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LAW REVIEW

"THE INTERJURISDICTIONAL ABORTION WARS HAVE ARRIVED"

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With the promulgation of *Dobbs v. Jackson Women's Health Org.*,[1] the United States Supreme Court eviscerated federal protection for a woman's right to exercise the difficult choice to abort her pregnancy. *Dobbs* represents a seismic shift in the law with gargantuan import and unforeseen implications for years to come. The unexpected consequences of the *Dobbs* decision unfold daily with troubling reverberations throughout our society. One consequence is that the removal of federal protection for a woman's right to choose to terminate a pregnancy has been supplanted with state laws that prohibit the provision of this specific medical service and serve to punish other citizens who seek to help women obtain healthcare within this realm.

I. THE STATES TAKE ADVANTAGE OF THE LACK OF FEDERAL PROTECTIONS BY CASTING A WIDER NET

Thus, we find ourselves in a time where state laws fill the void left by the removal of federal protection for a woman's right to choose with a wide range of prohibitions, penalties, and in some instances, the danger of criminal prosecution. For example, in Wisconsin, a law enacted in 1849 makes performance of an abortion a Class H felony punishable by six years in jail and a $10,000 fine for the

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[1] 1422 S. Ct. 2228 (2022).

healthcare provider.[2] In Alabama, abortion is illegal except when the procedure is necessary to save the woman's life.[3] Alabama's accessory[4] and conspiracy[5] laws prohibit women from traveling to another state to receive the necessary healthcare associated with an abortion. Moreover, these Alabama laws subject the individuals who aid women in obtaining abortion related healthcare in another state to criminal prosecution. Texas now has a law that enables any citizen to file a civil lawsuit against anyone who assists a woman in procuring an abortion.[6] The law is written to include the provision of abortion services provided outside the state of Texas.[7] The Texas law is unique and worthy of separate mention, as it purports to extend its reach beyond the state borders, subjecting healthcare practitioners and citizens from other states to this law.

A. *The Practical Effect*

The removal of federal protection for abortion and the rise of different forms of state prohibitions with civil, regulatory, and criminal penalties has led to a corresponding increase in creative efforts by women and women's health advocates to circumvent those state laws. In response, people volunteer their time to drive into states that prohibit abortions to transport women to states with more lenient laws to receive abortions. The transportation of women into a "pro-choice healthcare" state is not limited to the roads. Women's healthcare advocates and organizations are establishing networks of private pilots to provide free flights for women seeking abortions in other states. Pilots in these networks volunteer fly women in their private planes and cover all associated costs such as fuel and maintenance expenses that arise in connection with transporting women to a pro-choice healthcare state.

As the number of requests for these free healthcare flights increased, pilots asked whether the use of their private airplanes to transport women for medical care somehow violated the Federal Aviation Regulations (FARs). Violations of the FARs can result in enforcement actions undertaken by the Federal Aviation Administration (FAA) with either a revocation or suspension of the pilot's license.[8] The good news for pilots is that flights transporting women for medical care fall into the category of public benefit flying. As long as the flights are not conducted for commercial purposes, and neither the pilot nor the organization arranging the

[2] Wis. Stat. Ann. § 940.04 (West, Westlaw through 2023 Act 18)
[3] Ala. Code § 26-23H-4 (West, Westlaw through 2023 First Spec. Sess., Reg. Sess., and Second Spec. Sess.).
[4] Ala. Code § 13A-2-23 (West, Westlaw through 2023 through 2023 First Spec. Sess., Reg. Sess., and Second Spec. Sess.).
[5] Ala. Code § 13A-4-4 (West, Westlaw through 2023 First Spec. Sess., Reg. Sess., and Second Spec. Sess.).
[6] Tex. Health & Safety Code Ann §171.208 (West, Westlaw through 2023 Reg. Sess.).
[7] *Id.*
[8] U.S. Department of Transportation, FAA Order 2150.3C, Chapter 4 (November 14, 2022).

flight receives any compensation, the pilots are not subject to enforcement action by the FAA.[9]

Here, the history of public benefit flying works in favor of the pilots fearful of exposure to an enforcement action. For many years, pilots have used their own aircraft to fly patients seeking medical care, such as chemotherapy treatment or lifesaving surgery, from one state to another for free. The FAA's position is that pilots transporting patients who seek medical care for free constitutes public benefit flying such that those flights do not violate the FARs. With respect to transporting women seeking medical care associated with abortion, the analytical application of the public benefit categorization removes the fear of punitive action by the FAA. However, legal worries are not over. The legal liability that remains is not limited to pilots but also applies to the members of the public who endeavor to assist women in obtaining healthcare such as an abortion.

Returning to Texas law, any Texas citizen may commence a civil lawsuit against anyone who aids or assists a woman in Texas with receiving an abortion outside of the state. Therefore, a person who volunteers to drive their car into or out of Texas to transport a woman to another state for an abortion, even if acting with purely altruistic motives, could find themselves named as a defendant in a civil lawsuit. The first such lawsuit was filed on March 9th, 2023, under the new Texas law.[10] Two important points need to be made at this stage. First, the Texas law is a blatant end-run around constitutional protections afforded to all citizens, such as the exercise of the Commerce Clause and the right to travel. Second, the prospect of defending a civil lawsuit, to have the judicial system hopefully deem the law unconstitutional, is an expensive endeavor.

Addressing the first point, the Texas law violates the Commerce Clause[11] because the law seeks to regulate interstate commerce by penalizing those who assist women with obtaining a service that is unavailable in their home state and preventing the retention of that service from a provider in another state.[12] Next, the law is unconstitutional because it violates the right to travel guaranteed by the U.S. Constitution.[13] The right to travel protects the right of a citizen of one state to enter and leave another state and to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state.[14] The Texas law seeks to deter the exercise of the right of a person to travel and the Commerce Clause protections when the action of entering Texas is for the purpose of assisting a woman with obtaining healthcare outside of Texas. Within the text of the *Dobbs*

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[9] The Federal Aviation Administration strictly enforces its regulations against commercial operations without proper licensure. The provision of public benefit flights as a response to increased demand creates a risk which is discussed in depth in an article by this author in the EAA Sport Magazine September 2023 issue titled, *Swept Up in the Illegal Charter Net*. Ronnie R. Gipson, Jr., *Swept Up in the Illegal Charter Net*, EAA Sport Aviation (Sept. 6, 2023), https://ssrn.com/abstract=4547131.

[10] *See* Original Pet., Marcus Silva v. Jackie Noyola, et al., No. 23-CV-0375, (56th Dist. Ct., Galveston County, filed Mar. 9, 2023).

[11] U.S. Const. art. I, § 8, cl. 3.

[12] Tex. Health & Safety Code Ann §171.208.

[13] Saenz v. Roe, 526 U.S. 489, 500–01 (1999). *See also* U.S. Const. amend. XIV, § 1.

[14] *Saenz*, 526 U.S. at 500.

opinion, Justice Kavanaugh penned a concurrence that refers to the right to travel as a means of preserving a woman's right to seek a healthcare option, such as an abortion in one state that is banned in another state.[15] Does the existence of Justice Kavanaugh's concurrence mean that the Supreme Court of the United States and lower courts will strike down barriers imposed by states, such as the Texas law, that infringe on the right to travel for citizens seeking to help the woman in search of healthcare? The answer is unknown, but it should be an unequivocal and resounding YES. In fact, the dissent in *Dobbs* predicted this legal quagmire, arguing that by overruling *Roe v. Wade*,[16] states would over legislate and thus infringe on the rights to free speech, the right to travel, and Interstate Commerce protections. As Justices Breyer, Sotomayor, and Kagan opined, removing the federal protections for the woman's right to choose will put the judiciary at the center of the coming "interjurisdictional abortion wars."[17] Alas, here we are.

It is important to note that the Texas law, as written, prohibits the use or invocation of the law by any government actor in Texas. Consistent with established constitutional law precedent, in the absence of a state government agency pursuing enforcement of the Texas law, there exists no violation of the Commerce Clause or the right to travel.[18]

Based on the interplay between the different branches of government, namely the legislative branch and the judicial branch, the Texas law remains valid until it is challenged in the courts. In practical terms, this means that someone must be a party in the test case that challenges the constitutionality of the Texas law. Raising the point that the Texas law is unconstitutional in an article is one thing. Yet, to obtain a ruling by a court declaring that the law runs afoul of the U.S. Constitution and is thus inapplicable requires a volunteer in the women's healthcare advocacy sphere, charged with a violation of the Texas law, to hire a lawyer to represent them in court. The legal fees associated with representation in untested waters can quickly escalate into the five and six figure range, with litigation lasting years.

The issues and liabilities that could potentially attach to the many volunteers in this area arose because pilots asked questions about regulatory liability. However, pilots volunteering their time, planes, and skill represent a small segment of the many, many people throughout the country who are volunteering in their own way to assist women in traveling from one state to another for healthcare. Do these everyday people, acting with the best of motives, giving time, driving their cars, and buying gas, realize that they could find themselves defending an expensive case that tests the legitimacy of a law? Most assuredly, the answer is a resounding "no!" At this stage, anyone who chooses to assist women with obtaining necessary

[15] *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).
[16] *Dobbs*, 142 S. Ct. at 2337 (Breyer, Sotomayor & Kagan, JJ., dissenting).
[17] *Id.*
[18] Will one of the justiciability doctrines serve to block and deter any legitimate challenges to the Texas law at the start of litigation? Consider that state action is needed to trigger the infringement of the constitutional rights in play. Without state action, an individual does not have standing to bring a claim challenging the Texas law. Therefore, in the absence of standing, there exists a justiciability problem.

healthcare services by volunteering to transport them to another state for an abortion must be aware of their exposure to legal liability. Knowledge is power; it affords volunteers the opportunity to prepare themselves, in the best way possible, for any negative legal consequences. Forewarned is forearmed because, unfortunately, no good deed goes unpunished.