It's Not Squarely Settled: Why States Can Still Attempt to Limit Interstate Travel for Abortions Despite a Fundamental Right to Travel Between States

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Abstract

This Note explores the tension between the fundamental right to interstate travel and state abortion restrictions limiting out of state travel for abortions. Legal scholars long contemplated what would happen if Roe and Casey were overturned. That day has come, and states are now free to regulate abortion subject to rational basis review… unless another fundamental right is implicated.

In his Dobbs concurrence, Justice Kavanaugh cited the fundamental right to interstate travel as justification for barring states from banning out of state travel for abortions. Although he cited no precedent for his statement, he seemed to believe this was an open-and-shut question. This Note will seek to examine whether the fundamental right to interstate travel can protect the ability to travel between states for an abortion. If it does, then state abortion restrictions should still be subject to strict scrutiny. Even still, states may be able to put forth compelling justifications to support their laws.

To test this argument, this Note will examine Idaho's HB 242—the nation's first law limiting interstate travel for abortions. Though this law has not yet been challenged, we can expect that it will soon make its way before the courts. Even though HB 242 regulates abortions, its impact on interstate travel will likely still make it subject to strict scrutiny.

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INTRODUCTION

On June 24, 2022, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*.[1] In *Dobbs*, the Court held that *Roe v. Wade and Planned Parenthood v. Casey* were "egregiously wrong," that the Constitution did not provide a federal right to abortion, and that states retained the sole authority to regulate abortions.[2]

Dobbs immediately had real world effects.[3] One effect was the application of "trigger laws" in numerous states.[4] After these laws went into effect, access to

1. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. *See id.* at 2243, 2279.

3. Leslie Francis & John Francis, *Federalism, and the Right to Travel: Medical Aid in Dying and Abortion, 26* J. OF HEALTH CARE L. & POL'Y 49, 52 (2023) ("The moment the Court announced its decision in *Dobbs*, states objecting to abortion began considering a wide range of new abortion restrictions.").

4. Trigger laws are laws that are unconstitutional under current law but have the potential to become effective upon a change in the law. *See* Casey Parks & Amber Phillips, *What are 'Trigger' Laws, and Which States Have Them?*, WASH. POST (May 3, 2022, 12:26 PM), https://perma.cc/S77W-RLJH. In the abortion context, many states had laws that banned abortion at times outlawed under *Roe*. However,

abortion was severely limited and, in some cases, completely outlawed.[5] Even in states where abortion was "legal" but restricted, providers stopped services for fear of losing their job or criminal prosecution.[6] Facing rising operating costs but reduced revenue, facilities that were once safe havens for crucial reproductive healthcare services—including abortions—shut their doors indefinitely.[7]

Within weeks of the *Dobbs* decision, an Indiana newspaper ran a story about a ten-year-old girl who traveled from Ohio to Indiana to receive an abortion.[8] The article recounted the story of the child's Ohio-based doctor who contacted Indiana OBGYN, Dr. Caitlin Bernard, in hopes that Dr. Bernard could help the child.[9] Citizens were outraged, but for different reasons. Some felt sorrow for the child who had to leave her home state to receive an abortion.[10] Others, like the Indiana Attorney General, believed Dr. Bernard deliberately violated the law and should have been punished.[11] The situation even captured the attention of President Joe Biden, who issued a statement saying that the child was "forced to travel out of the state of Indiana to seek to terminate the pregnancy and maybe save her life . . . ."[12] Afterwards, he signed numerous executive orders aimed at providing federal protection for abortion—including supporting patients traveling out of their home state for reproductive healthcare services.[13] But while President Biden sought to enforce the Executive Branch's position on abortion, numerous state lawmakers were working with anti–abortion groups to find even more ways

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when *Dobbs* became law, these laws no longer per se violated the Constitution as states became free to restrict abortion as they saw fit. *See id.*

5. *See Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (Apr. 9, 2023), https://perma.cc/YF3J-85EF.

6. *See* Selena Simmons-Duffin, *Doctors Who Want to Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), https://perma.cc/BUP7-Q85B.

7. *See* Wicker Perlis, *Mississippi's Last Clinic Performs Final Abortions Wednesday, Ban Takes Effect Thursday*, CLARION LEDGER (July 6, 2022, 5:14 PM), https://perma.cc/8PBU-WEAC (detailing the closure of the sole abortion clinic in the state that drove the *Dobbs* lawsuit); *see also* Christine Fernando, *Independent Abortion Clinics are 'Disappearing from Communities' After the End of* Roe v. Wade, USA TODAY (Dec. 8, 2022), https://perma.cc/3EBJ-VB76 (citing lack of institutional support and fundraising as causes of facility closure).

8. Shari Rudavsky & Rachel Fradette, *Patients Head to Indiana for Abortion Services as Other States Restrict Care*, INDYSTAR (Jan. 24, 2023), https://perma.cc/4BZW-RLSK.

9. *See id.*

10. *See* David Folkenflik & Sarah McCammon, *A Rape, an Abortion, and a One-Source Story: a Child's Ordeal Becomes National News*, NPR (July 13, 2022, 10:28 PM), https://perma.cc/BDU5-X926.

11. Tom Davies, *Indiana AG Seeks Punishment for Doctor Who Provided Abortion to 10-Year-Old Rape Survivor*, ASSOCIATED PRESS (Nov. 30, 2022, 4:22 PM), https://perma.cc/6C8X-VAYC.

12. Mariana Alfaro, *Biden Decries Case of 10-Year-Old Rape Victim Forced to Travel for Abortion*, WASH. POST (July 8, 2022, 2:44 PM), https://perma.cc/Y34T-KUD7.

13. *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, WHITE HOUSE (July 8, 2022), https://perma.cc/FD8Q-WP9M; *see also Fact Sheet: President Biden Issues Executive Order at the First Meeting of the Task Force on Reproductive Healthcare Access*, WHITE HOUSE (Aug. 3, 2022), https://perma.cc/XTB5-EW45.

to limit access to abortion.[14] The next target was banning interstate travel for abortion.[15]

The idea that states might attempt to ban interstate travel for abortions is not new.[16] In fact, Justice Kavanaugh, a member of the Conservative majority of the Court, used a portion of his *Dobbs* concurrence to emphasize that such a law would likely be unconstitutional.[17] Justice Kavanaugh seemed to believe that this was an open-and-shut question. In his opinion, the Constitution provides a fundamental right to interstate travel even though it does not provide a fundamental right to abortion.[18] Therefore, any state law that infringes upon the fundamental right to interstate travel would presumably have to survive strict scrutiny review, which rarely happens.[19] But, in reality, the strength of a right to interstate travel, and the limits that states may impose on that right, are far from settled questions.

The goal of this Note is to examine the question posed by Justice Kavanaugh—"may a State bar a resident of that State from traveling to another State to obtain an abortion?"[20] Unsurprisingly, at least one state has already attempted to do so.[21] Earlier this year, Idaho passed a law, House Bill 242 (HB 242), aimed at limiting out-of-state travel for abortions by criminalizing the in-state coordination that occurs before a person travels out of state for an abortion.[22] Even before HB 242's passage, Idaho had already implemented a near total ban on abortions.[23] And

14. *See* Haley Weiss, *America's Second Year Post-Roe Will Be Even More Contentious*, TIME (June 25, 2023, 8:00 AM), https://perma.cc/SRY9-4UVX.

15. *See id.*; This Note is not a critique of whether *Dobbs* was correctly decided. For the sake of the argument, this Note accepts the position that there is not a federally recognized right for a woman to choose to have an abortion. However, the question of whether laws aimed at restricting abortion may only be subject to rational basis review depends on other rights that may be implicated. Thus, this Note will examine whether another right may limit a state's ability to regulate abortion even in the absence of federal protection for abortion.

16. *See* Mark D. Rosen, *"Hard' or 'Soft' Pluralism? Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS UNIV. L. J. 713, 714 (2007) (discussing whether a state may bar a resident from traveling to another state to receive an abortion).

17. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) ("For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.").

18. Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE 21, 28 (2022).

19. For years, Gerald Gunther's quote that strict scrutiny was "strict in theory but fatal in fact" stood for the proposition that strict scrutiny was an insurmountable barrier. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–95 (2006). However, Adam Winkler later published an article that included an empirical analysis of how likely laws were to survive scrutiny. *See generally id.* Though Winkler's article showed that laws may survive strict scrutiny, only about thirty percent of laws survived a strict scrutiny analysis. *Id.* at 868. Furthermore, Winkler examined how the treatment a law receives could differ depending on the topic involved. *Id.* at 815. Though a law's ability to survive is context-specific, laws—especially state laws—are still more likely to be struck down than to survive strict scrutiny. *See id.* at 823.

20. *Dobbs*, 142 S. Ct. at 2309 (2022).

21. Aria Bendix, *Idaho Becomes One of the Most Extreme Anti-Abortion States with Law Restricting Travel for Abortions*, NBC NEWS (Apr. 6, 2023, 9:24 AM), https://perma.cc/XN2Y-HA7P.

22. *Id.* The law at issue will be referenced as "HB 242" throughout this Note.

23. *See* discussion *infra* Conclusion.

now, HB 242's vague wording further complicates attempts to travel outside of the state for an abortion.

Using Idaho's HB 242 as a case study, this Note will explore Justice Kavanaugh's question. The remainder of this Note will proceed in three parts. Part I will recount the history of the fundamental right to interstate travel. Though the Court has seemingly recognized that there is a fundamental right to interstate travel, there is still much gray area regarding what actions are protected by that right. Part II will walk through three of the Court's key abortion cases—*Roe v. Wade*, *Planned Parenthood v. Casey*, and *Dobbs v. Jackson Women's Health Organization* to highlight the rise and fall of the fundamental right to abortion. As mentioned above, there is no longer a fundamental right to choose to have an abortion, which is directly relevant to how strong a state interest needs to be to outlaw the procedure. Finally, Part III will examine Idaho's HB 242 and explain why strict scrutiny should still apply when the law is challenged. To do so, this Note will posit potential interests a plaintiff may present and potential interests that the state may raise in defense of its law.

I. BACKGROUND & HISTORY OF THE LAW

A. HISTORY OF THE FUNDAMENTAL RIGHT TO INTERSTATE TRAVEL

It is undisputed that the Constitution does not explicitly protect the right to interstate travel.[24] Although America's founders certainly traveled from state to state, they did not list the right to interstate travel as a right to be enjoyed by future citizens.[25] Scholars have argued that the Constitution's failure to mention this right did not mean that it was not important to the founders, but that it was so commonly understood as a right there was no need to include it.[26]

In addition to not being explicitly mentioned, there is also no seminal case recognizing the right to interstate travel. Historically, Supreme Court Justices did not seem to think that it was crucial to locate the source of the right.[27] Instead, numerous cases have declared that the right exists without a need to determine its exact origins.[28] The current state of the right to travel has been described as "several independent travel-related rights guarded by different provisions of the U.S.

24. U.S. v. Guest, 383 U.S. 745, 758 (1966).

25. This is true even though the Articles of Confederation had previously specified that "the people of each State [s]hall have free ingre[s]s and regre[s]s to and from any other state." Alexander E. Hartzell, *Implied Fundamental Rights and the Right to Travel With Arms for Self Defense: An Application of* Glucksberg *to Anglo-American History and Tradition*, 69 AM. U. L. REV. F. 69, 103 (2020).

26. It is extremely unlikely that the same men who traveled across state lines to form the Constitution believed that they forfeited the ability to do so upon its ratification. *Id.* at 103 n.198; *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 522 (Aspen Publishing, 6th ed. 2019).

27. *See* Saenz v. Roe, 526 U.S. 489, 501 (1999) ("For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution.").

28. *See id. See also* United States v. Wheeler, 254 U.S. 281, 298–300 (1920); *Guest*, 383 U.S. at 759; Shapiro v. Thompson, 394 U.S. 618, 623 (1969).

Constitution."[29] Here, this Note will examine a few of the Supreme Court's cases interpreting the right to interstate travel to frame its place in constitutional law.

1. The Passenger Cases

The Supreme Court first acknowledged a general right to travel in a pair of cases that became known as *The Passenger Cases*. [30]

In June of 1841, George Smith, master of the British ship Henry Bliss, docked his ship in New York with 295 passengers aboard.[31] At the time, a New York law required the health-commissioner to charge each foreign ship master a tax that was based on the number of passengers on their ship.[32] The ship masters were entitled to collect that money from the passengers and the health-commissioners were entitled to sue the ship masters for failure to pay.[33] George Smith refused to pay.[34] When Smith was sued by a health-commissioner, he argued that the statute violated the United States Constitution.[35] Both the trial court and a lower appellate court held for the plaintiff health-commissioner.[36] But still unsatisfied, Smith appealed to the United States Supreme Court.[37]

The facts of the second case, *Norris v. City of Boston*,[38] are similar. Norris was the master of a British ship that docked at a Boston port in June 1837.[39] He arrived with nineteen foreign passengers aboard and was compelled to pay a two-dollar tax for each passenger.[40]

After paying the tax, Norris sued to recover his money.[41] However, he was denied, as the jury found that Boston law authorized the city to collect a tax from ship masters attempting to bring certain foreign passengers into the country.[42] Norris ultimately appealed and asserted, among other things, that the Boston law violated the Commerce Clause.[43]

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29. Smith-Drelich, *supra* note 18, at 22.

30. *See* Smith v. Turner, 48 U.S. 283, 492 (1849). A lengthy discussion of the cases would reveal battles over the scope of the Commerce Clause, immigration policy, and the general balance of powers between the state and federal government in the young country. But for the purposes of this Note, we will focus on the facts of the cases that highlight their impact on the fundamental right to interstate travel.

31. *Id.* at 284.

32. *Id.* at 283–84.

33. *Id.*

34. *Id.* at 284.

35. *Id.*

36. *Smith*, 48 U.S. at 284–85.

37. *Id.* at 285.

38. *Id.*

39. *Id.*

40. *Smith*, 48 U.S. at 285.

41. *Id.*

42. *Id.* at 286. "No [foreign] passenger . . . shall be permitted to land until the master . . . shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing . . . "

43. *Id.* at 288–89.

In the end, the Court held that a state law which imposed a tax on aliens arriving from foreign ports was unconstitutional.[44] Neither case produced a majority opinion as the justices reached their results on different grounds.[45]

Though there were numerous opinions from the Court, perhaps one of the most memorable was Chief Justice Taney's dissenting opinion. In his view, the two cases dealt with similar yet distinct issues.[46] The Massachusetts law affected non-citizens' ability to come into a state. To Chief Justice Taney, the states were free to regulate this through their power to regulate immigration.[47]

However, the New York law could not be so easily accepted. Unlike Massachusetts's law, New York's law imposed a tax upon United States citizens for simply choosing to enter a state.[48] In Chief Justice Taney's view, the Constitution did not permit a state to tax citizens for entering its borders.[49] To support his conclusion, he argued that "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every bit of it without interruption, as freely as in our own States."[50] Although Chief Justice Taney dissented, his opinion is often cited as "guidance" for understanding the right to interstate travel.[51]

2. United States v. Wheeler

Over fifty years later, in *United States v. Wheeler*, the Court sought to protect a right to interstate travel as an extension of the rights previously protected under the Articles of Confederation.[52] To ascertain this right, the Court looked at the "implications arising from [the creation of the Constitution], the conditions existing at the time of its adoption, and the consequences inevitably produced from the creation by it of the government of the United States."[53]

According to the Court, citizens possessed "the fundamental right, inherent in all citizens of all free governments. . . to move at will from place to place. . . and to have free ingress thereto and egress therefrom . . . ."[54] This was a right that

44. CHEMERINSKY, *supra* note 26, at 977.

45. *See generally Turner*, 48 U.S. 283. Though the Justices in the majority did not directly tackle the issue of the right to interstate travel, it is likely that they would have grounded the right in the Commerce Clause.

46. *Turner*, 48 U.S. at 464.

47. *Id.* at 464–69. The Chief Justice reasoned that if states could remove non-citizens based on certain criteria, then the states must also possess the power to prevent these individuals from ever entering their borders. *Id.*

48. *Id.* at 491–92.

49. *Id.* One potential question is how the "tax" here differs from modern day tolls a state may charge. That is a question beyond the scope of this Note.

50. *Id.*

51. United States. v. Guest, 383 U.S. 745, 758 (1966); Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2465 (2010).

52. United States v. Wheeler, 254 U.S. 281, 298–300 (1920).

53. *Id.* at 293.

54. *Id.* at 293.

seemingly existed in all states since the adoption of the Articles of Confederation.[55] Though the Constitution may have superseded the Articles of Confederation, it did not completely invalidate the rights previously protected.[56] As it relates to interstate travel, this right was still protected because:

> It was undoubtedly the object of [the Privileges and Immunities Clause] to place the citizens of each state upon the same footing with citizens of other states, so far as those advantages resulting from citizenship in those states are concerned. . . . [I]t gives them the right of free ingress into other states, and egress from them;. . . and it secures them in other estates the equal protection of their laws.[57]

In sum, the Court reasoned that it was immaterial that the Constitution did not explicitly mention the right to interstate travel because it was inherent in the privileges and immunities protected.[58] Accordingly, *Wheeler* held that states were limited in their ability to pass laws limiting a citizen's right to travel—especially if the law discriminated against out-of-state residents.[59]

3. United States v. Guest

The Court faced the issue of interstate travel head on in the 1966 case *U.S. v. Guest*.[60] In *Guest*, the Court "reaffirm[ed]" the constitutional right to interstate travel.[61] Writing for the majority, Justice Stewart stated the right extended as far back as 1904.[62]

Guest arose after six defendants were charged with criminal conspiracy after harassing African American citizens in violation of 42 U.S.C. 2000a(a).[63] The relevant portion of the indictment alleged that the defendants conspired to "injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of: '[t]he right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.'"[64] At trial, the district court dismissed

55. *Id.*
56. *See id.* at 294.
57. *Id.* at 295.
58. *See id.* at 295. *See id.* at 296–97 for more discussion on the theory behind the privileges and immunities protected under the Constitution.
59. *Id.* at 294.
60. United States v. Guest, 383 U.S. 745, 759 (1966).
61. *Id.*
62. *Id.* Here, the Court cited *United States v. Moore* for recognition of the right to interstate travel. However, a discussion of *Moore* was omitted because the case does not directly discuss the right to interstate travel. The Court reasoned that *Moore* spoke to the issue because it listed "the right to go and return from the seat of government" and "the right to engage in interstate commerce" as rights protected by the Constitution. *See* United States v. Moore, 129 F. 630, 633 (N.D. Ala.1904).
63. *Guest*, 383 U.S. at 747–50.
64. *Id.* at 757.

this count. [65] But on appeal, the Supreme Court determined the lower court was incorrect.[66]

In reaching this decision, the Court began by stating the right to travel between states "occupies a position fundamental to the concept of our Federal Union."[67] It went on to note Justice Taney's dissent in *The Passenger Cases* along with numerous other decisions that recognized freedom of travel as a basic, yet unenumerated, right under the Constitution.[68]

Guest's holding rested primarily on the Commerce Clause as a method of protecting the right to interstate travel.[69] The Court went on to list cases that had previously protected the right to travel from state interference.[70] Additionally, it reasoned that the federal Commerce Clause also allowed Congress to pass legislation protecting individuals from civil rights violations that affected their "free movement in interstate commerce."[71]

Ultimately, the Court remanded the case to the district court for further hearings.[72] *Guest*'s holding did not provide all citizens with a broad ability to sue for any law that infringed upon their rights to move between states, but it did provide the ability to sue when a person's actions were specifically aimed at limiting the ability to freely travel between states.[73]

4. Shapiro v. Thompson

By 1969, the right to interstate travel had been deemed fundamental—at least according to Justice Brennan's majority opinion in *Shapiro v. Thompson*. Though *Shapiro* told the story of many citizens who were unjustly denied assistance, most relevant here is the case of Vivian Marie Thompson. Thompson was a nineteen-year-old unwed woman who sought assistance from the Connecticut Welfare Department.[74] At the time, she was already a mother of one child and was pregnant with another.[75] She originally lived in Dorchester, Massachusetts

65. *Id.*
66. *Id.* at 760.
67. *Id.* at 757.
68. *Id.* at 758.
69. *Guest*, 383 U.S. at 759.
70. *Id.*
71. *Id.* This theory essentially viewed individuals as pieces of "interstate commerce" and thus within the scope of the Commerce Clause's protection. *Id.* The reasoning at the time argued that "the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities." *Id.* at 758. Thus, a law that violated the ability to move as commerce also affected the ability to freely move as a fundamental right. *Id.*
72. *Id.* at 760.
73. *Id.* The Court provided an example to further clarify the distinction it drew. "Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede on or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, . . . the conspiracy becomes a proper object of the federal law . . . ." *Id.*
74. Shapiro v. Thompson, 394 U.S. 618, 623 (1969).
75. *Id.*

but moved to Hartford, Connecticut in June 1966 to have her mother's assistance in raising her child.[76] In August 1966, she moved into her own apartment in Hartford.[77] But because she was pregnant, she could not enter a work training program.[78]

Thompson's application for assistance was denied because she had not lived in Connecticut for a year before she filed for assistance.[79] Connecticut's stated purpose for the waiting period was to "discourag[e] entry of those who come needing relief."[80] Thompson filed suit and the trial court invalidated the statute because it "ha[d] a chilling effect on the right to travel."[81] Connecticut appealed, arguing that the statute was a method to protect the fiscal integrity of the state's public assistance program.[82]

Even accepting Connecticut's posited reasoning as true, the majority still determined the state unconstitutionally infringed on Thompson's right to interstate travel.[83] Because the right to interstate travel had been deemed fundamental, the Connecticut law was subject to strict scrutiny.[84] The Court reasoned that Connecticut had a valid—yet not compelling—interest in preserving its fiscal integrity[85] and preventing fraud on its welfare programs.[86] Accordingly, neither of these reasons could support a law that "has no other purpose. . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them."[87]

Justice Stewart also provided more support for the right to interstate travel in his concurrence. In response to Justice Harlan, who believed that the Court was creating new rights, Justice Stewart emphasized that the Court was simply recognizing "an established constitutional right."[88] In his opinion, the right included the ability to enter and abide in any state in the union without government interference.[89]

Shapiro tells us that the right to interstate travel does not simply cover a person's ability to enter and leave a state; it also extends to ensure citizens are not discouraged from venturing to a state by the threat of discriminatory treatment.

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Shapiro*, 394 U.S. at 623.
81. *See id.*
82. *Id.* at 627–28.
83. *Id.* at 628–30.
84. *Id.* at 638.
85. *Shapiro*, 394 U.S. at 633.
86. *Id.* at 637.
87. *Id.* at 631 (internal quotations omitted).
88. *Id.* at 642 (Stewart, J., concurring).
89. *Id.*

5. Saenz v. Roe

The Court last examined the right to interstate travel in the 1999 case *Saenz v. Roe*. Similar to Connecticut in *Shapiro*, California enacted a statute limiting the amount of public benefits available to new residents of the state.[90] The statute stated that new residents were limited to the amount of public assistance they would have received in their previous state of residence.[91] Three residents challenged the statute as imposing an unconstitutional durational residency requirement.[92] The district court found that the statute placed a "penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents," and the court of appeals affirmed the district court's decision.[93] Before the Supreme Court could decide the issue, Congress implemented a statute that explicitly authorized states to calculate a person's benefits according to their last state of residence if they had been in the new state for twelve months or less.[94] After Congress's action, the plaintiffs filed suit again with an additional challenge to the federal statute.[95] Again, the district court stopped the government's actions and the court of appeals affirmed that decision.[96] Ultimately, the case went before the Supreme Court.

Writing for the majority, Justice Stevens outlined three components of the right to interstate travel:

> It protects the right of a citizen of one State to enter and leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[97]

Justice Stevens reasoned the issue in this case focused primarily on a citizen's right to choose to be a citizen of a state, which was a right protected through the Privileges and Immunities clause.[98] The Court's guidance made clear that a citizen had both a state and federal right to be entitled to the same rights as any other citizen upon choosing to make a residence in a state.[99] Because the law at issue subjected the new citizens to worse treatment than older residents, California was required to explain its reasons for the distinction.[100] The State's reasoning, which rested primarily on fiscal reasons, went against the Fourteenth Amendment's

90. Saenz v. Roe, 526 U.S. 489, 492 (1999).
91. *Id.*
92. *Id.* at 493–94.
93. *Id.* at 494–95.
94. *Id.* at 495.
95. *Saenz,* 526 U.S. at 496.
96. *Id.* at 496–98.
97. *Id.* at 500.
98. *Id.* at 501, 510–11.
99. *Id.* at 503–04.
100. *Id.* at 505.

protections.[101] Accordingly, the law was struck down as unconstitutional infringement on the right to travel—the right to enjoy the same privileges as other citizens of that state.[102]

B. THE RIGHT TO INTERSTATE TRAVEL IN THE TWENTY–FIRST CENTURY

There is still ambiguity surrounding how the Court recognized the right to interstate travel. Many of the Court's early cases—like *The Passenger Cases*, *Wheeler*, and *Guest*—either cite to dissents, the Articles of Confederation, or cases that did not directly deal with a challenge to the right to interstate travel. So, the legal foundation of the right to interstate travel is still subject to scrutiny.

But, for the purposes of this Note, we will accept the Court's recognition of a fundamental right to interstate travel.[103] Should a modern Court decide to overrule the right, it would need to spend time addressing how previous Courts consistently protected the right even in the absence of firm historical grounding.

Though it is unclear exactly how far the right to interstate travel extends, *Saenz v. Roe* tells us that—at a minimum—the right to enter and leave a state is constitutionally protected.[104] Relying on *Saenz*, the remainder of this Note will proceed under the framework that there is a general right to interstate travel that includes the right to travel between states.[105]

II. THE RIGHT TO ABORTION COMES AND GOES

A. ROE V. WADE

In 1973, the Supreme Court declared the Constitution protected a woman's[106] right to choose to have an abortion pre-viability.[107] *Roe v. Wade* arose from a

101. *Saenz*, 526 U.S. at 506–07 (1999).

102. *See Saenz*, 526 U.S. at 511; Wilhelm, *supra* note 51, at 2466.

103. Some may still disagree about whether the right to interstate travel would be deemed fundamental if challenged today. Additionally, this Note does not argue that *Saenz* is the best case to support a right to interstate travel. Though the case is nearly thirty years old, it is extremely unlikely that the current Supreme Court would find this old enough to establish that the right is "deeply rooted in the Nation's history and tradition" as required under *Glucksberg*. And, as shown in the next section, the Court recently struck down a fundamental right that was originally codified through a case older than *Saenz*. *See* discussion *infra* section II.C. But for all relevant purposes, this Note will accept the right to interstate travel as fundamental to the extent provided for in *Saenz*.

104. *Saenz*, 526 U.S. at 500; Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 511 (2023).

105. There is also room to argue that the second category under *Saenz* is implicated. But this Note will not explore that area because the state attempting to ban the travel would likely be the citizen's home-state and not the state they are visiting. In this case, it is not the desired state that is treating the citizen as unfriendly but the home-state attempting to block the citizen from leaving to do something that those residents who are still within the state cannot do.

106. While persons other than women may become pregnant, the Supreme Court used the term "women" to refer to cisgender women in *Roe*, *Casey*, and *Dobbs*. When referencing the Court's reasoning, this Note will use the term "woman" as understood by the Court. However, the remainder of the Note will use the gender-neutral phrase "pregnant person" to reflect the understanding that pregnancy—and the relevant abortion bans—are not solely limited to cisgender women.

107. Roe v. Wade, 410 U.S. 113, 164 (1973).

young woman's attempt to obtain an abortion in the face of a Texas law that criminalized all abortions except for those that were "procured or attempted by medical advice for the purpose of saving the life of the mother."[108]

Most relevant here is the way the *Roe* Court determined the Constitution did protect a woman's right to choose to have an abortion. Like interstate travel, there is no explicit right to abortion mentioned in the text of the Constitution. The Constitution also does not explicitly mention a right to privacy.[109] However, the Court posited that the Constitution did protect a right to "personal privacy" or, at minimum, "zones of privacy."[110] As it related to the potential right to choose to have an abortion, the Court believed the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action" was the constitutional provision broad enough to encompass the right.[111]

After determining that the right to choose to have an abortion was not unqualified, the Court then sought to determine the point where a state could constitutionally interfere with a woman's decision. Relying on various potential state interests—including the need to protect "potential life"—the Court reasoned that the point where a state's interest in the health of the mother outweighed the potential mother's interest was at the end of the first trimester.[112] The Court gave special interest to a state's interest in protecting potential life. For states asserting this interest, the Court stated that the compelling point was when the potential life reached viability.[113] But before viability, the decision of whether to perform an abortion was solely left to the medical judgment of the potential mother's physician.[114] Then, the Court announced the tool it believed should be used to assess whether a state's interest outweighed that of the potential mother, the trimester framework.[115] *Roe's* holding and the trimester framework went on to serve as the Court's leading case regarding abortion for roughly twenty years.

B. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY

In *Planned Parenthood v. Casey*, the Supreme Court reinforced Roe's central holdings: women have the right "to choose to have an abortion before viability and to obtain it without undue influence from the State," the State has the "power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health," and "the State has legitimate

108. *Id.* at 117–18.
109. *Id.* at 152.
110. Roe v. Wade, 410 U.S. 113, 152 (1973).
111. *Id.* at 153.
112. *Id.* at 163.
113. *Id.* (defining the point of viability as the State's "compelling point" because it was the period where "the fetus . . . presumably has the capability of meaningful life outside the mother's womb."). At the time of *Roe*, the point of viability was presumed to be around twenty-eight weeks. *See* Adam Liptak, *Fetal Viability, Long an Abortion Dividing Line, Faces a Supreme Court Test*, N.Y. TIMES (Dec. 1, 2021), https://perma.cc/JXF6-48Z9.
114. *Roe*, 410 U.S. at 163.
115. *Id.* at 164–65.

interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[116]

After listing the challenged provisions in the Pennsylvania Abortion Control Act of 1982, the *Casey* opinion shifted to recounting the impact of the liberty interest at stake in *Roe* on the case currently at issue.[117] Again, the Court found that the Fourteenth Amendment's Due Process Clause protected a woman's decision to terminate her pregnancy through its concept of "liberty."[118] Although liberty provided a starting point for the Court's analysis, it did not end there. The Court also noted the potential "consequences" that could come from a woman's decision to terminate her pregnancy.[119] The *Casey* Court's holding implied that states maintained a justified interest in regulating the practice of abortion as long as the law did not violate the Constitution.[120].

While the Court believed that *Roe's* central holding should be upheld, it rejected the trimester framework as inessential to the case.[121] The Court reasoned that the trimester framework was flawed because it "misconceives the nature of the pregnant woman's interest" and "undervalues the State's interest in potential life."[122] Instead, the Court created the "undue burden standard" to reconcile the State's interest with a woman's constitutionally protected liberty interest.[123] The Court defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[124] The undue burden standard clarified that a state could pass laws related to its interests—including the interest in potential life—but those laws could only inform and not hinder a woman's free choice.[125]

Additionally, the Court clarified the interest at stake in cases concerning abortion. The relevant question was whether the woman had the chance to make the ultimate decision, not whether she should be completely insulated from others in making the decision.[126] This confirmed that states could still pass laws that affected a woman's right to choose, so long as they did not pose a substantial obstacle and deprive a woman of the ability to choose to have an abortion.[127]

116. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).
117. *Id.* at 844, 846.
118. *Id.* at 846.
119. *Id.* at 852.
120. *Id.* at 837, 876.
121. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 873 (1992).
122. *Id.*
123. *Id.* at 874.
124. *Id.* at 877.
125. *Id.*
126. *Id.*
127. *Id.*

C. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court officially overturned *Roe* and *Casey*.[128] Writing for the majority, Justice Alito stated *Roe* was "egregiously wrong from the start."[129] Having detailed the ways the court previously upheld the decision, here we will discuss the rationale the Court used to strike down both cases.

Dobbs stemmed from a challenge to Mississippi's Gestational Age Act which prohibited abortions if the fetus was over the gestational age of fifteen weeks.[130] When the respondents sued, alleging that the law unconstitutionally infringed on the constitutional right to an abortion, the district court granted summary judgment in their favor.[131] On appeal, the Fifth Circuit affirmed that decision.[132] Mississippi then appealed to the Supreme Court. Initially, the question before the Court dealt solely with the constitutionality of Mississippi's law.[133] But sometime during the briefing, the question morphed into "whether 'all pre-viability prohibitions on elective abortions are unconstitutional,'" and ultimately whether the Constitution protects a woman's right to choose an abortion at all.[134]

The Court began its inquiry by asking whether the Constitution, "properly understood," conferred a right to abortion.[135] Mississippi believed that *Roe* and *Casey* were incorrectly decided, and the Court welcomed the opportunity to reexamine its abortion precedent.

Again, the Court began by noting that the Constitution made no express reference to any right to obtain an abortion.[136] But, unlike both the *Roe* and *Casey* Courts, the *Dobbs* Court did not believe that the Fourteenth Amendment's concept of liberty protected a right to abortion.[137]

To support its decision, the Court relied on a similar line of inquiry as those before it. The Court noted that while no state constitution provided a right to abortion, every state had historically criminalized abortion in some form.[138] This fact provided the *Dobbs* Court with the support it needed to hold that the right to abortion could not be deeply rooted in the Nation's history and tradition and, thus, was an issue for the states to decide for themselves.[139]

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128. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
129. *Id.* at 2243.
130. *Id.*
131. *Id.* at 2244.
132. *Id.*
133. *See id.* at 2242.
134. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
135. *Id.*
136. *Id.* at 2246. ("The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.").
137. *Id.* at 2248.
138. *Id.*
139. *Id.* at 2248–49.

Dobbs prides itself on returning the issue of abortion back to the states.[140] Justice Alito even posited that this would solve the abortion issue and make it easier.[141] But that could not be further from the truth.[142]

III. PREPARING FOR CONFLICTS BETWEEN THE RIGHT TO INTERSTATE TRAVEL AND STATE ABORTION RESTRICTIONS

A. AMERICA AFTER *DOBBS*—A NEW BATTLEGROUND FOR INTERSTATE TRAVEL LITIGATION

While the future of abortion access is unsure, it is clear that travel for abortion will become even more common.[143] This may be seen through medication abortion pills traveling through the stream of commerce, physicians advising out of state patients through a telehealth service, or pregnant persons traveling from their home state to a state that allows abortion to receive what is considered a safe and legal abortion within that other state.[144] Justice Kavanaugh seemed to think these methods were constitutionally permissible.[145] If a state cannot pass a law limiting travel for abortion, then it stands to reason that the state would not be able to penalize a person returning to the state after receiving an abortion in a state where it is legal.[146] But what happens when a state believes that the person is simply trying to circumvent state law by traveling for an abortion?

The question above is just one of the reasons *Dobbs* does not solve the abortion debate. In their work *The New Abortion Battleground*, Professors David Cohen, Greer Donley, and Rachel Rebouché shed light on some of the conflicts expected to arise in this new legal landscape.[147] Contrary to Justice Alito, they predict that future of abortion challenges will be much more complex than those in the past.[148] Instead of focusing on due process concerns or the Equal Protection Clause, abortion litigation will delve into underexplored areas like the Commerce Clause, the Extraterritoriality Principle, and the fundamental right to interstate travel.[149] For instance, how should the Court even judge a law that limits

140. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1,4 (2023).

141. *Id.*

142. *Id.*

143. Cohen, Donley, & Rebouché, *supra* note 140, at 9; Isaac Maddow-Zimet & Kathryn Kost, *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care*, GUTTMACHER INST.(July 2022), https://perma.cc/ELG8-TUBD.

144. *See* Cohen, Donley & Rebouché, *supra* note 140, at 14.

145. *See* Adam Liptak, *The Right to Travel in a Post-Roe World*, N.Y. TIMES (July 11, 2022), https://perma.cc/DJ4H-TZGM.

146. This situation would also have limits. Take for example the Murder Island hypo originally created by Glenn Cohen. If a state considers a fetus a "person" then the state's interest is surely enhanced because the state has an interest in preventing murder of its citizens. That state could almost certainly exert its interest outside of its physical borders. *See* I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 334– 43, 347–56 (OXFORD, 2015).

147. *See* Cohen, Donley, & Rebouché, *supra* note 140, at 1.

148. *Id.* at 5.

149. *Id.* at 19–20.

interstate travel for abortion? If the right to interstate travel truly is fundamental, the answer should be strict scrutiny.

The remainder of this section will explore the ways the courts may approach the issue. In April 2023, Idaho became the first state to ban interstate travel for abortion.[150] Idaho's law will likely have a narrow effect in practice, but it provides us with a law to examine. Now, the question becomes whether the right to travel between states extends to the right to travel between states for an abortion.

B. HB 242: EXAMINING IDAHO'S ATTEMPT TO BAN INTERSTATE TRAVEL FOR ABORTIONS

1. What is HB 242?

In April 2023, Idaho passed HB 242 thus becoming the first state to criminalize interstate travel for abortion.[151] The law states that:

> An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures obtains an abortion. . . or obtains an abortion–inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking.[152]

Abortion[153] was already "almost totally banned" within Idaho's borders except when necessary to "prevent the death of the mother."[154] Idaho does also recognize a rape or incest exception, but the incident must have been reported to authorities and the person must provide the physician with a copy of the report.[155] Now, HB 242 further restricts access to abortion by making it a criminal human trafficking violation to assist certain minors with obtaining abortions either inside or outside of the state borders.[156]

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150. Bendix, *supra* note 21.

151. *Id.* HB 242 was not Idaho's first attempt at criminalizing travel for abortion. Before HB 242, House Bill 98 (HB 98) sought to criminalize certain attempts to travel for abortion. *See* H.B. 98, 67th Leg., First Reg. Sess. (Idaho 2023). However, as of the time this Note was written, HB 98 had not become law.

152. H.B. 242, 67th Leg. First Reg. Sess. (Idaho 2023).

153. Idaho takes a broad approach to defining abortion. Currently, abortion is defined as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination will, with reasonable likelihood, cause the death of the unborn child." IDAHO CODE § 18-604 (1) (LEXIS through 2023 Reg. Sess.).

154. IDAHO CODE §18-622 (LEXIS through 2023 Reg. Sess.); *Idaho*, CTR. FOR REPROD. RTS., https://perma.cc/PP82-3FUJ; Susan Rinkunas, *Idaho House Passed Bill to Ban Helping Teens Get Abortions in Other States*, JEZEBEL (Mar. 7, 2023), https://perma.cc/CQ26-67L5.

155. IDAHO CODE §18-622 (3) (LEXIS through 2023 Reg. Sess.).

156. IDAHO CODE §18-623 (LEXIS through 2023 Reg. Sess.).

Commentators have noted that the law only criminalizes the portion of the trip that happens in Idaho.[157] So, the law is aimed at preventing adults from taking minors across the state border by subjecting them to criminal exposure for all the planning and traveling they do before they leave the state.[158] The law also provides an affirmative defense for an adult who "traffics" the child with consent from the parent.[159]

Idaho's ban falls into the most direct form of restrictions on interstate travel for abortions because it is directly aimed at limiting the ability to leave the state for an abortion.[160] Here, the crime appears to be leaving, or preparing to leave, the state for the abortion, not actually receiving the abortion.[161]

2. Potential Challenges to HB 242

Because HB 242 just became law in April 2023, it has not faced a challenge before the courts yet. We can predict that the law will soon be challenged, but there are a few ways that it may reach a court. We may see a direct challenge when an adult is charged for supplying a minor with an abortion–inducing medication or, more boldly, when a concerned adult drives a child to another state without the parent's consent. We may also see a case where parent A gives consent without parent B's knowledge. Parent B may then press the State to hold parent A and/or the third-party adult responsible. At a broader level, we may see a healthcare advocacy organization challenge the law as an infringement on their right to conduct business within the state.

Therefore, it is worthwhile to spend time exploring how a court may review the constitutionality of the law.[162] Because the Idaho bill does not give the state's interest or rationale for passing the law, we will proceed by using interests that legal scholars expect to appear before the courts in the post-*Dobbs* era and commentary from the bill's sponsor.

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157. Alanna Vagianos, *Idaho is About to be the First State to Restrict Interstate Travel for Abortion Post-Roe*, HUFF. POST (Mar. 28, 2023, 3:04 PM), https://perma.cc/X2FH-7JFF.

158. *See id.* In this same article, Professor David Cohen proposes that this method of drafting arguably allows the law to evade the extraterritoriality challenge.

159. IDAHO CODE § 18-623(2) (LEXIS through 2023 Reg. Sess.). It is not entirely clear what would happen in cases where one parent consents and the other doesn't. Other adults may raise this affirmative defense, but the law does not specifically state what happens when there is conflicting consent.

160. *See* Francis & Francis, *supra* note 3, at 52; H.B. 242, 67th Leg. First Reg. Sess. (Idaho 2023)

161. H.B. 242, 67th Leg. First Reg. Sess. (Idaho 2023). It appears that HB 242 is specifically aimed at preventing adults from taking minors to another state to get abortions without their parents' consent. Because the law is so narrowly focused, opponents of the law would likely be criticized for blocking a measure aimed at allowing adults to "kidnap" a child for the purposes of violating a state law. Remember, abortion is banned in Idaho. So, the adult could not simply take the child to a provider within the state to receive an abortion.

162. These are not the only ways the challenge may arise. See Francis & Francis, *supra* note 3, at 54–55 (discussing Texas and Oklahoma statutes that are examples of statutes that could lead to constitutional challenges).

3. Framing the Fundamental Right to Interstate Travel

In the Idaho law, it appears that the criminal action begins when the adult makes plans and acts to take a minor across state lines for an abortion. The act could also begin when the adult orders an abortion–inducing medication for the minor or when they go to pick that medication up with the intent to give it to the minor. Accordingly, the law seems to infringe upon the right to travel; not on the ability to abort a fetus.[163]

Of course, we have not seen anyone prosecuted under this law yet, so it is unclear how a district attorney or the state attorney general would present their case.[164] But, if a court frames the issue in any of these ways, it is possible that the law will be subject to strict scrutiny because of the fundamental right to travel between states.[165] By criminalizing a person's intent to move between a state or to receive something from another state, the law may chill a person's desire to "leave" the state of Idaho.

4. Framing the Potential State Interests

a. Interest in Protecting Minor Residents. If the law is subject to strict scrutiny, the state would then need to put forth a compelling interest in limiting the ability to travel. Even though the law does not "directly" limit minors because it applies to the adult's actions, Idaho has already passed laws indicating that the state believes it has a duty to promote a compelling state interest in protecting minors.[166] Idaho could argue that it is further promoting its interest by attempting to bar minor residents from leaving the state to access services that they could not access within the state. The theory behind this interest is comparable to the

163. Though the ability to have an abortion is still infringed upon, placing the larger burden on the right to travel would be better for a constitutional challenge. If the primary infringement is on the right to travel, the law could be subject to strict scrutiny. However, if the case is brought alleging infringement on the ability to have an abortion, a reviewing court could view travel as simply incidental and still subject the law to rational basis review.

164. Even if a district attorney decides not to bring charges, the law allows the state attorney general to supersede that decision. *See* H.B. 242, 67th Leg. First Reg. Sess. §18-623 (4) (Idaho 2023).

165. *See* Francis & Francis, *supra* note 3, at 71.

166. IDAHO CODE §18-602(2) (LEXIS through 2023 Reg. Sess.).

> "It is the intent of the legislature in enacting 18-609A, Idaho Code, to further the following important and compelling state interests recognized by the United States supreme court in:
>
> (a) Protecting minors against their own immaturity;
>
> (b) Preserving the integrity of the family unit;
>
> (c) Defending the authority of parents to direct the rearing of children who are members of their household;
>
> (d) Providing a pregnant minor with the advice and support of a parent during a decisional period;
>
> (e) Providing for proper medical treatment and aftercare when the life or physical health of the pregnant minor is at serious risk in the rare instance of a sudden and unexpected medical emergency."

interest in "preventing abortions within the state by preventing the out-of-state movement" proposed by Leslie and John Francis.[167] The state could argue that it has decided to accomplish its goal by punishing the adults who would likely be assisting the minors instead of punishing minors for a decision that may not be completely theirs.

Idaho has required "induced abortions" to be reported since 1977.[168] We can use this data to gain a better understanding of the recent trends in abortion across the state. Here, we are primarily concerned with the Idaho resident minors' ability to access abortion either within the state or across state lines. But before examining those numbers specifically, it is helpful to review additional statistics published by the Division of Public Health.

As of the last report, 1,985 Idaho residents received an abortion either within the state or across state lines.[169]Additionally, 1,553 abortions were performed within the state.[170] This number reflects the number of abortions performed within the state's borders regardless of whether the patient was an Idaho resident.[171]

Of the 1,553 abortions reported, forty-seven occurred on minors under eighteen.[172] All minors who received an abortion in Idaho did so after "written informed consent of a parent, guardian, or conservator and the minor."[173] Outside of the state, sixty-five minor Idaho residents received an abortion during the reporting year.[174] The data does not report the procedure, if any, required of Idaho resident minors who received an abortion outside of the state prior to receiving the abortion.

At face value, it appears that in-state abortions involving minors are in the minority—representing only about 3.1 percent of the 1,553 abortions reported.[175]. However, there does seem to be a slight uptick in the number of Idaho resident minors who received an abortion outside of the state.[176]

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167. *See* Francis & Francis, *supra* note 3, at 73.

168. Pam Harder, *Idaho Vital Statistics-Induced Abortion 2021*, IDAHO DEP'T OF HEALTH AND WELFARE, DIV. OF PUB. HEALTH, BUREAU OF VITAL RECORDS AND HEALTH STATS. 1, 5 (Sept. 2022), https://perma.cc/YC74-MWF5.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* Specifically, the numbers show that four children between ten and fourteen received abortions and forty-three children between fifteen and seventeen received one.

173. Pam Harder, *Idaho Vital Statistics-Induced Abortion 2021*, IDAHO DEP'T OF HEALTH AND WELFARE, DIV. OF PUB. HEALTH, BUREAU OF VITAL RECORDS AND HEALTH STATS. 1, 15 (Sept. 2022), https://perma.cc/YC74-MWF5.

174. *Id.* Here, the numbers show that seven children between ten and fourteen received abortions and fifty-eight children between fifteen and seventeen received one.

175. *Id; see also* Mia Steupert & Tessa Longbons, *Abortion Reporting: Idaho (2021)*, CHARLOTTE LOZIER INST. (Nov. 18, 2022), https://perma.cc/3NNH-UGRG.

176. Harder, *supra* note 168, at 21; *see also* Steupert & Longbons, *supra* note 175.

But this data does not represent the state of abortion in Idaho post-*Dobbs* and with Idaho's trigger law in effect. Because of Idaho's current restrictive stance on abortion, we can predict that the number of abortions both in-state and out-of-state will be significantly lower as of the next report. Idaho can directly control the number of in-state abortions through its laws and reporting requirements. However, the state does not have as much control on what its neighboring states do, and this again highlights the conflict raised by a state attempting to extend its laws into actions taken in other states.

Because of Idaho's current stance, the state will likely argue that it has a compelling interest in ensuring that minors cannot leave the state to access something that they could not within the state. The state appears to have an interest in preventing minors from obtaining an abortion within the state, but absent some state action, minors could attempt to leave the state to access the procedure. In short, the state can argue that it has a compelling justification for completely barring resident minors from accessing abortions and that it needed to pass a law to effectuate its goal.[177]

Even if a complete bar is held to be unconstitutional, Idaho may still argue that its written informed consent requirement helps with data tracking and is an effective narrow tailoring measure. The state may recognize that minors will need to receive an abortion in certain circumstances, but that the state still has the right to require the minor to consent to the procedure. Because other states may not follow the same reporting and consent requirement, Idaho could argue that its law protects minors in a way that another state may not.

b. Interest in Protecting Parental Rights. While HB 242 did not specifically express the state's interest, interviews with the bill's sponsor allude to the purpose for its creation.[178] The bill was sponsored by Representative Barbara Ehardt, a Republican from Idaho Falls.[179] She stated that the bill was a "parental rights" bill and "gives us the tools to go after those who would subvert a parent's right to be

177. *See* Bellotti v. Baird, 443 U.S. 622 (1979) for an example of a similar law being struck down. In *Bellotti*, the Court struck down a Massachusetts law as an unconstitutional infringement on minors' ability to access abortions Notably, that law did not provide for a judicial authorization exception. It also required parental notification in almost all cases. The Idaho law also does not provide for a judicial authorization exception. Additionally, it seems to require parental notification as the minor's parents would need to have given consent for the third party to avoid criminal liability. It is nearly impossible for the parent to give consent without notification. But it is unclear whether *Bellotti's* principles are still constitutionally sound post *Dobbs*. This remains an open question since a minor does not have a fundamental constitutional right to have an abortion—much less to travel to another state because their home state outlawed the procedure. Though this Note tees up that tension, a complete analysis is outside of its scope.

178. Vagianos, *supra* note 157.

179. *See House Membership*, IDAHO LEG., https://perma.cc/3EB3-HV9W.

able to make those decisions in conjunction with their child."[180] Representative Ehardt also acknowledged the limitations of the bill: "[t]his does not prohibit a parent who wants to give consent or a parent who takes their child across the border to receive an abortion. A parent can still do that. A parent can still give permission to an aunt or an uncle to do that."[181]

By no means are Representative Ehardt's words legally binding. But, they do allow for an argument that the bill is aimed at protecting parental rights. Therefore, it is possible that the state may attempt to assert a parent's fundamental right to parent their child as a compelling justification for passing the law. The data above shows that there have been instances of minor residents leaving the state for abortions, so it is plausible that some of these minors may have left without their parent's permission.

Tension could arise if a parent argues that they do not want to consent to their child getting an abortion. A parent may want to take the oblivious stance of knowing that their child is pregnant and needs to abort the fetus but not wanting to cosign that decision for several reasons. Could that parent argue that by requiring them to give consent before another adult helps their child infringes on their fundamental right to parent? I recognize that this is a stretch argument, but in this new landscape we will likely see creative arguments by those for and against restricting access to abortion.[182]

Representative Ehardt's words also point out another potential weakness with the bill—its extremely narrow scope. A parent can "traffic" their minor child without violating the law. Additionally, a third-party party can "traffic" a minor with parental consent. Accordingly, it appears that Idaho is not necessarily as concerned with limiting access to abortion but more so making sure parents have a say in their child's life/medical decision making.

This creates an inconsistency and arguably weakens the state's potential interest in limiting access to abortion to protect a parent's right. If Idaho is truly concerned with a parent's fundamental right to raise their child—which should encompass making the best decisions for their child—the legality of a third party's actions should not simply depend on whether the parent had notice. A third party could argue that Idaho would also have limited parents' ability to "traffic" their children if the state was really concerned with limiting access to abortions. Yes, a parent has a fundamental right to raise their child, but the state could argue that the parent's interest must give way to the state's interest if Idaho

180. Rachel Cohen, *Idaho's 'Abortion Trafficking' Bill Goes to the Senate Floor*, BOISE STATE PUB. RADIO (Mar. 27, 2023, 2:24 PM), https://perma.cc/2YD6-FJ3S.

181. Steve Kirch, *Abortion Trafficking and Drag Show Legislation Pass House, Head to Senate*, KMVT 11 (Mar. 8, 2023, 1:52 AM), https://perma.cc/9KGQ-DNH3.

182. Idaho Code 18-609A may prove to be helpful in this instance. The statute requires written consent from "one (1) of the minor's parents or the minor's guardian or conservator." IDAHO CODE §18-609A (LEXIS through 2023 Reg. Sess.). So, the third party might be protected so long as the consenting parent had the legal authority to provide consent.

truly believes that abortion should be outlawed. Here, it is more plausible the state is cherry picking when it wants to allow abortions versus when it does not.[183]

c. Interest in Protecting "Preborn Children" as Vulnerable Individuals. Idaho might also cite an interest in protecting the fetus, which it considers a "preborn child," from being transported out-of-state to be harmed[184] This interest recognizes the reality that a fetus is leaving the state likely never to return.

In HB 240, Idaho amended a section of the law that refers to the protections offered to a "preborn child."[185] In other legislation, the state has also attempted to bring a "preborn child" into the same legal category as a fetus or unborn child.[186] Currently, Idaho defines a fetus or unborn child as "an individual organism of the species Homo sapiens from fertilization until live birth."[187] Accordingly, we see that Idaho believes it has at least an enhanced interest in protecting fetal life.

Surprisingly, Idaho bases its potential recognition of a preborn child on the Court's decision in *Planned Parenthood v. Casey*—which as we know was overruled by *Dobbs v. Jackson Women's Health Organization*.[188] But now, Idaho may not even need *Casey's* holding to further protect fetal life. *Dobbs* did not state that a state has a compelling interest in fetal life from the outset of a pregnancy, but its holding will likely protect Idaho's restriction if they claim that interest.

Finally, Idaho could argue that its interest in protecting vulnerable life can be protected by allowing the state to limit citizens from assisting each other with violating the law. This would be in line with the current trend to limit aiding and abetting originally seen through Texas's Heartbeat Act.[189] The current Idaho law does not contain that explicit provision, so we will not examine its nuances

183. The state may also have hoped that parents just would not consent to their child having an abortion. Though it appears that a parent could legally take their child across state lines, it does not seem like Idaho would really bless this action. That parent is still taking their child across state lines to access a procedure that they could not within the state.

184. *See* Francis & Francis, *supra* note 3, at 72.

185. IDAHO CODE §18-8807 (LEXIS through 2023 Reg. Sess.).

186. *See* S.B. 1183, 66th Leg., First Reg. Sess. (Idaho 2021).

187. IDAHO CODE § 18-604(5) (LEXIS through 2023 Reg. Sess.).

188. IDAHO CODE §18-601 (LEXIS through 2023 Reg. Sess.); *see generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

189. Before *Dobbs*, Texas's Heartbeat Act (SB 8) made national news, in part, because it punished aiding, abetting, or intending to aid or abet anyone who performs or induces an abortion in the state. The statute specifically outlined that actions like paying for or reimbursing someone for the cost of an abortion could lead to liability. SB 8 was also controversial because it provided for private civil enforcement instead of judicial enforcement. Since SB 8's passage, many states have attempted to replicate the law to restrict access to abortion within their states. This Note will not analyze SB 8, but it is worth looking to the law for guidance on how future states may craft their laws to evade constitutional challenges. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West, Westlaw through 2023 Reg. & Second Called Sess's. 88th Legis.); *see also* Diego A. Zambrano, Mariah Mastrodimos, & Sergio Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws* 98 N.Y.U. L. REV. ONLINE 382, 385–388 (2022).

here.[190] But, we should be aware that future laws may continue to trend in the direction created through Texas's law.

HB 242's limited scope may also render this interest susceptible to challenges. A reviewing court may question why a parent can lawfully travel with the intent to help their minor child receive an abortion when the end result is still a terminated pregnancy. If Idaho truly wants to protect vulnerable individuals—like preborn children—then this law does not accomplish that goal.

C. PREDICTING THE APPLICABLE LEVEL OF SCRUTINY

Ultimately, strict scrutiny will likely apply when HB 242 is challenged. Because the law appears to criminalize attempts to travel out of state for abortions, it implicates the fundamental right to interstate travel. Therefore, Idaho will need to present a compelling interest to defend its law.

The interests put forth above are just examples of those the state may argue. Whether these potential interests would be considered compelling is a question still open to the reviewing court. But because the law will likely interfere with the ability to travel, it would likely be subject to strict scrutiny even though it is an abortion regulation.

CONCLUSION

The goal of this Note was to examine the question "may a State bar a resident of that State from traveling to another State to obtain an abortion?" The answer to that question is the dreaded, "it depends." Even though there is still a fundamental right to interstate travel, it is not settled that the fundamental right to interstate travel includes the right to travel out of state for an abortion. This means that it also is not settled that all state laws restricting travel for abortion must be judged under strict scrutiny as opposed to rational basis review.

Though pregnant persons have long had to travel for abortions, the Supreme Court has not recognized that the right to interstate travel includes the right to travel to receive an abortion.[191] At most, *Saenz* recognized that a pregnant person does have a constitutional right to travel from state to state. Because of *Saenz's* limited scope, if a state passes a law barring a pregnant person from leaving the state to commit what would otherwise be a crime within the state and provides a justification for the law, there is a possibility that a court would uphold the state law under rational basis review. As the post-*Dobbs* landscape continues to unfold, states likely can, and will, *attempt* to ban interstate travel for abortions.[192] Before *Dobbs* was even in effect for a year, Idaho had already done so. We can expect that other states will soon follow.[193]

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190. See Francis & Francis, *supra* note 3, at 75 for a discussion on how courts may review laws that prohibit aiding and abetting.

191. *See* Lisa M. Kelley, *Symposium Article, Abortion Travel and the Limits of Choice*, 12 FIU L. REV. 27, 27 (2016).

192. *See* Rosen, *supra* note 16, at 758.

193. *See* Zambrano, Mastrodimos, & Valente, *supra* note 189, at 4.

Some state laws likely will be unconstitutional regardless of the level of scrutiny applied. But, more likely, state legislatures will become more skilled with drafting legislation that either evades judicial review, like the Texas Heartbeat Law, or emphasizes the state interest at stake to infringe upon other fundamental rights implicated.

Allowing states to craft laws relating to abortion does not remove abortion from the national stage. Instead, it has opened the door for more complex legal battles. Idaho's HB 242 will be remembered as the first of many direct attempts to ban out of state travel for abortion. And even if it is struck down, other states will soon follow behind with their attempts to ban out of state travel for abortions.