ABORTION TRAVEL RESTRICTIONS UNDER THE DORMANT COMMERCE CLAUSE AFTER *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

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Since Dobbs v. Jackson Women's Health Organization*, twelve states have banned abortion entirely, and seven states have banned abortion earlier in pregnancy than the standard set in* Roe v. Wade*. As abortion access dwindles, patients increasingly cross state lines to seek reproductive healthcare. In response, antiabortion state officials and lawmakers have made efforts to restrict interstate travel for abortion care.*

This Note examines abortion travel restrictions under the "Dormant" Commerce Clause doctrine, which limits state laws that burden interstate commerce. In 2023, the U.S. Supreme Court affirmed but narrowed the judge-made doctrine in National Pork Producers Council v. Ross*. This Note analyzes state regulations of interstate abortion travel under the newly clarified two-tier Dormant Commerce Clause test. It concludes that such laws violate the Dormant Commerce Clause by (1) impermissibly depriving out-of-state businesses of their competitive advantages and (2) imposing a clearly excessive burden on interstate commerce relative to the laws' purported benefits.*

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INTRODUCTION

In 2022, Amber Thurman, a twenty-eight-year-old mother and medical assistant, died after suffering from an infection that a routine dilation and curettage (D&C) procedure could have treated.[1] After taking abortion pills at a clinic in North Carolina, Thurman suffered a rare complication—some fetal tissue remained in her uterus, and a routine D&C procedure could have removed it.[2] But Thurman's home state of Georgia criminalized abortions, including D&C procedures, except in a "medical emergency."[3] When Thurman's medical complications arose, she sought emergency care in

1. Moira Donegan, *Amber Thurman Was Killed by Georgia's Abortion Ban. There Will Be Others*, THE GUARDIAN (Sept. 19, 2024, 6:00 AM), https://www.theguardian.com/commentisfree/2024/sep/19/georgia-abortion-ban [https://perma.cc/N98A-KVCM].
2. *Id.*
3. GA. CODE ANN. § 31-9B-2 (West 2020).

Georgia.[4] Doctors monitored Thurman's infection and waited twenty hours until her organs began to fail before they started operating, by which point it was too late.[5] An official state committee of medical professionals later concluded that Thurman's death was "preventable" if not for the hospital's delay in operating.[6]

In 2022, the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization*[7] overturned *Roe v. Wade*[8] and held that the Constitution does not guarantee the right to abortion.[9] As of March 6, 2025, twelve states have banned abortion entirely, and seven states have restricted the procedure earlier in pregnancy than the standard set in *Roe*.[10] These abortion bans and restrictions have led to "increased maternal mortality and morbidity, a climate of fear among healthcare providers, and reduced access to all forms of care."[11] The reproductive healthcare crisis in the United States disproportionately harms women of color, like Amber Thurman, and other marginalized communities.[12] Thurman's story is an especially tragic example of the many women who have suffered serious health consequences because they were denied routine obstetric care due to their states' abortion bans.[13]

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4. Dara Kass & Julie F. Kay, *The Supreme Court Cost Amber Thurman Her Life*, SLATE (Sept. 18, 2024, 1:31 PM), https://slate.com/news-and-politics/2024/09/georgia-abortion-ban-supreme-court-killed-amber-thurman.html [https://perma.cc/2MJL-LF78].

5. Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable.*, PROPUBLICA (Sept. 16, 2024, 5:00 AM), https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death [https://perma.cc/6FUY-CUA9].

6. *Id.* Multiple women have suffered preventable deaths due to state abortion bans. Candi Miller died from the same complications that caused Amber Thurman's death, which a routine D&C could have treated but for Georgia's abortion ban. *See* Kavitha Surana, *Afraid to Seek Care amid Georgia's Abortion Ban, She Stayed at Home and Died*, PROPUBLICA (Sept. 18, 2024, 6:00 AM), https://www.propublica.org/article/candi-miller-abortion-ban-death-georgia [https://perma.cc/RL5C-AGNP]. Josseli Barnica died from a sepsis infection after she miscarried and, pursuant to Texas's abortion ban, had to wait days until doctors could no longer detect a "fetal heartbeat" before they induced delivery. *See* Cassandra Jaramillo & Kavitha Surana, *A Woman Died After Being Told It Would Be a "Crime" to Intervene in Her Miscarriage at a Texas Hospital*, PROPUBLICA (Oct. 30, 2024, 5:00 AM), https://www.propublica.org/article/josseli-barnica-death-miscarriage-texas-abortion-ban [https://perma.cc/P8V8-LV6L].

7. 142 S. Ct. 2228 (2022).

8. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

9. *Dobbs*, 142 S. Ct. at 2242.

10. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html [https://perma.cc/48PK-HBAH] (Mar. 6, 2025, 5:48 PM).

11. HUM. RTS. WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER *DOBBS* (2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/W77L-HTU5].

12. *Id.*; *see* Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of* Roe*, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe/ [https://perma.cc/F6MB-YKMC].

13. *See, e.g.*, *supra* note 6; State v. Zurawski, 690 S.W.3d 644, 655–56 (Tex. 2024) (describing the plaintiffs' serious health consequences that resulted from physicians delaying

States' efforts to limit abortion access include restrictions on patients' ability to travel across state lines to seek abortion care in states where the procedure is legal. In April 2023, Idaho passed an "abortion trafficking" law that criminalizes assisting a pregnant minor in obtaining an abortion outside the state.[14] Similar bills have been enacted in Tennessee[15] and were introduced but did not advance in Alabama,[16] Mississippi,[17] and Oklahoma.[18] Alabama Attorney General Steve Marshall threatened to use the state's criminal conspiracy law to prosecute women who obtained abortions outside the state, as well as people who assisted them.[19] These attempts to limit travel for abortion care raise numerous constitutional issues, such as the right to travel, freedom of speech, and the Full Faith and Credit Clause. Such restrictions also implicate the "Dormant" Commerce Clause, which courts have inferred from the Constitution as a limitation on state actions that burden interstate commerce.[20]

The question of whether states can restrict interstate travel for abortion care is important for several reasons. First, courts tackling this issue will set precedent determining how and to what extent state laws can impact other states' commerce. For instance, in the Supreme Court's recent Dormant Commerce Clause case, *National Pork Producers Council v. Ross*,[21] Justice Kavanaugh wrote separately to express concern that a state "unilaterally impos[ing] its moral and policy preferences . . . on the rest of the Nation" would "undermine[] federalism and the authority of individual States by

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or refusing to provide abortion care in Texas). In *State v. Zurawski*, 690 S.W.3d 644 (Tex. 2024), two doctors and several women who were denied abortion care after suffering pregnancy complications challenged Texas's abortion bans. *Zurawski*, 690 S.W.3d at 654. The lead plaintiff, Amanda Zurawski, suffered from severe septic shock, requiring surgical reconstruction of her uterus and permanently damaging one of her fallopian tubes, after doctors refused to perform an abortion while a fetal cardiac activity could be detected. *Id.* at 655. The plaintiffs challenged the abortion laws' ambiguous language under the Texas Constitution. *Id.* at 654. The Supreme Court of Texas upheld the state's abortion bans because their text included exceptions for lifesaving abortions. *Id.* at 671.

14. IDAHO CODE ANN. § 18-623 (West 2023).

15. TENN. CODE ANN. § 39-15-201 (2024); *see* Anita Wadhwani, *Tennessee Senate Passes Bill Making It a Crime to Aid a Minor Seeking an Abortion*, TENN. LOOKOUT (Apr. 11, 2024, 5:00 AM), https://tennesseelookout.com/2024/04/11/senate-passes-bill-making-it-a-crime-to-aid-a-minor-seeking-an-abortion/ [https://perma.cc/AXB3-4WJS].

16. H.B. 378, 2024 Reg. Sess. (Ala. 2024).

17. H.B. 713, 139th Leg., Reg. Sess. (Miss. 2024).

18. S.B. 1778, 59th Leg., 2d Reg. Sess. (Okla. 2024); *see* Mary Anne Pazanowski, *Doubts over Abortion Travel Bans Lead States to Try Other Means*, BLOOMBERG L. (May 15, 2024, 4:45 AM), https://news.bloomberglaw.com/health-law-and-business/doubts-over-abortion-travel-bans-lead-states-to-try-other-means [https://perma.cc/4ZSL-CW8K].

19. *See* Yellowhammer Fund v. Marshall, 733 F. Supp. 3d 1167, 1174 (M.D. Ala. 2024); *see also infra* Part I.A.3 (describing the efforts of state attorneys general in Alabama, Idaho, and Texas to regulate out-of-state abortions).

20. Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 399, 417–18 (2024); Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress*, 35 J. AM. ACAD. MATRIM. L. 461, 491–96 (2023).

21. 143 S. Ct. 1142 (2023).

forcing individuals and businesses in one State to conduct their . . . practices in a manner required by the laws of a *different* State."[22]

Second, abortion travel restrictions directly impact patients' ability to receive out-of-state healthcare and medical providers' ability to give care that is legal within their state. More broadly, it touches on fundamental freedoms, including the right to travel under the Privileges and Immunities Clause.[23] Stories like Amber Thurman's demonstrate that an abortion can be a lifesaving medical procedure in obstetric emergencies.[24] Therefore, access to out-of-state abortion care is necessary to protect the health and lives of pregnant people who live in states where abortion is illegal.[25]

Third, restrictions on access to reproductive healthcare have racial and social justice implications. Studies show that women of color, LGBTQ+ individuals, people with disabilities, low-income populations, and rural residents face discrimination in the healthcare system and have poorer health outcomes than those in other populations.[26] Further, traveling out of state for abortion care is expensive and time-consuming, often requiring individuals to take time off of work, arrange childcare, and pay for travel expenses and accommodations.[27] Thus, abortion bans have disparate impacts on low-income and marginalized populations, exacerbating the obstacles they face in accessing quality healthcare.[28]

This Note evaluates abortion travel restrictions under the Dormant Commerce Clause. It argues that extraterritorial regulation of abortion care violates the Dormant Commerce Clause by impermissibly burdening interstate commerce. Part I begins by discussing the evolution of abortion laws in the United States. It then examines Dormant Commerce Clause jurisprudence, including the Supreme Court's splintered decision in *Ross*. Part II describes how courts apply the Dormant Commerce Clause after *Ross* and presents scholars' arguments for and against the validity of abortion travel restrictions under the doctrine. Part III explains that state laws restricting interstate travel for abortion care violate the Dormant Commerce Clause because (1) they stifle competition in other states that possess

22. *Id.* at 1174 (Kavanaugh, J., concurring in part and dissenting in part); *see* Bradley W. Joondeph, *The "Horizontal Separation of Powers" After* National Pork Producers Council v. Ross, 61 SAN DIEGO L. REV. 45, 49 (2024) (discussing the "unresolved interstate federalism issues" arising from the Supreme Court's Dormant Commerce Clause precedent).

23. *See* Appleton, *supra* note 20, at 494–96. In his *Dobbs* concurrence, Justice Kavanaugh posited that a state law "bar[ring] a resident of that State from traveling to another State to obtain an abortion" could violate "the constitutional right to interstate travel." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

24. *See* Donegan, *supra* note 1; Surana, *supra* note 5; *see also supra* notes 6, 13 and accompanying text.

25. *See, e.g.*, State v. Zurawski, 690 S.W.3d 644, 655 (Tex. 2024) (explaining that one plaintiff, who was pregnant with twins in Texas, had to travel out of state to obtain an abortion procedure necessary to save one twin fetus after the other twin fetus was diagnosed with a "100 percent fatal" condition that would have likely triggered a labor too early for the healthy fetus to survive).

26. *See* HUM. RTS. WATCH, *supra* note 11.

27. *See id.*

28. *See id.*

competitive advantages due to their abortion-permissive laws, and (2) such laws impose a clearly excessive burden on interstate commerce relative to their putative local benefits.

I. THE HISTORY OF ABORTION LAW AND THE DORMANT COMMERCE CLAUSE DOCTRINE

To contextualize abortion travel restrictions and their Dormant Commerce Clause implications, Part I.A examines the evolution of abortion law in the United States, both at common law and under state regulations. Part I.B delineates the development of the judge-made Dormant Commerce Clause doctrine.

A. Abortion Law: The Swinging Pendulum

In a 2017 interview, the late Justice Ruth Bader Ginsburg described the "true symbol of the United States" as "the pendulum."[29] She opined, "when the pendulum swings too far in one direction it will go back."[30] The image of Justice Ginsburg's pendulum encapsulates the history of abortion law in the United States. Part I.A.1 summarizes the Supreme Court's decades-long jurisprudence that first guaranteed and later revoked a constitutional right to abortion. Part I.A.2 details the variety of state laws that regulated or protected abortion access before and after *Dobbs*. Finally, Part I.A.3 describes the ways in which states have attempted to hinder interstate travel for abortion care.

1. Abortion Jurisprudence from *Griswold* to *Dobbs*

Before *Dobbs* in 2022, the Supreme Court recognized a constitutional right to abortion for nearly fifty years under *Roe*.[31] The right to abortion stemmed from decades of precedent that recognized unenumerated substantive due process rights under the Fourteenth Amendment.[32] The Fourteenth Amendment's Due Process Clause provides that no state may "deprive any person of life, liberty, or property, without due process of law."[33] Since the early 1900s, the Court has interpreted the Due Process Clause to protect certain unenumerated fundamental rights from government interference,[34]

29. *Not Best of Times for US—Supreme Court Justice Ginsburg*, BBC NEWS (Feb. 23, 2017), https://www.bbc.com/news/world-us-canada-39065535 [https://perma.cc/VVX8-WKYJ].

30. *Id.*

31. *See* Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

32. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1502–08 (1999).

33. U.S. CONST. amend. XIV, § 1.

34. *See* Chemerinsky, *supra* note 32, at 1509.

including parental rights,[35] the right to marry,[36] and the right to refuse medical treatment.[37]

In *Lochner v. New York*,[38] the Supreme Court held that freedom of contract was a fundamental right under the Due Process Clause, spurring decades of Supreme Court cases striking down state economic regulations.[39] During the *Lochner* era, the Court also used substantive due process to recognize civil liberties, including parental rights to control children's upbringing.[40] *Lochner* and its progeny garnered criticism that the Court's recognition of substantive due process rights was too expansive.[41] In 1937, the Court rejected *Lochner* and stopped invalidating economic regulations under the Due Process Clause.[42]

After a decades-long pause,[43] the Court in 1965 continued recognizing unenumerated civil liberties rights in the Constitution, but from a privacy perspective rather than an economic liberty perspective, laying the groundwork for *Roe*.[44] The Court in *Griswold v. Connecticut*[45] struck down a Connecticut ban on the distribution of contraceptives to married couples.[46] The Court held that a fundamental right to privacy existed in the "penumbras" of the Bill of Rights, thus avoiding a substantive due process analysis.[47] In *Eisenstadt v. Baird*,[48] the Court extended *Griswold*, invalidating a Massachusetts statute that banned the distribution of contraceptives to unmarried couples.[49]

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35. *See, e.g.*, Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

36. *See* Obergefell v. Hodges, 576 U.S. 644, 645–46 (2015); Loving v. Virginia, 388 U.S. 1, 12 (1967).

37. *See* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261 (1990).

38. 198 U.S. 45 (1905), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

39. *Id.* at 53; *see* Chemerinsky, *supra* note 32, at 1502–03 (noting "over two hundred laws were struck down for economic regulations" between 1905 and 1937).

40. *See Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 400.

41. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (rejecting *Lochner* and noting that "the Constitution does not recognize an absolute and uncontrollable liberty"); *see* Chemerinsky, *supra* note 32, at 1501 ("There is no concept in American Law that is more elusive or more controversial than substantive due process.").

42. *See W. Coast Hotel*, 300 U.S. at 391; *see also* United States v. Caroline Prods. Co., 304 U.S. 144, 147–48 (1938); Chemerinsky, *supra* note 32, at 1504 ("[S]ince 1937, not one federal, state, or local economic regulation has been invalidated on substantive due process grounds.").

43. Chemerinsky, *supra* note 32, at 1506 ("[A]fter 1937, the Court backed away from substantive due process in all of its forms, economic and otherwise.").

44. *See* Griswold v. Connecticut, 381 U.S. 479, 482–84 (1965).

45. 381 U.S. 479 (1965).

46. *Id.* at 481–82 (finding Connecticut's contraceptives ban "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation").

47. *Id.* at 484; *cf.* Chemerinsky, *supra* note 32, at 1508 ("Justice Douglas [in *Griswold*] used substantive due process even though at the time he denied that was what he was doing.").

48. 405 U.S. 438 (1972).

49. *Id.* at 454.

One year later, the Supreme Court in *Roe* recognized a constitutional right to abortion, striking down Texas's criminal abortion ban.[50] The Court cited *Griswold* and *Eisenstadt* in finding the abortion right "in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."[51] The *Roe* Court declared that the Ninth and Fourteenth Amendments guaranteed a fundamental right to privacy, which encompassed the right to choose whether or not to terminate one's pregnancy.[52]

Roe established a trimester system to balance the fundamental right to abortion against the state's "important and legitimate interest" in promoting the "potentiality of human life" and maternal health.[53] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[54] a plurality of the Court established a new standard, replacing *Roe*'s trimester framework with the undue burden test.[55] Under *Casey*, an abortion regulation was unconstitutional if it placed an undue burden on the right to an abortion before viability.[56] The Court reaffirmed the right to abortion in 2016 in *Whole Woman's Health v. Hellerstedt*[57] and again in 2020 in *June Medical Services L.L.C. v. Russo*.[58] In both cases, the Court used the undue burden test to strike down nearly identical state laws requiring abortion-performing doctors to have active admitting privileges at a nearby hospital.[59]

In 2022, the *Dobbs* Court overturned *Roe* and its progeny, holding that the Constitution does not guarantee a right to abortion.[60] Justice Alito wrote for the majority that although the Due Process Clause protects some unenumerated rights "deeply rooted in this Nation's history and tradition"

50. Roe v. Wade, 410 U.S. 113, 162–65 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

51. *Id.* at 129 (first citing *Griswold*, 381 U.S. at 479; and then citing *Eisenstadt*, 405 U.S. at 438).

52. *Id.* at 153; *see* Chemerinsky, *supra* note 32, at 1508 ("*Roe* was unquestionably a substantive due process case.").

53. *Roe*, 410 U.S. at 162–63. Under *Roe*, the state could not regulate abortion during the first trimester of pregnancy. *Id.* at 164. During the second trimester, the state could regulate abortion only in ways that were "reasonably related to maternal health." *Id.* During the third trimester, the state could "regulate, and even proscribe," abortion except when it was necessary to preserve the life or health of the mother. *Id.* at 164–65.

54. 505 U.S. 833 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

55. *Id.* at 874–79.

56. *Id.* at 878 (defining an "undue burden" as one which "place[s] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability").

57. 136 S. Ct. 2292 (2016), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

58. 140 S. Ct. 2103 (2020), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

59. *See id.* at 2112–13; *Hellerstedt*, 136 S. Ct. at 2300. Justice Stephen G. Breyer, writing for the majority in both cases, found that the admitting privileges laws "did not further the State's asserted interest in protecting women's health" and imposed an unconstitutional undue burden on abortion access "when viewed in light of the virtual absence of any health benefit." *June Med. Servs.*, 140 S. Ct. at 2112 (quoting *Hellerstedt*, 136 S. Ct. at 2313).

60. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

and "implicit in the concept of ordered liberty," the right to abortion "does not fall within this category."[61] The *Dobbs* Court held that abortion regulations, like other health and welfare laws, "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[62] The Court upheld Mississippi's fifteen-week abortion ban under this new standard, finding that legitimate interests, such as protecting fetal life and maternal health, provided a rational basis for the law.[63]

2. States as Battlegrounds for a Culture War and Laboratories for Abortion Laws Pre- and Post-*Dobbs*

Before and after *Dobbs*, states served as laboratories for testing laws protecting and restricting abortion access. Under *Roe*, antiabortion advocates and lawmakers sought to undermine the right to abortion through statutes, regulations, and impact litigation.[64] The Supreme Court "abandoned the strict scrutiny standard" in *Roe* when it adopted the undue burden test in *Casey*, lowering the bar for abortion regulations.[65] Subsequently, state legislatures restricted abortion access by requiring waiting periods, parental consent, and preabortion testing.[66] States passed targeted regulation of abortion providers (TRAP) laws, including the admitting privileges laws at issue in *Hellerstedt* and *June Medical*.[67] Other laws restricted public funding, private insurance coverage, medication abortion, and specific abortion procedures.[68] Together, these laws created significant legal and

61. *Id.*

62. *Id.* at 2284.

63. *Id.* Chief Justice Roberts concurred in judgment, agreeing that the "viability rule" established in *Roe* and affirmed in *Casey* "should be discarded," but disagreeing with the majority's "dramatic step of altogether eliminating the abortion right." *Id.* at 2311, 2313 (Roberts, C.J., concurring in judgment). Justice Breyer, joined by Justice Sotomayor and Justice Kagan, dissented, remarking that under the majority's opinion, "a woman has no rights to speak of" and "a State will be able to impose its moral choice on a woman and coerce her to give birth to a child." *Id.* at 2317, 2318 (Breyer, J., dissenting). The dissent warned of the decision's potential effects on interstate travel for abortion care, noting that "some States may block women from traveling out of State to obtain abortions, or even . . . criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services." *Id.* at 2318.

64. *See* Adrienne R. Ghorashi & DeAnna Baumle, *Legal and Health Risks of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of* Dobbs, 37 J.L. & HEALTH 1, 9 (2023).

65. *Id.*

66. *See id.*

67. Ashoka Mukpo, *TRAP Laws Are the Threat to Abortion Rights You Don't Know About*, ACLU (Mar. 3, 2020), https://www.aclu.org/news/reproductive-freedom/trap-laws-are-the-threat-to-abortion-rights-you-dont-know-about [https://perma.cc/H5BU-8FVT]. Between 2011 and 2017, TRAP laws caused over eighty abortion clinics to close, leaving some states with only one abortion clinic. *Id.*

68. *See* Ghorashi & Baumle, *supra* note 64, at 9. Amid backlash to *Roe*, Congress passed the Hyde Amendment, Pub. L. No. 94-439, 90 Stat. 1434 (1976), prohibiting Medicaid recipients from accessing abortion using federal healthcare insurance. *See id.*; *see also* Harris v. McCrae, 448 U.S. 297, 317 (1980) (upholding the Hyde Amendment).

logistical barriers to abortion care, resulting in sizable "abortion deserts" in the South and Midwest, where access was impossible for some despite *Roe*'s guarantee of a constitutional right to abortion.[69]

Moreover, even when abortion care was constitutionally protected, trigger bans and pre-*Roe* bans lay dormant in many states.[70] At the time of the *Dobbs* decision, ten states had pre-*Roe* bans, laws criminalizing abortion, which remained "on the books" but unenforceable under *Roe*.[71] Thirteen states had trigger bans, abortion bans that had effective dates contingent on the Supreme Court overturning *Roe*.[72] The *Dobbs* decision allowed all thirteen trigger bans to take effect within the weeks and months after the decision.[73] In 2021, Texas passed a law, known as Senate Bill 8 (S.B. 8),[74] prohibiting abortion upon detection of fetal cardiac activity (which can occur as early as six weeks)[75] and creating a private civil cause of action allowing "any person" to sue anyone who "performs or induces an abortion" in violation of the law or "aids or abets" such an abortion.[76] Federal courts dismissed challenges to S.B. 8, holding that the plaintiffs lacked standing to sue state officials who had no authority to enforce the law.[77] After S.B. 8 survived in the courts, other states, including Idaho and Oklahoma, enacted copycat laws.[78]

As of March 6, 2025, twelve states have banned abortion entirely, and seven states have restricted the procedure earlier in pregnancy than the standard set in *Roe*.[79] Although most abortion restrictions target healthcare providers, some penalize patients or nonproviders who assist them, imposing criminal penalties, and in some cases, allowing civil enforcement.[80] Some statutes do not clearly indicate to whom they apply, leading to ambiguity in the law and a chilling effect on reproductive healthcare.[81]

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69. Ghorashi & Baumle, *supra* note 64, at 10; David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 11 (2023).

70. *See* Ghorashi & Baumle, *supra* note 64, at 11.

71. *Id.*

72. *See id.*

73. *See id.*; *see, e.g.*, SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1324–25 (11th Cir. 2022) (lifting injunction against Georgia's abortion ban less than a month after *Dobbs*); Robinson v. Marshall, No. 19cv365, 2022 WL 2314402, at *1 (M.D. Ala. June 24, 2022) (lifting injunction against Alabama's abortion ban on the day of the *Dobbs* decision).

74. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2023).

75. *See* Ghorashi & Baumle, *supra* note 64, at 13.

76. HEALTH & SAFETY § 171.208(a).

77. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530, 539 (2021); *see also* Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam).

78. *See, e.g.*, IDAHO CODE ANN. § 18-8807 (West 2023); OKLA. STAT. ANN. tit. 63 § 1-745.52 (West 2022), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023) (per curiam). The Oklahoma Supreme Court struck down its S.B. 8 copycat law in 2023 under the state's constitution. *See* Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023) (per curiam).

79. McCann & Walker, *supra* note 10.

80. *See* Ghorashi & Baumle, *supra* note 64, at 15–16.

81. *See id.*

Meanwhile, abortion-permissive states passed constitutional amendments and state laws to guarantee and, in some cases, expand the right to abortion.[82] After *Dobbs*, several states enacted "shield laws" to protect healthcare providers from other states attempting to criminally prosecute or civilly enforce abortion restrictions across state lines.[83] Some states passed data privacy protection laws, prohibiting healthcare and insurance providers from sharing abortion-related health records in the context of another state's criminal or civil proceedings.[84] Voters in multiple states, including California, Michigan, and Vermont, approved ballot measures creating an abortion right under their state constitutions.[85] Voters in Kansas rejected a proposed amendment to the state constitution that would have eliminated the right to abortion.[86] As of April 2, 2025, the right to an abortion is protected by state law in twenty-one states and the District of Columbia.[87]

3. States' Attempts to Restrict Out-of-State Travel for Abortion Care

After *Dobbs*, interstate travel for abortion care increased significantly.[88] Despite state bans, the total number of abortions in the United States did not decrease after *Dobbs* due to increased travel to abortion-permissive states and growing access to medication abortion.[89] In 2023, 171,000 patients traveled out of state for abortions, a number that more than doubled compared to 2019

82. *See* Cohen et al., *supra* note 69, at 10.

83. *Id.* at 42–43; *see, e.g.*, 775 ILL. COMP. STAT. 55/1-20 (2023); WASH. REV. CODE § 9.02.120 (2022). As of June 2024, interstate shield laws were in effect in eighteen states. *Interstate Shield Laws*, CTR. FOR REPROD. RTS. (June 26, 2024), https://reproductiverights.org/interstate-shield-laws/ [https://perma.cc/FG9L-LHNH].

84. *See* Ghorashi & Baumle, *supra* note 64, at 20; *see, e.g.*, CONN. GEN. STAT. §§ 52-146W, 52-146X (2022); N.J. STAT. ANN. § 2A:84A-22.18 (West 2022); CAL. PENAL CODE § 13778.2 (West 2022).

85. *See* Ghorashi & Baumle, *supra* note 64, at 33. In 2024, voters in seven states approved ballot measures to enshrine the right to abortion in their state constitutions. *See* McCann & Walker, *supra* note 10.

86. *See* Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR, https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/EQ6M-ACAH] (Aug. 3, 2022, 2:18 AM).

87. *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/4XS3-MP5F] (last visited Apr. 2, 2025).

88. *See* Molly Cook Escobar, Amy Schoenfeld Walker, Allison McCann, Scott Reinhard & Helmuth Rosales, *171,000 Traveled for Abortions Last Year. See Where They Went.*, N.Y. TIMES (June 13, 2024), https://www.nytimes.com/interactive/2024/06/13/us/abortion-state-laws-ban-travel.html [https://perma.cc/E4PJ-AQEZ].

89. *See* Claire Cain Miller & Margot Sanger-Katz, *Despite State Bans, Legal Abortions Didn't Fall Nationwide in Year After* Dobbs, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/upshot/abortion-numbers-dobbs.html [https://perma.cc/9MN7-Y2HL]. When one state outlaws abortion, providers in surrounding states see an increase in patients from that abortion-prohibitive state. *See* Berman et al., *supra* note 20, at 414–15.

and made up almost a fifth of recorded abortions.[90] Abortion funds around the country have raised money to help patients pay for abortion care and travel.[91]

In 2023, medication abortion comprised nearly two-thirds of the approximately one million abortions performed in the United States.[92] Telehealth services have made medication abortion accessible by mail delivery.[93] Although remote abortion care is banned in many states, some telehealth providers have satellite sites or mobile clinics near the borders of abortion-restrictive states to help patients who must cross state lines to access abortion care and who live far from a brick-and-mortar clinic.[94]

Even before *Dobbs*, lawmakers in antiabortion states began proposing restrictions on out-of-state travel for abortion care.[95] In 2005, Missouri enacted a statute that made it illegal to "intentionally cause, aid, or assist a minor to obtain an abortion without [parental] consent."[96] The statute provides that "[i]t shall not be a defense . . . that the abortion was performed or induced pursuant to consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced."[97] In 2007, the Supreme Court of Missouri upheld the statute with the limited construction that it was only valid as applied to in-state conduct and not to "wholly out-of-state conduct."[98]

In 2021, Missouri's state legislature also considered a bill, Senate Bill 603 (S.B. 603), which would apply all Missouri abortion regulations to conduct occurring "[p]artially within and partially outside this state" and to conduct wholly outside the state if one of many conditions is met: the patient (1) resides in Missouri, (2) has a substantial connection with Missouri, (3) intends to give birth in Missouri if the pregnancy is carried to term, (4) had sex in Missouri that "may have" conceived the pregnancy, or

90. *See* Escobar et al., *supra* note 88 ("Most traveling patients went to the next closest state that allowed abortions. But those in the South, where 13 states banned or restricted the procedure, had to go farther.").

91. *See id.* Abortion procedures range in cost from approximately $580 to $2,000 depending on the care needed, how far along the pregnancy is, and the state in which the patient is treated. *How Much Does an Abortion Cost?*, PLANNED PARENTHOOD (Apr. 29, 2022), https://www.plannedparenthood.org/blog/how-much-does-an-abortion-cost [https://perma.cc/45F3-2YSP].

92. *See Monthly Abortion Provision Study*, GUTTMACHER INST., https://www.guttmacher.org/monthly-abortion-provision-study [https://perma.cc/PWN8-Q95B] (last visited Apr. 2, 2025).

93. *See* Cohen et al., *supra* note 69, at 15–16.

94. *See id.* at 16–17.

95. *See* Marnie Leonard, *Pro-Choice (of Law): Extraterritorial Application of State Law Using Abortion as a Case Study*, 31 AM. U. J. GENDER SOC. POL'Y & L. 195, 198 (2023).

96. MO. REV. STAT. § 188.250 (2005).

97. *Id.* § 188.250(3).

98. Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732, 742–43 (Mo. 2007) (en banc) (citing Bigelow v. Virginia, 421 U.S. 809, 827–28 (1975)) ("Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect.").

(5) sought prenatal care in Missouri.[99] The bill, which did not pass,[100] exemplifies legislative attempts to restrict abortion travel even under *Roe*.[101]

Since *Dobbs*, antiabortion groups have promoted "abortion trafficking" bans, modeled on laws that prohibit human trafficking.[102] In April 2023, Idaho became the first state to enact such legislation, which states in pertinent part:

> (1) 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 commits the crime of abortion trafficking. . . .
>
> (3) *It shall not be an affirmative defense . . . that the abortion provider or the abortion-inducing drug provider is located in another state*.[103]

Pro-choice groups challenged the law, contending it was unconstitutionally vague and violated the First Amendment.[104] The district court granted a preliminary injunction, which the U.S. Court of Appeals for the Ninth Circuit affirmed as to the statute's ban on "recruiting" but reversed as to its "harboring, or transporting" language.[105] The Ninth Circuit held that although the language on "recruiting" likely violates the First Amendment, it is severable from the limitation on "harboring and transporting," which likely does not.[106] The court further concluded the statute was not void for vagueness.[107]

Tennessee legislators followed suit in 2024, when the state enacted a similar "abortion trafficking" law.[108] The Tennessee statute states in pertinent part:

> (a) An adult commits the offense of abortion trafficking of a minor if the adult intentionally recruits, harbors, or transports a pregnant unemancipated minor within this state for the purpose of:
>
> (1) Concealing an act that would constitute a criminal abortion . . . from the parents or legal guardian of the pregnant unemancipated minor;

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99. S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. § 188.550.1 (Mo. 2021).

100. *See Missouri Senate Bill 603*, LEGISCAN, https://legiscan.com/MO/bill/SB603/2021 [https://perma.cc/7PWP-SKQS] (last visited Apr. 2, 2025).

101. *See, e.g.*, Mo. S.B. 603.

102. *See* Pazanowski, *supra* note 18; Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1146 (2024).

103. IDAHO CODE ANN. § 18-623 (West 2023) (emphasis added).

104. *See* Matsumoto v. Labrador, 122 F.4th 787, 795 (9th Cir. 2024).

105. *Id.* at 796.

106. *Id.* at 795. The Ninth Circuit also called into question the statute's categorization as an antitrafficking statute, noting that, unlike "traditional human trafficking statutes," it does not limit its scope to coercive or universally illegal conduct, nor does it require an economic motive. *Id.* at 805 ("Calling the statute 'abortion trafficking' does not make it so.").

107. *See id.* at 795.

108. TENN. CODE ANN. § 39-15-201 (2024).

> (2) Procuring an act that would constitute a criminal abortion . . . for the pregnant unemancipated minor, *regardless of where the abortion is to be procured*; or
>
> (3) Obtaining an abortion-inducing drug for the pregnant unemancipated minor for the purpose of an act that would constitute a criminal abortion . . . *regardless of where the abortion-inducing drug is obtained*.[109]

A district court in Tennessee preliminarily enjoined the law, concluding that its challengers had a high likelihood of success on their First Amendment, overbreadth, and vagueness claims.[110] Alabama, Mississippi, and Oklahoma lawmakers attempted to pass similar bills[111] that did not advance.[112]

Beyond legislative efforts, state attorneys general have also threatened to restrict interstate travel for abortion care. Alabama Attorney General Steve Marshall threatened to use the state's criminal conspiracy law to prosecute anyone who assisted or facilitated abortions in other states.[113] Pro-choice groups and medical providers sued Attorney General Marshall, bringing right to travel, First Amendment, extraterritoriality, and due process claims.[114] The district court denied Marshall's motion to dismiss as to the right to travel and free speech claims.[115]

Texas's attorney general was also sued over statements he made indicating that funds used to assist Texans seeking out-of-state abortion care could be prosecuted.[116] The district court clarified that Texas's trigger ban "does not regulate abortions that take place outside the State of Texas and cannot even be arguably read to do so."[117]

Further, Idaho's attorney general sent a letter to a state legislator, in which he interpreted Idaho's abortion ban to prohibit medical providers from referring a patient to an abortion provider in another state.[118] Healthcare providers sued, arguing his interpretation violated the First Amendment, Due Process Clause, and Dormant Commerce Clause.[119] The district court preliminarily enjoined the Attorney General from enforcing the law under that interpretation, and the Ninth Circuit affirmed on First Amendment

109. *Id.* (emphasis added).
110. *See* Welty v. Dunaway, 749 F. Supp. 3d 882, 909, 913, 915, 917 (M.D. Tenn. 2024).
111. H.B. 378, 2024 Reg. Sess. (Ala. 2024); H.B. 713, 139th Leg., Reg. Sess. (Miss. 2024); S.B. 1778, 59th Leg., 2d Reg. Sess. (Okla. 2024).
112. *See* Pazanowski, *supra* note 18.
113. *See* Yellowhammer Fund v. Marshall, 733 F. Supp. 3d 1167, 1174 (M.D. Ala. 2024).
114. *See id.* at 1174–75.
115. *Id.* at 1200–01 ("Alabama can no more restrict people from going to, say, California to engage in what is lawful there than California can restrict people from coming to Alabama to do what is lawful here.").
116. *See* Fund Tex. Choice v. Paxton, 658 F. Supp. 3d 377, 384 (W.D. Tex. 2023).
117. *Id.*
118. *See* Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Labrador, 122 F.4th 825, 833 (9th Cir. 2024).
119. *See id.* at 833–34.

grounds.[120] Neither the district court nor the appellate court addressed the plaintiffs' Dormant Commerce Clause claims.[121]

In sum, antiabortion advocates, legislators, and state officials are finding creative ways to restrict interstate travel for abortion care.[122] The Tennessee and Idaho abortion trafficking laws replicate language in model legislation published by the National Right to Life Committee (NRLC), an antiabortion organization.[123] The memorandum introducing the NRLC's model law states that "abortion trafficking" laws are necessary to prevent "the abortion industry" from "exploit[ing] existing State laws on telehealth and the proximity of [abortion-permissive] States . . . to circumvent" abortion restrictions.[124] As Justice Ginsburg foresaw,[125] the nation's ever-swinging pendulum continues to oscillate as states restrict abortion access under *Dobbs*.

As lower courts begin to address the constitutionality of abortion travel restrictions, the question arises whether such laws impermissibly burden interstate commerce. To contextualize this inquiry, the next section describes the centuries-long development of the Dormant Commerce Clause doctrine.

B. The Dormant Commerce Clause Doctrine

The judge-made Dormant Commerce Clause doctrine is a "negative implication" of the Constitution's Commerce Clause, restricting states' ability to burden interstate commerce.[126] The threshold question in any negative or affirmative Commerce Clause analysis is whether the regulated activity falls within the scope of the Commerce Clause.[127] Part I.B.1 recounts the evolution of the commerce power and how modern courts perceive it. Part I.B.2 chronicles the legal foundations of the Dormant Commerce Clause and explains the modern doctrine. Finally, Part I.B.3 examines the Supreme Court's recent *Ross* decision and how it altered the doctrine's course.

120. *See id.* at 835, 844.

121. *See id.*

122. *See* Cohen et al., *supra* note 69, at 24–25.

123. *See* Memorandum from James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm., Courtney Turner Milbank & Joseph D. Maughon to the Nat'l Right to Life Comm. & Whom It May Concern (July 4, 2022), https://nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-Version-2-1.pdf [https://perma.cc/35DD-GWVP]; *see also* Press Release, Nat'l Right to Life Comm., National Right to Life Committee Proposes Legislation to Protect the Unborn Post-Roe (June 15, 2022), https://nrlc.org/communications/national-right-to-life-committee-proposes-legislation-to-protect-the-unborn-post-roe/ [https://perma.cc/P5F5-L9QW].

124. Memorandum from James Bopp et al. to Nat'l Right to Life Comm. & Whom It May Concern, *supra* note 123.

125. *See Not Best of Times for US—Supreme Court Justice Ginsburg*, *supra* note 29.

126. Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008).

127. *See* Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979).

1. The Evolution of the Commerce Power

The Commerce Clause provides that "Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states."[128] Before the 1930s, courts defined "commerce" narrowly and heavily restricted Congress from regulating local matters, including Major League Baseball[129] and shipments of child labor products.[130] But after the expanded breadth of federal regulations in the New Deal era, the Supreme Court began defining commerce broadly, allowing Congress to regulate any activity that has an aggregate substantial economic effect on interstate commerce.[131] For instance, in *Heart of Atlanta Motel, Inc. v. United States*,[132] the Court upheld the Civil Rights Act of 1964[133] as a valid exercise of the commerce power, finding that the conduct of a hotel that "solicit[ed] patronage from outside the State of Georgia through various national advertising media" substantially affected interstate commerce.[134]

In two cases, *United States v. Lopez*[135] and *United States v. Morrison*,[136] the Court pulled back its expansion of the commerce definition. In *Lopez*, the Court established three categories of activities Congress can regulate under the Commerce Clause: (1) "channels of interstate commerce," (2) "instrumentalities of" or "persons or things in" interstate commerce, and (3) "activities having a substantial relation to interstate commerce."[137] Five years later, the *Morrison* Court reinforced *Lopez* and held that congressional regulation of local, intrastate activity is only constitutional "where that activity is economic in nature," establishing a new threshold test.[138]

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128. U.S. CONST. art. I, § 8, cl. 3.

129. *See* Fed. Baseball Club of Balt. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 209 (1922).

130. *See* Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

131. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125, 128–29 (1942) (upholding a congressional statute limiting homegrown wheat because such wheat production had an aggregate substantial effect on the commercial wheat market); *see also* Gonzales v. Raich, 545 U.S. 1, 16–17 (2005) (describing the "new era of federal regulation under the commerce power" that commenced "in response to rapid industrial development and an increasingly interdependent national economy").

132. 379 U.S. 241 (1964).

133. Pub L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S. Code).

134. *Id.* at 243; *cf.* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) (finding that summer camps substantially affect interstate commerce because they "are comparable to hotels that offer their guests goods and services that are consumed locally").

135. 514 U.S. 548 (1995).

136. 529 U.S. 598 (2000).

137. *Lopez*, 514 U.S. at 558–59 (holding Congress lacked authority to regulate firearm possession in school zones because such activities did not have a "substantial relation to interstate commerce," striking down the Gun-Free School Zones Act of 1990).

138. *Morrison*, 529 U.S. at 613 (holding Congress lacked authority to regulate sexual assault because it is not an economic activity, striking down the civil remedy provision of the Violence Against Women Act of 1994).

Accordingly, under the modern Commerce Clause test, courts first ask whether the regulated activity is "economic in nature."[139] Then, only if the activity is economic, they ask whether the regulated activity substantially affects interstate commerce in the aggregate.[140]

2. Dormant Commerce Clause Jurisprudence

The Supreme Court has acknowledged that the Commerce Clause not only authorizes Congress to regulate interstate trade, but also "contain[s] a further, negative command," prohibiting states from regulating interstate commerce even when Congress has not passed legislation on the subject.[141] In the early nineteenth century, the Supreme Court wavered on whether states could regulate interstate commerce under the Constitution.[142] But by the latter half of the nineteenth century, the Dormant Commerce Clause was "firmly established."[143] Throughout the twentieth century, the Supreme Court continued implementing the Dormant Commerce Clause doctrine, noting that "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States."[144]

The Supreme Court considers two questions when analyzing a state law under the Dormant Commerce Clause.[145] First, the Court asks "whether a challenged law discriminates against interstate commerce."[146] If so, it is per se invalid under this initial prong prohibiting economically protectionist

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139. *Id.*

140. *Id.* at 610–13; *see, e.g.*, Gonzales v. Raich, 545 U.S. 1, 25–26 (2005) (upholding the regulation of local cannabis use under the Controlled Substances Act because "the production, distribution, and consumption of commodities," such as marijuana, are "quintessentially economic").

141. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

142. In 1824, Chief Justice John Marshall wrote that the Commerce Clause does not grant states the power to regulate interstate commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824). In 1847, Chief Justice Roger B. Taney disagreed, writing that state regulations of interstate commerce are valid unless they conflict with congressional law. *See* Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 578–79 (1847), *overruled by* Leisy v. Hardin, 135 U.S. 100 (1890). But in 1851, Justice Benjamin R. Curtis suggested that the Commerce Clause implies limitations on what "may be regulated by the states in the absence of all congressional legislation." Cooley v. Bd. of Wardens *ex rel.* Soc. for Relief of Distressed Pilots, 53 U.S. (12 How.) 299, 320 (1851).

143. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459–60 (2019); *see, e.g.*, Guy v. Baltimore, 100 U.S. 434, 443 (1879) (holding that state laws that "build up . . . domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States" violate the Commerce Clause, regardless of whether Congress has legislated on the subject).

144. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571–72 (1997); *see also Okla. Tax Comm'n*, 514 U.S. at 179.

145. *See* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 500 (2016); Jack Goldsmith & Alan Sykes, *The California Effect, Process-Based Regulation, and the Future of* Pike *Balancing*, 2023 SUP. CT. REV. 125, 125–26.

146. Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (citing Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 99 (1994)).

laws.[147] If the statute is not discriminatory against interstate commerce, the Court then turns to the doctrine's second prong: a balancing test established in *Pike v. Bruce Church, Inc.*[148] Under the *Pike* balancing test, a state law violates the Dormant Commerce Clause if it imposes a burden on interstate commerce that is "clearly excessive in relation to [its] putative local benefits."[149]

Thus, the first prong of the Dormant Commerce Clause test, often called the "antidiscrimination principle," prohibits states from protecting their own economic interests to the detriment of other states' economic interests.[150] For instance, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*[151] involved a Maine statute that allowed charities which "operated principally for the benefit" of nonresidents to only qualify for a more limited tax benefit.[152] The Court held that the statute violated the Dormant Commerce Clause because it facially discriminated against interstate commerce.[153] It reasoned that "Maine could not tax petitioner more heavily than other camp operators simply because its campers come principally from other States."[154]

Similarly, in *Baldwin v. G.A.F. Seelig, Inc.*,[155] a New York law barred out-of-state dairy farmers from selling their milk in New York for less than the minimum price New York law guaranteed in-state producers.[156] The Supreme Court held that the law was discriminatory because it protected local industry against competition from other states.[157] Justice Benjamin N. Cardozo wrote that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[158] After *Baldwin*, the Court continued to strike down similar price-affirmation statutes.[159]

A state law need not be *facially* discriminatory to fail under the Dormant Commerce Clause's first prong banning protectionist state laws. Even a facially neutral state law is unconstitutional if its *practical effects* reveal a discriminatory purpose.[160] In *Pike*, the Court recognized that an Arizona order, requiring cantaloupes grown in state to be packaged within the state, was facially nondiscriminatory because it applied equally to in-state and

147. *See id.*; *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986).

148. 397 U.S. 137 (1970).

149. *Id.* at 142 (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

150. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997).

151. 520 U.S. 564 (1997).

152. *Id.* at 568.

153. *Id.* at 581.

154. *Id.* at 572.

155. 294 U.S. 511 (1935).

156. *Id.* at 519.

157. *Id.* at 521–22.

158. *Id.* at 521.

159. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986).

160. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 140, 145–46 (1970).

out-of-state businesses.[161] Nonetheless, the Court held the order was unconstitutionally discriminatory because it "require[ed] business operations to be performed [in state] that could *more efficiently* be performed elsewhere."[162]

If a state law is not per se invalid under the antidiscrimination principle, it may still violate the second prong of the Dormant Commerce Clause test. The *Pike* balancing test examines whether "the burden imposed on [interstate] commerce is clearly excessive" as compared to its purported benefits, in which case the statute is invalid.[163] *Pike* instructed, "Where 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."[164]

For instance, in *Edgar v. MITE Corp.*,[165] the Supreme Court struck down an Illinois securities regulation requiring any takeover offer for the shares of a target company with ties to Illinois to be registered with the state's secretary.[166] The Court, applying the *Pike* balancing test, held that the statute imposed a clearly excessive burden on interstate commerce in light of its purported local benefits.[167] The Court noted that "[t]he effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial," including depriving shareholders of the opportunity to sell their shares at a premium.[168] The Court held that these burdens outweighed Illinois's interest in protecting resident shareholders because Illinois had no interest in protecting nonresident investors.[169]

Thus, the modern Dormant Commerce Clause doctrine entails "two primary principles."[170] First, the antidiscrimination principle prohibits state regulations that discriminate against interstate commerce.[171] Second, the *Pike* balancing test precludes states from imposing clearly excessive burdens on interstate commerce.[172] Critics of the Dormant Commerce Clause, including Justice Thomas and the late Justice Antonin Scalia, have called the doctrine "a judicial fraud"[173] with "no basis in the text of the Constitution."[174] Despite criticisms, "the doctrine has doggedly

161. *Id.* at 138, 142.
162. *Id.* at 145 (emphasis added).
163. *Id.* at 142; *see also* Dep't of Revenue v. Davis, 553 U.S. 328, 338–39 (2008) (citing *Pike*, 397 U.S. at 142).
164. *Pike*, 397 U.S. at 142.
165. 457 U.S. 624 (1982).
166. *Id.* at 626–27, 640.
167. *Id.* at 640, 643.
168. *Id.* at 643.
169. *Id.* at 644.
170. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018).
171. *Id.*
172. *Id.*
173. Comptroller of Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).
174. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

survived,"[175] and federal courts across the country have applied it for decades.[176]

3. *Ross* and the Current Supreme Court's Splintered Views on the Dormant Commerce Clause

In 2023, the Supreme Court refined the Dormant Commerce Clause doctrine in *Ross*.[177] In that case, a divided Court upheld California's Proposition 12,[178] which prohibits the in-state sale of pork meat from pigs "confined in a cruel manner."[179] Out-of-state pork producers challenged Proposition 12, arguing that it violated the Dormant Commerce Clause by interfering with interstate commerce.[180]

The Court rejected the petitioners' argument that the Dormant Commerce Clause included a broad "extraterritoriality doctrine" prohibiting per se any state law with the "practical effect of controlling commerce outside the state."[181] The Court expressed concern that such a sweeping rule would invalidate most state laws because "virtually all state laws create ripple effects beyond their borders."[182] Thus, its overbreadth would fail to provide "meaningful guidance" for resolving disputes while inviting "endless litigation and inconsistent results" unintended by the Court's Dormant Commerce Clause precedents.[183]

Instead, the Court narrowly interpreted the Dormant Commerce Clause as prohibiting statutes that "deliberately prevent[]" out-of-state businesses from "undertaking competitive pricing" or "deprive[] businesses and consumers in other States of 'whatever competitive advantages they may possess.'"[184] The petitioners conceded that Proposition 12 was not protectionist, admitting it imposed the same burdens on in-state and out-of-state pork producers.[185] Thus, the *Ross* Court did not explain how a court should identify a protectionist statute.[186]

The Court rejected the petitioners' alternative theory that Proposition 12 failed under the *Pike* balancing test because it placed a burden on interstate commerce that was clearly excessive in relation to its putative benefits.[187] However, the nine justices were divided in their reasoning for upholding

175. Joondeph, *supra* note 22, at 51.
176. *See* Martin, *supra* note 145, at 500 ("Since the [*Pike*] balancing test was named in 1970, it has been referred to in eighty-two federal appellate court cases and in all federal circuit courts first through eleventh.").
177. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153–54 (2023).
178. CAL. HEALTH & SAFETY CODE § 25990 (West 2023).
179. *Id.*
180. *Ross*, 143 S. Ct. at 1151.
181. *Id.* at 1154.
182. *Id.* at 1165.
183. *Id.* at 1156.
184. *Id.* at 1155 (quoting Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989)).
185. *Id.* at 1153.
186. *Id.*
187. *Id.* at 1157–58.

Proposition 12 under *Pike*. In Part IV.B of the *Ross* opinion, joined only by Justice Thomas and Justice Barrett, Justice Gorsuch rejected the *Pike* balancing test because judges are not authorized or "institutionally suited" to weigh the costs and benefits of legislation.[188] Justice Sotomayor and Justice Kagan clarified that they did not support the "fundamental reworking of [the *Pike*] doctrine" recommended in Part IV.B.[189]

Nonetheless, in Part IV.C, Justice Gorsuch, joined by Justices Thomas, Sotomayor, and Kagan, upheld Proposition 12 under the *Pike* balancing test because the petitioners' complaint failed to plead facts plausibly showing that the law imposed "substantial burdens" on interstate commerce.[190] Justice Barrett disagreed, writing separately that the petitioners' complaint plausibly alleged that Proposition 12's costs were substantially burdensome on interstate commerce.[191]

Chief Justice Roberts, joined by the remaining three justices, Justices Alito, Kavanaugh, and Jackson, concurred in part and dissented in part.[192] The chief justice agreed with the majority's rejection of a per se rule against state laws with extraterritorial effects.[193] But he disagreed with the majority's rejection of the petitioners' *Pike* claim[194] and would have found that the petitioners plausibly alleged a substantial burden on interstate commerce, as required under *Pike*.[195] Thus, he would have remanded the case for the circuit court to apply *Pike* balancing.[196] As Chief Justice Roberts emphasized, "[A] majority of the Court agrees that it is possible to balance benefits and burdens" under the *Pike* balancing test.[197] He further stressed that five justices agreed the petitioners plausibly stated a substantial burden against interstate commerce.[198]

Because the *Ross* Court was splintered and "there was no controlling reasoning for the majority . . . its precedential effect is . . . uncertain."[199] After *Ross*, lower courts have recognized that only the "specific result," not the reasoning, in *Ross* is binding "because a majority of the Justices in [*Ross*]

188. *Id.* at 1159 (dictum) (quoting Dep't of Revenue v. Davis, 553 U.S. 328, 353 (2008)). Justice Barrett wrote separately, concurring that judges should not conduct cost-benefit analyses of state laws. *Id.* at 1167 (Barrett, J., concurring in part).

189. *Id.* at 1165 (Sotomayor, J., concurring in part).

190. *Id.* at 1161 (dictum).

191. *Id.* at 1167 (Barrett, J., concurring in part).

192. *Id.* (Roberts, C.J., concurring in part and dissenting in part).

193. *Id.*

194. *Id.*

195. *Id.* at 1167, 1169 (finding that "Petitioners identify broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce").

196. *Id.* at 1169.

197. *Id.*; *see id.* at 1166 (Sotomayor, J., concurring in part) ("I agree with the Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other. . . .").

198. *See id.* at 1172 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1167 (Barrett, J., concurring in part) ("If the burdens and benefits were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim.").

199. Berman et al., *supra* note 20, at 453; *see also* Joondeph, *supra* note 22, at 46 ("While the bottom-line outcome in [*Ross*] was clear, what the decision really *means* going forward is less obvious.").

did not agree upon a 'single rationale' and there is no opinion in that case that 'can reasonably be described as a logical subset of the other.'"[200] Thus, the *Ross* Court's holding with regard to the *Pike* test "lack[s] any precedential rationale" and "may mean *nothing* going forward" other than that California's Proposition 12 is enforceable.[201]

After *Ross*, lower courts will continue employing the *Pike* balancing test but under the Supreme Court's instruction to do so with "extreme caution."[202] The apparent precedential effect of *Ross* is that the Dormant Commerce Clause's extraterritoriality doctrine only prohibits statutes that "deliberately prevent[]" out-of-state businesses from "undertaking competitive pricing" or "deprive[] businesses and consumers in other States of [their] 'competitive advantages.'"[203] But the Court left unanswered questions about how to identify a statute that is unconstitutionally protectionist or imposes a clearly excessive burden under the *Pike* balancing test.[204] Part II of this Note explores how courts may approach potential Dormant Commerce Clause challenges to abortion travel restrictions after *Ross*.

II. ANALYZING ABORTION TRAVEL RESTRICTIONS UNDER THE DORMANT COMMERCE CLAUSE AFTER *ROSS*

In 1975, the Supreme Court expressed concern about the extraterritorial effects of abortion restrictions in the First Amendment context.[205] In *Bigelow v. Virginia*,[206] the Court struck down a Virginia statute that prohibited publications from encouraging "the procuring of an abortion."[207] The Court held that the law infringed on the freedom of speech and press and that Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services or . . . prosecute them for going there."[208]

Although the Supreme Court has yet to analyze post-*Dobbs* abortion regulations under the Dormant Commerce Clause, legal scholars have long recognized the doctrine's potential application to extraterritorial abortion

200. Iowa Pork Producers Ass'n v. Bonta, No. 22-55336, 2024 WL 3158532, at *2–3 (9th Cir. June 25, 2024) (quoting United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc)); *see* McBride v. Lawson, No. 24-cv-01394, 2024 WL 4826378, at *6 (E.D. Cal. Nov. 19, 2024).

201. Joondeph, *supra* note 22, at 73.

202. *Ross*, 143 S. Ct. at 1165 (directing courts to use the *Pike* balancing test to strike down laws only "where the infraction is clear" (quoting Conway v. Taylor's Ex'r, 66 U.S. (1 Black) 603, 634 (1862))); *see* Joondeph, *supra* note 22, at 76–77.

203. *Ross*, 143 S. Ct. at 1155 (quoting Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989)).

204. *See* Joondeph, *supra* note 22, at 78–86 (discussing the questions left "unresolved" after *Ross*, including whether "Idaho [can] prosecute one of its own citizens who traveled across the [state] border to Spokane to end her pregnancy").

205. Bigelow v. Virginia, 421 U.S. 809, 824–25 (1975).

206. 421 U.S. 809 (1975).

207. *Id.* at 811.

208. *Id.* at 824. After *Dobbs*, the precedential effect of these statements in *Bigelow*, which relied heavily on *Roe*, is unclear. *See* Cohen et al., *supra* note 69, at 28–29.

regulations.[209] As states begin to restrict interstate travel for abortion care, scholars have ideated how and whether such laws would violate the Dormant Commerce Clause.[210] Part II.A considers whether abortion laws regulate activity that falls within the scope of the Commerce Clause. Part II.B then contemplates how courts will apply the two-tier Dormant Commerce Clause test to state laws restricting interstate travel for abortion care.

A. Whether Abortion Care Is Commerce

Before a court considers striking down a regulation under the Commerce Clause, it must first determine whether the statute regulates "commerce" within the meaning of the Clause.[211] Under Supreme Court precedent, regulated activity falls within the scope of the Commerce Clause where it is "economic in nature" and "substantially affects interstate commerce" in the aggregate.[212] The Supreme Court has noted that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation."[213] Thus, courts conducting a Dormant Commerce Clause analysis use the same substantial effects test to identify commerce as they would in an affirmative Commerce Clause analysis.[214]

Scholars have disagreed on whether abortion travel restrictions regulate commercial activity. Professor Bradley W. Joondeph posited that a hypothetical Texas law criminalizing any abortion performed within 250 miles of the state's border "would plainly be unconstitutional" under federalism principles but would have "nothing in particular to do with commerce, interstate or otherwise."[215] In contrast, Professor Richard H. Fallon Jr. contended, "Abortions are services sold in interstate commerce, and the business of providing medical care, including abortions, is intertwined with commerce in innumerable ways."[216]

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209. *See, e.g.*, C. Steven Bradford, *What Happens If* Roe *Is Overruled?: Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 148 (1993) ("The most likely source for holding an extraterritorial abortion statute unconstitutional is the Commerce Clause."); Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 636–37 (2007).

210. *See, e.g.*, Berman et al., *supra* note 20, at 440; Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 504 (2023).

211. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573–74 (1997).

212. United States v. Morrison, 529 U.S. 598, 610–13 (2000) (quoting United States v. Lopez, 514 U.S. 549, 560 (1995)); *see supra* Part I.B.1 (describing the evolution of the Commerce Clause power).

213. Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979).

214. *Id.*; *see, e.g.*, *Camps Newfound*, 520 U.S. at 573–74.

215. Joondeph, *supra* note 22, at 67.

216. Fallon, *supra* note 209, at 622–23; *see also* Ilya Somin, *Can States Ban Residents from Getting Abortions in Other States, If* Roe v. Wade *Is Overturned?*, REASON: THE VOLOKH CONSPIRACY (May 10, 2022, 5:08 PM), https://reason.com/volokh/2022/05/10/can-states-ban-residents-from-getting-abortions-in-other-states-if-roe-v-wade-is-overturned [https://perma.cc/Z2JG-S7EH] ("Traveling to get an abortion is pretty obviously interstate commerce.").

In alignment with Professor Fallon's view, courts have frequently held that reproductive healthcare falls within the scope of the Commerce Clause.[217] Pursuant to its Commerce Clause powers, Congress enacted the Freedom of Access to Clinic Entrances Act of 1994,[218] (the "FACE Act") prohibiting certain intimidating and dangerous behaviors near reproductive healthcare facilities.[219] All federal courts of appeals to consider the FACE Act's constitutionality have upheld its reproductive health provisions as constitutional under the Commerce Clause.[220] For instance, in *Norton v. Ashcroft*,[221] the U.S. Court of Appeals for the Sixth Circuit held that "Congress validly enacted the [FACE] Act pursuant to its Commerce Clause power" because the activities it prohibited "disrupted the national market for abortion-related services and decreased the availability of such services."[222]

Likewise, in *GenBioPro, Inc. v. Sorsaia*,[223] the U.S. District Court for the Southern District of West Virginia considered whether West Virginia's abortion restrictions violated the Dormant Commerce Clause. The district court noted in dicta that the abortion bans "can hardly be characterized as an economic regulation."[224] Nevertheless, the court conducted a comprehensive *Pike* balancing analysis, finding that the laws' benefits justified their burdens.[225] The court recognized mifepristone, an abortion medication, as an "article of commerce," finding that "impeding the sale of an 'article of commerce' is not an intrinsic violation of the Dormant Commerce Clause."[226]

Courts and scholars have also considered whether abortion restrictions as applied to nonprofit or noncommercial entities would implicate the Commerce Clause. The Supreme Court has recognized that the commerce power is implicated even when the regulated business is a nonprofit organization.[227] Professor Fallon posited that even the regulation of abortion services "lack[ing] any commercial element" would fall under Congress's

217. *See, e.g.*, United States v. Dinwiddie, 76 F.3d 913, 920 (8th Cir. 1996); United States v. Wilson, 73 F.3d 675, 688 (7th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir. 1995); *see also* Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301, 332–36 (2006).

218. 18 U.S.C. § 248.

219. *Id.*

220. *See* United States v. Williams, 701 F. Supp. 3d 257, 269 (S.D.N.Y. 2023) (collecting cases); *see, e.g.*, Norton v. Ashcroft, 298 F.3d 547, 559 (6th Cir. 2002); United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998).

221. 298 F.3d 547 (6th Cir. 2002).

222. *Id.* at 559 (citing United States v. Gregg, 226 F.3d 253, 263–64 (3d Cir. 2000)).

223. No. 23-0058, 2023 WL 5490179, at *1–3 (S.D. W. Va. Aug. 24, 2023), *appeal docketed sub nom.* GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. argued Oct. 29, 2024).

224. *Id.* at *15.

225. *Id.* at *13–14.

226. *Id.*; *see also* Cohen et al., *supra* note 69, at 14–16 (describing medication abortion and telehealth abortion services).

227. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 584–86 (1997) (reasoning that "[n]othing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce" and "the interstate commercial activities of nonprofit entities . . . are unquestionably significant").

Commerce Clause authority because reproductive healthcare "is a commodity for which a commercial market exists."[228]

The Supreme Court has not yet considered whether abortion regulations fall within the commerce power. But lower courts have consistently concluded that they do,[229] albeit sometimes hesitantly, as in *GenBioPro*.[230]

B. Whether Abortion Travel Restrictions Survive the Two-Tier Dormant Commerce Clause Test

If a court concludes that an abortion regulation falls within the commerce power, it may analyze such a law under the two-tiered Dormant Commerce Clause test. Part II.B.1 discusses whether abortion travel restrictions promote economic protectionism in violation of the Dormant Commerce Clause's antidiscrimination principle. Part II.B.2 assesses whether abortion travel restrictions would survive the doctrine's *Pike* balancing test.

1. Whether Abortion Travel Restrictions Are Protectionist Under the Antidiscrimination Principle

At "the very core" of the Dormant Commerce Clause doctrine sits the antidiscrimination principle, which prohibits states from protecting their own economic interests to the detriment of other states' economic interests.[231] After *Ross*, a state law is only invalid under the antidiscrimination principle if it "deliberately prevent[s]" out-of-state businesses from "undertaking competitive pricing" or deprives out-of-state businesses and consumers of their competitive advantages.[232] A majority of the *Ross* Court agreed that "a law's practical effects may also disclose the presence of a discriminatory purpose."[233]

Many scholars have posited that abortion travel bans would not violate the antidiscrimination principle because these laws are not protectionist. For instance, Professor Paul Schiff Berman argued that attempts to restrict interstate travel for abortion care "will likely not have either the purpose or effect of advancing economic protectionism."[234] Professor Katherine Florey similarly stated that "[p]rohibitions against obtaining, providing, or assisting in an [out-of-state] abortion are . . . clearly not animated by protectionist motives."[235] On the contrary, Professor Ilya Somin posited that "a ban on

228. Fallon, *supra* note 209, at 623 (citing Gonzalez v. Raich, 545 U.S. 1, 18 (2005)).
229. *See supra* note 220 and accompanying text.
230. *GenBioPro*, 2023 WL 5490179, at *15.
231. *Camps Newfound*, 520 U.S. at 581; *see also* Joondeph, *supra* note 22, at 51–52.
232. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1155 (2023); *see supra* Part I.B.3.
233. *Ross*, 143 S. Ct. at 1157.
234. Berman et al., *supra* note 20, at 441.
235. Florey, *supra* note 210, at 508; *see also* Fallon, *supra* note 209, at 637 ("[A] state's law prohibiting its citizens from obtaining abortions would not discriminate against interstate commerce: it would ban abortions performed in-state as well as out-of-state.").

traveling out of state" to obtain an abortion "is a pretty obvious violation" of the Dormant Commerce Clause.[236]

Although federal courts have not yet applied the antidiscrimination principle to abortion travel restrictions, a state supreme court did so before *Dobbs* and *Ross*.[237] In 2005, Planned Parenthood Federation of America, Inc. ("Planned Parenthood") challenged a Missouri law that outlawed assisting a minor in obtaining an abortion without parental consent.[238] Planned Parenthood argued that the statute violated the Dormant Commerce Clause because it had "the practical effect of controlling commerce beyond Missouri's borders by requiring non-Missouri healthcare providers, counselors and others who are engaged in speech and conduct wholly outside Missouri to comply" with it.[239] In its en banc decision, the Supreme Court of Missouri mandated a narrow construction of Missouri's law, holding that it was invalid as applied to "wholly out-of-state conduct" but upholding the law as applied to in-state conduct.[240] Without explaining its analysis, the court concluded that under this limited construction, the statute did not violate the Dormant Commerce Clause.[241]

In *GenBioPro*, the district court applied the Dormant Commerce Clause to a state ban on medication abortion.[242] The court considered a Dormant Commerce Clause challenge to West Virginia's mifepristone bans, including the Unborn Child Protection Act[243] (UCPA). Initially, GenBioPro, the manufacturer of generic mifepristone, argued that the laws violated the Dormant Commerce Clause "by regulating extraterritorially."[244] After *Ross*, GenBioPro withdrew its extraterritoriality claim and reframed its argument solely under the *Pike* balancing test.[245] Because GenBioPro did not allege that the laws were protectionist, the district court did not analyze the statute under the antidiscrimination principle but only under *Pike* balancing.[246] Nevertheless, the court remarked that "[t]he UCPA can hardly be characterized as an economic regulation" and did not have competitive implications on drug pricing.[247] After balancing the laws' burdens and

236. Somin, *supra* note 216. Professor Somin does not clarify which prong of the Dormant Commerce Clause test invalidates abortion travel restrictions in his analysis. *Id.*

237. *See* Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732, 742–43 (Mo. 2007) (en banc).

238. *Id.*; *see supra* Part I.A.3 (discussing MO. REV. STAT. § 188.250 (2005)).

239. Appellants' Brief at 64, *Planned Parenthood of Kan. & Mid-Mo.*, 220 S.W.3d 732 (No. 87321).

240. *Planned Parenthood of Kan. & Mid-Mo.*, 220 S.W.3d at 742–43.

241. *See id.* at 745.

242. *See generally* GenBioPro, Inc. v. Sorsaia, No. 23-0058, 2023 WL 5490179 (S.D. W. Va. Aug. 24, 2023), *appeal docketed sub nom.* GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. argued Oct. 29, 2024).

243. W. VA. CODE § 16-2R-3 (2022); *see GenBioPro*, 2023 WL 5490179, at *1.

244. *GenBioPro*, 2023 WL 5490179, at *12.

245. *Id.*

246. *See id.*; *see also infra* Part II.B.2 (describing the district court's *Pike* balancing analysis).

247. *GenBioPro*, 2023 WL 5490179, at *15.

benefits, the court dismissed GenBioPro's Dormant Commerce Clause claims.[248]

Thus, federal courts have yet to apply the Dormant Commerce Clause's antidiscrimination principle to an abortion law after *Ross* was decided in 2023. However, in *Govatos v. Murphy*,[249] the U.S. District Court for the District of New Jersey applied the antidiscrimination principle post-*Ross* in another healthcare context: medical aid in dying.[250] There, the court upheld a New Jersey law authorizing terminally ill patients who are residents of the state to obtain medical aid in dying.[251] A group of nonresidents and New Jersey physicians challenged the statute's residence requirement, arguing that it violated the Privileges and Immunities, Equal Protection, and Dormant Commerce Clauses.[252]

The plaintiffs contended that the residence requirement was facially discriminatory against interstate commerce because it prevented New Jersey physicians from treating out-of-state patients and interfered with nonresidents' ability to access medical care in New Jersey.[253] In dismissing the plaintiffs' claims, the *Govatos* court held that the statute "is not driven by 'economic protectionism'" because "it merely provides access to a service that would not otherwise exist at all."[254] The court reasoned that because most states prohibit medical aid in dying, there is no national "interstate market" for medical aid in dying which the law could burden.[255]

Even if a court applies the *Govatos* court's reasoning to an abortion travel restriction and finds that such a law is not protectionist,[256] it may still hold the law invalid under the Dormant Commerce Clause's *Pike* balancing test.[257]

2. Whether Abortion Travel Restrictions Are Clearly Excessive Under the *Pike* Balancing Test

Under *Ross*, courts will continue applying the *Pike* balancing test in Dormant Commerce Clause cases so long as the complaint plausibly alleges that the challenged law imposes a "substantial burden" on interstate

248. *See id.*; *see also infra* Part II.B.2. In GenBioPro's appeal, currently pending before the U.S. Court of Appeals for the Fourth Circuit, it only raised claims under the Supremacy Clause, not the Commerce Clause. *See* Opening Brief of Plaintiff-Appellant GenBioPro, Inc. at 4, GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. Feb. 7, 2024), 2024 WL 661577, at *4.

249. No. 23-cv-12601, 2024 WL 4224629 (D.N.J. Sept. 18, 2024), *appeal docketed*, No. 24-2947 (3d Cir. Oct. 17, 2024).

250. *See id.* at *17-19.

251. N.J. STAT. ANN. § 26:16-2 (West 2019); *see Govatos*, 2024 WL 4224629, at *19.

252. *See Govatos*, 2024 WL 4224629, at *1.

253. *See id.* at *17.

254. *Id.* at *2 (first citing Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152–53 (2023); and then citing McBurney v. Young, 569 U.S. 221, 235 (2013)).

255. *Id.* at *18.

256. *But see infra* Part III.B.1 (explaining that "the *Govatos* court's reasoning is inapplicable to laws that restrict interstate travel for abortion care, for which a national market exists").

257. *See infra* Part II.B.2.

commerce.[258] Scholars disagree on whether abortion travel restrictions would survive the *Pike* test. Professor Berman argued that "[s]tate regulation of healthcare services provided out-of-state . . . seems quite clearly to be an excessive burden under this test."[259] He reasoned that the "due diligence" out-of-state medical providers would need to undertake to avoid liability under such laws, and the resulting chilling effect, would significantly burden those providers.[260] Likewise, Professor C. Steven Bradford predicted an extraterritorial abortion ban applied directly to doctors would impose an "enormous" investigatory burden on healthcare providers and would fail under *Pike* balancing.[261]

However, Professor Joseph W. Dellapenna explained that courts give "[s]pecial weight" to states' health and safety interests when conducting *Pike* balancing.[262] Scholars have noted that courts are hesitant to overturn state laws under the *Pike* test "even when a law creates a substantial burden on interstate commerce."[263] Professor Joondeph observed that *Ross* "seemed to push [the *Pike*] balancing test even further to the margins of constitutional doctrine," imploring courts to apply the test cautiously.[264] Professor Joondeph noted that even before *Ross*, "the probability that a court would invalidate a genuinely nondiscriminatory state law under the dormant Commerce Clause was already quite low" and predicted that after *Ross*, "it may border on the infinitesimal."[265]

Indeed, the clearly excessive standard is a high bar. The Supreme Court has noted that "[s]tate laws frequently survive this *Pike* scrutiny . . . though not always."[266] In *Pike* itself, the Court qualified its ruling by noting that the Arizona statute it struck down had "incidental consequence[s]" which "could perhaps be tolerated if a more compelling state interest were involved."[267] But the Court held that the state's interest in enhancing the reputation of in-state producers was "minimal at best" and thus not compelling.[268]

Despite this high bar, the Supreme Court has struck down state laws regulating interstate traffic under the *Pike* test, providing insight into how the

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258. *See Ross*, 143 S. Ct. at 1161 (dictum) (rejecting Petitioners' *Pike* claim because the complaint failed to plead facts plausibly showing a substantial burden on interstate commerce); *cf. id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part) (contending the case should have been remanded for the lower court to apply *Pike* balancing because petitioners plausibly alleged a substantial burden on interstate commerce).

259. Berman et al., *supra* note 20, at 453–54.

260. *Id.*

261. *See* Bradford, *supra* note 209, at 152–53 (noting that, to avoid liability, "every doctor in every state would have to screen all of his or her patients to make sure they were not from a state that prohibits extraterritorial abortions" and that it would be "difficult and costly for doctors to keep up with various states' abortion laws and apply these different rules").

262. Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1692.

263. Florey, *supra* note 102, at 1198; *see also* John F. Preis, *The Dormant Commerce Clause As a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 154 (2016).

264. Joondeph, *supra* note 22, at 49.

265. *Id.*

266. Dep't of Revenue v. Davis, 553 U.S. 328, 339 (2008) (collecting cases).

267. Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970).

268. *Id.*

Court weighs a statute's burden on interstate commerce against the state's interest in promoting safety.[269] In two separate cases, the Supreme Court struck down state laws restricting the length of vehicles that could use highways in the respective states.[270] In each case, the trucking company plaintiff produced evidence that the law forced it to either use smaller vehicles in that state, route around the state, or detach the trailers and ship them separately.[271]

In the first case, *Raymond Motor Transportation, Inc. v. Rice*,[272] the Court explained that under *Pike* balancing, courts consider the degree of the state's purported interest and whether it "could be promoted as well with a lesser impact on interstate activities."[273] The Court held that the burdens the statute imposed on the interstate transportation industry outweighed Wisconsin's legitimate interest in promoting highway safety because the state "failed to make even a colorable showing that its regulations contribute to highway safety."[274] Likewise, in *Kassel v. Consolidated Freightways Corporation of Delaware*,[275] although the Court recognized a "strong presumption of validity" for state safety regulations, it noted that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack."[276] The *Kassel* Court struck down Iowa's regulation because, "as in *Raymond*, the State failed to present any persuasive evidence" that the regulation contributed to safety.[277]

Thus, the dispositive question is whether abortion travel restrictions further a compelling state interest sufficient to justify their burdens on interstate commerce.[278] In *Dobbs*, the Supreme Court ruled that abortion regulations, like other health and welfare regulations, are entitled to a "strong presumption of validity" and are subject to rational basis review.[279] The Court held that Mississippi's legitimate interests in protecting "prenatal life" and maternal health provided a rational basis for the state's fifteen-week

269. *See, e.g.*, Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 671 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978).

270. *See Kassel*, 450 U.S. at 671; *Raymond Motor*, 434 U.S. at 447.

271. *See Kassel*, 450 U.S. at 674; *Raymond Motor*, 434 U.S. at 438–39.

272. 434 U.S. 429 (1978).

273. *Id.* at 441–42 (quoting *Pike*, 397 U.S. at 142).

274. *Id.* at 447–48.

275. 450 U.S. 662 (1981).

276. *Id.* at 670 (citing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959)).

277. *Id.* at 671.

278. *See* Berman et al., *supra* note 20, at 454–55 ("The [*Dobbs*] Court listed legitimate interests states may have in regulating abortion, and held that the proper constitutional standard for reviewing such laws is rational basis. The Court did not, however, explain how much weight to give these interests in other contexts, such as a Dormant Commerce Clause . . . analysis.").

279. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)).

abortion ban.[280] But how courts will apply *Pike* balancing to abortion laws after *Ross* and *Dobbs* remains unsettled.[281]

After *Ross*, lower courts began implementing the newly refined Dormant Commerce Clause test to state regulations, with some confusion.[282] *GenBioPro* provides an early example of how courts may apply the balancing test to abortion restrictions.[283] However, the case has limited relevance to abortion travel restrictions because it did not involve a limitation on interstate travel.[284] In *GenBioPro*, the district court dismissed the Dormant Commerce Clause claim after applying *Pike* balancing to West Virginia's ban on medication abortion.[285] First, the district court held that GenBioPro did not plausibly allege a "compelling need for national uniformity" because the Supreme Court has established a "complementary role" for state action in the regulation of health and medicine, even where Congress has acted.[286] Further, the court opined that even a "compelling need for national uniformity" may not necessarily violate the Dormant Commerce Clause.[287]

Second, the court held that under *Ross*, "state bans of products as diverse as horsemeat, fireworks, and plastic bags" are constitutional and fall within states' police powers.[288] Third, the court found that, although the mifepristone ban would create "substantial derivative harms to pregnant West Virginians," such health risks were nonmonetary harms it could not consider in *Pike* balancing.[289] Finally, the court concluded that GenBioPro "alleged less of a burden on interstate commerce than was alleged by the pork

280. *Id.* ("These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." (citations omitted) (first citing Gonzales v. Carhart, 550 U.S. 124, 156–58 (2007); and then citing Roe v. Wade, 410 U.S. 113, 150 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022))).

281. *See* Joondeph, *supra* note 22, at 50, 79–80; Berman et al., *supra* note 20, at 454–55.

282. *See, e.g.*, GenBioPro, Inc. v. Sorsaia, No. 23-0058, 2023 WL 5490179, at *15 (S.D. W. Va. Aug. 24, 2023) (noting the court was "skeptical" as to whether GenBioPro met "the threshold burden necessary to invoke *Pike*," which was ill-defined under the fractured opinions in *Ross* (citing Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1165 (2023) (Sotomayor, J., concurring in part))), *appeal docketed sub nom.* GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. argued Oct. 29, 2024); *see also supra* note 200 and accompanying text.

283. *See GenBioPro*, 2023 WL 5490179, at *12; *supra* Part II.B.1.

284. *See* W. VA. CODE § 16-2R-3 (2022); *GenBioPro*, 2023 WL 5490179, at *1.

285. *See GenBioPro*, 2023 WL 5490179, at *15.

286. *Id.* at *12. *But see* Berman et al., *supra* note 20, at 443 ("[T]here 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.").

287. *GenBioPro*, 2023 WL 5490179, at *13.

288. *Id.* (first citing Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1163 (2023) (dictum); then citing *id.* at 1171 (Roberts, C.J., concurring in part and dissenting in part); and then citing *id.* at 1150 (majority opinion)).

289. *Id.* at *14 (citing *Ross*, 143 S. Ct. at 1169 (Roberts, C.J., concurring in part and dissenting in part)). *But see* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526 (1959) (holding that judges may consider both pecuniary costs and "other factors" when identifying a burden on interstate commerce). See *infra* Part III.B.2 for a discussion of nonpecuniary factors in *Pike* balancing.

producers" in *Ross*.[290] For these reasons, the court dismissed GenBioPro's Dormant Commerce Clause claims, which GenBioPro declined to raise on appeal.[291]

Although *GenBioPro* provides insight into how a court may analyze an abortion law under *Pike* balancing, the court considered a West Virginia statute that prohibited abortion only within the state.[292] No federal court has considered the additional burdens on interstate commerce posed by abortion travel restrictions. Part III contends that restrictions on interstate travel for abortion care violate the Dormant Commerce Clause under both its prongs, even after *Ross* narrowed the doctrine.

III. ABORTION TRAVEL RESTRICTIONS VIOLATE THE DORMANT COMMERCE CLAUSE

This Note asserts that abortion travel restrictions violate the Dormant Commerce Clause under both the antidiscrimination principle and the *Pike* balancing test. Part III.A contends that abortion travel restrictions fall within the commerce power and thus are subject to Dormant Commerce Clause scrutiny. Part III.B analyzes such laws under each prong of the Dormant Commerce Clause test and concludes that they fail under both.

A. Abortion Care Is Commerce

Abortion care falls within the scope of the Commerce Clause because it is economic in nature and substantially affects interstate commerce in the aggregate.[293] First, federal courts have consistently held that reproductive healthcare falls within the commerce power.[294] Second, abortion care is more akin to economic activity that the Supreme Court has found to fall under the Commerce Clause than activity the Court has deemed noneconomic. Third, the rise of telehealth providers and medication abortion demonstrates that abortion travel restrictions substantially affect interstate commerce.

First, decades of case law support Professor Fallon's view that abortion restrictions regulate interstate commerce. Circuit courts have consistently held that abortion care falls within the scope of the commerce power. All federal circuit courts to consider the reproductive health provisions of the FACE Act have upheld them under the Commerce Clause.[295] For instance, the Sixth Circuit reasoned that the FACE Act regulated activities that

290. *GenBioPro*, 2023 WL 5490179, at *15 ("None of West Virginia's laws require Plaintiff to alter its national production methods in order to access the State's market. Nor will compliance with the UCPA and other restrictions entail broad re-working of the entire pharmaceutical industry.").

291. *See id.*; *see also* Opening Brief of Plaintiff-Appellant GenBioPro, Inc. at 4, GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. Feb. 7, 2024), 2024 WL 661577, at *4.

292. *See* W. VA. CODE § 16-2R-3 (2022); *GenBioPro*, 2023 WL 5490179, at *1.

293. *See* United States v. Morrison, 529 U.S. 598, 610 (2000); *see also supra* Parts I.B.1, II.A.

294. *See supra* Part II.A.

295. *See* United States v. Williams, 701 F. Supp. 3d 257, 269 (S.D.N.Y. 2023) (collecting cases); *see also supra* Part II.A.

"disrupted the national market for abortion-related services and decreased the availability of such services."[296] There, the court recognized that a "national shortage in reproductive health providers" requires physicians and clinics to engage in interstate commerce by traveling interstate and purchasing medical products from other states.[297] The same reasoning is apposite to abortion travel restrictions, especially those that plainly apply regardless of whether abortion is legal in the state where it is sought.[298]

Second, like the hotel in *Heart of Atlanta Motel* and the summer camp in *Camps Newfound*, abortion clinics "solicit[] patronage" from outside the state "through various national advertising media" and offer services to individuals who travel from other states.[299] In the thirty days after the *Dobbs* decision, Planned Parenthood, which is affiliated with nearly 600 health clinics in the United States,[300] increased its online advertising, spending $2.17 million on advertisements across social media platforms.[301] Some of those advertisements educated viewers on how to obtain abortion pills and on the abortion procedures available at Planned Parenthood clinics.[302] Between 2018 and 2022, Planned Parenthood spent $13.2 million on Facebook and Instagram advertisements.[303] Because abortion providers solicit out-of-state patients through national marketing, their services "have a substantial effect on [interstate] commerce, as do state restrictions on making those services available to nonresidents."[304]

Abortion regulations are distinct from noneconomic laws that the Supreme Court has said fall beyond the scope of the Commerce Clause. In *Morrison*, the Supreme Court held that regulation of sexual assault under the Violence Against Women Act of 1994[305] (VAWA) exceeded Congress's commerce power because it regulated behavior the Court deemed noneconomic.[306] But unlike VAWA, abortion travel restrictions regulate and affect businesses—abortion clinics—that provide services to patrons they solicit through national advertisements.[307] Thus, the regulation of interstate travel for

296. Norton v. Ashcroft, 298 F.3d 547, 559 (6th Cir. 2002); *see supra* Part II.A.

297. *Norton*, 298 F.3d at 558.

298. *See, e.g.*, MO. REV. STAT. § 188.250 (2005); IDAHO CODE ANN. § 18-623 (West 2023); TENN. CODE ANN. § 39-15-201 (2024).

299. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964)); *see supra* Parts I.B.1, II.A.

300. *Who We Are*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/about-us/who-we-are [https://perma.cc/LHN8-EZAK] (last visited Apr. 2, 2025).

301. Marty Swant, *How Planned Parenthood Has Increased Ad Spend with Meta, TikTok amid* Roe v. Wade *Overturn*, DIGIDAY (July 7, 2022), https://digiday.com/marketing/how-planned-parenthood-has-increased-ad-spend-with-meta-tiktok-amid-roe-vs-wade-overturn/ [https://perma.cc/WS6B-9CM3].

302. *See id.*

303. *See id.*

304. *Camps Newfound*, 520 U.S. at 574.

305. Pub. L. No. 103-322, 119 Stat. 2979 (codified as amended in scattered sections of the U.S. Code).

306. *See* United States v. Morrison, 529 U.S. 598, 613 (2000).

307. *See supra* Parts I.A.3, II.A (describing the volume of abortions provided to out-of-state patients).

abortion is more comparable to the regulation of hotels or camps than it is to that of sexual assault.

Third, the rise of telehealth services and medication abortion indicates that abortion travel restrictions substantially affect interstate commerce.[308] In *Gonzales v. Raich*,[309] the Supreme Court upheld a federal statute regulating the local use of cannabis, reasoning that "the production, distribution, and consumption of commodities," including drugs like marijuana, are "quintessentially economic."[310] The Court's reasoning in *Raich* applies equally to the "distribution" and "consumption" of abortion medication, which are "commodities" like other prescribed drugs.[311]

Although Professor Joondeph argued that abortion restrictions have "nothing in particular to do with commerce,"[312] as Professor Fallon noted, "the business of providing medical care, including abortions, is intertwined with commerce in innumerable ways."[313] In 2023 alone, 171,000 patients traveled out of state for abortions, comprising almost a fifth of recorded abortions.[314] That year, the number of abortions performed increased in nearly every state where the service remained legal.[315] Thus, abortion travel restrictions, including Idaho and Tennessee's "abortion trafficking" laws,[316] regulate healthcare services that facilities often provide to out-of-state residents. Because abortion care is economic in nature and substantially affects interstate commerce in the aggregate, abortion travel restrictions are subject to Dormant Commerce Clause scrutiny.

B. Abortion Travel Restrictions Fail Under Both Prongs of the Dormant Commerce Clause Test

Abortion travel restrictions violate both prongs of the Dormant Commerce Clause doctrine. Part III.B.1 argues that abortion travel restrictions promote economic protectionism on their face and as evidenced from their practical effects. Part III.B.2 asserts that, even if courts find such laws are not protectionist, they fail the *Pike* balancing test by imposing a clearly excessive burden on interstate commerce relative to their putative local benefits.

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308. *See supra* Part I.A.3 (explaining that telehealth services have increased the accessibility of abortion through online pharmacies and mail delivery of abortion medication).

309. 545 U.S. 1 (2005).

310. *Id.* at 25.

311. *Id.*; *see* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552–53 (2024) (describing the FDA's approval and regulation of mifepristone for use to terminate pregnancies).

312. Joondeph, *supra* note 22, at 67.

313. Fallon, *supra* note 209, at 622–23; *see supra* Part II.A.

314. Escobar et al., *supra* note 88; *see supra* Part I.A.3.

315. Escobar et al., *supra* note 88.

316. IDAHO CODE ANN. § 18-623 (West 2023); TENN. CODE ANN. § 39-15-201 (2024); *see supra* Part I.A.3.

1. Abortion Travel Restrictions Are Protectionist

Restrictions on interstate travel for abortion care fail under the first prong of the Dormant Commerce Clause test for three reasons. First, they are facially discriminatory because they purposefully deprive businesses in abortion-permissive states of their competitive advantages. Second, such laws are facially protectionist because they control wholly extraterritorial commercial activity. Third, their practical effects reveal a discriminatory purpose.

First, abortion travel restrictions deprive businesses in abortion-permissive states of the competitive advantages they possess by offering more comprehensive obstetric care and medical services.[317] Companies selling products in multiple states "must normally comply with the laws of those various States."[318] Therefore, under the Dormant Commerce Clause's antidiscrimination principle, "no State may use its laws to discriminate purposefully against out-of-state economic interests."[319] This includes laws that "deprive[] businesses and consumers in other States of 'whatever competitive advantages they may possess.'"[320]

Although Professors Berman and Florey argue that abortion travel restrictions are not facially discriminatory,[321] such laws deprive businesses of their competitive advantages. In 2023, the year after *Dobbs*, the number of patients traveling out of state for abortion care more than doubled, with most of those patients traveling to the closest state that permitted abortion.[322] Telehealth providers have established satellite sites and mobile clinics near borders of states where abortion is illegal, anticipating interstate travelers seeking abortion care.[323] Thus, laws that restrict out-of-state travel for abortion deprive businesses in surrounding states of the "competitive advantages" they possess due to their abortion-permissive laws.[324]

Moreover, the statutory language of the Idaho, Missouri, and Tennessee laws restricting interstate travel for abortion care demonstrates purposeful discrimination against the economic interests of states where abortion is legal. These laws expressly apply regardless of where the abortion is to be procured or whether the abortion is legal in that state.[325] By explicitly precluding a legality defense, the "plain terms" of these state laws

317. *See supra* Introduction and Part I.A.3.

318. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023).

319. *Id.*

320. *Id.* at 1155 (quoting Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989)); *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).

321. *See* Berman et al., *supra* note 20, at 441; Florey, *supra* note 210, at 508; *supra* Part II.B.1.

322. Escobar et al., *supra* note 88; *see supra* Part I.A.3.

323. Cohen et al., *supra* note 69, at 16–17; *see supra* Part I.A.3.

324. *Ross*, 143 S. Ct. at 1155.

325. MO. REV. STAT. § 188.250 (2005); IDAHO CODE ANN. § 18-623 (West 2023); TENN. CODE ANN. § 39-15-201 (2024); *see supra* Part I.A.3 (excerpting pertinent statutory text).

purposefully deprive other states of their competitive advantages in violation of the antidiscrimination principle.[326]

The Supreme Court has consistently held that state regulations forcing out-of-state competitors to "surrender" their cost advantages violate the antidiscrimination principle.[327] In the seminal Dormant Commerce Clause case *Baldwin*, the Court invalidated a New York law barring out-of-state dairy farmers from selling milk in New York for less than the minimum price New York law guaranteed in-state producers because it protected local industry against competition from other states.[328] In two later cases, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*[329] and *Healy v. Beer Institute*,[330] the Court struck down state laws requiring businesses to affirm their in-state prices were no higher than their out-of-state prices, holding that such laws forced out-of-state distillers to "surrender" whatever cost advantages they enjoyed against their in-state rivals.[331] Like the price-affirmation statutes in those three cases, abortion travel restrictions are facially discriminatory because they stifle the flow of commerce to out-of-state healthcare providers that offer more comprehensive obstetric care, forcing those businesses to "surrender" their cost advantages.[332]

Second, abortion travel restrictions are facially protectionist because they control commerce that occurs entirely outside a state's jurisdiction. In *Edgar*, the Court held that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[333] Likewise, here, the commerce affected by the abortion travel restrictions would occur wholly out of state in jurisdictions where abortion is legal. Such statutes, including the Idaho, Missouri, and Tennessee statutes that plainly apply when the abortion is sought in other states, fail *Edgar*'s "de facto test for impermissible extraterritorial regulation."[334]

Abortion travel restrictions differ from the New Jersey law at issue in *Govatos*, which permitted only state residents to qualify for medical aid in dying services in the state.[335] The court upheld the law, concluding it was not protectionist because "it merely provides access to a service that would not otherwise exist at all."[336] Unlike New Jersey's law, which regulates only

326. Healy v. Beer Inst., 491 U.S. 324, 341 (1989).
327. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).
328. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519, 521–22 (1935).
329. 476 U.S. 573 (1986).
330. 491 U.S. 324 (1989).
331. *Brown-Forman Distillers*, 476 U.S. at 580; *see Healy*, 491 U.S. at 338.
332. *Brown-Forman Distillers*, 476 U.S. at 580.
333. Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982); *see* Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732, 742–43 (Mo. 2007) (en banc).
334. Martin, *supra* note 145, at 503.
335. Govatos v. Murphy, No. 23-cv-12601, 2024 WL 4224629, at *1 (D.N.J. Sept. 18, 2024), *appeal docketed*, No. 24-2947 (3d Cir. Oct. 17, 2024); *see supra* Part II.B.1.
336. *Govatos*, 2024 WL 4224629, at *2.

services performed within the state, abortion travel restrictions affect healthcare procedures performed outside the state.[337]

Further, the *Govatos* court noted that "[u]nlike other forms of healthcare, there is no 'interstate market' for medical aid in dying."[338] Medical aid in dying first became legal in Oregon in 1994 and is now legal in ten states and Washington, D.C.[339] In contrast, abortion care became legal nationwide in 1973 and remained a constitutionally-protected right for almost fifty years under *Roe*.[340] Although *Roe* was overturned in 2022, abortion remains legal, at least in the early stages of pregnancy, in thirty-seven states and Washington, D.C.[341] Thus, the *Govatos* court's reasoning is inapplicable to laws that restrict interstate travel for abortion care, for which a national market exists.[342]

Third, even if, arguendo, abortion travel restrictions were facially neutral, their practical effects reveal a discriminatory purpose.[343] The *Pike* Court held that an Arizona order requiring cantaloupes grown in state to be processed and packed in state was discriminatory because, even if it was facially neutral, it "require[ed] business operations to be performed in [state] that could *more efficiently* be performed elsewhere."[344] Such a burden on interstate commerce would be unconstitutional "[e]ven where the State is pursuing a clearly legitimate local interest."[345] Likewise, abortion travel restrictions compel patients to seek in-state obstetric healthcare that would be *more efficiently* and safely performed in another state where abortion services are legal.[346] Thus, although the Supreme Court has recognized that abortion bans further legitimate state interests,[347] statutes that restrict interstate travel further a discriminatory purpose in violation of the Dormant Commerce Clause.

Abortion travel restrictions aim to control interstate commerce in a discriminatory way by diverting patients away from out-of-state businesses that offer superior healthcare services. In *Toomer v. Witsell*,[348] the Supreme Court struck down a South Carolina law requiring shrimp boat owners

337. *Id.* at *2–4.

338. *Id.* at *18.

339. *See* Erin Nolan & Grace Ashford, *Doctor-Assisted Death Is Legal in 10 States. Could New York Be No. 11?*, N.Y. TIMES (June 1, 2024), https://www.nytimes.com/2024/06/01/nyregion/euthanasia-assisted-suicide-ny.html [https://perma.cc/2NU3-QF5G].

340. *See supra* Part I.A.1.

341. *See* CTR. FOR REPROD. RTS., *supra* note 87; McCann & Walker, *supra* note 10.

342. *See supra* Part III.A (describing the interstate market for abortion care).

343. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1157 (2023) (holding that "a law's practical effects may also disclose the presence of a discriminatory purpose").

344. Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970) (emphasis added).

345. *Id.*

346. *See, e.g.*, Jaramillo & Surana, *supra* note 6 (relating a medical expert's remark that if Josseli Barnica had been treated in "Massachusetts or Ohio," rather than Texas, she would have received lifesaving abortion care "within a couple hours"); *supra* notes 6, 13 and accompanying text.

347. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022); *see supra* note 280 and accompanying text.

348. 334 U.S. 385 (1948).

licensed to fish in the state to unload and pack their catch in South Carolina before transporting it to another state.[349] The law appeared facially neutral, applying equally to in-state and out-of-state fisherman, but the statute's practical effects revealed a discriminatory intent "to divert to South Carolina employment and business which might otherwise go to Georgia."[350] Thus, the law "impose[d] an artificial rigidity on the economic pattern of the industry."[351] Likewise, abortion travel restrictions aim to divert pregnant patients who might seek out-of-state obstetric care to instead seek in-state care, imposing the same "artificial rigidity" on industry patterns that the Court in *Toomer* held unconstitutional.[352]

As Professor Berman observed, the practical effects of an abortion ban are to "push patients out of state, not to reduce the total number of abortions."[353] Moreover, the National Right to Life Committee proposed its model "abortion trafficking" ban with the goal of preventing "the abortion industry" from "exploit[ing] . . . the proximity of States" with abortion-permissive laws to "circumvent" abortion restrictions.[354] Abortion travel restrictions are designed to obstruct access to abortion in states where the procedure is legal, revealing a purpose to discriminate against out-of-state businesses.

The Supreme Court has found no impermissible burden on interstate commerce when "there is no reason to suspect that the gainers will be [in-state] firms, or the losers out-of-state firms."[355] But in the case of abortion travel restrictions, the losers are out-of-state medical providers who are deprived of the competitive advantage they possess by virtue of their states' abortion-permissive laws. The gainers are in-state medical providers who stand to lose patients seeking services now banned in the state, but who will not suffer as great a loss if the state restricts patients' ability to receive care outside the state. Therefore, the practical effects of abortion travel restrictions reveal a discriminatory purpose in violation of the Dormant Commerce Clause. The next section contends that restrictions on interstate travel for abortion care also fail under the doctrine's second inquiry, the *Pike* balancing test.

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349. *Id.* at 403–04, 406.
350. *Id.* at 403.
351. *Id.* at 403–04.
352. *Id.* at 404.
353. Berman et al., *supra* note 20, at 414; *see supra* Parts I.A.3, III.A. After Texas enacted S.B. 8, the number of Texas residents that obtained abortions in Oklahoma more than doubled, and Texans seeking abortions in New Mexico also increased. Berman et al., *supra* note 20, at 414. Meanwhile, the total number of abortions provided to Texans decreased by only 10 percent. *Id.*
354. Memorandum from James Bopp et al. to Nat'l Right to Life Comm. & Whom It May Concern, *supra* note 123, at 3; *see supra* Part I.A.3.
355. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981).

2. Abortion Travel Restrictions Impose a Clearly Excessive Burden on Interstate Commerce

Even if courts find that abortion travel restrictions are not protectionist, such laws violate the Dormant Commerce Clause under *Pike* balancing for two reasons. First, they impose burdens on interstate commerce that are clearly excessive relative to the laws' putative local benefits. Second, they are similar to state regulations of interstate transportation that the Supreme Court has consistently struck down under the *Pike* test.

First, as Professors Bradford and Berman asserted, abortion travel restrictions substantially burden healthcare providers in states where abortion is legal.[356] The investigatory burden on physicians to conduct due diligence to avoid liability for providing healthcare that is legal within their state would be "enormous."[357] Doctors would need to confirm each patient's state of residence, consult lawyers to determine their potential liability, and possibly defend themselves against out-of-state prosecution or civil lawsuits.[358] These burdens are compounded as multiple states enact laws restricting extraterritorial abortions, with varying requirements, exceptions, defenses, and enforcement mechanisms.[359] The ambiguity of abortion bans already has chilling effects on doctors within the enacting state, resulting in patients being refused care or receiving delayed care.[360] Doctors will be even more confused and burdened if they must consider the abortion laws of every state where their patients reside, particularly as interstate travel for abortion care increases rapidly.[361]

Courts may consider both pecuniary costs and "other factors" in analyzing burdens and benefits under *Pike*.[362] In *Bibb v. Navajo Freight Lines, Inc.*,[363] the Supreme Court held that an Illinois law requiring trucks to use a certain type of mudguard when in Illinois placed an unconstitutional burden on interstate commerce, even though it was facially neutral.[364] The Court considered its nonmonetary harms, including "significant delay in an operation where prompt movement may be of the essence."[365] Further, changing mudguard types when crossing state lines would require multiple hours of labor and could be "exceedingly dangerous."[366]

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356. *See* Bradford, *supra* note 209, at 152–53; Berman et al., *supra* note 20, at 453–54; *supra* Part II.B.2.

357. Berman et al., *supra* note 20, at 454 (quoting Bradford, *supra* note 209, at 152).

358. *Id.*

359. *Id.*; Bradford, *supra* note 209, at 152–53.

360. *See, e.g.*, State v. Zurawski, 690 S.W.3d 644, 655–56 (Tex. 2024) (describing plaintiffs' serious health consequences that resulted from physicians delaying or refusing to provide abortion care in Texas due to the alleged ambiguity of the state's abortion bans); *see supra* note 13.

361. Berman et al., *supra* note 20, at 454.

362. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526 (1959).

363. 359 U.S. 520 (1959).

364. *Id.* at 530.

365. *Id.* at 527.

366. *Id.*

Similarly, abortion care, especially in certain obstetric emergencies, is an operation where "prompt movement" is essential and where significant delay could be "exceedingly dangerous."[367] The deaths of Amber Thurman, Josseli Barnica, and Candi Miller each could have been prevented had doctors provided abortion care sooner.[368] Thus, patients seeking obstetric care out of state who may require "prompt" action from physicians could suffer severe physical harm if doctors refuse or delay in providing abortion care. Courts can consider those nonmonetary effects of extraterritorial abortion laws.

The *GenBioPro* court refused to consider patients' health risks because it interpreted the chief justice's *Ross* concurrence to indicate that courts employing the *Pike* test could only consider derivative harms that are "primarily economic in nature."[369] But Chief Justice Roberts acknowledged that "[r]egulations that 'aggravate . . . the problem of highway accidents,' or 'slow the movement of goods' . . . impose economic burdens, even if those burdens may be difficult to quantify and may not arise immediately."[370] Likewise, the potential financial costs to both medical providers[371] and patients[372] resulting from laws that deter interstate travel for abortion care may be substantial economic burdens, regardless of their quantifiability or immediacy.

Considering the extraterritorial reach of abortion travel restrictions, the significant burdens such laws pose on interstate commerce are clearly excessive in relation to their purported local benefits. States have no legitimate interest in controlling behavior wholly outside their jurisdiction, such as abortions performed in other states.[373] *Raymond Motor* established that courts conducting *Pike* balancing should consider whether the state's purported interest "could be promoted as well with a lesser impact on

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367. *Id.*; *see supra* Introduction.

368. *See supra* notes 6, 13 and accompanying text (describing women's deaths and serious health consequences that resulted from physicians delaying or refusing to provide abortion care).

369. GenBioPro, Inc. v. Sorsaia, No. 23-0058, 2023 WL 5490179, at *14 (S.D. W. Va. Aug. 24, 2023) (citing Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1169 (2023) (Roberts, C.J., concurring in part and dissenting in part)), *appeal docketed sub nom.* GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. argued Oct. 29, 2024).

370. *Ross*, 143 S. Ct. at 1170 (Roberts, C.J., concurring in part and dissenting in part) (citations omitted) (first quoting Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 674 (1981); and then quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445 (1978)).

371. *See supra* Part I.A.3 (describing the correlative rise in interstate travel for abortion care after states ban abortion).

372. *See How Much Does an Abortion Cost?*, *supra* note 91 (explaining that the cost of abortion procedures is time sensitive, as it depends on the care needed and how far along the pregnancy is).

373. *See* Edgar v. MITE Corp., 457 U.S. 624, 643–44 (1982) (holding that because "the State has no legitimate interest in protecting nonresident shareholders," a state statute cannot regulate "commerce wholly outside the State"); *cf.* Joondeph, *supra* note 22, at 50 (noting that the *Ross* decision failed to address whether a state could have a legitimate interest in influencing behavior occurring out of state).

interstate activities."[374] A state's purported interest in preventing abortions in state would be promoted just as well, and without burdening interstate commerce, if its statute provided an affirmative defense for abortions sought in states where the procedure is legal. Because the laws in Idaho, Missouri, and Tennessee explicitly preclude such a legality defense, they excessively burden interstate commerce.[375]

That courts give significant weight to states' health and safety interests[376] is inapposite here because laws restricting abortion access do not actually protect maternal health. In *Edgar*, the Court struck down an Illinois securities regulation in part because the law exempted from compliance a corporation's acquisition of its own shares, which seemed "at variance with Illinois' asserted legislative purpose" of protecting local investors and "undermine[d] appellant's justification for the burdens the statute impose[d] on interstate commerce."[377] In *Dobbs*, the Court held that Mississippi's legitimate interests in protecting "prenatal life" and maternal health provided a rational basis for the state's fifteen-week abortion ban.[378] But the harmful effects of abortion bans on maternal health[379] contradict their purported legislative goals of protecting health and safety.[380] That abortion regulations do not practically further their purported goal of protecting maternal health compromises their validity.

Second, abortion travel restrictions implicate "instrumentalities of interstate transportation," like the transportation regulations the Supreme Court has consistently struck down under the *Pike* test.[381] Although the Court recognized that the safety regulations in *Raymond Motor* and *Kassel* warranted a "strong presumption of validity," it found in both cases insufficient evidence to prove the regulations contributed to safety.[382] Idaho and Tennessee's "abortion trafficking bans" prohibit "transporting" a pregnant minor "within this state" to procure an abortion, similarly implicating methods of interstate transportation.[383] But like in *Raymond*

374. *Raymond Motor*, 434 U.S. at 441–42; *see supra* Part II.B.2.

375. MO. REV. STAT. § 188.250 (2005); IDAHO CODE ANN. § 18-623 (West 2023); TENN. CODE ANN. § 39-15-201 (2024); *see supra* Part I.A.3 (excerpting pertinent statutory text).

376. *See* Dellapenna, *supra* note 262, at 1692.

377. *Edgar*, 457 U.S. at 644.

378. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022); *see supra* note 280.

379. *See supra* note 13 and accompanying text.

380. *See* June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020) (finding that Louisiana's admitting privileges requirement "did not further the State's asserted interest in protecting women's health"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

381. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158 n.2 (2023) (describing the Supreme Court's "line of cases" striking down "state regulations on instrumentalities of interstate transportation—trucks, trains, and the like"); *see, e.g.*, Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 671 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959).

382. *Raymond Motor*, 434 U.S. at 445 n.19, 447–48; *see Kassel*, 450 U.S. at 671–72; *see supra* Part II.B.2.

383. IDAHO CODE ANN. § 18-623 (West 2023); TENN. CODE ANN. § 39-15-201 (2024).

Motor and *Kassel*, evidence fails to show that abortion travel restrictions contribute to health and safety,[384] undermining their presumption of validity.

Ross does not change the apt comparison between abortion travel restrictions and interstate transportation regulations. A majority of the *Ross* Court acknowledged that the Dormant Commerce Clause precludes state statutes regulating "instrumentalities of interstate transportation" that "impede[] the flow of commerce."[385] Justice Gorsuch distinguished Proposition 12 from such transportation regulations, reasoning that the regulation of pork production does not "impede[] the flow of commerce."[386] Abortion travel restrictions are more akin to regulations of trucks and trains than Proposition 12 was. The state laws struck down in *Raymond Motor* and *Kassel* forced trucking companies to use smaller vehicles in the state, route around the state, or detach the trailers and ship them separately.[387] Likewise, statutes prohibiting the in-state transportation of a pregnant minor seeking an out-of-state abortion[388] force patients and those who assist them to route around that state to avoid liability. Unlike Proposition 12, abortion travel restrictions impose clearly excessive burdens on the "flow of commerce" in violation of the Dormant Commerce Clause's *Pike* balancing test.[389]

CONCLUSION

Abortion travel restrictions violate the Dormant Commerce Clause because they impermissibly burden interstate commerce, even after *Ross* narrowed the doctrine. As a threshold matter, such laws are subject to review under the Dormant Commerce Clause because they regulate commercial activity that falls within the scope of Congress's Commerce Clause authority. Further, abortion travel restrictions violate both prongs of the Dormant Commerce Clause test. First, such laws fail under the antidiscrimination principle because they are facially discriminatory, and even if they were not, they yield practical effects that reveal a discriminatory purpose. Second, they fail the *Pike* balancing test because they impose a clearly excessive burden on interstate commerce relative to their putative local benefits.

Courts considering Dormant Commerce Clause challenges to state laws that restrict interstate travel for abortion care will set impactful precedent. Courts should clearly establish that states cannot regulate wholly extraterritorial commercial activity, including healthcare services that are legal in other states. As abortion access deteriorates in many states, striking down abortion travel restrictions is critical to preserving access to abortion care and protecting patients' health and lives.

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384. *See* Berman, *supra* note 20, at 414; *supra* Part III.B.1.

385. *Ross*, 143 S. Ct. at 1158 n.2; *see also id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part).

386. *Id.* at 1158 n.2 (majority opinion) ("Pigs are not trucks or trains.").

387. *See Kassel*, 450 U.S. at 674; *Raymond Motor*, 434 U.S. at 438–39.

388. *See, e.g.*, IDAHO CODE ANN. § 18-623 (West 2023); TENN. CODE ANN. § 39-15-201 (2024).

389. *Ross*, 143 S. Ct. at 1158 n.2.