domicile is traditionally the strongest basis supporting general jurisdiction over a party. Domicile provides such a strong foundation for the imposition of general personal jurisdiction because it typically satisfies four of the major theoretical justifications for the assertion of jurisdiction: convenience for the defendant, convenience for the plaintiff, power, and reciprocal benefits.").

hunters.[502] The sponsor of the measure, Republican State Representative Mary Elizabeth Coleman, provided the following justification: "If a Missouri resident is hurt, even in Illinois, by a product that they bought in Illinois, there is still jurisdiction for them to sue in a Missouri court because that's home for them . . . and this is extending that same kind of thought to abortion jurisprudence."[503] This statement exemplifies the confusion that exists, even among lawmakers, as to how the U.S. Supreme Court's personal jurisdiction jurisprudence applies to out-of-state defendants.

To begin, the premise of Representative Coleman's analysis is incorrect. It is *not* necessarily true that a Missouri citizen who buys a product in Illinois from an Illinois citizen can sue that Illinois citizen in Missouri. To the contrary, the U.S. Supreme Court, in *World-Wide Volkswagen v. Woodson*[504] ruled that a New York car dealer could *not* be sued in Oklahoma, even though the customer drove the car there, because the dealer had not done anything to purposely solicit business from people in Oklahoma or to purposefully avail itself of the Oklahoma market.[505] In addition, even if, under *World-Wide Volkswagen*, a Missouri patient receiving medical care in another state could somehow justify the assertion of jurisdiction in Missouri over the doctor who treated her, it does not necessarily follow that a *different* Missouri citizen, having no contact whatsoever with the out-of-state doctor, could *also* bring suit in Missouri. Thus, it seems clear that we need to return to first principles and examine the U.S. Supreme Court's personal jurisdiction jurisprudence with regard to the cross-border provision of services.

Since the nineteenth century, the U.S. Supreme Court has made it clear that courts can only assert jurisdiction over a defendant if that assertion of jurisdiction satisfies the requirements of constitutional due process.[506]

---

502 *See supra* text accompanying notes 91–95.

503 Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow.*, POLITICO (Mar. 19, 2022), https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539 [perma.cc/5Y2J-8BV5].

504 444 U.S. 286 (1980).

505 *Id.* at 297-98.

506 *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (ruling that proceedings against an individual over which the "court has no jurisdiction do not constitute due process of law"). This requirement is usually located in the Due Process Clause of the Fourteenth Amendment, and federal courts, with limited exceptions, have been deemed to possess no more jurisdictional power under the Due Process Clause of the Fifth Amendment than state courts have under the Fourteenth. *See, e.g.*, *In re* Chase & Sanborn Corp. v. Granfinanciera, S.A., 835 F.2d 1341, 1344 (11th Cir. 1988) ("The due process clause of the fifth amendment constrains a federal court's power to acquire personal jurisdiction via nationwide service of process." (footnotes omitted), *rev'd on other grounds sub nom.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Republic of Panama v. BCCI Holdings S.A., 119 F.3d 935, 944 (11th Cir. 1997) ("Because the language and motivating policies of the due process clauses of these two amendments are substantially similar, opinions interpreting the Fourteenth Amendment due process clause provide important guidance for us . . . .").

According to the classic formulation, this due process requirement is met only if the defendant has sufficient "minimum contacts with [the forum state] such that" the assertion of jurisdiction satisfies "traditional notions of fair play and substantial justice."[507]

The "minimum contacts" inquiry is necessarily context-specific, and the U.S. Supreme Court has repeatedly been forced to clarify the application of the inquiry in a wide variety of factual scenarios. Parsing these many cases, however, certain jurisdictional principles can be gleaned that might be relevant to the new abortion context.

First, the Court has made clear that it is the *defendant's* contacts with the forum state that matter for the due process inquiry, not the plaintiff's.[508] Thus, as in *World-Wide Volkswagen*, if a defendant sells a physical product in one state and the customer then brings that product elsewhere, where it causes harm, that is not enough, by itself, to justify the assertion of jurisdiction in the state where the harm occurred.[509] Indeed, even a sale from a manufacturer into a state through a third-party distributor is not necessarily enough to justify jurisdiction over the manufacturer, absent either a large flow of products or some indication that the manufacturer was targeting that state specifically.[510] Accordingly, a medical provider operating in a state is likely *not* subject to personal jurisdiction in another state if the provider's only contact with that state is the treatment of a patient who happens to be a citizen of that state.

It is true that the U.S. Supreme Court has at times suggested that a defendant could potentially be subject to jurisdiction elsewhere because the effects of the defendant's actions were felt in another state. For example, in *Calder v. Jones*,[511] the Court upheld the assertion of personal jurisdiction in California over Florida-based journalists for an allegedly libelous article published in the *National Enquirer* and written entirely in Florida. The

---

507 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

508 *See, e.g.*, *id.* at 319 (noting that the due process clause does not allow for making a judgment against "an individual or corporate defendant with which the state has no contacts, ties, or relations"); *World-Wide Volkswagen Corp.*, 444 U.S. at 291-92 (observing that the "concept of minimum contacts" exists to protect "the defendant against the burdens of litigating in a distant or inconvenient forum").

509 *See World-Wide Volkswagen Corp.*, 444 U.S. at 298 (ruling that although automobiles sold at a car dealership would foreseeably be taken to other states, such foreseeability, on its own, was insufficient to establish sufficient minimum contacts with the forum state); Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[U]nilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

510 *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885-86 (2011) (finding that a foreign manufacturer may have intended to serve the U.S. market, but did not "purposefully avail[] itself" of a specific state's market).

511 465 U.S. 783 (1984).

defendants in *Calder* never travelled into California for the story, and only consulted California sources by phone, but, according to the Court,

> their intentional, and allegedly tortious, actions were expressly aimed at California. [Defendants wrote and edited] an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.[512]

Calder might therefore seem to support the idea that healthcare providers in a state who know they are treating an out-of-state patient could potentially be subject to jurisdiction in the state where the effects of their services are felt. The U.S. Supreme Court, however, has never extended the logic of *Calder* that far, and more recent cases have instead limited the application of a broad effects test for jurisdiction. In *Walden v. Fiore*, for example, airport police officers in Georgia allegedly harmed a couple traveling through the airport.[513] The officers knew the travelers were from Nevada and therefore presumably knew that any harm caused to the travelers would ultimately be felt in Nevada.[514] Yet, the Court ruled that was not enough to establish jurisdiction over the officers in Nevada.[515] According to the Court, the citizenship of the plaintiff alone could not be the only connection between the defendant and the forum state.[516] That approach would "impermissibly allow[] a *plaintiff's* contacts with the defendant and forum to drive the jurisdictional analysis."[517] Instead "it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."[518]

Applying *Walden* to the abortion context, it seems clear that even under *Calder* it is not sufficient that a doctor treated a patient the doctor knew to be from another state. Accordingly, if patients travel from Missouri to Illinois to obtain an abortion, that could not by itself form the basis for jurisdiction in a Missouri court. The key is whether the relevant doctor has done

---

512 *Id.* at 789-90 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

513 *See* 571 U.S. 277, 279-81 (2014) (describing the couple's claims that their Fourth Amendment rights were violated by DEA officials at the airport).

514 *Id.* at 289 (concluding that it was insufficient to establish jurisdiction in Nevada that the defendant "allegedly directed his conduct at plaintiffs whom he knew had Nevada connections").

515 *Id.*

516 *Id.*

517 *Id.*

518 *Id.* at 290.

something further to purposely reach out to that state to attract customers or to do business there.

Yet, that is not the end of the analysis because it may often be the case that abortion providers in one state *do* have additional contacts with neighboring anti-abortion states. In fact, one of the effects of *Dobbs* and corresponding anti-abortion laws is to increase the market for interstate abortion care. As discussed above with regard to Missouri and Illinois,[519] providers may develop reciprocal referral relationships with out-of-state clinics. In the confusion that ensued after the enactment of Texas SB 8 and the *Dobbs* decision, clinics that were prohibited by law from providing abortion care turned their energy to finding out-of-state appointments for the patients they could no longer serve.[520] For example, in a December 2022 interview, Amy Hagstrom Miller, CEO of Whole Woman's Health, one of the largest groups of abortion clinics in the country, talked to the Austin Chronicle about the reaction of Texas clinics to SB8:

> We can absolutely help anybody who calls our clinic get an abortion in a state where abortion is legal. . . . So we are making referrals, we are guiding people with transportation advice, we're giving people gas gift cards, or helping them with flights or hotels, and helping them if they can't afford the abortion. We're still getting hundreds of phone calls from people who are still calling our phone numbers. Our staff are doing a lot of case management and advocacy.[521]

Referrals such as these may be deemed to create sufficient contacts between the out-of-state providers and the state, particularly if there is evidence that the out-of-state providers actively solicited the referrals. Alternatively, even in the absence of direct solicitation, it may be enough that

---

519 *See supra* notes 91–95.

520 Brenda Goodman, *Clinics Become Travel Agencies to Help Patients with 'Devastating' Lack of Abortion Access, CNN* (May 5, 2022), https://www.cnn.com/2022/05/05/health/abortion-providers-shift-services/index.html [https://perma.cc/33SD-KASA] (reporting that medical providers in states with restricted access to abortion are working to connect patients to out-of-state care); Haley BeMiller & Abbey Marshall, *Canceled Appointments, Out-of-State Referrals: 6-Week Ban Uproots Ohio Abortion Access*, COLUMBUS DISPATCH (June 27, 2022), https://www.dispatch.com/story/news/2022/06/25/ohio-abortion-clinics-cancel-appointments-heartbeat-bill/7734347001/ [https://perma.cc/JK2R-UALA] (describing how Ohio medical providers assist patients in obtaining abortion appointments out of state); Pocharapon Neammanee, *West Virginia's Only Abortion Clinic Can't Provide the Service After* Roe v. Wade*. But in One Weekend It Raised $75,000 to Help Send Patients Out of State*, INSIDER (July 3, 2022), https://www.insider.com/west-virginias-abortion-clinic-raised-75k-send-patients-out-state-2022-7 [https://perma.cc/XJ5X-R8LR] (detailing West Virginia abortion clinic's fundraising and referral efforts to send patients out of state).

521 Sara Hutchinson, *Abortion on the Border*, AUSTIN CHRONICLE (Dec. 30, 2022), https://www.austinchronicle.com/news/2022-12-30/abortion-on-the-border/ [https://perma.cc/Q2AU-EKJV].

the out-of-state doctor knew about the referrals and encouraged them. If clinics work with abortion funds to help patients from anti-abortion states travel to and obtain abortions in pro-access states, that also may be enough to establish jurisdiction over both the clinics and the funds. And to the extent clinics and providers advertise across state lines, that too might constitute sufficient volitional contact with the state to justify the assertion of jurisdiction.[522]

Thus, we see two paradigm cases that are likely to arise as states attempt to assert personal jurisdiction over out-of-state entities involved with the provision of abortion care: (A) patients reaching out from an anti-abortion forum state and into a pro-access state in pursuit of abortion care, and (B) defendant clinics, providers, or funds reaching into an anti-abortion forum state to help residents of that state obtain abortions elsewhere.

In scenario A, providers could avoid the assertion of jurisdiction in the anti-abortion state so long as the providers eschewed all contact with that anti-abortion state. This would likely require abortion funds or other outreach organizations to take the brunt of the legal risk and help connect in-state residents to out-of-state providers without the collaboration of those providers. Or, it would mean that patients would be left without assistance in seeking out-of-state abortion care. If providers simply received out-of-state patients referred to them by other entities or who found them independently, those providers could argue that, as in *Walden*, even if they know where the patient resides, they have no independent volitional connection to that state. Although this would allow providers to avoid personal jurisdiction in anti-abortion states, it obviously would impact both the dissemination of information to pregnant people in those states and the provision of often necessary travel funds.

Planned Parenthood of Illinois's Regional Logistics Center is likely an example of scenario B.[523] It operates in a pro-access state and effectively "recruits" Missouri patients, who then travel across state lines to receive abortion care. The abortion occurs wholly in Illinois, but Missouri plaintiffs and prosecutors might argue that the "harm" is felt in Missouri and that Planned Parenthood directly targets Missouri. Whether an abortion fund or clinic targets a forum state may depend on the extent to which it advertises,

---

522 *See, e.g.,* SEC v. Carillo, 115 F.3d 1540, 1545 (11th Cir. 1997) ("It is well settled that advertising that is reasonably calculated to reach the forum may constitute purposeful availment of the privileges of doing business in the forum."); Sinatra v. Nat'l Enquirer, 854 F.2d 1191, 1195 (9th Cir. 1988) (holding that a Swiss clinic purposefully availed itself of California law when it solicited clients from California through advertisements, knew of the plaintiff's residence in California, and knowingly caused effects in California by misappropriating plaintiff's image).

523 *See supra* notes 91–95 and accompanying text (discussing Illinois's Regional Logistics Center).

raises awareness of its services, or creates a network, in the forum state. But any activity in Missouri relating to abortions in Illinois could arguably be characterized as contributing to minimum contacts there for purposes of enforcing anti-abortion laws. In this scenario, the patient would no longer be the only nexus between the defendant and the forum state, and so personal jurisdiction could be exercised in keeping with the reasoning of *Calder* and *Walden*. Similarly, Missouri could exercise personal jurisdiction over a doctor providing telemedicine to patients located in the state or shipping pills directly into the state, even if the provider were located elsewhere.[524]

In the end, the personal jurisdiction inquiry results in a mixed bag for abortion access. Abortion providers and others operating in pro-access states may be able to avoid being sued in anti-abortion states, depending on how they structure their operations. To avoid jurisdiction, however, providers, clinics, abortion funds, and other organizations will be forced to silo themselves off completely, shun all out-of-state contact, and place the onus entirely on patients to seek and fund out-of-state care. Due process limits on state jurisdiction, therefore, offer only limited protection if abortion clinics, clinicians, and others are to provide effective care to all those who might need their help.[525]

---

524 One final wrinkle is that there may be a distinction, for jurisdictional purposes, between the individual provider and the provider's employer. For example, *Creech v. Roberts* was a medical malpractice suit brought by an Ohio resident against an Oklahoma health care center and its physician employee, who was also domiciled in Oklahoma. 908 F.2d 75, 77-78 (6th Cir. 1990). The Sixth Circuit found that the Ohio court properly exercised jurisdiction over the Center, but not the physician. *Id.* at 84. According to the court, the treatment center had, through a nationally televised program, "invited people to come from around the country, as well as from other countries, to the Hospital and the Center for treatment." *Id.* at 77-78. Ohio was one of the states that received the broadcast, and the plaintiff as well as other Ohio residents were "convinced to go to the Hospital and the Center for treatment." *Id.* at 79. The court refused, however, to impute these Ohio contacts to the defendant physician, who had never himself advertised in Ohio and had no other contacts in Ohio. *Id.* at 80. The court was "unable to find, and [the plaintiff did] not cite, any case in which a trial court has asserted personal jurisdiction over a nonresident doctor who committed a tortious act outside the forum state—even where the doctor worked for a hospital that advertised in the forum state. Indeed, every case reported seems to reach the opposite result." *Id.*

525 Consider the provision of medication abortion pills. If the pills are provided to the patient by an out-of-state provider at an out-of-state location, the analysis would likely be the same as above. To the extent a medication abortion distributor is shipping pills directly into an anti-abortion state, however, the jurisdictional inquiry is more straight-forward because the pill distributor is presumably purposely shipping pills into the state, which is likely to be sufficient to constitute minimum contacts for jurisdictional purposes. State assertion of liability against such medical abortion providers, however, may still run into choice-of-law, Dormant Commerce Clause, or federal preemption issues, discussed elsewhere in this Article. In addition, there is the practical difficulty that medication abortion providers may be located outside the United States and therefore may be difficult to find or to summon to stand trial.

B. *Choice of Law*

Assuming an anti-abortion state can overcome the hurdles to asserting personal jurisdiction over out-of-state abortion providers or others, will the courts in the state be able to apply their local anti-abortion law to the cause of action, given that the relevant conduct occurred elsewhere? Interestingly, unlike in the jurisdictional context, the U.S. Supreme Court has ruled that the U.S. Constitution provides only minimal limitations on a state's choice of law analysis.[526] Thus, states are free to adopt very different approaches to resolving choice-of-law questions.

For states that use the choice-of-law approach contained in the first Restatement of Conflicts, the key starting point is the place of the alleged tort.[527] Joseph Beale, the theory's most prominent advocate, wrote, "the chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created it . . . ," because if "two laws were present at the same time and in the same place upon the same subject, we should . . . have a condition of anarchy."[528] Thus, under the first Restatement approach, the law of the place of injury is applied, because injury is the last occurrence necessary to create a tort. In the abortion context, place of injury depends on the type of abortion performed. For surgical abortions, the relevant incident creating the alleged tort most likely occurs in the provider's home state, not the patient's. Even if a state might argue that the long-term harm, psychological or otherwise, occurs back in the home state of the person who undergoes the abortion, it is difficult to claim that the tort actually occurs later, when the patient is back home, rather than at the time the abortion occurs.

The only wrinkle to this analysis is the case of a medication abortion, where the relevant pills are administered out of state, but the fetus is expelled after the pregnant person returns home. Notably, the comments to section 377 of the first Restatement note that "[w]hen a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered."[529] This would seem to mean that the relevant territorial nexus is the home state, not the state where the pills were

---

526 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 306, 313 (1981) (plurality opinion) (finding it constitutional for a Minnesota court to apply Minnesota insurance law even in a case where the relevant insurance policy was issued in Wisconsin, the relevant car accident occurred in Wisconsin, and all parties were Wisconsin residents at the time of the accident). Although the opinion in *Allstate* was only a plurality, it was subsequently adopted verbatim as the appropriate choice-of-law framework in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818-19 (1985).

527 *See* JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 1287-88 (1st ed. 1935) (describing and defending this approach).

528 *Id.* at 46, 64.

529 RESTATEMENT OF CONFLICT OF L. § 377 n.2 (Am. L. Inst. 1934).

prescribed. On the other hand, section 382 of the first Restatement provides that "[a] person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state."[530] Because a medical provider in a pro-access state would be under a duty to provide standard medical care, imposing out-of-state liability on that provider might effectively subject the provider to conflicting legal duties. A court following section 382, therefore, might find in such a case that the law of the place of conduct must govern.[531]

But in any event, even states using the first Restatement approach sometimes depart from using the state of territorial nexus anyway, by invoking a public policy exception and applying their own law regardless of the place of the tort. This exception, of course, is not meant to be used any time the forum state's law differs from the law of the place of the tort. Otherwise, forum law would simply always apply. Instead, the canonical statement on the scope of the public policy exception is from Judge Cardozo, writing at the time for New York's highest court: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[532] Thus, according to Cardozo, use of the public policy exception should be reserved for exceptional circumstances, when application of the foreign law would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[533]

Nevertheless, an anti-abortion law is precisely the sort of circumstance where courts might decide that a fundamental principle of justice or morality is in fact at stake. Thus, courts in anti-abortion states might be tempted to apply their own law to a case against an out-of-state abortion provider, regardless of how the place-of-tort analysis came out. On the other hand, as Joseph Singer has pointed out, the public policy exception has been used historically "only when a state refuses to recognize rights created elsewhere," but not "to allow a state to create obligations by imposing its regulations on conduct that was lawful in the place where it happened."[534] Thus, as Singer argues, the use of a public policy exception to impose local law on out-of-state

530 *Id.* at § 382(1).

531 *See* Singer, *supra* note 24, at 96-97 ("There is nothing more clearly a violation of 'rule of law' norms than both requiring someone to do something and requiring them not do it at the same time. In such cases, the law that wins is the law of the place of conduct, not the law of the place of injury.").

532 Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

533 *Id.* at 202.

534 Singer, *supra* note 24, at 38 (emphasis omitted).

acts in this context would violate the original American understanding of choice-of-law.[535]

A state following the Restatement (Second) of Conflicts[536] might well resolve the choice-of-law analysis by applying forum law. The Second Restatement incorporates what is called "interest analysis."[537] But in this sort of case, both the anti-abortion and pro-access states have strong interests in applying their own law, and it seems highly likely that the court would break the tie in favor of applying forum law, given the contentiousness of the public policy at stake. On the other hand, the Second Restatement also contains presumptions specific to tort law that emphasize territorial connections in determining applicable law,[538] and those might, if Singer is correct, militate in favor of applying the law of the place where the medical services occurred.

In any event, choice-of-law doctrines are sufficiently malleable that a determined court could almost certainly justify applying forum law even to out-of-state activity. One could, of course, argue that the choice-of-law analysis should not be applied in this way. After all, if a state chooses to allow access to an abortion, that is a sovereign choice that should potentially apply to all within its jurisdictional borders, whether those within the borders are domiciliaries of the state or not. In that sense, the choice-of-law analysis might merge with the equal treatment, right-to-travel, and dormant Commerce Clause discussion above,[539] resulting in a principle that territorial location should preempt residence for choice-of-law purposes, at least in the abortion context. Following this reasoning, Lea Brilmayer and Joseph Singer have both argued that even with regard to suits against the actual pregnant person seeking the abortion, the law of the person's domicile should not be permitted to apply.[540] That argument presumably would be even stronger when applied to a non-domiciliary medical provider or abortion fund.

---

535 *See id.* at 21–47 (recounting the early historical understanding of conflict of laws in the United States).

536 RESTATEMENT (SECOND) OF CONFLICT OF L. (AM. L. INST. 1971).

537 *Id.* § 6(c); *see also* BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function* (describing "interest analysis" and various court opinions that adopt it), *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 189-90, 238-59 (1963); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 173 (1959) (arguing that the "central problem of conflict of laws" is "determining which interest shall yield" when state interests conflict).

538 *See* RESTATEMENT (SECOND) OF CONFLICTS OF L. § 145(2) (Am. L. Inst. 1973) (listing "the place where the injury occurred" and "the place where the conduct causing the injury occurred," among others, as territorial contacts for consideration).

539 *See supra* Part II.

540 *See* Lea Brilmayer, *supra* note 172, at 874-75 (arguing that a state cannot regulate a resident's out-of-state conduct in obtaining an out-of-state abortion); Singer, *supra* note 24, at 30-31 ("[I]it would arguably deny a person equal protection of law to deny them the benefits of a state's laws simply because they are not domiciled at the place of conduct.").

Yet, regardless of the choice-of-law framework a court uses in general, we believe the incredibly strong public policy interests implicated by the abortion question will pull most courts to the application of forum law.[541] In addition, because choice-of-law rules are a matter of state law, states could always—by legislation or judicial opinion—*change* their choice-of-law rules, either in general or specifically regarding abortion laws. And although an argument could be made that applying forum law to out-of-state behavior might violate the U.S. Constitution, the bottom line is that, at least as interpreted by the U.S. Supreme Court over many decades, the Constitution appears to offer no serious limitations to the ability of courts in anti-abortion states to apply their own law to an out-of-state tort,[542] assuming they can overcome the hurdle of personal jurisdiction.

C. *Recognition of Judgments and Retaliatory Suits*

Under the Full Faith and Credit Clause of the U.S. Constitution, all states are required to enforce the judgments issued by courts in other states, assuming the original court had proper jurisdiction.[543] This Full Faith and Credit command is exacting,[544] and the U.S. Supreme Court has recognized only very few exceptions. Indeed, in *Baker v. General Motors Corp.*, the Court made clear that, although states may interpose their own public policies as a reason to apply their *law* to a dispute, they may not use a "roving public policy exception" to avoid enforcing another state's *judgment*.[545] As the Court noted in an earlier case, the Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."[546] The Court was therefore "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect [of] the full faith and credit clause."[547] Given this unambiguous command, it seems at first glance, that a tort judgment issued in an anti-abortion state would have to be

541 Indeed, one empirical analysis suggests that, when analyzing choice-of-law even in less fraught contexts than abortion, courts using interest analysis and the second Restatement tend to gravitate towards using forum law. *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study,* 49 WASH. & LEE L. REV. 357, 377-78 (1992). And, as discussed above, even courts using the first Restatement could either choose to locate the tort in the forum state or use the public policy exception to apply forum law regardless. See notes 527–35 and accompanying text, *supra*.

542 *See supra* note 526 and accompanying text.

543 U.S. CONST. art. IV, § 1.

544 *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230, 236-38 (1908) (requiring Mississippi to recognize a Missouri judgment, even though the Missouri judgment rested on a misunderstanding of Mississippi law).

545 522 U.S. 222, 233-34 (1998) (internal quotation marks omitted).

546 Estin v. Estin, 334 U.S. 541, 546 (1948).

547 *Baker*, 522 U.S. at 234 (quoting Magnolia Petrol. Co. v. Hunt, 320 U.S. 430, 438 (1943)).

recognized and enforced even in pro-access states, again assuming the original court had proper jurisdiction.

However, it has long been established that penal laws are not subject to Full Faith and Credit Clause commands.[548] Thus, the question in cases involving Texas SB8 or similar provisions would be whether those laws should count as penal in nature. We believe that, although styled as civil actions, these suits are penal and are therefore not subject to the Full Faith and Credit command. The U.S. Supreme Court made clear more than a century ago that the relevant question is whether a suit's "purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."[549] Indeed, the Court drew an explicit distinction between *private wrongs* and *public wrongs*. Quoting Blackstone, the Court explained that "[t]he former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community."[550]

Although suits under Texas SB8 and similar provisions are technically initiated by private citizens rather than the state, those citizen bounty hunters are not directly injured by the alleged wrongful act, the abortion. Instead, the injury, if there is one, is based on a purported public harm to society as a whole. Thus, judgments in these suits are likely to be deemed penal, and courts in other states may deny recognition and enforcement.

As noted in Part I above, pro-access states have contemplated or adopted policies explicitly aimed at protecting abortion providers from suits brought under the anti-abortion laws of other states.[551] For example, in 2022 Colorado

548 *See* Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by the comity of other States."). In U.S. jurisprudence, this principle is usually thought to derive from Chief Justice Marshall's early statement: "The Courts of no country execute the penal laws of another . . . ." The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). Although Marshall wrote about the laws of other countries, the penal law exception was later adopted for sister-state judgments as well. *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) (noting that "[t]he rule that the courts of no country execute the penal laws of another" extends to penal judgments by other states as well), *overruled on other grounds*, Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935); *see also* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 196 (1932) (observing that courts have "taken for granted, as a principle fundamental and beyond question, that one state will not enforce the criminal, or penal, laws of another").

549 *Huntington*, 146 U.S. at 673-74.

550 *Id.* at 668 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 2).

551 *See supra* Section I.B; *see also* Laurie Sobel, Alina Salganicoff & Amrutha Ramaswamy, *State Actions to Protect and Expand Access to Abortion Services*, KAISER FAM. FOUND. (May 16, 2022), https://www.kff.org/womens-health-policy/issue-brief/state-actions-to-protect-and-expand-access-to-abortion-services/ [https://perma.cc/3VCN-YQRA] (discussing state laws that aim to protect local abortion providers from legal actions brought in other states).

Governor Jared Polis signed an order prohibiting state agencies and departments from participating in, or providing information to, investigations and proceedings initiated by other states that would impose "criminal or civil liability or professional sanction" on individuals for engaging in conduct relating to "providing, assisting, seeking, or obtaining reproductive health care," if such conduct would be legal under Colorado law.[552] The order specifies that agencies may share such information only if it is pursuant to a court order.[553] The Governor also stated that he "will exercise the full extent of [his] discretion to decline requests for the arrest, surrender, or extradition of any person charged with a criminal violation of a law of another state" related to the provision of reproductive health services.[554]

Likewise, New York Governor Kathy Hochul signed a six-bill package of reproductive rights protections into law.[555] Among other things, the laws: prohibit professional misconduct charges against abortion providers for providing services to patients who reside in states where such services are illegal; ban medical malpractice insurance companies from taking adverse action against an abortion provider who performs a service on an out-of-state patient that is legal in New York; create a statutory exception that blocks extradition for abortion-related offenses and prohibits courts and law enforcement from cooperating with out-of-state proceedings stemming from abortions that took place legally in New York; and create a cause of action under New York law for "unlawful interference with protected rights," which allows individuals to bring a claim against someone who has sued them or brought charges against them for abortion-related conduct.[556] Other states have enacted or are likely soon to enact similar legislation.[557]

Most of these provisions likely comply with the Full Faith and Credit Clause. Certainly, local laws that prevent misconduct charges or malpractice claims based on adverse tort judgments elsewhere seem within the power of pro-access states to adopt because they involve independent state regulatory or licensing authority. More complicated are the provisions that prevent state authorities from extraditing or providing information to the anti-abortion

552 Co. Exec. Order No. D-2022-032 (July 6, 2022).

553 *Id.*

554 *Id.*

555 *Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All,* N.Y. STATE (June 13, 2022), https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive [https://perma.cc/3E79-HUKR].

556 *See* FIRE HATE Act, ch. 218, 2022 N.Y. Laws 1206; Acts of June 13, 2022, chs. 219-21, 2022 N.Y. Laws 1207-12.

557 *See supra* notes 70–79 and accompanying text (surveying various state enactments).

state. The Colorado executive order still requires state authorities to obey a court command, so that is less problematic.[558]

Turning to New York's provision, however, we face the question of whether New York can refuse to extradite a person charged with a criminal offense under the laws of another state. The Extradition Clause of the U.S. Constitution,[559] as well as the federal Extradition Act of 1793 that implements it,[560] contemplate in their express language only the situation of a person indicted or convicted in a state who then flees to a second state. In such circumstances, the Extradition Act requires other states to return the fugitive to the original state. In the abortion context, however, the circumstances are essentially reversed because the person being indicted may never have entered the state of indictment at all and therefore would not be a fugitive. Moreover, as discussed above, it has long been accepted that states need not enforce the penal laws of other states,[561] and this principle should also apply to civil damage awards that are punitive in nature, as with Texas SB8.[562] Thus, we think it likely that state refusal to comply with extradition requests, at least with regard to acts committed in their state by their own citizens, would be permissible.

Finally, as to laws that potentially allow retaliatory suits by in-state citizens against out-of-state citizens who sued them in another state, courts might well deem this sort of litigation an impermissible, albeit indirect, interference with the full faith and credit command. To our knowledge, there is no existing caselaw on the constitutionality of retaliatory lawsuits of this kind. And such suits do not technically violate the Full Faith and Credit Clause because they do not refuse enforcement of the out-of-state judgment;

---

558 See Co. Exec. Order No. D-2022-032 (July 6, 2022) (forbidding "[a]ll state agencies and principal departments" from assisting in a criminal or civil investigation pertaining to abortion "unless pursuant to a court order").

559 U.S. CONST. art. IV, § 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

560 18 U.S.C. § 3182 ("Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit . . . charging the person demanded with having committed treason, felony, or other crime . . . . the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.").

561 *See supra* notes 548–50 and accompanying text.

562 *See supra* notes 548–50 and accompanying text; *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888) (noting that if the penal non-enforcement principle did not apply to punitive civil suits in favor of the state, "all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.").

they just allow for a separate cause of action back against the party who initiated the original suit. However, if such retaliatory suits were permissible, then one could imagine the anti-abortion state in turn authorizing a new retaliatory suit against those who file a retaliatory suit, and in theory the litigation would be never-ending. This is precisely the sort of result that the Full Faith and Credit Clause was designed to avoid.[563] In any event, we would expect the constitutionality of these retaliatory suit provisions to be litigated should they ever be used.

V. PRIVATE ACTORS AND CONFLICTS OF LAW

Nongovernmental entities also play an important role regulating people's daily lives. Corporations, religious organizations, and other private actors make decisions every day that impact the regulatory environment in which we live. Legal pluralism scholars have long sought to analyze this sort of private, quasi-lawmaking activity.[564] And of course, private actors may seek to assert norms that test the boundaries of state and federal law, creating a form of conflicts of law problem.[565]

In this final Part, we briefly touch on three such conflicts questions arising in the abortion context post-*Dobbs*. First, many corporations are seeking to provide health insurance coverage for abortions and abortion-related expenses through their private employee health insurance programs. To the extent states seek to regulate or block such coverage, there may be a question of whether such state regulation is preempted by federal law. Second, states may commandeer the search and location data collected by private companies in order to find those seeking abortions or those aiding and abetting such activity, setting up battles over privacy rights to information held by third parties. Third, private religious organizations may attempt to use the banner of the First Amendment and federal and state religious freedom law to claim exemption from state anti-abortion (or pro-access) regulations. Because each of these issues justifies treatment in a separate article, here we simply lay out

563 *See* Baker v. General Motors, 522 U.S. 222, 232 (1998) (describing the "animating purpose of the full faith and credit command" as ensuring that the states remain "integral parts of a single nation") (quoting *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

564 *See* Berman, *supra* note 15 (reviewing the literature).

565 *See, e.g.*, Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1000 (2004) (positing "an 'inter-systemic conflicts law,' derived not from collisions between the distinct nations of private international law, but from collisions between distinct global social sectors"); *see also* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS, 286-90 (2012) (discussing conflicts between state-based and religious law through the lens of conflicts of law analysis).

the contours of the problems in order to flag the potential legal issues involved.

A. *Private Employee Benefits for Abortion-Related Expenses*

The *Dobbs* aftermath brought forth a flurry of statements from private companies, vowing to provide both health insurance coverage and other funding for employees who must travel out of state for their abortions.[566] These companies include heavyweights such as Starbucks, Yelp, Airbnb, Microsoft, Netflix, PayPal, and Reddit.[567] Uber has committed to funding reproductive health benefits including abortion, while other companies have offered travel stipends of up to $7500, and still others plan to make relocation opportunities available for employees living and working in anti-abortion states.[568] It is unclear if these companies intend to deliver this funding through the normal health insurance infrastructure available to their employees, or in some other way.[569] One private employer, Civitech, billed itself as a "last line of defense" for abortion rights.[570] But these offers of support may be only marginally effective because in order to take advantage of these benefits, patients seeking abortions must disclose to their employers both that they are pregnant and that they are seeking to terminate their pregnancy. Given that such an act will likely be illegal in the state of their employment, the employees may fear that, if not safeguarded by employers, the information could be used as evidence in legal actions against abortion-seekers.

Even apart from the privacy concerns, anti-abortion states will almost certainly continue their efforts to fence their citizens off from vital health care services by taking aim at corporate abortion funding. Indeed, even before the final decision in *Dobbs* was released, a group of Texas legislators, many of whom are members of the Texas Freedom Caucus, had begun to threaten legislative action against companies funding abortion travel for their employers.[571] In a May 2022 letter to the CEO of Lyft, they wrote, "the state

---

566 Emma Goldberg, Lora Kelley & Emily Flitter, *Here Are the Companies that Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES, https://www.nytimes.com/2022/06/24/business/abortion-companies-travel-expenses.html [https://perma.cc/2PJ2-ANAL] (June 27, 2022) (listing companies that affirmed their commitment to helping employees access out-of-state health care services post-*Dobbs*).

567 *Id.*

568 *Id.*

569 *See, e.g., id.* (reporting on Patagonia's statement that "[c]aring for employees extends beyond basic health insurance").

570 *Id.*

571 Zach Despart, *Businesses That Help Employees Get Abortions Could Be Next Target of Texas Lawmakers if* Roe v. Wade *Is Overturned*, TEX. TRIBUNE (May 23, 2022),

of Texas will take swift and decisive action if you do not immediately rescind your recently announced policy to pay for the travel expenses of women who abort their unborn children."[572] That threatened action would both ban corporations from doing business in Texas if those businesses pay for abortions in states where it is legal and also authorize shareholders of publicly traded companies to sue executives for making such payments.[573] Private abortion funding could also fall under the ambit of state laws that penalize "aiding and abetting" abortion.

In July 2022 the Texas Freedom Caucus also sent a letter to the law firm Sidley Austin, which was among the private employers offering funding for abortion travel.[574] Claiming that Sidley Austin "may have aided or abetted drug-induced abortions" by paying for "abortion-related travel," the letter threatened prosecution under Texas' existing and pre-*Roe* abortion bans and demanded that Sidley preserve documents and data relating to abortions performed after SB8 went into effect in anticipation of litigation.[575] Lastly, the letter referenced a potential new law that would prohibit employers in Texas from paying for abortions or reimbursing abortion-related expenses, wherever the abortion takes place.[576] It would impose felony criminal sanctions on violators[577] and would include a bounty hunter provision to allow private citizens to sue any individual or entity who pays for an abortion obtained by a Texas resident anywhere in the country.[578] It would also require the State Bar of Texas to disbar any attorney who violates existing Texas abortion law.[579] Lastly, the law would empower district attorneys to criminally prosecute transgressions of Texas abortion bans, a power SB8 did not convey as part of a ploy to evade judicial review of the law while *Roe* was still in place.[580] These eleven members of the Texas legislature concluded their tirade against one of the nation's top law firms by saying, "[t]he state of Texas will

https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions/?utm_campaign=trib-social-buttons&utm_source=twitter&utm_medium=social [https://perma.cc/KF38-EMCD].

572 *Id.*

573 *Id.*

574 Kathryn Rubino, *Texas Legislators Threaten Sidley Over Abortion Care Travel Costs*, ABOVE THE LAW (July 8, 2022), https://abovethelaw.com/2022/07/texas-legislators-threaten-sidley-over-abortion-care-travel-costs/ [https://perma.cc/3UNQ-B33U].

575 Letter from Texas Freedom Caucus to Sidley Austin (July 7, 2022), https://docs.google.com/viewerng/viewer?url=https://abovethelaw.com/uploads/2022/07/texas-sidley-letter.pdf&hl=en_US [https://perma.cc/YY9R-Z4FX].

576 *Id.*

577 *Id.*

578 *Id.*

579 *Id.*

580 *Id.*

ensure that you and colleagues are held accountable for every abortion that you illegally assisted."[581]

Although the Texas legislature has not yet enacted the threatened legislation, the letter raises the specter of potential state regulation of private companies when they provide health-related benefits to their employees or otherwise attempt to shield people from the full brunt of anti-abortion statutes. This, in turn, creates the very real possibility of conflicts between state law and the "law" laid out by private companies. Here, we discuss how such conflicts might play out.

1. ERISA Preemption of State Regulatory Statutes

Despite the threats of the Texas Freedom Caucus, it is important to understand that employer-sponsored health care is actually a matter of federal law. The Employee Retirement Income Security Act of 1973 (ERISA) provides various guidelines for the administration of employer-provided health insurance plans. The statute was designed to protect plan administrators from needing to comply with 50 different sets of regulations.[582] This emphasis on uniformity was intended, in part, to promote the availability of affordable health insurance. For this reason, the law contains very few requirements regarding the specific procedures covered plans must pay for, but it does contain "one of the broadest preemption clauses ever enacted by Congress."[583]

Section 1144(a) of ERISA provides that it supersedes all state laws insofar as they "relate to" employee benefit plans.[584] A law relates to an employee benefit plan when it has a "connection with or reference to such a plan."[585] This definition is intuitive but unhelpful. More specifically, the Supreme Court has found that laws compelling plan administrators to change their benefit structures or method of administration relate to employee benefit plans.[586] This is because,

> [r]equiring administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of "minimizing the administrative and financial burden[s]" on plan

581 *Id.*

582 *See* Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 149-50 (2001) (citations omitted) (describing ERISA as having the "congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by beneficiaries").

583 Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1439 (9th Cir. 1990).

584 29 U.S.C. § 1144(a).

585 Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983).

586 See, e.g., N.Y. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 658 (1995) (discussing cases).

> administrators . . . . [D]iffering state regulations affecting an ERISA plan's "system for processing claims and paying benefits" impose "precisely the burden that ERISA pre-emption was intended to avoid."[587]

In a pair of 2016 cases, *Gobeille v. Liberty Mutual Insurance Co.*[588] and *Rutledge v. Pharmaceutical Care Management Ass'n*,[589] the Supreme Court clarified that state laws governing or significantly impacting plan administration are preempted, whereas state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not. Significantly, in *Gobeille*, the Court noted that "a state law . . . might have an impermissible connection with ERISA plans if 'acute, albeit indirect, economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.'"[590] Thus, the key determinant seems to be whether the state regulation forces a plan either to cover or not cover particular conditions or treatments.

This point of federal ERISA law is relevant to state statutes or regulations that purport to prevent employer-sponsored healthcare plans from covering abortion-related services. Such laws or regulations are, under ERISA's terms, "related to" employee benefit plans. If state laws that prohibit aiding and abetting abortion are applied to ban employee-sponsored coverage for abortion-related care and travel, the state would be binding plan administrators to one specific, state-approved choice. And the choice of which benefits to provide is clearly a "central matter of plan administration."[591] Moreover, a total state ban on a specific health care benefit is extraordinarily unusual and would indeed create non-uniformity in insurance coverage and plan administration across the country because the same insurer or employer would be bound to offer different plans in different states. This non-uniformity is precisely what Congress enacted ERISA to prevent.

It is true that, under ERISA, state laws may generally be saved from preemption if they merely "regulate insurance."[592] However, that provision applies only if the state law "substantially affect[s] the risk pooling arrangement between the insurer and the insured" and is "specifically directed" at regulating the insurance industry.[593] Abortion bans can probably

---

587 Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 149-50 (2001) (first quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990); then quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987)).

588 577 U.S. 312 (2016).

589 141 S. Ct. 474 (2020).

590 *Gobeille*, 577 U.S. at 320 (citing *Travelers*, 514 U.S. at 668).

591 *Egelhoff*, 532 U.S. at 148.

592 29 U.S.C. § 1144(b)(2)(A)-(B).

593 Ky. Ass'n of Health Plans v. Miller, 538 U.S. 329, 341-42 (2003).

not be saved from preemption under this provision because, although they certainly relate to health insurance, they are not specifically aimed at the insurance *industry*: they are aimed at a variety of in-state and out-of-state actors. No anti-abortion policymaker would argue that the policy concern underlying abortion bans is limited to the health insurance industry. Nor does an abortion ban seek to shift the risk of financial loss.

Finally, it is significant that ERISA makes *self-insured* employee benefit plans exempt from all state insurance regulation, even those regulations that would not otherwise be preempted by ERISA.[594] A plan is self-insured when the sponsoring employer retains the economic risk, specifically the obligation to pay claims, rather than outsourcing it to an insurance company.[595] Therefore, anti-abortion state regulatory laws, even if they somehow escaped preemption based on the foregoing analysis, could still not be applied to self-insured plans in order to impose a ban on abortion-related benefits. Therefore, employers wishing to provide benefits, including travel, for employees seeking abortions out-of-state would be well-advised to do so using self-insured employee benefit plans to even more definitively avoid state regulation of abortion-related benefits.

2. ERISA Preemption of State Criminal Statutes

To the extent that state anti-abortion statutes are not regulatory, but are instead included as part of state *criminal* law, the ERISA preemption question is more complicated. This is because Section 1144(b)(4) of ERISA provides that the supersedure clause "shall not apply to any generally applicable criminal law of a State," meaning such laws are *not* preempted with regard to either employer self-funded or fully funded plans.[596] Nevertheless, this exception may not apply to state anti-abortion laws because lower courts have found that criminal laws *specifically directed at employee benefit plans* are still preempted. As one lower court reasoned,

> [o]ne cannot fairly attribute to Congress the purpose in 29 U.S.C. § 1144(b)(4) to except from preemption all the criminal laws of the states. To do so would be to read out of the section the words "generally applicable." Every criminal law, if it is to be consistent with the Constitution, is "general"

---

594 29 U.S.C. § 1144(b)(2)(B). While this section, known as the "deemer clause," does not explicitly mention self-insured plans, it is referring to them. As the U.S. Supreme Court has explained, by "forbidding States" from regulating companies that self-fund employee benefit plans as insurance companies, the deemer clause "relieves plans from state laws 'purporting to regulate insurance.'" FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990) (quoting § 1144(b)(2)(B)).

595 *Self-Insured Plan*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/self-insured-plan/ [https://perma.cc/FN2Y-VRKU] (last visited Jan. 20, 2023).

596 29 U.S.C. § 1144(b)(4) (2021).

> in the sense that it must apply not to specific acts of a specific individual but to some class of circumstances.[597]

For example, in *Aloha Airlines, Inc. v. Ahue*,[598] the Ninth Circuit considered a Hawaii law that imposed criminal penalties on employers if they failed to include federally mandated health screenings in their employee benefit plans. The court concluded that ERISA preempted the Hawaii law, even though it was part of the criminal code, because Congress intended the exception for "generally applicable" state criminal laws to refer only to "criminal laws that apply to general conduct like larceny and embezzlement."[599] In contrast, the Hawaii law was not a generally applicable criminal law "because failure by an employer to pay or provide its employees with employment-related expenses is not general criminal conduct such as larceny and embezzlement."[600] Under this analysis, a state would "not [be] precluded from prosecuting under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan, simply because the theft involves such a plan."[601] However, courts have found that "Congress manifested a purpose to supersede criminal laws directed specifically at employee benefit plans."[602]

The Texas Freedom Caucus' letter to Sidley Austin details the provisions to be included in a potential anti-abortion law aimed at employee benefit plans. The legislators write that such a law may include a prohibition on employer funding for abortion or related expenses and will "impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law."[603] We have found no evidence that the type of penalty attached to a criminal law, whether a misdemeanor or a felony, determines whether a law is considered "generally applicable" for the purposes of ERISA preemption. Yet, as discussed with regard to the penal law exemption in the choice-of-law context, statutes such as SB8 do seem penal in scope even if

---

597 Trs. of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund (N.Y) v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 562-63 (E.D.N.Y. 1983).

598 12 F.3d 1498, 1505-06 (9th Cir. 1993).

599 *Id.* at 1506 (quoting Aloha Airlines, Inc. v. Ahue, 807 F. Supp. 1501, 1503 n.1 (D. Haw. 1992)).

600 *Id.*; *see also* Baker v. Caravan Moving Corp., 561 F. Supp. 337, 341 (N.D. Ill. 1983) (holding that a state law criminalizing "an employer's willful failure to contribute to an employee benefit program" was preempted by ERISA because it was not generally applicable); Blue Cross & Blue Shield of Ala. v. Peacock's Apothecary, Inc., 567 F. Supp. 1258, 1276 (D. Ala. 1983) (holding that a state criminal law "directed primarily at pharmacists" was preempted by ERISA because it was not generally applicable).

601 Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1495 (D. Conn. 1986) (quoting Commonwealth v. Federico, 419 N.E.2d 1374, 1378 (Mass. 1981)).

602 *Trs. of Sheet Metal Workers'*, 559 F. Supp. at 563.

603 Letter from Texas Freedom Caucus to Sidley Austin, *supra* note 575.

enforced technically through civil suits. And the provision described by the Texas Freedom Caucus certainly seems directed specifically at employee benefit plans; indeed, it explicitly seeks to regulate what benefits employers may and may not offer. The proposed law therefore would likely be preempted by ERISA because, although it may impose criminal sanctions, it is not generally applicable. In any event, this is a matter that undoubtedly will be litigated should Texas or any other state enact such a law.

B. *Data Privacy*

The post-*Dobbs* surge of new punitive state anti-abortion laws has created a myriad of privacy concerns. And these concerns are likely to increase as abortions are more frequently obtained through medication ingested in private, non-clinical settings.[604] In the criminal context, privately-held information is subject to the warrant requirement of the Fourth Amendment,[605] applicable to the states through the Fourteenth Amendment,[606] when the person to whom the information pertains has a "reasonable expectation of privacy."[607] The "third-party doctrine," however, holds that when information is voluntarily shared with a third party, such as an accountant,[608] a bank,[609] or telephone company,[610] then the person to whom the information pertains forfeits any reasonable expectation of privacy.[611] As technology has improved over the last several decades, more and more data, some of which is exceptionally private, is stored with third parties rather than with their owner.[612] The scope of the third-party doctrine may be tested in the abortion context, as both states and private parties will seek to obtain

604 For a discussion of the changes wrought by the rise of medication abortions, see generally Cohen, Donley & Rebouché, *supra* note 347.

605 *See* U.S. CONST. amend. IV. (prohibiting "unreasonable searches and seizures"); *see also* Riley v. California, 573 U.S. 373, 385-86 (2014) (holding that searches of cell phones, even if incident to arrest, generally require a warrant to be reasonable, given the vast amounts of privately-held information on cell phones).

606 *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that both the Fourth Amendment right to privacy and the exclusionary rule remedy apply to the states).

607 *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (articulating the "reasonable expectation of privacy" test).

608 Couch v. United States, 409 U.S. 322, 329 (1973).

609 United States v. Miller, 425 U.S. 435, 440-41 (1963).

610 Smith v. Maryland, 442 U.S. 735, 742-44 (1979).

611 *See id.* at 744 (reasoning that such an expectation of privacy is not reasonable where the petitioner "assumed the risk" that a third party would disclose the information).

612 *See, e.g.*, Riley v. California, 573 U.S. 373, 397 (2014) (discussing privacy interests involved in "cloud computing"); *see also* United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." (citations omitted)).

abortion-related information held by third parties, such as Google or Apple, or the makers of health-tracking apps.

In *Carpenter v. United States*, the U.S. Supreme Court added the first modern caveat to the third-party doctrine with regard to digital information.[613] In that case, police used historical cell-site location information ("CSLI") from telecommunications companies to track a defendant's movements, resulting in "12,898 location points cataloging [defendant's] movements—an average of 101 data points per day."[614] The Court acknowledged that such "digital data . . . does not fit neatly under existing precedents" recognizing the third-party doctrine.[615] Instead of extending the third-party doctrine to cover digital data revealing a person's location, the Court held that use of CSLI "contravenes" society's expectation that law enforcement cannot secretly monitor an individual's movements for an extended period of time.[616] In other words, even though the digital data at issue was voluntarily "shared" with and maintained by a third party, the Fourth Amendment's warrant requirement nevertheless applied because the defendant still maintained a reasonable expectation of privacy in such detailed information about his movements.[617]

The Court's reasoning in *Carpenter* may also extend to health-related data stored on third-party servers, such as health-tracking apps, but it may be too early to tell. *Carpenter* indicated that the type of data sought, the technological advancements used to obtain such data, and the voluntariness of disclosure to a third party will likely factor into whether the third-party doctrine applies in future cases.[618] Location- and health-tracking apps contain deeply personal information that may be relevant in the abortion context, such as those that track menstrual cycles or those that could track a user's location to and from an abortion clinic.[619] Indeed, the deeply personal nature and uniqueness of this data, as well as the technology advancements used to procure them, have led some commentators to argue that health-related data

613 138 S. Ct. 2206, 2217 (2018).

614 *Id.* at 2211-12.

615 *Id.* at 2214.

616 *Id.* at 2217.

617 *Id.* at 2220.

618 *Id.* at 2219-20 (distinguishing CSLI collection from "conventional surveillance techniques" such as security cameras and from surveillance techniques involving a "meaningful sense" in which the user voluntarily assumes the risks of disclosing data).

619 *See, e.g.*, Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit Into a Post-*Roe v. Wade *Climate*, NPR (June 24, 2022), https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps [https://perma.cc/4FNN-2BMA] (describing various apps that collect such data).

deserves Fourth Amendment protection under *Carpenter*.[620] Although we largely agree with this assessment, the *Carpenter* majority admitted that "[o]ur decision today is a narrow one" that did not address "other business records that might incidentally reveal location information."[621] Thus, it remains to be seen whether the U.S. Supreme Court ultimately extends *Carpenter* to the health information context. Even if it did, however, it would only directly apply to state-requested information in criminal investigations where the Fourth Amendment itself applies. In contrast, it might not preclude companies from being forced to comply with court-issued subpoenas for information in private litigation under citizen-enforced abortion bans,[622] unless those civil suits were deemed to be tantamount to a government prosecution.[623] And, of course, even in the criminal context, prosecutors seeking to enforce state anti-abortion criminal law might well be able to obtain a valid warrant.[624] In any event, the potential implications of *Carpenter* in abortion-related cases is a fruitful area for further analysis.

There are also other data privacy considerations relevant to the abortion context. Health information disclosed to an employer is not necessarily protected health information under the Health Insurance Portability and Accountability Act ("HIPAA"), which only covers health care providers and health insurance plans.[625] HIPAA would therefore not prevent a state from subpoenaing a private employer's records or deposing its human resources

620 *See, e.g.*, Ryan Knox, *Fourth Amendment Protections of Health Information after* Carpenter v. United States*: The Devil's in the Database*, 45 AM. J.L. & MED 331, 355 (2019) ("Fourth Amendment inquiry should recognize the expectation of privacy in health information in private databases notwithstanding the third-party doctrine.").

621 *Carpenter*, 138 S. Ct. at 2220.

622 *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) ("[The Fourth Amendment's] origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."); Henderson-Burkhalter v. Nat'l Union Fire Ins. Co., No. CV 18-0928, 2019 WL 8889978, at *2 (E.D. La. Jan. 18, 2019) (finding *Carpenter* inapplicable to private civil suits); Juliana Kim, *Data Privacy Concerns Make the Post-*Roe *Era Unchartered Territory*, NPR (July 2, 2022), https://www.npr.org/2022/07/02/1109565803/data-privacy-abortion-roe-apps [https://perma.cc/B739-J6NT] (reporting that the citizen-enforced abortion bans in Texas, Oklahoma, and Idaho would "allow plaintiffs to request troves of data in order to build their case").

623 For a discussion of this sort of argument in the context of the penal law exception to choice of law, see *supra* notes 548–50 and accompanying text.

624 *Carpenter*, of course, addressed only one type of data in one factual context, so the scope of its application is still to be developed. For a useful empirical analysis of post-Carpenter cases, see generally Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1807-30 (2022).

625 *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 27, 2022), https://www.cdc.gov/phlp/publications/topic/hipaa.html#:~:text=The%20Health%20Insurance%20Portability%20and,the%20patient's%20consent%20or%20knowledge [https://perma.cc/6AML-KHQ7].

representatives. It is also unlikely that the Family Educational Rights and Privacy Act ("FERPA")[626] would protect abortion-related information obtained from students by educational institutions, such as information a student discloses to a professor or resident advisor.[627] States might also seek other types of privately held data that might shed light on a person's healthcare choices. Geolocation data, search engine history, Venmo or PayPal payments, menstrual-tracking data, and records of online mifepristone orders could constitute a "digital abortion footprint" that serves as evidence that an individual sought or obtained an abortion.[628] The third-party entities in possession of this kind of electronic data could sell it pursuant to their terms of service or could be forced to turn it over pursuant to a court order such as a geofence or keyword search warrant.[629] Crisis Pregnancy Centers—organizations masquerading as family planning clinics that advertise to pregnant people and attempt to persuade them not to seek an abortion—also collect extraordinary amounts of data about "abortion-minded" women.[630] Even if employers are able to offer abortion benefits to their employees under state law, the lack of comprehensive protections for data collected by private companies could undercut these efforts, or subject patients to prosecution if they take advantage of such benefits.

---

626 20 U.S.C. § 1232g.

627 *See, e.g.*, Katie Rose Guest Pryal, *Abortion Bans Put Colleges in Legal Limbo*, CHRON. HIGHER EDUC. (Aug. 4, 2022), https://www.chronicle.com/article/abortion-bans-put-colleges-in-legal-limbo#:~:text=Due%20to%20a%20legal%20loophole,protected%20as%20most%20people%20think [https://perma.cc/VY4Y-FK4A] (noting that FERPA "allows student medical records to be shared around campus without meaningful oversight" when, for instance, "a college sues a student" or "a student sues a college"); *see also* Janet Koven Levit, *The Demise of* Roe *Will Weaken American Colleges*, CHRON. HIGHER EDUC. (June 14, 2022), https://www.chronicle.com/article/the-demise-of-roe-will-weaken-american-colleges [https://perma.cc/P6RG-R7JG] (observing that in anti-abortion states, college staff members may be "targeted as 'aiders and abetters' in costly lawsuits that almost any colleague or student could bring").

628 Abby Vesoulis, *How a Digital Abortion Footprint Could Lead to Criminal Charges—and What Congress Can Do About It*, TIME (May 10, 2022), https://time.com/6175194/digital-data-abortion-congress/ [https://perma.cc/CQ9A-PY2Z].

629 ALBERT FOX CAHN & ELENI MANIS, STOP, PREGNANCY PANOPTICON: ABORTION SURVEILLANCE AFTER *ROE* 3-5 (2022), https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/6297d83433c19479f037ab8c/1654118453441/2022.6.1_STOP+Report_Pregnancy+Panopticon.pdf [perma.cc/4QX2-4FY3].

630 Sharona Coutts, *Anti-Choice Groups Use Smartphone Surveillance to Target 'Abortion-Minded Women' During Clinic Visits*, REWIRE NEWS GRP. (May 25, 2016), https://rewirenewsgroup.com/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/ [https://perma.cc/BC6D-PSZ7]; *see also* Abigail Abrams & Vera Bergengruen, *Anti-Abortion Pregnancy Centers Are Collecting Troves of Data that Could Be Weaponized Against Women*, TIME (June 22, 2022), https://time.com/6189528/anti-abortion-pregnancy-centers-collect-data-investigation/ [https://perma.cc/5J9N-Z7BQ] (considering impact of such surveillance post-*Dobbs*).

Both the federal government and some state governments have taken (or could take) action to address some of these privacy concerns. At the federal level, several bills have been introduced in Congress to specifically protect private data related to reproductive health.[631] The Federal Trade Commission ("FTC") has also stated that it is "committed" to enforcing current privacy laws against the "misuse of mobile location and health information—including reproductive health data," such as "products that track women's periods, monitor their fertility, oversee their contraceptive use, or even target women considering abortion."[632] In August 2022, for example, the FTC sued Kochava, Inc., a major data broker, for selling personal data, including geolocations, that could expose information about consumers' private visits to sensitive locations, such as abortion clinics.[633] The FTC has also instituted rulemaking procedures "concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive."[634] There are doubts, however, over whether federal law actually authorizes the FTC to take these steps, and it is likely that any protections provided through the FTC's rulemaking will be challenged in court and will take years to come into effect.[635] HHS has also initiated formal rulemaking proceedings to "modify existing standards permitting uses and disclosures of

631 *See* My Body, My Data Act of 2022, H.R. 8111, 117th Cong. (describing the bill's purpose "[t]o protect the privacy of personal reproductive or sexual health information").

632 Kristin Cohen, Acting Assoc. Dir., FTC Div. Priv. & Identity Prot., *Location, Health, and Other Sensitive Information: FTC Committed to Fully Enforcing the Law Against Illegal Use and Sharing of Highly Sensitive Data*, FED. TRADE COMM'N (July 11, 2022), https://www.ftc.gov/business-guidance/blog/2022/07/location-health-and-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal [https://perma.cc/HL9A-UNC2].

633 *See* Complaint at 1, Fed. Trade Comm'n v. Kochava Inc., No. 2:22-cv-00377-DCN (D. Idaho Aug. 29, 2022), ECF No. 1 (accusing Kochava of "acquiring consumers' precise geolocation data" and "selling the data in a format that allows entities to track the consumers' movements to and from sensitive locations"). In response, Kochava argued that the FTC is attempting to enforce "non-existent laws and regulations" to the company's past conduct. Mem. in Support of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 1, Fed. Trade Comm'n v. Kochava Inc., No. 2:22-cv-00377-DCN (D. Idaho Oct. 28, 2022), ECF No. 7-1. The court ultimately dismissed the FTC's lawsuit against Kochava because the FTC did not plead sufficient facts to show that consumers were injured by Kochava's alleged activities. Fed. Trade Comm'n v. Kochava Inc., ___ F. Supp. 3d ___, 2023 WL 3249809, at *8 (D. Idaho May 4, 2023). Notably, however, the court rejected Kochava's arguments that the FTC lacked the authority to bring the suit in the first place. *Id.* at *11-13.

634 *Trade Regulation Rule on Commercial Surveillance and Data Security*, 87 Fed. Reg. 51,273 (Aug. 22, 2022) (adv. notice of proposed rulemaking).

635 *See, e.g.*, Allison Grande, *FTC's Broad Privacy Rulemaking Faces Bumpy Path Forward*, LAW360 (Sept. 1, 2022), https://www.law360.com/articles/1523495/ftc-s-broad-privacy-rulemaking-faces-bumpy-path-forward [https://perma.cc/M5RC-7UA9] (reporting that, according to various experts, "the breadth of the undertaking and looming legal challenges will likely make the process" of such FTC rulemaking an "uphill climb").

protected health information" under HIPAA,[636] but such a process will likely take years to complete as well.[637] Moreover, future administrations that are hostile to abortion rights could take steps to reverse any such regulations.

That said, additional generally applicable federal privacy protections may be available.[638] Federal agencies not subject to HIPAA, such as the Veterans Benefits Administration in the Department of Veterans Affairs, could update their policies for releasing personal information to law enforcement entities under the Privacy Act of 1974.[639] The Privacy Act generally forbids federal agencies from disclosing "any record which is contained in a system of records," such as those submitted for benefits claims, without the "written request" or "prior written consent" of the individual.[640] Although there is an exception for disclosing records to law enforcement entities in civil or criminal investigations that make specific, written requests for such records,[641] the agency's compliance with such a request appears to be voluntary and is not required by the Act.[642] Thus, unless required by their own regulations, federal agencies may adopt policies refusing to comply with such requests in abortion-related investigations, or may choose to do so on a case-by-case basis, without the need for lengthy notice-and-comment proceedings.[643] Here again, however, any such policies could be rolled back in future administrations.

At the state level, several pro-access states have taken steps to further protect sensitive health-related user data. In 2021, for example, Colorado

---

636 *HIPAA Privacy Rule to Support Reproductive Health Care Privacy*, 88 Fed. Reg. 23,506, 23,506 (proposed Apr. 17, 2023).

637 The proposed regulations have been criticized by Republicans and Democrats alike, with the former saying the regulations extend beyond the Executive's authority and the latter claiming the proposals do not go far enough to protect private data. *See* Alice Miranda Ollstein, *Biden's HIPAA Expansion for Abortion Draws Criticism, Lawsuit Threat*, POLITICO (July 18, 2023, 12:22 PM), https://www.politico.com/news/2023/07/18/biden-hipaa-expansion-abortion-00106694 [https://perma.cc/WL47-T7Q4] (describing these bipartisan difficulties). Accordingly, even after the long process of formulating a final rule is complete, the rule is likely to be immediately challenged.

638 *See generally* CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10786, ABORTION, DATA PRIVACY, AND LAW ENFORCEMENT ACCESS: A LEGAL OVERVIEW (2022) (surveying existing federal law protecting data privacy in light of *Dobbs*).

639 5 U.S.C. § 552a.

640 *Id.* § 552a(b).

641 *See id.* § 552a(b)(7) (stating that requests from law enforcement must "specify[] the particular portion desired and the law enforcement activity for which the record is sought").

642 *See* LINEBAUGH, *supra* note 638, at 4 ("Even if a record falls under the Privacy Act's law enforcement exception, the agency may be able to voluntarily withhold it.").

643 Absent a court order, federal agencies would not be required to comply with subpoenas for protected information arising out of private abortion litigation. *See, e.g.*, Doe v. DiGenova, 779 F.2d 74, 84-85 (D.C. Cir. 1985) (holding that an agency cannot release protected personal information in response to a grand jury subpoena because the subpoena was not a "*written request*" by the "*head* of the agency" requesting the information).

enacted a law requiring data collectors to notify individuals regarding any secondary uses of their personal data.[644] Although this law preceded *Dobbs*, it could limit the data exposure of Colorado citizens and those traveling to Colorado for abortion services.

The most comprehensive state action on data privacy following *Dobbs* has come from California. In addition to enshrining the right to an abortion in California's state constitution,[645] the California General Assembly passed several measures seeking to limit public and private cooperation with out-of-state investigators. Specifically, Assembly Bill 1242[646] prohibits both public and private entities in California from providing personal data when they know, or should know, that such information is requested or ordered in connection with an out-of-state abortion investigation.[647] Separately, Assembly Bill 2091 prohibits a "provider of health care, a health care service plan, a contractor, or an employer" from disclosing medical records of a person seeking or obtaining an abortion that is lawful in California for the enforcement of another state's laws banning or limiting access to abortion.[648]

These measures could have significant impact on abortion regulation nationwide because of their broad scope and applicability to major California-based technology companies.[649] Although these features could make California a "data haven" for those seeking abortions,[650] they may also

644 *See* 2021 COLO. LEGIS. SERV. ch. 483 (S.B. 21-190) (West) (enacting § 6-1-1308, which requires that a controller "shall not process personal data for purposes that are not reasonably necessary to or compatible with the specified purposes for which the personal data are processed, unless the controller first obtains the consumer's consent").

645 *See* CAL. CONST. art. I, § 1.1 (West, Westlaw through Nov. 2022 amendments) ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion . . . .").

646 2022 CAL. LEGIS. SERV. ch. 627 (A.B. 1242) (West).

647 *Id.* § 1. Specifically, the law prevents public or private entities from cooperating with out-of-state investigations that are known, or should be known, to be based on a "prohibited violation." *Id.* The bill then defines the term "prohibited violation" as a "violation of a law that creates liability for, or arising out of, either providing, facilitating, or obtaining an abortion or intending or attempting to provide, facilitate, or obtain an abortion that is lawful under California law." *Id.* The law provides an exception to this prohibition only if the out-of-state warrant includes an "attestation that the evidence sought is not related to an investigation into, or enforcement of, a prohibited violation." *Id.*

648 2022 CAL. LEGIS. SERV. ch. 628 (A.B. 2091) (West).

649 *See* Ashley Gold, *California Abortion-Info Law Ups Stakes in Online War Between States*, AXIOS (Sept. 29, 2022), https://www.axios.com/2022/09/29/california-abortion-data-law-privacy-states-civil-war [perma.cc/B6NG-VWWQ] (reporting a state assemblymember's remark that A.B. 1242 "gives [tech companies] a way to protect the privacy of their customers" despite out-of-state pressures).

650 *See* Benjamin Freed, *California Lawmakers Approve Bill Creating 'Data Haven' for Abortion*, STATESCOOP (Sept. 1, 2022), https://statescoop.com/california-abortion-data-privacy-haven/ [perma.cc/EGG6-SQEX] ("California lawmakers seek to block the state's tech companies from sharing data with states that have outlawed abortion since the fall of Roe v. Wade.").

complicate matters for corporations with nationwide offices. For example, it is unclear whether the abortion at issue would necessarily have to be performed within California for the new laws to apply, or whether the abortion at issue would only need to be *legal* in California, regardless of where it occurred. Corporations based in California with offices in anti-abortion states, moreover, may be subject to inconsistent regulations that would require them to comply with an abortion investigation (for example, in Texas) using data stored in California, thereby complying with Texas law while violating California law.[651] Thus, an "all-new legal jujitsu" is likely to arise out of California's law, and the courts will inevitably be forced to decide which law controls when California's law comes into conflict with other states' abortion bans.[652]

Finally, it is worth noting that California's data privacy law is at risk of being preempted by federal law. Congress is currently considering bipartisan legislation governing data privacy rules nationwide.[653] Significantly, its protections are weaker than California's new laws and could preempt these stronger protections if enacted.[654] Although uniform privacy laws in this increasingly digital age are welcomed by many, members of Congress should consider how new federal legislation may weaken state protections for those seeking access to abortion services where they are legal.

C. *Religious Exemptions*

In August 2022 coalitions of religious leaders sued to stop Florida's abortion ban, arguing that the state's ban violated their religious expression under the state and federal constitutions and under the Florida Religious Freedom Restoration Act.[655] The suits were brought by Jewish rabbis, a United Church of Christ reverend, a Unitarian Universalist minister, an

651 For more on inconsistent regulation, see *supra* Section II.B.

652 Freed, *supra* note 650.

653 *See* American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022) (proposing a law "[t]o provide consumers with foundational data privacy rights, create strong oversight mechanisms, and establish meaningful enforcement").

654 *See* JONATHAN M. GAFFNEY, ERIC N. HOLMES, AND CHRIS D. LINEBAUGH, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152, CONG. RSCH. SERV. 5 (2022) https://crsreports.congress.gov/product/pdf/LSB/LSB10776 ("The Attorney General of California sent Congress a letter co-signed by nine other state attorneys general criticizing the ADPPA because it would set a 'ceiling' for privacy rights rather than a 'floor.'"); *see* also Jennifer Haberkorn, *Congress Mulls Data Privacy Bill That Would Void California's Tougher Protections*, L.A. TIMES (Sept. 6, 2022), https://www.latimes.com/politics/story/2022-09-06/congress-mulls-data-privacy-bill-that-would-void-california-tougher-protections [https://perma.cc/NTR3-6SBZ] (reporting that the federal proposal "has too broad of a loophole for law enforcement to demand data related to a state crime" related to abortion).

655 *See, e.g.*, Complaint at 2-3, Pomerantz v. Florida, No. 2022-014373-CA-01 (Fla. Cir. Ct. filed Aug. 11, 2022), 2022 WL 3155358.

Episcopal Church priest, and a Buddhist lama.[656] Because Florida's abortion ban forbids aiding or abetting the procurement of an abortion,[657] these religious leaders argued that they were unable to practice their faith, which may at times call for counseling congregants about abortion services.[658] One Jewish scholar, for example, considers abortion an acceptable practice in Judaism that may even be a "commandment" if a fetus endangers the life or health of the pregnant person.[659] According to the plaintiffs, making it illegal either for congregants to obtain an abortion or for religious leaders to advise congregants regarding abortion care violates their right to free exercise of their religion.[660]

Since then, more suits have been filed by religious leaders challenging other states' abortion bans on similar grounds. For example, Jewish women in Kentucky filed a suit against its abortion ban in October 2022, arguing that the ban imposes a "sectarian theology" that violates their religious beliefs.[661] Meanwhile, a group known as the Hoosier Jews for Choice and other religious plaintiffs have sued to stop Indiana's abortion ban under that state's Religious Freedom Restoration Act, which prohibits government action that interferes with religious exercise absent a compelling objective.[662] In December 2022 a state judge agreed that Indiana's abortion ban substantially burdened religious

---

656 See Jacqueline Thomsen, *Florida Clergy Lawsuits Say Abortion Ban Violates Religious Freedom*, REUTERS (Aug. 2, 2022), https://www.reuters.com/world/us/florida-clergy-lawsuits-say-abortion-ban-violates-religious-freedom-2022-08-02/ [https://perma.cc/ZUX7-ZGEX].

657 FLA. STAT. § 390.0111(10) (2022) (subjecting anyone who "willfully performs, or actively participates in" an unlawful abortion to criminal penalties); FLA. STAT. § 777.011 (2022) (making it a felony to "aid[], abet[], counsel[], hire[], or otherwise procure[] such offense").

658 *See* Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME (July 7, 2022), https://time.com/6194804/abortion-religious-freedom-judaism-florida/ [https://perma.cc/4BPW-VL85] (reporting a rabbi's statement that Florida law "prohibits Jewish women from practicing their faith free of government intrusion").

659 *Id.*

660 *See, e.g.*, Pomerantz Complaint, *supra* note 655, at 21-33 ("The right to receive and support quality reproductive healthcare for all members of the Jewish faith, including abortion procedures in certain circumstances, is a significant component of Judaism.").

661 Bruce Schreiner, *Jewish Women Cite Faith in Contesting Kentucky Abortion Ban*, AP NEWS (Oct. 6, 2022), https://apnews.com/article/abortion-2022-midterm-elections-health-kentucky-legislature-26ecd225013231ee8766248633d289a3 [perma.cc/H2F4-UBB8].

662 *See* Complaint at 2, Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056, (Super. Ct. Marion Cnty. filed Sep. 8, 2022) (alleging that Indiana's abortion ban violates Indiana's RFRA because it "burdens the plaintiffs' sincere religious beliefs" by prohibiting abortion in circumstances where their religion "direct[s] them to obtain an abortion."); *see also* Laura Kusisto, *State Abortion Bans Face Religious-Liberty Lawsuits from the Left*, WALL ST. J. (Sept. 16, 2022), https://www.wsj.com/articles/state-abortion-bans-face-religious-liberty-lawsuits-from-the-left-11663343259 [https://perma.cc/TJX9-9TB6] (describing the suit brought by Hoosier Jews for Choice, as well as suits challenging other states' abortion bans).

exercise and issued a preliminary injunction blocking Indiana's law.[663] In June 2023 the judge certified the case as a class action, meaning that any final ruling in the case will apply to anyone in the state whose religious beliefs direct them to obtain an abortion.[664] Religious freedom arguments have also arisen in challenges to abortion bans in Ohio,[665] Utah, and Wyoming.[666] Given the preliminary success of these cases, additional challenges to abortion bans on religious freedom grounds are likely to arise.

Like Florida, twenty-one states have adopted religious freedom restoration acts, which are largely based on the federal Religious Freedom Restoration Act ("RFRA") that Congress passed in 1993.[667] RFRA restored strict scrutiny analysis to laws of general applicability that significantly burden religious expression,[668] a standard that the U.S. Supreme Court had abandoned in *Employment Division v. Smith*.[669] In *City of Boerne v. Flores*,[670] the U.S. Supreme Court held that RFRA could not be applied to the states under section five of the Fourteenth Amendment, and thus RFRA continues to apply to actions of the federal government, but not those of the states.

Because the federal RFRA does not apply to the states, challenges to generally applicable state laws on religious freedom grounds largely rely on

---

663 Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056, slip op. (Super. Ct. Marion Cnty. Dec. 2, 2022). It should be noted that Indiana's abortion law was already blocked in a different case, but because the issues raised in that case were "based on entirely different legal claims and sources of rights," the Indiana court held that an additional injunction was appropriate. *Id.* at 3.

664 *Id.* at 28; *see also* Casey Smith, *Judge Grants Class Action for RFRA-Based Lawsuit Against Indiana Abortion Ban*, INDIANAPOLIS BUS. J. (June 7, 2023), https://www.ibj.com/articles/judge-grants-class-action-for-rfra-based-lawsuit-against-indiana-abortion-ban [https://perma.cc/JFM8-WTLA] (reporting on the judge's order certifying the class).

665 *See* Morgan Trau, *Jewish Community to Join ACLU, Abortion Providers in Lawsuit Against Ohio's Six-Week Abortion Ban*, OHIO CAP. J. (July 12, 2022), https://ohiocapitaljournal.com/2022/07/12/jewish-community-to-join-aclu-abortion-providers-in-lawsuit-against-ohios-six-week-abortion-ban/ [https://perma.cc/979Q-WF5T] (describing an analogous suit in Ohio).

666 *See* Harry Isaiah Black, *3 Takeaways About Abortion Litigation Since* Dobbs, BRENNAN CTR. FOR JUST. (Dec. 13, 2022), https://www.brennancenter.org/our-work/analysis-opinion/3-takeaways-about-abortion-litigation-dobbs [https://perma.cc/3H4Y-NZJY] (referencing the Utah and Wyoming litigation).

667 *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq*.) (noting a purpose of the act as "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government"); Sophie Martin Schechner, Note, *Religion's Power Over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 CARDOZO J.L. & GENDER 395, 397 n.9 (2016) (collecting state statutes based on RFRA).

668 *See* Christopher C. Lund, *Religious Liberty After* Gonzalez*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 471-72 (2010) (noting that "RFRA brought back the same sort of strict scrutiny model that had been jettisoned in *Smith*").

669 494 U.S. 872 (1990).

670 521 U.S. 507 (1997).

state RFRA laws.[671] Nevertheless, because state RFRA laws usually track the federal law, state courts have turned to guidance from the U.S. Supreme Court's federal RFRA jurisprudence when analyzing their state-law counterparts.[672] Significantly, the U.S. Supreme Court has, in recent years, greatly enhanced RFRA's protections against generally applicable laws that burden religious expression. In *Burwell v. Hobby Lobby Stores, Inc.*,[673] the Court held that RFRA applies to closely held corporations and that therefore HHS could not require that cost-free contraceptives be included in mandatory healthcare plans under the Affordable Care Act ("ACA") when doing so would substantially burden the sincerely held religious beliefs of the corporation's owners. More recently, in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[674] the Court upheld HHS regulations implemented to accommodate religious objections to the inclusion of contraceptives in the ACA's healthcare mandate. In that decision, the Court stated that its prior decisions "all but instructed [HHS] to consider RFRA going forward."[675] Taken together, *Hobby Lobby* and *Little Sisters* require the federal government to comply with RFRA when passing generally applicable laws or regulations and permit the federal government to achieve this compliance through religious or moral exemptions.[676]

The irony of this jurisprudence is that religiously-based objections to generally applicable abortion bans now have a greater chance of obtaining relief under state RFRA statutes. State RFRA laws have been widely criticized on the left as a basis for discrimination, particularly against LGBTQ persons.[677] Indiana's RFRA law, enacted in 2015, was especially contentious because it was viewed as undermining same-sex marriage by

671 *See* Lund, *supra* note 668, at 474-79 (examining state RFRA statutes).

672 *See, e.g.*, Blattert v. State, 190 N.E.3d 417, 421 n.1 (Ind. Ct. App. 2022) (explaining that "federal caselaw provides some useful guidance" because of the similarities between the state and federal RFRA laws); State v. Hardesty, 214 P.3d 1004, 1008 n.7 (Ariz. 2009) ("[T]he United States Supreme Court's interpretation of RFRA, although technically not binding in our interpretation of [Arizona's Free Exercise of Religion Act], provides persuasive authority."); Barr v. City of Sinton, 295 S.W.3d 287, 296 (Tex. 2009) (stating that because RFRA and Texas's RFRA statute "were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statute[ ] germane in applying the Texas statute").

673 573 U.S. 682, 705-07 (2014).

674 140 S. Ct. 2367, 2373 (2020).

675 *Id.* at 2383.

676 For more on these religious exemptions, see Alexandra Brown et al., *Religious Exemptions*, 22 GEO. J. GENDER & L. 335 (2021).

677 *See, e.g.*, Brian Miller, *The Age of RFRA*, FORBES (Nov. 16, 2018), https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/?sh=86b83e77bae8 [https://perma.cc/7LE8-ERNP] (observing that state RFRA laws are often "too toxic for even deeply conservative states," given the negative view of RFRA among those supporting LGBTQ rights).

allowing individuals and for-profit businesses to invoke religious beliefs as a defense in private suits.[678] Now, however, groups that previously opposed stringent state RFRA laws are turning to those same laws for protection against generally applicable abortion bans. And so far, they are finding success in doing so.

Cases from Kentucky and Indiana demonstrate how religious objections to abortion bans can succeed in state courts. In Kentucky, a state circuit judge held, *inter alia*, that the state's abortion ban violated section 5 of the Kentucky Constitution, which protects the free exercise of religion and prohibits the establishment of a state religion[679] because, according to the court, the abortion ban imposes the view that "life begins at the very moment of fertilization," which the court stated was "a distinctly Christian and Catholic belief."[680] The court ruled that, by making this Christian belief the state's policy, and criminalizing noncompliance with such policy, the Kentucky General Assembly "impermissibly establish[ed] a distinctly Christian doctrine of the beginning of life, and . . . unduly interfere[ed] with the free exercise of other religions that do not share that same belief."[681] Thus, Kentucky's abortion ban was unconstitutional under the Kentucky constitution because it established a "preferred faith" while ignoring the competing views of others.[682] Although this case focused on a constitutional provision rather than a state RFRA law, the same logic could well apply to RFRA analyses. In addition, this case demonstrates that even absent a state RFRA law, challenges to abortion bans can succeed on state constitutional religious-freedom grounds alone.

In contrast to the Kentucky case, the Indiana litigation focused on the state's RFRA law. But the result was largely similar. The state had tried to argue that plaintiffs' religious exercise was not burdened by its abortion ban because "abortion is not a religious practice, 'but a secular means to a religious end.'"[683] The court rejected this argument, however, stating that this same argument had been similarly rejected by the U.S. Supreme Court in *Hobby Lobby*.[684] There the U.S. Supreme Court had ruled that the closely-held for-

678 Joshua Sato, *Indiana's Religious Freedom Restoration Act Sparks Controversy*, ABA (Mar. 31, 2015), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/indianas-religious-freedom-restoration-act-sparks-controversy/ [https://perma.cc/W4JT-AQ2K].

679 KY. CONST. § 5.

680 EMW Women's Surgical Ctr. v. Cameron, No. 22-CI-3225, slip op. at 15 (Ky. Cir. Ct. July 22, 2022).

681 *Id.* at 16.

682 *Id.* at 19.

683 Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056, slip op. at 29 (Marion Super. Ct. Dec. 2, 2022) (quoting State's Br. at 30).

684 *See id.*

profit corporation's religious exercise was burdened through the payment for contraceptives included in its mandated healthcare plan, which was also not a "religious practice."[685] Furthermore, the court noted that the U.S. Supreme Court has often held that activities that may not have religious significance to some are still considered religious practices "for those who believe" and are therefore entitled to protection.[686] As in the Kentucky case, the court rejected the argument that there is a one-size-fits-all religious understanding of abortion (as bad and immoral) and instead recognized that religion and religious freedom is a two-way street: protections of some religious practices (e.g., Christian practices) necessitate the protection of others (e.g., Jewish, Muslim, and Buddhist practices). By extension, the strengthening of religious protections in *Hobby Lobby* and *Little Sisters* from mandated contraception also strengthens religious protections from mandated births.

The court also found that Indiana's abortion ban substantially burdened the plaintiffs' religious practices because "[t]he government's pressure upon them to abandon their religious beliefs is clear."[687] The court likened the case to *Sherbert v. Verner*,[688] in which the U.S. Supreme Court held that denial of unemployment benefits to a member of the Seventh-Day Adventist Church burdened her free exercise in violation of the First Amendment because the alternative employment on which the unemployment determination relied required her to work on Saturdays. According to the Court, the denial of unemployment benefits on that basis amounted to "pressure upon her to forego" her religious practice.[689] Likewise, in the Indiana case, the court found that the plaintiffs' religious beliefs would counsel them to obtain an abortion if complications arose in the pregnancy.[690] Banning abortion therefore exerted the state's "pressure upon [the plaintiffs] to abandon their religious beliefs" and amounted to a "substantial burden" on their religious practice.[691]

Of course, the finding of a substantial burden on a sincerely held religious practice does not end the inquiry under either federal or state RFRA statutes. Instead, the burden shifts to the government to show that the burden "is in furtherance of a compelling governmental interest; and is the least restrictive

685 *Id.* at 29-30.

686 *Id.* at 30 (citing Holt v. Hobbs 574 U.S. 352, 369 (2015) (growth of facial hair); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525, 547 (1993) (ritual slaughter of animals); and Wisconsin v. Yoder, 406 U.S. 205, 210-12, 234 (1972) (compulsory education beyond eighth grade).

687 *Id.* at 31.

688 374 U.S. 398, 420-22 (1963), *abrogated on other grounds as recognized by* Holt v. Hobbs, 574 U.S. 352, 357 (2015).

689 *Id.* at 404.

690 *Anonymous Plaintiff 1*, slip op. at 31.

691 *Id.*

means of furthering that compelling governmental interest."[692] In the Indiana litigation, the state argued that it has a compelling interest in protecting a class of "vulnerable human beings" (i.e., zygotes, embryos, and fetuses) because, according to the state, "human physical life begins" at the moment of fertilization.[693] Although the state characterized this as a "simple scientific observation,"[694] the U.S. Supreme Court has consistently indicated that courts have no authority to decide the issue of when life begins or ends as a matter of law.[695] Of course, the state may make this value judgment, but in doing so it must recognize that the judgment is at least in part based on theology.[696] And even if this value judgment does not violate the Establishment Clause, one must at least acknowledge the value judgments of other religions that counsel for the use of abortions.[697]

Furthermore, as the Indiana court acknowledged,[698] neither the state nor the courts have any business addressing "whether the religious belief asserted in a RFRA case is reasonable."[699] Thus, even if anti-abortion laws themselves do not violate the Establishment Clause, statutorily mandating that the Christian and Catholic version of "when life begins" is the *only* permissible answer might well violate "[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another."[700] Accordingly, even if the state has a compelling interest in preserving "fetal life," it does not, and arguably cannot, have a compelling interest in refusing all religiously-based exemptions to an abortion ban

692 42 U.S.C. § 2000bb-1(b); IND. CODE § 34-13-9-8 (2022).

693 *Anonymous Plaintiff 1*, slip op. at 32.

694 *Id.* (quoting State's Brief at 6).

695 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022) ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. . . . Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that 'theory of life.'" (citation omitted)); see also Ohio v. Akron Ctr. For Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (calling the question of "when human life begins" a "nonjusticiable question").

696 *See* Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists, 476 U.S. 747, 792, 795 n.4 (1986) (White, J., dissenting) (describing the question of "whether the fetus is a 'human being'" as a "metaphysical or theological question").

697 *See* John M. Breen, *Abortion, Religion, and the Accusation of Establishment: A Critique of Justice Stevens' Opinions in* Thornburgh, Webster, *and* Casey , 39 OHIO N. U. L. REV. 823, 839 (2013) (criticizing the view that anti-abortion laws violate the Establishment Clause and arguing that if the view that places great value on a developing fetus is "religious," then the argument that the fetus has little or no value is equally "religious"). For an extended argument that views on abortion are fundamentally spiritual and should be viewed through the lens of freedom of religion, see RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

698 *Anonymous Plaintiff 1*, slip op. at 33 ("[T]he State may not dictate the parameters of what constitutes a question of religion.").

699 *Hobby Lobby*, 573 U.S. at 724 (2014).

700 Larson v. Valente, 456 U.S. 228, 244 (1982).

because doing so would potentially violate both the Establishment Clause and federal and state RFRA laws.

This brings us to the last RFRA consideration: the least restrictive means test. In the Indiana case, the court found that because Indiana's abortion ban provides some exceptions, such as in the case of rape or incest,[701] then a total abortion ban in all other circumstances is by definition *not* the least restrictive means of meeting the state's interests.[702] According to the court, if the state is willing to grant exceptions to the abortion ban in some circumstances, it would be devaluing plaintiffs' religious beliefs not to allow religiously based exceptions as well.[703] To use the words of *Employment Division v. Smith*, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[704]

As the Indiana and Kentucky cases show, effective arguments can be made against abortion bans on the grounds of religious practice and belief. These cases have had so much success that the Law, Rights, and Religion Project at Columbia Law School has even published a memorandum outlining how to bring religious objections to abortion bans.[705] That said, these cases are ongoing, and it remains to be seen whether the state supreme courts will uphold these lower court decisions. There are also doubts as to whether the U.S. Supreme Court's conservative majority would give religious objections to abortion bans the same weight as the Court has given to religious objections to other generally applicable laws.[706] Nevertheless, these cases demonstrate how innovative applications of increasingly robust religious protections can be used to challenge abortion bans.

---

701 IND. CODE § 16-34-2-1(a)(2) (2022).

702 *Anonymous Plaintiff 1*, slip op. at 36-39. This raises the question of whether a state could address the least restrictive means problem by enacting a total abortion ban, with no exceptions even in the cases of rape, incest, or threat to the life of the pregnant person. However, apart from potential political backlash to such a draconian law, we wonder whether such a ban would be constitutional because a majority of the historical statutes regarding abortion that were relied upon in *Dobbs* did indeed contain some form of exception, including to save the life of the mother. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285-300 (2022) (listing historical statutes).

703 *See Anonymous Plaintiff 1*, slip op. at 36-39; see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537-38 (1993) ("Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.").

704 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

705 LAW, RTS., & RELIGION PROJECT, COLUM. L. SCH., RELIGIOUS RIGHT TO ABORTION: LEGAL HISTORY & ANALYSIS (Aug. 2022), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/LRRP%20Religious%20Liberty%20%26%20Abortion%20Rights%20memo.pdf [https://perma.cc/J3SZ-Q6TQ].

706 *See* Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2326 (2023) (expressing doubt that the U.S. Supreme Court would accept religious exemptions in the abortion context as it has in other contexts).

Conclusion

As should be clear from the discussion in this Article, the new abortion legal landscape is fraught with uncertainty on nearly every front. And such legal uncertainty inevitably creates a chilling effect, as those potentially affected by legal enforcement will tend to steer clear of even the possibility of liability or criminal penalty. Yet, in the absence of national legislation or an eventual reversal of course by the U.S. Supreme Court, this is the post-*Dobbs* reality, and it will be necessary for litigants and courts to address the complicated conflicts of law issues that are raised by the increasing disunity of the states regarding abortion access. Indeed, resolving such issues could at least create some clarity as to what activities can be regulated by specific states and what cannot. In this Article, therefore, we have sought to provide a roadmap through many of those issues in the hope of informing the litigation strategies, political debates, and judicial decisions that are beginning to arise, as the shockwaves from the demise of *Roe v. Wade* reverberates now, and in the years to come.

* * * * *