COMMENTS

State Telemedicine Abortion Restrictions and the Dormant Commerce Clause

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Telemedicine abortions allow women to meet virtually with abortion providers and receive abortion medication through the mail, all without ever leaving their homes. This development could be instrumental in facilitating access to abortion care for women living in abortion-restrictive states after the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization. *However, many abortion-restrictive states have moved to restrict remote abortion care and impose legal liability on out-of-state telemedicine abortion providers.*

This Comment outlines a novel argument that these state restrictions on telemedicine abortions violate the Dormant Commerce Clause, which prohibits state regulation that discriminates against or unduly burdens interstate commerce.

Although the Court's decision in National Pork Producers Council v. Ross *significantly narrowed the scope of the Dormant Commerce Clause, the fractured opinions highlighted important areas of the doctrine that remain unsettled. This Comment argues that this ambiguity presents an opportunity for courts to adopt an expansive model of the Dormant Commerce Clause's undue burden standard, consistent with Chief Justice John Roberts's opinion. Under this model, telemedicine abortion restrictions impose a substantial burden on the interstate market for abortion care that clearly outweighs their benefits. Although a Dormant Commerce Clause approach will not guarantee unfettered access to telemedicine abortions nationwide, it represents one of many tools that abortion rights advocates can leverage to protect reproductive rights in a post-*Dobbs *world.*

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INTRODUCTION

The Supreme Court's decision to overturn the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*[1] has created a state-by-state patchwork of abortion regulations. As of April 2024, fourteen states have banned abortion at all stages of pregnancy, twenty states have codified or expanded abortion rights, and the remainder fall somewhere in between.[2]

In part due to the complicated regulatory landscape, telemedicine is becoming increasingly important for facilitating access to abortion care. Since the Food and Drug Administration (FDA) relaxed regulatory requirements for abortion medication in 2021, patients can obtain abortion care by scheduling a virtual patient consultation with a healthcare provider and having the medication dispensed through the mail to an address of their choice.[3] As a result, women can now obtain abortions without ever leaving their homes. This development could dramatically expand abortion access by making abortion care both cheaper and more convenient for women living in abortion-restrictive states.

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1 142 S. Ct. 2228 (2022).

2 *Tracking Abortion Bans Across the Country*, N.Y. TIMES (last updated Apr. 26, 2024), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (listing the states that have banned almost all abortions, added new protections for abortion access, or banned abortions past a certain gestational limit).

3 *See infra* notes 15–21 and accompanying text.

However, women seeking telemedicine abortion care still face significant obstacles. Abortion-restrictive states have implicitly or explicitly included telemedicine abortions in their abortion bans.[4] While states can certainly exercise their police powers to regulate abortions within their borders, abortion-restrictive states have not stopped there; they have sought to apply their abortion restrictions broadly in an attempt to reach out-of-state telemedicine providers and patients who travel out of state to receive telemedicine abortion care.[5]

These restrictions not only create the potential for novel interjurisdictional conflicts, but also stand on shaky constitutional grounds. Because telemedicine abortions are part of an interconnected national market and involve the flow of medication across state lines, these abortion services are a form of interstate commerce. Courts have long invoked the Dormant Commerce Clause to strike down state regulation that discriminates against or impermissibly burdens interstate commerce.[6]

However, the Dormant Commerce Clause is a complex and controversial doctrine,[7] and its contours are far from stable. The Court recently updated its Dormant Commerce Clause jurisprudence in *National Pork Producers Council v. Ross*.[8] Notably, the Court decisively narrowed the doctrine by rejecting extraterritorial effects as a per se basis for invalidating state regulation.[9] As a result, the decision eliminated one of the more promising avenues for challenging abortion restrictions that reach out-of-state abortions under the Dormant Commerce Clause.

National Pork left other significant Dormant Commerce Clause issues unsettled. In particular, it remains unclear how the doctrine applies to state laws that do not facially discriminate

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4 *See infra* notes 34–37 and accompanying text.

5 For example, in 2021, a Missouri legislator introduced a bill that would apply all Missouri abortion restrictions to conduct that occurs outside the state if the pregnant person resides in Missouri or the pregnancy may have been conceived in Missouri. *See* S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. § 188.550.1(3)(c)(a)–(d) (Mo. 2021).

6 *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (invalidating a state law that prohibited the import of waste from out of state as discriminating against interstate commerce); Pike v. Bruce Church, Inc., 397 U.S. 137, 143–44 (1970) (invalidating a state law that imposed restrictions on packaging cantaloupes grown in state as unduly burdening interstate commerce).

7 *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENVER L. REV. 255, 273–78 (2017) (describing the erosion of the Dormant Commerce Clause beginning in the mid-1980s); *see also infra* Part II.B (summarizing criticisms of the Court's Dormant Commerce Clause jurisprudence).

8 143 S. Ct. 1142 (2023).

9 *Id.* at 1155–57.

against out-of-state economic interests, which are evaluated under an undue burden standard. The *National Pork* decision does not compel any one way to evaluate undue burdens; rather, the opinions proposed a range of different models for evaluating these statutes.[10] As a result, this area of the Dormant Commerce Clause continues to be uncertain legal terrain.

This Comment argues that this uncertainty is an opportunity for a novel Dormant Commerce Clause challenge to telemedicine abortion restrictions. Because *National Pork* does not compel any one model for evaluating undue burdens, lower federal courts have the opportunity to adopt a more expansive model consistent with Chief Justice John Roberts's opinion, which would make the undue burden standard more broadly applicable and allow plaintiffs to allege a broader range of legally cognizable harms.[11] Under this model, state restrictions on telemedicine abortions can impose an undue burden on interstate commerce. Because telemedicine providers operate over the internet and cannot reliably determine whether patients live in abortion-restrictive states, state regulation will substantially affect the interstate market for telemedicine abortion services. Moreover, these burdens significantly outweigh the statutes' actual benefits.

After *Dobbs*, telemedicine abortions may be the only abortion method available for many women living in abortion-restrictive states. Abortion rights activists must ensure that abortion-restrictive states do not extend their abortion bans to reach telemedicine abortions outside their borders. Although the Dormant Commerce Clause will not prohibit all such attempts, it could play a significant role in protecting abortion access in a fraught regulatory landscape.

This Comment proceeds as follows. Part I discusses the rise of telemedicine abortions and the steps that states have taken to restrict (or expand) access to remote abortion care post-*Dobbs*. Part II describes the Dormant Commerce Clause doctrine and the implications of the *National Pork* decision. Part III analyzes state abortion restrictions under the updated doctrine and outlines the argument that state restrictions on telemedicine abortions violate the Dormant Commerce Clause. Finally, Part IV addresses potential counterarguments and acknowledges the limitations of this approach.

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[10] *See infra* Part II.C.2.

[11] *See infra* Part II.C.2.

I. THE TELEMEDICINE ABORTION LANDSCAPE

Telemedicine has the potential to dramatically expand abortion access, particularly for women living in abortion-restrictive states who cannot afford to travel out of state. However, state regulations of telemedicine abortions have created a host of legal and practical issues. Part I.A describes telemedicine abortions and their importance in improving access to abortion care. Part I.B outlines the measures states have taken to restrict or protect access to telemedicine abortions, as well as how patients and providers have navigated the murky regulatory landscape.

A. A New Avenue of Abortion Access

A medication abortion uses two drugs to end a pregnancy without any surgical procedure. The first drug, mifepristone, blocks the hormone progesterone, which is necessary for a pregnancy to continue.[12] The second, misoprostol, causes uterine contractions that expel the pregnancy.[13] As of 2020, medication abortions accounted for over half of all abortions in the United States.[14]

Until recently, the FDA had a Risk Evaluation and Mitigation System (REMS) in place that required patients to pick up mifepristone in person from certified providers.[15] The in-person dispensing requirement prevented the dispensation of mifepristone through the mail or a pharmacy. This requirement became a substantial obstacle during the COVID-19 pandemic, which severely restricted patients' ability to visit medical offices in person.[16] As a result, the District Court of Maryland enjoined the

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12 *The Abortion Pill*, PLANNED PARENTHOOD, https://perma.cc/3F77-PY6G.

13 *Id.*

14 Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin & Marielle Kirstein, *Medication Abortion Now Accounts for More than Half of All US Abortions*, GUTTMACHER INST. (Feb. 24, 2022), https://perma.cc/69EM-E8FE.

15 *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA (last updated Sept. 1, 2023) [hereinafter *Q&A on Mifepristone*], https://perma.cc/QUH6-389S.

16 Esther Chong, Tara Shochet, Elizabeth Raymond, Ingrida Platais, Holly A. Anger, Shandhini Raidoo, Reni Soon, Melissa S. Grant, Susan Haskell, Kristina Tocce, Maureen K. Baldwin, Christy M. Boraas, Paula H. Bednarek, Joey Banks, Leah Coplon, Francine Thompson, Esther Priegue & Beverly Winkoff, *Expansion of a Direct-to-Patient Telemedicine Abortion Service in the United States and Experience During the COVID-19 Pandemic*, 104 CONTRACEPTION 43, 44 (2021) (noting that "[t]he COVID-19 pandemic has exacerbated barriers to accessing abortion care").

agency from enforcing the in-person dispensing requirement during the pandemic.[17]

On December 16, 2021, after an extensive review of the safety of medication abortion, the FDA announced that it would update its protocol to remove the in-person dispensing requirement.[18] These changes went into effect on January 3, 2023,[19] opening the door for a key development in the abortion landscape: telemedicine abortions.[20] Through telemedicine abortions, patients can meet remotely with a provider who dispenses abortion medication through the mail or a certified pharmacy.[21] As a result, patients can now safely obtain abortion care without ever leaving their homes.

Studies have shown that medication abortions are a safe and effective means to end a pregnancy, with a very low rate of serious complications.[22] FDA data indicates that out of 5.9 million women in the United States who had medication abortions between September 2000 and December 2022, only 4,218 (or about 0.001%) reported experiencing an adverse event.[23] Overall, the risk of adverse events is similar to those of commonly used prescription and

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17 *See* Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F. Supp. 3d. 183, 233 (D. Md. 2020), *clarified*, 2020 WL 8167535 (D. Md. Aug. 19, 2020), *vacated as moot*, 2021 WL 3276054 (4th Cir. May 19, 2021).

18 *Q&A on Mifepristone*, *supra* note 15.

19 *Id.*

20 These have also been called "telehealth abortions," "teleabortions," and "telabortions." *See* Hina Mohiuddin, Comment, *The Use of Telemedicine During a Pandemic to Provide Access to Medication Abortion*, 21 HOUS. J. HEALTH L. POL'Y 483, 497 (2022) (using the term "telehealth abortions"); Katherine Fang & Rachel Perler, Comment, *Abortion in the Time of COVID-19: Telemedicine Restrictions and the Undue Burden Test*, 32 YALE J.L. & FEMINISM 134, 136 (2021) (using the term "teleabortions"); Jareb A. Gleckel & Sheryl L. Wulkan, *Abortion and Telemedicine: Looking Beyond COVID-19 and the Shadow Docket*, 54 U.C. DAVIS L. REV. ONLINE 105, 108 (2021) (using the term "telabortions").

21 Rachel Rebouché, Greer Donley & David S. Cohen, *The FDA's Telehealth Safety Net for Abortion Only Stretches So Far*, THE HILL (Dec. 18, 2021), https://perma.cc/3PBG-TAQ4.

22 *Mifepristone U.S. Post-Marketing Adverse Events Summary Through 12/31/2022*, FDA, https://perma.cc/6KBZ-ECDC; *see also* Fekede Asefa Kumsa, Rameshwari Prasad & Arash Shaban-Nejad, *Medication Abortion via Digital Health in the United States: A Systematic Scoping Review*, NPJ DIGIT. MED., July 12, 2023, at 6–8 (synthesizing the findings of thirty-three telemedicine abortion studies in the United States and demonstrating themes of high success and safety rates, low adverse outcome rates, and ameliorated privacy concerns); NAT'L ACADS. SCIS., ENG'G & MED., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES 55 (2018) (reporting that complications after medication abortions, such as hemorrhage and hospitalization, are rare and occur in "no more than a fraction of a percent of patients").

23 *See Mifepristone U.S. Post-Marketing Adverse Events Summary Through 12/13/2022*, *supra* note 22. For comparison, the mortality rate for live pregnancies is 8.8

over-the-counter medications.[24] Researchers have also found that delivering medication abortions via telemedicine does not materially affect the success rate or risk of adverse events.[25]

Moreover, telemedicine can dramatically improve access to abortion care for individuals who are low-income, live in remote geographic areas, or do not want to face the stigma of in-person visits. In addition to being convenient, telemedicine abortion services often impose lower out-of-pocket costs[26] and eliminate the need to pay for transportation and lodging. The reduced financial burden can be a decisive factor for many patients deciding between telemedicine and in-person care.[27] These services also lessen the burden on brick-and-mortar clinics that would otherwise need to meet increased demand by patients traveling from abortion-restrictive states. Given these benefits, it is unsurprising that patients have increasingly turned toward telemedicine for abortion care. The Society of Family Planning reported that the number of telemedicine abortions increased by 137% nationally in the eight months after *Dobbs*, even after excluding self-managed abortions that took place outside the formal healthcare system.[28]

However, telemedicine abortions are far from a panacea. The FDA has approved medication abortions only for the first ten weeks of pregnancy.[29] Patients seeking later-term abortions, as

per 100,000 live births, or 0.0088%. THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES, *supra* note 22.

[24] THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES, *supra* note 22, at 58.

[25] Chong et al., *supra* note 16, at 46 (reporting comparable efficacy rates and rates of adverse events between medication abortions delivered via telemedicine and those dispensed in person); THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES, *supra* note 22, at 57 (same).

[26] Erica Kahn, *How Much Do Abortion Pills Cost Without Insurance?*, MIRA (Aug. 23, 2022), https://perma.cc/2LCF-YJ36 (reporting that the cost of a telemedicine medication abortion ranges from $110–400, compared to $550–750 for a medication abortion with an in-person visit).

[27] Dana M. Johnson, Melissa Madera, Rebecca Gomperts & Abigail R.A. Aiken, *The Economic Context of Pursuing Online Medication Abortion in the United States*, 1 SSM – QUALITATIVE RSCH. HEALTH, Dec. 2021, at 3–4 (reporting that survey participants cited "personal financial hardship" as "a key motivator for pursuing the pathway of online telemedicine").

[28] *#WeCount Report*, SOC'Y FAM. PLAN. 2 (Apr. 11, 2023), https://perma.cc/G7JU-FEND.

[29] *Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA (last updated Mar. 23, 2023), https://perma.cc/F6GM-9KUT.

well as patients with ectopic pregnancies,[30] still need to undergo surgical abortions at brick-and-mortar clinics.[31] Moreover, although telemedicine enhances affordability and convenience, it does require patients to have (at minimum) stable internet access, telehealth-capable devices, and digital literacy. Patients must also account for delivery time and potential shipment delays for an often time-sensitive procedure.[32] And as discussed in the next Section, even though the FDA's in-person dispensing requirement is no longer in place, abortion-restrictive states have taken steps to restrict or ban telemedicine abortions.[33]

B. State Restrictions on Telemedicine Abortions

As of March 2024, twenty-six states have enacted legislation directly or indirectly limiting telemedicine abortions. Fourteen states ban nearly all abortions, including medication and telemedicine abortions, in the early stages of pregnancy.[34] Six states

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[30] An ectopic pregnancy occurs when the fertilized egg develops outside the uterus and can be life-threatening if left untreated. *Ectopic Pregnancy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Feb. 2018), https://perma.cc/3BF5-4TPX. The FDA has stated that individuals with ectopic pregnancies should not take mifepristone. *Q&A on Mifepristone*, *supra* note 15.

[31] Some abortion rights advocates have also expressed concern that telemedicine abortion services will siphon demand from brick-and-mortar clinics, forcing them to close. *See, e.g.*, Amy Littlefield, *Telemedicine Abortions Offer Cheaper Options but May Also Undermine Critical Clinics*, FIERCE HEALTHCARE (Sept. 7, 2021), https://perma.cc/B37S-9EAB. This could threaten access for patients seeking in-person care for later-term abortions or other complications. More research is needed to estimate the trade-off between the availability of telemedicine and in-person abortion care.

[32] *See* Melissa Madera, Dana M. Johnson, Kathleen Broussard, Luisa Alejandra Tello-Perez, Carol-Armelle Ze-Noah, Aleta Baldwin, Rebecca Gomperts & Abigail R.A. Aiken, *Experiences Seeking, Sourcing, and Using Abortion Pills Through an Online Telemedicine Service*, 2 SSM – QUALITATIVE RSCH. HEALTH, Dec. 2022, at 4 (reporting that shipping delays were a major concern for survey participants sourcing abortion medication from Aid Access). *But see* Leah R. Koenig, Elizabeth G. Raymond, Marji Gold, Christy M. Boraas, Bliss Kaneshiro, Beverly Winikoff, Leah Coplon & Ushma D. Upadhyay, *Mailing Abortion Pills Does Not Delay Care: A Cohort Study Comparing Mailed to In-Person Dispensing of Abortion Medications in the United States*, 121 CONTRACEPTION, May 2023, at 1 (finding that mailing medication does not significantly delay ingestion of mifepristone compared to in-person dispensing).

[33] Antiabortion plaintiffs challenged the FDA's approval of mifepristone and its subsequent modifications to the mifepristone REMS as exceeding the FDA's authority. The cases resulted in two conflicting federal district court orders. The Supreme Court granted certiorari and held that the plaintiffs lacked standing to challenge the FDA's actions. *See* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540 (2024).

[34] The fourteen states are Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and

allow abortion, but have laws that either require the physical presence of a physician or explicitly ban the use of telemedicine for abortion.[35] Finally, six additional states have ultrasound or in-person counseling requirements that effectively prohibit the entirely remote provision of abortion care.[36] In addition, both Arizona and Montana have passed legislation explicitly prohibiting the mailing of abortion medication within the state.[37] Some of these restrictions predated the *Dobbs* decision; for instance, Missouri has a pre-*Dobbs* law requiring the in-person provision of medication abortion.[38]

Complicating the issue even further, several abortion-supportive states have passed "shield laws" to protect abortion providers and patients from extraterritorial criminal prosecutions and civil lawsuits brought in abortion-restrictive states.[39] These

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West Virginia. *See Tracking Abortion Bans Across the Country*, *supra* note 2; *The Availability and Use of Medication Abortion*, KFF (Mar. 20, 2024), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/.

35 The six states are Alaska, Arizona, Nebraska, North Carolina, South Carolina, and Wisconsin. Some of these restrictions have been temporarily or permanently enjoined by court order. *See The Availability and Use of Medication Abortion*, supra note 34.

36 The six states are Florida, Georgia, Iowa, Kansas, Ohio, and Utah. *See id.*

37 *Medication Abortion*, GUTTMACHER INST. (last updated Oct. 31, 2023), https://perma.cc/K5NN-BHG9.

38 2013 Mo. Law 725 (codified at MO. REV. STAT. § 188.021). Although there was some debate over whether these laws were unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), those questions are no longer relevant post-*Dobbs*. *See generally, e.g.*, Fang & Perler, *supra* note 20 (arguing that telemedicine abortion restrictions were unconstitutional during COVID-19 because they unduly burdened a woman's right to seek an abortion); Mohiuddin, *supra* note 20 (same).

39 *See* 2022 Cal. Stat. 7331 (codified as amended in scattered sections of CAL. PENAL CODE); 2022 Cal. Stat. 6457 (codified as amended in scattered sections of CAL. BUS. & PROF. CODE); 2022 Cal. Stat. 455 (codified as amended at CAL. HEALTH & SAFETY CODE § 123467.5 (Deering 2024)); 2022 Conn. Acts 68 (Reg. Sess.) (codified at CONN. GEN. STAT. §§ 54-82i(b), 54-162, 19a-602 (West 2022)); 83 Del. ch. 327 (2022) (codified in scattered sections of titles 10, 11, 18, and 24 of DEL. CODE ANN.); 2022 Mass. Acts 740 (codified in scattered sections of MASS. GEN. LAWS); 2022 N.J. Laws ch. 51 (codified at N.J. STAT. ANN. §§ 2A:84A-22.18, 2A:84A-22.19, 45:1-21 (West 2023)); 2022 N.J. Laws ch. 50 (codified at N.J. STAT. ANN. § 2A:160-14.1 (West 2023)); 2022 N.Y. Laws 1206 (codified as amended at N.Y. CIV. RIGHTS LAW § 70-b (McKinney 2024)); 2022 N.Y. Laws 1207 (codified as amended in scattered sections of N.Y. CRIM. PROC. LAW, N.Y. EXEC. LAW, and N.Y. C.P.L.R.); 2022 N.Y. Laws 1208 (codified as amended at N.Y. EDUC. LAW §§ 6505-4, 6531-b (McKinney 2024) and N.Y. PUB. HEALTH LAW § 230 (McKinney 2024)); 2022 N.Y. Laws 1210 (codified as amended at N.Y. INS. LAW § 3436-a (McKinney 2024)); 2022 N.Y. Laws 1211 (codified as amended at N.Y. EXEC. LAW § 108 (McKinney 2024)); 2023 Nev. Stat. ch. 82 (codified at NEV. REV. STAT. §§ 179.540, 232.0088, 629.250); 2023 Minn. Laws ch. 3 (codified in scattered sections of MINN. STAT.); 2023 Colo. Sess. Laws 239 (codified in scattered sections of COLO. REV. STAT.); 2022 Ill. Legis. Serv. Pub. Act 102-1117 (West) (codified as amended in scattered sections of ILL. COMP. STAT.). Some of these efforts were inspired by a recent law

shield laws vary state by state; among other protections, they may prohibit state officials from cooperating with legal proceedings in the patient's home state, protect providers from professional-licensure consequences or insurance-coverage losses, or prevent information about an abortion from being disclosed in the patient's home state.[40] States have also exempted abortion providers from extradition laws for providing abortions that comply with their home state's laws.[41] Thus, if an abortion-restrictive state attempts to gather information to prosecute an out-of-state abortion provider, it may be thwarted by shield laws in the provider's home state.

Some of these shield laws may seek to cover telemedicine abortions for patients located in other states. For example, Massachusetts's shield law applies "regardless of the patient location."[42] Such telemedicine shield laws would directly conflict with other states' abortion restrictions. It is not yet clear how these conflicts will play out in practice, or whether a telemedicine provider can be held liable if they violate the laws of an abortion-restrictive state but are protected by an abortion-supportive state's shield laws. As a result, some abortion rights advocates have cautioned against telemedicine shield laws that provide "false assurances" to providers.[43]

Many U.S.-based telemedicine providers have responded to this patchwork of state laws by limiting abortion services to states where remote care for medication abortion is legal. For instance, Abortion on Demand (AOD), an online medication abortion care provider, uses the patient's IP address to verify that the patient is in a state that allows telemedicine abortions.[44] If the IP address shows a location different from the one provided by the patient, then the patient is asked to provide in-state identification.[45] Other

review article. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023) [hereinafter Cohen et al., *New Abortion Battleground*].

40 *See* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws*, 2 NEW ENG. J. MED. EVID., Mar. 28, 2023, at 2–4 (describing general features of abortion shield laws).

41 Cohen et al., *New Abortion Battleground*, *supra* note 39, at 47–48.

42 *Id.* at 95.

43 Emily Bazelon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html.

44 Cohen et al., *New Abortion Battleground*, *supra* note 39, at 17 (citing a telephone interview with the founder of AOD).

45 *Id.*

providers ask the patient to provide a shipping address in a state where medication abortion is legal.[46]

However, providers may still be able to provide abortion access to patients in restrictive states. First, patients living in abortion-restrictive states can travel to a state that allows telemedicine abortion care to have their telemedicine appointment and take the abortion medication there.[47] Of course, even limited out-of-state travel could be prohibitively time-consuming and costly for many patients. However, the distance to a state border could be significantly less than the distance to a brick-and-mortar clinic, and patients would still be able to take advantage of reduced costs, more flexible appointment times, and increased privacy.

Moreover, some providers are willing to defy state laws to provide remote abortion care. The Massachusetts Medication Abortion Access Project, for example, works with clinicians licensed in Massachusetts to mail abortion medication to any address in the United States.[48] Aid Access, a European, online-only organization, allows doctors in Europe and abortion-supportive states with shield laws to prescribe mail pills directly to patients in abortion-restrictive states.[49] An analysis published in the Journal of the American Medical Association found that requests to Aid Access for medication abortions spiked after the *Dobbs* opinion was leaked and again after it was formally announced, with the largest increases coming from abortion-restrictive states.[50] The general counsel for the National Right to Life Committee has conceded that state laws are unlikely to reach this activity because the organization is based overseas.[51]

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46 *Id.*

47 *See* Chong et al., *supra* note 16, at 47 (finding that a small number of participants in a telemedicine abortion study traveled across state lines to access care in a less restrictive state); Farah Yousry, *Telemedicine Abortions Just Got More Complicated for Health Providers*, NPR (Sept. 26, 2022), https://perma.cc/K8RJ-9SWE (describing a provider's experience with a patient who drove several hours outside her home state to have a telemedicine appointment from her car).

48 *The MAP*, CAMBRIDGE REPROD. HEALTH CONSULTANTS, https://www.cambridgereproductivehealthconsultants.org/map.

49 Caroline Kitchener, *Blue-State Doctors Launch Abortion Pill Pipeline into States with Bans*, WASH. POST (July 19, 2023), https://perma.cc/V5KE-XYVW.

50 Abigail R.A. Aiken, Jennifer E. Starling & James G. Scott, *Requests for Self-Managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After the* Dobbs v. Jackson Women's Health Organization *Decision*, 328 JAMA 1768, 1768–69 (2022).

51 David Ingram, *A Dutch Doctor and the Internet Are Making Sure Americans Have Access to Abortion Pills*, NBC NEWS (July 7, 2022), https://perma.cc/ZQ3Y-8R7D.

Finally, even patients in abortion-restrictive states who cannot travel can and do take steps to circumvent state law. Telemedicine providers ask patients to provide a mailing address or preferred pharmacy location, but abortion activists have advised patients to use mail forwarding or borrow a friend or family member's mailing address in another state.[52] Plan C, an organization that helps women find abortion medication, has detailed instructions on its website for using mail forwarding to obtain abortion pills.[53] If a provider relies on IP addresses to verify location, patients can use a virtual private network (VPN) and proxy-server services to change the IP address that the provider sees.[54] As a result, telemedicine providers may not be able to detect when patients obfuscate their locations.[55]

II. THE EVOLUTION OF THE DORMANT COMMERCE CLAUSE

When telemedicine abortions occur wholly or partially outside a state's borders, it is not clear whether that state can constitutionally regulate them without violating the Dormant Commerce Clause. This Part provides background on the Dormant Commerce Clause. Part II.A summarizes the tiers of the Court's Dormant Commerce Clause jurisprudence, including the now-extinct extraterritoriality principle. Part II.B elaborates the criticism that the doctrine has faced from scholars and judges. Finally, Part II.C turns to *National Pork,* the Court's most recent Dormant Commerce Clause case. It discusses the Court's updates to the Dormant Commerce Clause jurisprudence and highlights the legal issues that remain unsettled after the decision. Finally, Part II.D describes the first application of the Dormant Commerce Clause to the abortion context after *National Pork*.

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[52] Christopher Rowland, *To Get Banned Abortion Pills, Patients Turn to Legally Risky Tactics*, WASH. POST (July 6, 2022), https://perma.cc/95EG-BSEZ.

[53] *Mail Forwarding and Other Options*, PLAN C, https://perma.cc/V7XZ-SZCD.

[54] *See Privacy*, ABORTION ON DEMAND (last updated Nov. 21, 2022), https://perma.cc/9KK6-SU7R (stating that AOD may refuse to provide services to patients who use VPN services to circumvent state law).

[55] *See* Rowland, *supra* note 52 (noting that some telemedicine providers have a "don't ask, don't tell" policy regarding patients in abortion-restrictive states). *But see Privacy*, *supra* note 54 (stating that AOD uses limited location tracking to identify patients who may be using VPN services to circumvent state law).

A. The Court's Dormant Commerce Clause Jurisprudence

The Commerce Clause states that "Congress shall have [the] Power . . . [t]o regulate Commerce . . . among the several States."[56] Although the Commerce Clause is written as an affirmative grant of authority to Congress, it has also been interpreted to encompass an implicit, or "dormant," limitation on states' authority to enact certain regulations that affect interstate commerce.[57] This implicit negative command, known as the Dormant Commerce Clause, is intended to prevent states from "retreating into economic isolation" or "jeopardizing the welfare of the Nation as a whole" by placing excessive burdens on the flow of commerce across state borders.[58]

The Commerce Clause allows Congress to regulate three general categories of activities: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce or the flow of goods across state lines; and (3) activities that substantially affect interstate commerce.[59] In *Gonzales v. Raich*,[60] the Court held that this third category applied to even purely intrastate activities that nevertheless have a "substantial economic effect on interstate commerce."[61] In that case, the Court upheld federal regulation of the intrastate use of medical marijuana grown purely for home consumption because that local noncommercial activity could impact the interstate market for marijuana.[62]

The Court's Dormant Commerce Clause doctrine is generally described as a two-tiered test.[63] The first tier prohibits protectionist state laws that are designed to benefit in-state economic interests by burdening out-of-state competitors.[64] If the challenged statute facially discriminates against interstate commerce, then it is subject to a "virtually per se rule of invalidity."[65] The statute will be upheld only if the state can show it serves a legitimate

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56 U.S. CONST. art. I, § 8, cl. 3.

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

58 *Id.* at 180.

59 Gonzales v. Raich, 545 U.S. 1, 16–17 (2005).

60 545 U.S. 1 (2005).

61 *Id.* at 17 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

62 *Id.* at 9, 17–19.

63 *See, e.g.*, Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 573 (1997).

64 *Nat'l Pork*, 143 S. Ct. 1142, 1153 (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008)).

65 City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

purpose that could not be adequately served by nondiscriminatory means.[66] "[T]his antidiscrimination principle lies at the 'very core' of [the Court's] Dormant Commerce Clause jurisprudence."[67] For example, in *Granholm v. Heald*,[68] the Court invalidated Michigan and New York statutes that allowed in-state wineries to sell directly to consumers but effectively mandated a three-tier distribution system for out-of-state wineries.[69] The Court reasoned that the statutes discriminated against interstate commerce because they gave in-state wineries easier access to consumers.[70]

Even if a statute regulates evenhandedly between in-state and out-of-state economic interests, it will fail under the second tier of the Dormant Commerce Clause if it imposes an undue burden on interstate commerce. The undue burden standard requires courts to determine whether the burden on interstate commerce "is clearly excessive in relation to the putative local benefits."[71] This balancing test emerged in *Pike v. Bruce Church, Inc.*,[72] a case in which the Court struck down an Arizona statute that required all cantaloupes grown commercially in Arizona to be packaged according to specific standards.[73] State officials prohibited the plaintiff company from transporting unpackaged cantaloupes to an out-of-state facility for packing and processing.[74] Although the statute was not facially discriminatory, the Court held that it unduly burdened interstate commerce because it would have required the plaintiff company to build and operate a $200,000 packing plant within the state.[75]

Confusingly, the Court has acknowledged that there is no clear line between the *Pike* balancing test and the antidiscrimination principle, because most cases that applied the *Pike* balancing test have involved facially neutral state regulations that were discriminatory in character or purpose.[76] Thus, the *Pike* undue

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66 New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

67 *Nat'l Pork*, 143 S. Ct. at 1153 (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 581 (1997)).

68 544 U.S. 460 (2005).

69 *Id.* at 466–67.

70 *Id.* at 466.

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

72 397 U.S. 137 (1970).

73 *Id.* at 138.

74 *Id.*

75 *Id.* at 145.

76 Gen. Motors Corp. v. Tracy, 519 U.S. 278, 289 n.12 (1997); *see also Nat'l Pork*, 143 S. Ct. at 1157 (plurality opinion) ("[I]f some of our cases focus on whether a state law

burden standard is most often used to ferret out more subtle forms of discrimination that the per se discrimination rule would miss. However, the Court has also invoked the *Pike* balancing test to invalidate genuinely nondiscriminatory state legislation "where such laws undermined a compelling need for national uniformity in regulation."[77]

Until recently, the Dormant Commerce Clause was also thought to contain a third prohibition against state laws whose "practical effect . . . is to control conduct beyond the boundaries of the State."[78] This extraterritoriality principle was articulated in three of the Court's twentieth-century cases. In *Baldwin v. G.A.F. Seelig, Inc.*,[79] the Court invalidated a New York statute that set minimum prices for milk purchased from producers and prohibited the in-state sale of milk purchased out of state if the milk was purchased for a lower price.[80] Because Vermont dairy farmers produced milk at a lower cost than their New York counterparts, the price-control statute effectively eliminated their competitive advantage.[81] Justice Benjamin Cardozo reasoned that the statute violated the Dormant Commerce Clause because it effectively placed an indirect customs duty on milk imported from other states.[82]

The Court continued to build on Justice Cardozo's reasoning in its later cases. First, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[83] it struck down a New York statute requiring liquor distillers to affirm that their in-state prices were no higher than their out-of-state prices.[84] Finally, in *Healy v. Beer Institute, Inc.*,[85] the Court struck down another price-affirmation

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discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose."); *id.* at 1165–66 (Sotomayor, J., concurring in part) ("*Pike*'s balancing and tailoring principles are most frequently deployed to detect the presence or absence of latent economic protectionism.").

77 *Gen. Motors Corp.*, 519 U.S. at 289 n.12.

78 Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)). The Court ultimately rejected this principle in *National Pork*. *See infra* Part II.B.

79 294 U.S. 511 (1935).

80 *Id.* at 519.

81 *Id.* at 520.

82 *Id.* at 521 ("Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.").

83 476 U.S. 573 (1986).

84 *Id.* at 575–76.

85 491 U.S. 324 (1989).

statute that regulated prices charged by out-of-state beer merchants.[86] Justice Harry Blackmun grounded the extraterritoriality principle in two driving principles: (1) the Constitution's "special concern" with maintaining a united national economy and (2) respect for state autonomy.[87] If every state could directly regulate commerce outside its borders, he reasoned, the practical result would be inconsistent, overlapping legislation.[88] Guided by those concerns, Justice Blackmun characterized the Commerce Clause as broadly precluding "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."[89]

B. Criticism of the Dormant Commerce Clause

Prior to *National Pork*, members of the Court had long criticized the lack of clarity in Dormant Commerce Clause jurisprudence, particularly the extraterritoriality principle. Before joining the Supreme Court, then-Judge Neil Gorsuch described the extraterritoriality principle as "the least understood" and "certainly the most dormant" strand of the Court's Dormant Commerce Clause jurisprudence.[90] Indeed, the Court had not applied the extraterritoriality principle to invalidate a state law in over three decades,[91] and its subsequent Dormant Commerce Clause cases signaled reluctance to expand the extraterritoriality argument beyond the facts of *Baldwin*, *Brown-Forman*, and *Healy*.[92] Judges and commentators began to question whether the test still

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86 *Id.* at 332.

87 *Id.* at 335–36.

88 *Id.* at 336.

89 *Id.*

90 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).

91 The last case in which the Court invalidated a state law under the extraterritoriality principle was *Healy* in 1989. The last case that explicitly applied the extraterritoriality principle was *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003). Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1093 nn.37–38 (2022).

92 In 2003, the Court declined to invalidate Maine's prescription-drug subsidy program under the extraterritoriality principle. *Pharm. Rsch. & Mfrs.*, 538 U.S. at 669. The program required any drug manufacturer whose drugs were sold in Maine to offer a rebate to the state that would be used to subsidize costs for uninsured residents. *Id.* Out-of-state manufacturers alleged that the statute was per se invalid under *Baldwin*, *Brown-Forman*, and *Healy* because it would reduce the revenue they received on out-of-state sales. Reply Brief of Petitioner, Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) (No. 01-188). The Court reasoned that the Maine statute was distinguishable and suggested that the extraterritoriality principle was limited to price-control or price-affirmation statutes. *Pharm. Rsch. & Mfrs.*, 538 U.S at 669.

had any contemporary relevance.[93] Some scholars argued that the extraterritoriality principle should be subsumed under either the antidiscrimination test or *Pike* balancing.[94] This conclusion was further strengthened by the Court's declaration in a 2018 case that its Dormant Commerce Clause precedents rest upon "two primary principles": the antidiscrimination principle and the *Pike* undue burden test.[95]

Scholars and judges have also questioned the justifications for the *Pike* prong of the Dormant Commerce Clause. Justice Antonin Scalia famously criticized the *Pike* undue burden test on the grounds that balancing the costs and benefits of nondiscriminatory laws is a legislative, not judicial, task.[96] Justice Clarence Thomas has gone further and argued that the Court should completely abandon its Dormant Commerce Clause jurisprudence because the doctrine is "unmoored from any constitutional text."[97]

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[93] Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) (describing the extraterritoriality principle as "a relic of the old world with no useful role to play in the new"); *see also* Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 421 (2013) (arguing that the notion of an extraterritorial inquiry is an "abandoned nineteenth-century relic"); Brandon Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 990–1004 (2013) (analyzing the "demise" of the extraterritoriality principle). *But see* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 502 (2016) (arguing that the extraterritoriality principle serves an important purpose of limiting burdens on interstate commerce that do not arise from economic protectionism); *id.* at 526 (arguing that the demise of the extraterritoriality principle had been "greatly exaggerated").

[94] *See, e.g.*, Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 (2001) (arguing for an interpretation of the extraterritoriality principle that would effectively fold it into *Pike* balancing); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 920 (2002) (arguing that the rule against extraterritoriality should be understood as applying to only protectionist state statutes).

[95] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018).

[96] *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("Weighing the governmental interests of a State against the needs of interstate commerce is . . . a task squarely within the responsibility of Congress."); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part) ("While it has become standard practice . . . to consider . . . whether the burden on commerce imposed by a state statute 'is clearly excessive in relation to the putative local benefits,' such an inquiry is ill-suited to the judicial function and should be undertaken rarely if at all." (citations omitted)).

[97] *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting); *see also id.* ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."); Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part) ("[T]he negative Commerce Clause . . . cannot serve as a basis for striking down a state statute."). Justice Thomas has also echoed Justice Scalia's concern that the undue burden standard leads courts to make judgments more suited to legislatures. *Camps Newfound/Owatonna*,

Although their opinions did not sway a majority of the Court, some scholars have argued that the *Pike* prong is unworkable and should be abandoned alongside the extraterritoriality principle.[98] In short, leading up to *National Pork*, both extraterritoriality and *Pike* balancing—and possibly the Dormant Commerce Clause as a whole—seemed to stand on shaky ground.[99]

C. Revisiting the Dormant Commerce Clause in *National Pork*

The Court finally revisited its Dormant Commerce Clause jurisprudence in May 2023 in *National Pork*. The plaintiffs challenged a California law that banned the in-state sale of pork products "derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around."[100] Because the statute applied with equal force to both in-state and out-of-state pork producers who sold pork products in California, the plaintiffs did not allege that the statute discriminated against out-of-state economic interests.[101] Rather, they challenged the statute on the grounds that it violated the extraterritoriality principle and failed the *Pike* balancing test.[102] In response to the first argument, the Court unanimously struck down the extraterritoriality principle and declared that there was no per se rule against state legislation with extraterritorial effects.[103] The plaintiffs' second argument, however, proved more divisive and demonstrated a range of different views on the Court regarding the applicability of *Pike* balancing.[104]

1. The death of extraterritoriality.

In response to the plaintiffs' extraterritoriality argument, Justice Gorsuch, writing for the majority, rejected the claim that

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520 U.S. at 610 (Thomas, J., dissenting) (stating that the *Pike* balancing test "surely invites us, if not compels us, to function more as legislators than as judges").

98 *See* Kalen, *supra* note 93, at 423–24 (arguing in favor of abandoning *Pike*); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 453–59 (2008) (arguing that *Pike* balancing no longer fits the Dormant Commerce Clause doctrine).

99 *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1033 (9th Cir. 2021), *aff'd*, 143 S. Ct. 1142 (2023) ("While the dormant Commerce Clause is not yet a dead letter, it is moving in that direction.").

100 *Nat'l Pork*, 143 S. Ct. at 1149.

101 *Id.* at 1153.

102 *Id.* at 1153–54, 1157.

103 *Id.* at 1156.

104 *See supra* Part II.C.2.

the Dormant Commerce Clause includes an "almost per se" rule against state laws with extraterritorial effect.[105] First, he noted that the challenged laws in *Baldwin*, *Brown-Forman*, and *Healy* were all price-control or price-affirmation statutes that "amounted to simple economic protectionism" by requiring out-of-state economic interests to surrender competitive advantages against their in-state counterparts.[106] Thus, Justice Gorsuch reasoned that those cases could be explained by the antidiscrimination principle alone,[107] and that Justice Blackmun's expansive language in *Healy* was mere dicta that the plaintiffs had taken out of context.[108] Moreover, Justice Gorsuch argued that the extraterritoriality principle is no longer workable in a modern economy. In an interconnected national marketplace where many state laws—including tax, environmental, and libel laws—have the practical effect of controlling extraterritorial behavior, an overly expansive extraterritoriality principle would "cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers."[109]

The *National Pork* decision was decisive in striking down the extraterritoriality principle as an independent basis for invalidating state laws under the Dormant Commerce Clause. This portion of the opinion was effectively unanimous.[110]

2. A contentious application of *Pike*.

In contrast to the Court's consensus on extraterritoriality, the application of *Pike* balancing proved far more contentious and produced a tangle of opinions. Echoing Justice Scalia's skepticism toward *Pike* balancing, Justice Gorsuch (along with Justices

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[105] *Nat'l Pork*, 143 S. Ct. at 1156.

[106] *Id.* at 1153–56.

[107] *Id.* at 1154 (stating that each of these cases "typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests").

[108] *Id.* at 1155 (explaining that the language in *Healy* "appeared in a particular context and did particular work").

[109] *Id.* at 1156.

[110] Chief Justice Roberts's partial dissent, which four Justices joined, likewise rejected extraterritoriality as an independent prong of the Dormant Commerce Clause. *Nat'l Pork*, 143 S. Ct. at 1167 (Roberts, C.J., concurring in part and dissenting in part) ("I also agree with the Court's conclusion that our precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."); s*ee also* Brandon P. Denning, National Pork Producers Council v. Ross*: Extraterritoriality is Dead, Long Live the Dormant Commerce Clause*, 2023 CATO SUP. CT. REV. 23, 29 ("But if there *was* some life left in extraterritoriality, *National Pork Producers* delivered a unanimous *coup de grace*." (emphasis in original)).

Thomas and Amy Coney Barrett) argued that *Pike* should be limited to smoking out a discriminatory purpose or effect hiding in facially neutral statutes.[111] He noted that most of the Court's cases applying *Pike* have been in this vein.[112] In addition, a small number of cases have applied *Pike* to invalidate state laws that seemed genuinely nondiscriminatory because they burdened "instrumentalities of interstate transportation," such as interstate railroads and highways, which are core to interstate commerce.[113] Absent any covert discrimination or burden on an artery of transportation, he reasoned, courts are not empowered to strike down democratically enacted state laws regulating the "in-state sale of ordinary consumer goods."[114]

Moreover, there was an issue of institutional competence. Justice Gorsuch claimed that courts are not equipped to judge whether the statute's economic costs (increased compliance costs for pork suppliers) outweighed its noneconomic benefits (moral concerns for animal welfare and health interests).[115] Justice Barrett likewise argued that the plaintiffs' *Pike* claim should fail because the benefits and burdens of the California statute were "incommensurable" and not "capable of judicial balancing."[116] On this view, courts could probably never apply *Pike* balancing to any state law enacted under the state's police powers to protect public morals or health—regardless of the economic burden on out-of-state parties—because economic costs are incommensurable with health and moral benefits.

Other Justices, however, disclaimed this "fundamental reworking" of *Pike* balancing.[117] Justice Sonia Sotomayor acknowledged that challenges to genuinely nondiscriminatory statutes are "further from *Pike*'s core" of smoking out discriminatory purposes or effects, but she emphasized that "the Court today does not shut the door on all such *Pike* claims."[118] Chief Justice Roberts, in a separate opinion, agreed that *Pike* balancing is more

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111 *Nat'l Pork*, 143 S. Ct. at 1157 ("[T]he *Pike* line [of cases] serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose.").

112 *Id.* at 1157.

113 *Id.* at 1159 (plurality opinion).

114 *Id.*

115 *Id.* at 1159–60 (plurality opinion).

116 *Nat'l Pork*, 143 S. Ct. at 1166–67 (Barrett, J., concurring in part).

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

118 *Id.* at 1166 (Sotomayor, J., concurring in part).

than a backstop for detecting discrimination.[119] Moreover, Justice Sotomayor and Chief Justice Roberts both agreed that courts are capable of weighing disparate burdens and benefits and "are called on to do so in other areas of the law with some frequency."[120] Ultimately, then, Justice Gorsuch's ambivalence toward *Pike* balancing failed to sway a clear majority.

Even if *Pike* balancing was feasible, Justice Gorsuch argued that the plaintiffs had not met the threshold burden of pleading that the challenged law imposed "substantial burdens" on interstate commerce.[121] The *National Pork* plaintiffs alleged that the California statute would not only impose compliance costs on pig farmers but would also disrupt existing industry practices, upend longstanding animal husbandry practices, and lead to worse health outcomes for animals across the country.[122] According to the plaintiffs, the interstate pork market was so interconnected, and California was so populous a state, that the regulation would require producers nationwide to comply with California's regulations.[123] Justice Gorsuch, however, pointed out that farmers had the option of either complying with the statute or withdrawing from the California market.[124] Because they had that choice, any increased costs resulting from the regulation were compliance costs and therefore not cognizable under *Pike*.[125] Justice Gorsuch did not expressly say what cognizable noncompliance costs would look like, but he suggested these might include increased costs to out-of-state consumers.[126] Justice Sotomayor also agreed that the plaintiffs failed to meet this threshold burden, although she did not elaborate on why.[127]

Chief Justice Roberts and Justice Barrett disagreed. First, the Chief Justice pointed out that the "sweeping extraterritorial effects" on out-of-state farmers, while no longer a per se invalidation, are still relevant to the *Pike* analysis.[128] Moreover, the Chief Justice also argued that the less easily quantifiable consequences

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[119] *Id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part).

[120] *Id.* at 1166 (Sotomayor, J., concurring in part); *see Nat'l Pork*, 143 S. Ct. at 1168–69 (Roberts, C.J., concurring in part and dissenting in part) (stating that such judicial balancing is possible and sometimes unavoidable).

[121] *Id.* at 1161 (plurality opinion).

[122] *Id.* at 1170–71 (Roberts, C.J., concurring in part and dissenting in part).

[123] *Id.* at 1170.

[124] *Id.* at 1161–62 (plurality opinion).

[125] *Nat'l Pork*, 143 S. Ct. at 1162–63 (plurality opinion).

[126] *Id.*

[127] *Id.* at 1166 (Sotomayor, J., concurring in part).

[128] *Id.* at 1170 (Roberts, C.J., concurring in part and dissenting in part).

of compliance—worse health outcomes for the animals and the upending of longstanding industry traditions[129]—still amounted to "economic harms" to the interstate market and were thereby cognizable under *Pike*.[130]

Although the Court ultimately rejected the plaintiffs' *Pike* argument, nearly every opinion did so on different grounds. As such, *National Pork* seems to stand for a range of different models of the *Pike* balancing test. Consider how each model would apply to an example statute: In response to popular concerns about the dangers of nonorganic produce, a state legislature decides to ban all nonorganic oranges from being sold within the state. The statute will impose higher costs on out-of-state orange producers who must come into compliance and in-state consumers who will pay higher prices for their oranges. Moreover, it will likely require producers to plant new organic orange groves, which will disrupt existing planting practices and result in greater crop loss from pests.

On the narrowest view, endorsed by Justice Gorsuch, *Pike* should apply to nondiscriminatory laws only when the challenged statute has commensurable burdens and benefits. Even then, plaintiffs must meet the demanding threshold requirement of showing a substantial burden on interstate commerce that excludes avoidable compliance costs and noneconomic harms. The orange statute fails both requirements. First, the statute's economic costs on producers and consumers are incommensurable with its health benefits. Second, the statute likely does not impose a substantial burden on interstate commerce. The increased costs for producers are merely compliance costs, and disruption to industry practices and increased crop loss are likely noneconomic, incognizable harms.

At the other end of the spectrum is the most expansive reading, endorsed by the Chief Justice. This model would permit courts to engage in *Pike* balancing even when the legislation involves economic burdens and noneconomic benefits. Moreover, it would allow plaintiffs to claim a broader range of harms to meet the substantial burden requirement, including compliance costs and derivative market harms that are difficult to quantify. Under this model, the orange statute could be analyzed under *Pike*. The

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129 *Id.*

130 *Nat'l Pork*, 143 S. Ct. at 1171.

fact that it requires a court to weigh economic costs against noneconomic health benefits would not be fatal. Moreover, Chief Justice Roberts would consider the disruption to industry practices and crop loss to be cognizable harms to the interstate market. If enough out-of-state producers faced these consequences of compliance, then these harms would constitute a substantial burden on interstate commerce.

Finally, there are two intermediate approaches, introduced by Justices Sotomayor and Barrett, that borrow from both extremes. Justice Sotomayor would allow courts to weigh economic burdens against noneconomic benefits in *Pike* balancing. However, she would impose the more demanding threshold requirement outlined by Justice Gorsuch. Justice Barrett would disavow *Pike* when the burdens and benefits are incommensurable but adopt a more lenient substantial-burden threshold requirement.

In short, *National Pork* did little to clarify exactly how and under what conditions lower courts should apply *Pike*. This ambiguity may raise concerns about uncertain legal outcomes, but it also leaves room for judges to adapt the Dormant Commerce Clause to new contexts and problems.

D. One District Court's Application of the Dormant Commerce Clause to Abortion Restrictions Post-*National Pork*

As of April 2024, only one federal district court has applied the Dormant Commerce Clause to abortion regulations following *National Pork*. In *GenBioPro, Inc. v. Sorsaia*,[131] the district court evaluated West Virginia's Unborn Child Protection Act[132] (UCPA), which outlawed all abortions, including medication abortions, with limited exceptions.[133] The court noted that because the UCPA did not discriminate against out-of-state providers, *National Pork* foreclosed any argument based on the extraterritoriality principle. Instead, the case turned on whether the UCPA failed the *Pike* balancing test.[134]

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[131] 2023 WL 5490179 (S.D. W. Va. Aug. 24, 2023), *appeal docketed*, No. 23-02194 (4th Cir. Nov. 15, 2023).

[132] 2023 W. Va. Acts 2547 (codified at W. VA. CODE § 16-2R (2023)).

[133] *Id.*

[134] *GenBioPro*, 2023 WL 5490179, at *11 ("[T]his Court finds that to whatever extent the Fourth Circuit's dormant Commerce Clause jurisprudence employed [the extraterritoriality principle], it has been abrogated by *National Pork*."); *id.* at *12 (noting that the plaintiff declined to assert that the UCPA was "motivated by economic protectionism").

The plaintiff, a mifepristone manufacturer, argued that the UCPA failed the *Pike* test because (1) it concerned an area where there is a compelling need for national uniformity; (2) it functionally banned a product for its indicated use; and (3) it inflicted "derivative harms" on the health and safety of pregnant West Virginians and the national market.[135] The court rejected the first argument on the ground that states have traditionally exercised authority in regulating health and medicine.[136] Regarding the second argument, the court believed that *National Pork* "put to rest any debate" over whether states may enact product bans under their police powers to regulate health and morality by upholding California's pork-product regulation.[137] Finally, while the court recognized that the UCPA caused "substantial derivative harms to pregnant West Virginians," it held those harms were not cognizable under *Pike* balancing because they were not primarily economic in nature.[138]

The court also suggested that the plaintiff would not have met the threshold burden for the *Pike* inquiry because the burden on interstate commerce was less than that alleged by the *National Pork* plaintiffs.[139] However, the court acknowledged that it was "unclear what exactly a party would need to do to meet the threshold" from the fractured opinions in *National Pork*.[140]

The court did allow the plaintiff's preemption challenge to the statute's restriction on prescribing abortion medication via telemedicine to proceed.[141] However, the court did not opine on whether the telemedicine provision specifically violated the Dormant Commerce Clause. The case has been appealed to the Fourth Circuit, and it remains to be seen whether the decision will result in authoritative precedent.

III. A PATH FORWARD: WHY TELEMEDICINE ABORTION RESTRICTIONS MAY VIOLATE THE DORMANT COMMERCE CLAUSE

The previous Part established that the *National Pork* decision failed to provide clear guidance on when and how lower federal courts should apply *Pike* balancing. This Part argues that

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135 *Id.* at *12.
136 *Id.*
137 *Id.* at *13.
138 *GenBioPro*, 2023 WL 5490179, at *14.
139 *Id.* at *15.
140 *Id.*
141 *Id.* at *10–11.

this lack of clarity presents a valuable opportunity. Because *National Pork* does not compel any one model of how to apply *Pike*, courts can be flexible in applying *Pike* balancing to new contexts. Under the model of *Pike* balancing endorsed by Chief Justice Roberts, telemedicine abortion restrictions likely place an undue burden on interstate commerce.

Part III.A evaluates telemedicine abortion restrictions under the antidiscrimination principle and concludes that they likely do not discriminate against interstate commerce. Part III.B articulates the argument that telemedicine abortion restrictions place a substantial burden on interstate commerce that meets the threshold requirement for *Pike* balancing. Part III.C argues that this burden clearly outweighs the putative local benefits served by these statutes. Finally, Part III.D discusses whether telemedicine abortion restrictions violate the Dormant Commerce Clause because they impede an artery of interstate commerce: the internet.

A. Telemedicine Abortion Restrictions Do Not Violate the Antidiscrimination Principle

Courts are unlikely to find that telemedicine abortion restrictions discriminate against interstate commerce. State abortion restrictions are generally facially neutral in that they do not explicitly discriminate against in-state versus out-of-state providers.[142] A ban applies evenhandedly to in-state and out-of-state interests; in a state with an abortion ban, a telemedicine provider cannot provide abortion care regardless of where it is located.

In addition, courts are unlikely to find that restrictions on remote abortion care are discriminatory in intent or effect. Telemedicine abortion restrictions are not primarily motivated by discrimination against out-of-state abortion providers. Even if there was evidence of a discriminatory purpose (perhaps in the legislative history), an abortion-restrictive state could point to a multitude of other, nondiscriminatory rationales, including the state's interest in promoting a specific brand of morality, protecting patients from substandard healthcare, or even safeguarding against telemedicine fraud.[143]

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[142] *See, e.g.*, IDAHO CODE ANN. § 18-623(3) (West 2023) (stating that it is not an affirmative defense to the state's abortion ban that the provider was located out of state).

[143] *See* Miranda Hooker, Allison DeLaurentis, Sharon R. Klein & Jason Kurtyka, *Fraud Emerges as Telehealth Surges*, WHITE COLLAR CRIME COMM., AM. BAR. ASS'N. (2021), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2021/telehealth_fraud.pdf.

A plaintiff could argue that these restrictions are discriminatory in effect because the vast majority of telemedicine abortion providers are located outside abortion-restrictive states. An in-person visit requirement, for instance, disproportionately impacts out-of-state telemedicine providers because it effectively guarantees that patients can seek care only from nearby, in-state providers. Therefore, these restrictions could be an insidious means of shifting business from out-of-state to in-state providers.

In 2015, telemedicine providers made a similar argument when challenging the Texas Medical Board's restriction requiring an in-person examination before prescription of a dangerous drug or controlled substance. The providers argued that although the regulation was facially neutral, it still discriminated against physicians located outside of Texas in its "practical effect and design."[144] The district court declined to dismiss the providers' overall Dormant Commerce Clause claim, although it did not clearly state whether the decision turned on the plaintiffs' antidiscrimination claim or *Pike* claim.[145] The medical board later changed its regulations, and the lawsuit was never resolved on its merits. Still, that the district court allowed the Dormant Commerce Clause claim to move forward suggests that courts may be open to the argument that restrictions on telemedicine care facially discriminate against interstate commerce.

The Court's precedents, however, establish that disparate impact on out-of-state businesses alone does not violate the Dormant Commerce Clause. In *CTS Corp. v. Dynamics Corp.*,[146] the Court considered Indiana state laws hindering hostile takeovers of Indiana corporations.[147] Even though, in practice, most hostile tender offers were made by out-of-state entities,[148] the Court reasoned that the statute did not discriminate against interstate commerce because it imposed the same burden on in-state and out-of-state offerors.[149] Thus, a court may determine that absent stronger evidence of discriminatory intent, a telemedicine abortion restriction that applies evenhandedly to in-state and out-of-state healthcare providers does not violate the antidiscrimination principle. The impact of abortion restrictions on out-

144 Teladoc, Inc. v. Tex. Med. Bd., 2015 WL 8773509, at *11 (W.D. Tex. Dec. 14, 2015).
145 *Id.* at *12.
146 481 U.S. 69 (1987).
147 *Id.* at 72–75.
148 *Id.* at 88.
149 *Id.*

of-state providers may still be relevant in showing an undue burden on interstate commerce under *Pike*, but it is unlikely to trigger the antidiscrimination principle's rule of per se invalidity.

B. Telemedicine Abortion Restrictions May Fail the Undue Burden Test

The *National Pork* opinions signaled some Justices' ambivalence toward the *Pike* prong of the Dormant Commerce Clause. Justice Gorsuch adopted a narrower view of *Pike* balancing that would apply only to statutes that (1) involve commensurable burdens and benefits and (2) impose a substantial burden on interstate commerce independent of compliance costs and noneconomic harms. If courts follow this narrow model, they may decline to apply the undue burden standard to telemedicine abortion restrictions at all. Both of Justice Gorsuch's concerns with *Pike* balancing are implicated in the telemedicine abortion context. First, as previously discussed, state abortion restrictions do not serve to conceal some discriminatory impact or design. Moreover, states can argue that an abortion statute, like California's animal welfare statute, involves costs and benefits that are incommensurable and not capable of judicial balancing. On one hand, these statutes will increase costs and potentially chill supply of telemedicine abortion services; on the other hand, they will vindicate citizens' moral interests in regulating abortions. In addition, it is not clear whether the narrow model of the *Pike* balancing test would consider the costs of these restrictions to be a sufficiently substantial burden on interstate commerce.

On the other hand, a court adopting Chief Justice Roberts's more expansive view could find that state regulation of telemedicine abortions does implicate *Pike* balancing. Abortion rights advocates can make a novel argument that courts should adopt this view and apply *Pike* balancing to invalidate telemedicine abortion restrictions under the Dormant Commerce Clause.

1. Internet regulations are likely to impose a significant burden on interstate commerce.

Courts in the early days of the internet recognized that state internet regulations are more likely than other economic regulations to violate the Dormant Commerce Clause. For example, in

American Booksellers Foundation v. Dean[150] and *ACLU v. Johnson*,[151] the Second and Tenth Circuits struck down Vermont's and New Mexico's obscenity laws prohibiting the online dissemination of sexually explicit materials to minors.[152] Those courts reasoned that due to the lack of geographic boundaries on the internet, a person outside the state who posted sexually explicit content online could not prevent minors inside the state from accessing it.[153] Therefore, the statutes required individuals outside of Vermont and New Mexico to comply with those states' laws.

However, the role of the internet has expanded significantly since those cases were decided. Given the volume of commerce conducted over the internet today, it may not be prudent for courts to except all online transactions from state regulation. The Court seemed to signal a move in this direction in a more recent Dormant Commerce Clause case. In *South Dakota v. Wayfair, Inc.*,[154] the Court held that a state could impose taxes on online sales by out-of-state businesses without violating the Dormant Commerce Clause.[155] The Court rejected a rule requiring physical presence within the state as "removed from economic reality."[156] Because the "[i]nternet's prevalence and power have changed the dynamics of the national economy," the Court reasoned, physical presence within a state has become nearly impossible to define.[157] Therefore, much like brick-and-mortar businesses that operate across multiple states, online businesses are expected to incur costs from compliance with varying state regulations. Such standard compliance costs are not sufficient to constitute an undue burden under *Pike*.

Moreover, recent developments in internet technology may enable internet service providers, including telemedicine providers, to control where their products and services are made available. Professors Jack Goldsmith and Eugene Volokh have argued that courts should recognize state discretion to regulate internet

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150 342 F.3d 96 (2d Cir. 2003).

151 194 F.3d 1149 (10th Cir. 1999).

152 *Dean*, 342 F.3d at 100; *Johnson*, 194 F.3d at 1152.

153 *Dean*, 342 F.3d at 103 ("A person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material.").

154 138 S. Ct. 2080 (2018).

155 *Id.* at 2099–2100.

156 *Id.* at 2092.

157 *Id.* at 2098.

services by upholding state internet regulations when the internet service provider could control the distribution of its product or content by geography.[158] For instance, courts have upheld state bans on internet gambling because online casinos can exclude individuals who provide home addresses located in states where internet gambling is illegal.[159]

A plaintiff could argue that telemedicine abortion restrictions are analogous to the obscenity statutes in *Dean* and *Johnson* because telemedicine providers cannot effectively prevent patients in abortion-restrictive states from traveling out of state or masking their locations to access remote abortion care. Thus, when an abortion-restrictive state prohibits abortions delivered via telemedicine, it forces abortion providers across the nation to comply with the state's law and imposes a substantial burden on interstate commerce.

States may argue that, like online casinos, abortion providers can ask patients to provide mailing or home addresses and thereby exclude individuals living in states that restrict telemedicine abortions. Among online service providers, however, telemedicine abortion providers have particular difficulty determining whether patients are located in states where remote abortion care is legal. Even providers who make efforts to verify patient location can be misled by patients who travel out of state for their appointments, or use VPN services or mail forwarding to mask their locations.[160]

Of course, internet casinos and other internet services also need to address law-evading consumers. However, it is reasonable to hypothesize that this evasion imposes a significantly greater burden on telemedicine abortion providers because the incidence of evasion will likely be uniquely high for telemedicine abortions. Because childbirth has such a profound effect on an individual's future physical, emotional, and economic health, individuals have greater incentives to evade state restrictions to obtain abortion care than to procure other online services. Recent research from the Guttmacher Institute shows that nearly one in five abortion patients now travel across state lines to seek abortion care, largely driven by abortion bans and restrictions in their

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158 Goldsmith & Volokh, *supra* note 91, at 1094.

159 Rousso v. State, 239 P.3d 1084, 1090 (Wash. 2010) ("[T]hose businesses can easily exclude Washingtonians. If an individual during registration marks his or her location as the state of Washington, the gambling web site can end the registration there.").

160 *See infra* Part I.B.

own states.[161] Given that mail forwarding and VPN services are less costly than out-of-state travel, and that they are already advertised by some abortion activists,[162] there is good reason to believe that women will also turn to these methods to circumvent state restrictions on telemedicine abortions.

More empirical research is needed to determine whether and to what extent this hypothesis bears out in practice. However, evidence of greater evasion would offer a compelling argument for distinguishing the telemedicine abortion market from other online markets. The burden on a particular interstate market should be assessed in light of the practical realities that are unique to the telemedicine abortion context.

An abortion-restrictive state may argue that this reasoning is inherently circular—essentially asking courts to decide the law based on how often people evade the law. However, the incidence of evasion is directly relevant to the burden that abortion restrictions impose on the interstate market. Telemedicine providers who unknowingly provide care for patients in abortion-restrictive states could face significant civil and criminal liability, as well as extralegal licensure consequences. These penalties are significant enough that telemedicine providers have incentives to comply with a state's abortion restrictions even if they do not intend to provide care to patients within that state. A provider placed in this situation may determine that it would be better to close its telemedicine practice than to risk incurring civil or criminal liability or having its license revoked, which would preclude it from providing care altogether. As a result, a state ban on telemedicine abortions would likely have a chilling effect on providers across the country.

As the supply of telemedicine abortion care declines, the remaining telemedicine providers and brick-and-mortar clinics will need to support an increase in demand for their services. If they are not able to meet that demand, there will likely be broader consequences for the interstate market, such as longer wait times and compromised quality of care at brick-and-mortar providers.[163]

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161 Kimya Forouzan, Amy Friedrich-Karnik & Isaac Maddow-Zimet, *The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, GUTTMACHER INST. (Dec. 7, 2023), https://perma.cc/QB9K-QJ7B.

162 *See supra* note 53 and accompanying text.

163 After *Dobbs*, wait times at abortion clinics in abortion-legal states increased significantly due to more patients traveling from abortion-restrictive states. *See* Laura Ungar, *It's Taking Longer to Get an Abortion in the US. Doctors Fear Riskier, More Complex Procedures*, AP NEWS (Dec. 9, 2023), https://perma.cc/XV9H-XMTW; Melissa Quinn,

Increased wait times are especially impactful in the abortion context because delayed care can lead to later-term, more complicated abortion procedures—or preclude a patient from obtaining care altogether if she passes the state's gestational limit.[164] Although these effects would likely be greatest in states that border abortion-restrictive states, such as Illinois and New Mexico,[165] the telemedicine market is sufficiently interconnected that a single state's abortion restriction carries implications for providers anywhere in the nation.[166] These are precisely the types of sweeping extraterritorial effects that Chief Justice Roberts argued are cognizable under *Pike* and constitute a substantial burden on interstate commerce.[167]

When analyzing the burdens of abortion restrictions under *Pike*, it seems strange that personal, noneconomic costs, which are arguably the most important costs to women who are denied abortion access, are left off the scale altogether. Most abortion litigation is grounded in the Due Process Clause of the Fourteenth Amendment and asks whether abortion restrictions violate women's substantive constitutional rights. As a result, many people are accustomed to thinking first of the toll on the women whose bodies are regulated: the steep emotional and physical effects of forced childbirth, reduced financial stability, and decreased levels of educational attainment and labor force

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One Year After Roe v. Wade*'s Reversal, Warnings About Abortion Become Reality*, CBS NEWS (June 23, 2023), https://perma.cc/WD52-Y3EU (reporting that wait times at an Illinois clinic increased from two or three days to nearly three weeks, even after it expanded its staff and operating hours).

164 *See* DANIEL GROSSMAN, CAROLE JOFFE, SHELLY KALLER, KATRINA KIMPORT, ELIZABETH KINSEY, KLAIRA LERMA, NATALIE MORRIS & KARI WHITE, CARE POST-*ROE*: DOCUMENTING CASES OF POOR-QUALITY CARE SINCE THE *DOBBS* DECISION 15 (2023) (describing how delayed care resulted in one patient receiving a surgical rather than medication abortion, and another patient missing her opportunity to obtain an abortion because she passed the gestational limit).

165 Illinois borders five abortion-restrictive states (Missouri, Indiana, Kentucky, Iowa, and Wisconsin); New Mexico borders four (Oklahoma, Texas, Utah, and Arizona). *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://perma.cc/37MY-YQDM (last updated Apr. 8, 2024). A study by the Guttmacher Institute estimated that over 18,000 abortions in Illinois and over 8,000 abortions in New Mexico were provided to patients traveling from out of state in the first half of 2023. Forouzan et al., *supra* note 161.

166 *See Nat'l Pork*, 143 S. Ct. at 1170 (Roberts, C.J., concurring in part and dissenting in part) ("But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California.").

167 *Id.*

participation.[168] That is to say nothing of wider societal consequences, such as increased racial disparities in health and economic outcomes.[169]

A Dormant Commerce Clause challenge, on the other hand, is focused on a very specific type of burden: economic burden on interstate commerce. Moreover, Justice Gorsuch's plurality opinion claims that even economic costs to in-state consumers, such as higher in-state prices, are not cognizable under *Pike* balancing because those consumers are part of the electorate that passed the law and could, in theory, overturn it through democratic means.[170] A court may still be able to consider the economic costs for women in other states where providers are strained by overdemand, but those effects are likely second order and more difficult to prove. Although the omission of these factors feels callous and not entirely satisfying, a focus on commercial burdens might present a better strategy to challenge state abortion restrictions given the current Court's open hostility to reproductive choice.

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[168] Lauren Hoffman, Osub Ahmed & Isabela Salas-Betsch, *State Abortion Bans Will Harm Women and Families' Economic Security Across the U.S.*, CTR. FOR AM. PROGRESS (Aug. 25, 2022), https://perma.cc/TBK5-AB85; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("[P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion . . . . The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

[169] Black, Latina, and Indigenous women are disproportionately impacted by obstacles to abortion access because they are more likely to have lower incomes and face racism in the healthcare system. Liza Fuentes, *Inequity in U.S. Abortion Rights and Access: The End of Roe is Deepening Existing Divides*, GUTTMACHER INST. (Jan 17, 2023), https://perma.cc/XN3Y-L92F. Moreover, research shows that Black and Indigenous women face disproportionate health risks when they become pregnant. The pregnancy-related mortality rates for Black and Indigenous women are over two and three times higher, respectively, than for white women. Latoya Hill, Samantha Artiga & Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), https://perma.cc/EJ6T-4CDN. As a result, abortion bans and restrictions will expose these groups to markedly higher risks of pregnancy-related complications and deaths. Finally, research shows that abortion access leads to greater increases in labor force participation and years of educational attainment for Black women. *See, e.g.*, David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RSCH. 503, 508–09 (2004); Jason M. Lindo, Mayra Pineda-Torres, David Pritchard & Hedieh Tajali, *Legal Access to Reproductive Control Technology, Women's Education, and Earnings Approaching Retirement*, 110 AM. ECON. ASS'N PAPERS & PROCEEDINGS 231, 233 (2020).

[170] *Nat'l Pork*, 143 S. Ct. at 1162–63 (citing United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007)).

2. State telemedicine abortion restrictions have limited benefits.

The burden that state legislation imposes on interstate commerce must also be weighed against its "putative local benefits."[171] In the context of telemedicine abortion restrictions, the burden on the interstate market outweighs the benefits within the state.

First, states have a recognized, legitimate interest in regulating abortion to protect the life of the mother and the potential life of the fetus.[172] A state could also argue that these interests are heightened in the telemedicine context, where regulations are necessary to ensure that patients receive adequate individualized care and do not become victims of fraud.[173]

However, the fact that a state regulation is justified by a compelling governmental interest is not necessarily dispositive. Some courts have also considered whether the statute actually confers those benefits. In *Johnson*, for example, the Tenth Circuit reasoned that although the state had a legitimate interest in protecting minors from sexually explicit content, the benefit from the challenged statute was "extremely small" because it would not reach the significant proportion of harmful content that originated overseas.[174]

A court could apply similar logic to find that state restrictions on telemedicine abortions confer little benefit. As with sexually explicit content, a significant number of telemedicine abortions are provided by overseas physicians and pharmacies, such as Aid Access.[175] This proportion will likely grow if states continue to restrict telemedicine abortions, as individuals seeking abortions will look more to foreign organizations not covered by state laws.

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171 *Pike*, 397 U.S. at 142.

172 *Dobbs*, 142 S. Ct. 2228 at 2284 (stating that abortion regulations may further a state's legitimate interest in "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" (citation omitted)); TEX. HEALTH & SAFETY CODE ANN. § 171.202 (West 2022) ("Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child.").

173 *See generally* Katrice Bridges Copeland, *Telemedicine Scams*, 108 IOWA L. REV. 69 (2022) (addressing fraud in the telemedicine industry).

174 194 F.3d at 1162.

175 Allison McCann, *Inside the Online Market for Abortion Pills*, N.Y. TIMES (Apr. 13, 2023), https://www.nytimes.com/interactive/2023/04/13/us/abortion-pill-order-online-mifepristone.html (estimating that fifty thousand abortion pills in the United States in the second half of 2022 were sourced from outside the U.S. healthcare system).

Moreover, a court may also consider whether restrictions on telemedicine abortions actually further the state's interest in protecting the health of pregnant women. Studies show that telemedicine abortions do not pose higher risks than abortions conducted with in-person visits.[176] Conversely, extensive research shows that bans and restrictions on abortions are associated with worse health outcomes for pregnant women, particularly in increased maternal mortality rates.[177] The *Pike* balancing test does not demand that courts apply this more demanding level of scrutiny when examining a statute's purported benefits, but it does not forbid it either.

3. Telemedicine abortions require nationally uniform regulation.

Although Justice Gorsuch argued in *National Pork* that the core of *Pike* balancing is rooting out covert discrimination, he acknowledged that some *Pike* cases have been motivated by "special concern with . . . the instrumentalities of interstate transportation," such as interstate highways and railways.[178] Courts and legal commentators in the early days of the internet argued that the internet is one such instrumentality that requires nationally uniform regulation.[179] This exception must be a narrow one; the Court "has only rarely held that the Commerce Clause itself preempts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of goods."[180] Still, one could argue that telemedicine does meet this minimum requirement, as it involves the transportation of physical medication across state lines. Moreover, there is a heightened need for uniform regulation in telemedicine abortions to avoid direct conflicts between abortion restrictions in abortion-restrictive states and shield laws in abortion-supportive states.

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176 *See supra* note 22 and accompanying text.

177 *See, e.g.*, Eugene Declercq, Ruby Baynard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, THE COMMONWEALTH FUND (Dec. 14, 2022), https://perma.cc/5SBN-3YAE (finding that abortion-restrictive states had higher maternal death rates and infant mortality rates than abortion-supportive states from 2018–2020).

178 *Nat'l Pork*, 143 S. Ct. at 1159 (plurality opinion).

179 *See, e.g.*, Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998); *Johnson*, 194 F.3d at 1162.

180 Exxon Corp. v. Governor of Md., 437 U.S. 117, 128 (1978).

An abortion-restrictive state would likely argue that history proves this argument false. States have taken differing approaches to abortion regulation throughout the nation's history, and that patchwork has proved (largely) workable. However, the rise of telemedicine threatens to disrupt that balance. As telemedicine abortions become more common, the incidence of abortions that occur across state lines—and resulting conflicts of state law—will increase dramatically.

Given the growing prominence of online marketplaces in people's everyday lives, however, courts will be cautious about creating a categorical rule that goods sold via the internet require national uniform regulation. One major concern is that it would be difficult to distinguish between telemedicine abortions and other politically contentious products, such as firearms.

IV. THE LIMITATIONS OF A DORMANT COMMERCE CLAUSE APPROACH TO ABORTION

Although there is a viable path to challenge telemedicine abortion restrictions under the Dormant Commerce Clause, this approach will likely draw opposition from both sides of the abortion debate. Antiabortion activists and proponents of judicial restraint will likely argue that this goes too far in limiting state police powers; abortion rights advocates may believe it does not go far enough to protect abortion access. This Part addresses some of these potential counterarguments and highlights the limitations of the approach.

One view is that allowing these Dormant Commerce Clause challenges would give courts too much freedom to strike down democratically enacted state legislation, especially since healthcare falls within the traditional sphere of state police powers. However, Dormant Commerce Clause challenges would be limited in scope. A Dormant Commerce Clause challenge will only be successful when the state seeks to regulate the behavior of patients and providers in a way that unduly burdens interstate commerce. A statute that only prohibits in-state providers from prescribing medication abortion, for instance, would likely be upheld because it would not force out-of-state providers to come into compliance. Similarly, a statute that only imposes liability on patients within the state that receive telemedicine abortion care likely would not impose a sufficient burden on the interstate market. Thus, a Dormant Commerce Clause challenge would not

reach cases of women who cannot afford out-of-state travel. Unfortunately, this is also the exact population for whom abortion access is most needed. If abortion advocates are most focused on expanding abortion access for those who need it most, then they will need to look outside the Dormant Commerce Clause.

Moreover, even if a Dormant Commerce Clause challenge is successful, states can turn to other means of restricting abortion access. If states cannot enforce their laws against out-of-state telemedicine abortion providers, they may shift toward nonstatutory means to prevent those providers from practicing. States regulate the practice of medicine through licensing boards, and a physician must obtain a license from a state's board to practice in that particular state.[181] These boards also oversee physicians' professional conduct and impose sanctions such as license modification, suspension, and revocation.[182] Lawsuits and complaints naming the provider as a defendant are typically reported to its licensing board and malpractice insurer.[183] Consequently, even if abortion-restrictive states cannot legally regulate an out-of-state provider, they can still report that provider to its licensing board in the hopes of affecting its license or malpractice insurance rates.

This is precisely the type of harm that abortion-supportive states have attempted to address using shield laws.[184] It is important to note, however, that shield laws cannot provide complete protection. For example, they cannot prevent a provider from losing her license to practice and provide other healthcare services in the abortion-restrictive state. They also cannot protect the provider from facing legal consequences if she travels to a state without shield laws. Ex ante, states may also be more selective in the licensing process to ensure they do not issue licenses to out-of-state providers who have provided abortion care or seem likely to do so in the future. In short, states can still exercise significant control over telemedicine abortions and other healthcare transactions through their licensure requirements.

Abortion activists may also oppose a Dormant Commerce Clause approach for an opposite reason: a Dormant Commerce Clause challenge does not do enough to protect abortion access.

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[181] Carmen E. Lewis, *My Computer, My Doctor: A Constitutional Call for Federal Regulation of Cybermedicine*, 32 AM. J.L. & MED. 585, 594 (2006).

[182] *Id.*

[183] Cohen et al., *New Abortion Battleground*, *supra* note 39, at 44.

[184] *See supra* Part I.B.

The Dormant Commerce Clause may prevent states from enforcing laws against out-of-state telemedicine providers, but it still allows states to regulate purely intrastate activity that does not implicate the interstate market. In particular, states can still impose civil and criminal liability on the individuals who seek, or assist others in seeking, telemedicine abortion care. For example, Texas's infamous, vigilante-style abortion law, the Texas Heartbeat Act[185] (commonly known as S.B. 8), allows any individual to sue any person who helps another obtain an abortion for $10,000 or more.[186] That law likely would not implicate the Dormant Commerce Clause because it does not impose consequences on the out-of-state telemedicine abortion providers that provide care to Texas residents. As a result, it would not force those providers to comply with the Texas law or have the requisite chilling effect on the interstate market.

Whether states should impose criminal, rather than civil, liability on women seeking abortions is an issue that has historically divided the antiabortion community.[187] However, some abortion-restrictive states seem to be moving in this direction. In April 2023, Idaho passed a statute imposing criminal penalties on any individual who helps a minor obtain a medication abortion outside the state.[188] At least one antiabortion politician has argued that patients in abortion-restrictive states who use mail forwarding to circumvent state laws should incur criminal penalties and fines.[189]

A Dormant Commerce Clause challenge could inadvertently push more states to adopt this approach, as states that cannot regulate out-of-state telemedicine providers will have to find other ways to regulate telemedicine abortion. Moreover, these individuals enjoy few protections from shield laws. A patient who

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[185] 2021 Tex. Gen. Laws 125 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2023)).

[186] *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208.

[187] *See* Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70, 71 (2015) ("The advent of medication abortion has further allowed some women to take matters into their own hands; however, doing so has exposed them to the risk of criminal prosecution."). *Compare* Amanda Stirone Mansfield, *Pro-Life Laws Exempt Women from Prosecution: An Analysis of Abortion Statutes in 27 States*, CHARLOTTE LOZIER INST. (Jan. 10, 2024), https://perma.cc/KQ3D-PDG7, *with* David A. Lieb & Geoff Mulvihill, *Missouri Lawmakers Propose Allowing Homicide Charges for Women Who Have Abortions*, AP NEWS (Dec. 8, 2023), https://perma.cc/5F2W-T6ZL.

[188] 2023 Idaho Sess. Laws 947 (codified at IDAHO CODE §§ 18-623, 18-8807 (2024)).

[189] *See* Rowland, *supra* note 52 (quoting Alabama state representative Andrew Sorrell).

travels to an abortion-supportive state for care must eventually return to her home state; a patient who used telemedicine to receive abortion medication without traveling never received the protection of shield laws to begin with.

Individual prosecutions are particularly concerning in the context of telemedicine abortions because virtual abortion care is much more likely to leave a digital trace for prosecutors to follow. Professors Aziz Huq and Rebecca Wexler have provided a detailed account of how prosecutors and civil plaintiffs in abortion-restrictive states can access many forms of personal data, such as those produced by period-tracking apps, Google searches, and GPS tracking, to identify violations of abortion bans.[190] A telemedicine abortion patient is even more susceptible to digital tracing because she will generate additional incriminating data whenever she schedules an appointment or communicates with a provider. Moreover, abortion-relevant data may not be sufficiently protected under existing information privacy statutes.[191]

A Dormant Commerce Clause challenge likely cannot resolve these concerns, but it does not need to. Abortion rights advocates have other legal avenues of tackling these problems. The Idaho statute, for instance, has been challenged as violating the constitutional rights to freedom of speech and interstate travel.[192] State shield laws can be key to preventing personal data from being used in legal proceedings against abortion seekers.[193] This Comment proposes that the Dormant Commerce Clause challenge is well tailored to address a specific issue in the abortion landscape: state restrictions that attempt to regulate the interstate market for telemedicine abortions. Abortion activists should continue the important work of bringing other legal challenges and influencing state legislation to protect broader access to abortion in a post-*Dobbs* world.

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[190] *See* Aziz Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice*, 98 N.Y.U. L. REV. 555, 572–87 (2023).

[191] *Id.* at 634–35 (stating that existing privacy statutes do not protect against warrants, subpoenas, and other forms of compulsory legal process).

[192] Matsumoto v. Labrador, 2023 WL 7386998, at *3–5 (D. Idaho Nov. 8, 2023) (denying a motion to dismiss the claim that the Idaho statute violates the First and Fourteenth Amendments).

[193] Huq & Wexler, *supra* note 190 at 634–43 (arguing that legislatures should enact evidentiary privileges for certain abortion data).

CONCLUSION

After *Dobbs*, abortion rights activists must look outside the Fourteenth Amendment's Due Process Clause for constitutional grounds to protect abortion access. Preserving access to telemedicine abortions will be key in facilitating access to abortion care, particularly for women living in abortion-restrictive states. This Comment argues that even after *National Pork*, the Dormant Commerce Clause provides a potential path to limit attempts by abortion-restrictive states to regulate telemedicine abortions outside their borders.

The Court may have abandoned extraterritoriality in *National Pork*, but many issues of Dormant Commerce Clause doctrine, particularly the *Pike* balancing test, remain unresolved. This ambiguity creates the opportunity for lower courts to adopt the expansive interpretation of *Pike*—one that is consistent with the Court's precedents and Chief Justice Roberts's opinion. Under this approach, state telemedicine abortions may impose an undue burden on interstate commerce in violation of the Dormant Commerce Clause. Because telemedicine abortion providers cannot reliably determine whether patients are located in abortion-restrictive states, abortion bans that affect out-of-state telemedicine providers could have a substantial chilling effect on providers across the nation and impose economic costs on the broader interstate market. Moreover, these costs clearly outweigh the limited actual benefits of these statutes in improving maternal health and preserving fetal life. Although more empirical research is needed to convince courts that these costs are real and not merely speculative, this argument presents a promising approach for abortion rights advocates to challenge abortion restrictions on novel grounds.

A Dormant Commerce Clause challenge does not guarantee unfettered access to telemedicine abortions nationwide. In particular, the Dormant Commerce Clause may not prohibit more moderate restrictions on telemedicine abortions. It cannot prevent abortion-restrictive states from imposing licensure penalties on providers that offer telemedicine abortion care, and it may even incentivize them to target restrictions toward the individual seeking an abortion, rather than the abortion provider. The Dormant Commerce Clause is only one of many tools that abortion rights advocates will have to wield to preserve reproductive rights in a post-*Dobbs* world.